Facilitating Change: Addressing the Underutilization of Mediation in Professional Sports

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While arbitration is the most common dispute resolution technique used in professional sports, mediation is underutilized and could benefit teams, players, and leagues if explored more often.

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I. Introduction

Alternative dispute resolution ("ADR") mechanisms are common in professional sports. The goal of these ADR mechanisms is to enable teams, leagues, players, and unions to resolve their disputes without having to enter costly, public, and prolonged litigation. Each of the four major professional sports leagues has set forth its own dispute resolution process in its respective collective bargaining agreement ("CBA").[1] Arbitration predominates in these processes; they do not even mention mediation. In Major League Baseball ("MLB") and the National Hockey League ("NHL"), for example, teams and players resort to mandated salary arbitration when the parties are unable to agree to appropriate compensation figures for the following season.[2] The National Football League ("NFL") employs arbitration for player discipline appeals, workers' compensation disputes, and injury and non-injury grievances.[3] The National Basketball Association ("NBA") uses a unique three-tiered arbitration structure to resolve disputes between players and the league.[4]

Formal negotiations are ubiquitous in professional sports, whether during player contract negotiations or the drafting of new CBA terms. Mediation, however, has been underutilized, particularly for salary arbitration and player grievances. This paper explores the current ADR mechanisms in the MLB, NFL, NBA, and NHL and asserts that mediation could fill a need in the industry, if the parties are willing to deploy it.

Part II of this Article examines the current ADR mechanisms in each of the four major professional sports leagues: MLB and NHL salary arbitration, and grievance arbitration systems in the MLB, NFL, NBA, and NHL. Part III analyzes the ways in which those dispute resolution methods fall short of their desired outcomes, specifically discussing the MLB and NHL salary arbitration systems as well as the NFL and NBA player discipline and grievance systems. Salary arbitrations in the MLB and NHL impose significant transactional,

1. For the purposes of this Article, the "four major professional sports" are Major League Baseball, the National Football League, National Basketball Association, and the National Hockey League.

2. *See* 2017-2021 Basic Agreement between Major League Clubs and Major League Baseball Players Association, Art. VI, E [hereinafter MLB CBA]; *see also* National Hockey Association & National Hockey League Players Association, Sept. 16, 2012 – Sept. 15, 2022, Art. 12 [hereinafter NHL CBA].

3. *See* National Football League & National Football League Players Association, Collective Bargaining Agreement 2011–2020, Aug. 4, 2011, Art. 15, 41 [hereinafter NFL CBA].

4. *See* discussion *infra*, Part II (C)(1).

financial, and relational costs due to their adversarial and public nature. Grievance arbitrations in the MLB, NFL, NBA, and NHL sometimes lack sufficient consistency, flexibility, and procedural fairness.

Part IV discusses the benefits of supplementing mediation to these ADR systems. Mediation can preserve the working relationships of disputing parties, save time, and reduce costs. A case example—the 2012–2013 NHL Labor Lockout—demonstrates how mediation can protect the interests of the parties in similar sports-related disputes. Finally, Part V discusses the limitations of mediation and implementation considerations, in light of the systems currently in place.

II. The Current ADR Mechanisms in Professional Sports

Each professional sports league has distinct procedures for handling conflicts, salary negotiations, and grievances. First, the MLB uses a "final offer arbitration" for salary disputes, unlike its peers, and also uses a two-step grievance system. Second, the NFL's CBA requires arbitration as the exclusive dispute resolution mechanism for grievances and other disputes. Next, the NBA's three-tier grievance system distinguishes between disputes over which the Commissioner presides and those over which a third-party arbitrator presides. Finally, the NHL uses a conventional interest arbitration process for salary disputes—with important similarities and distinctions from the MLB's—and uses a grievance arbitration process for player disputes.

A. *Major League Baseball*

Major League Baseball employs a distinct set of techniques in its conflict resolution process. Both MLB's salary arbitration system and its grievance procedure vary from the most conventional ADR techniques.

1. *Salary Arbitration*

The most notable dispute resolution mechanism MLB employs is its final offer salary arbitration system.[5] A player must meet certain requirements to be eligible for salary arbitration.[6] With few exceptions, a player is bound to MLB's league minimum salary until he has

5. For the detailed provisions of MLB's salary arbitration methods, see MLB CBA, *supra* note 2, at Art. VI, E.

6. *See Salary Arbitration*, MLB.com, http://m.mlb.com/glossary/transactions/salary-arbitration [https://perma.cc/TW3U-6F88] ("Players who have three or more

accumulated three full seasons of Major League service.[7] Once the player has accrued the requisite service time, he becomes salary arbitration eligible for the first time.[8] At that point, the player and team negotiate over the player's salary for the upcoming season; if they are unable to agree to terms, the dispute proceeds to arbitration.[9]

The MLB salary arbitration features a "pendulum" or final offer procedure that is designed to facilitate reasonable offers and encourage parties to settle pre-arbitration. Leading up to the arbitration hearing, the player and his team each submit a single number representing a proposed salary for the upcoming season to a panel of arbitrators—a final offer.[10] At the hearing, the player's representatives and the team's representatives are each provided the opportunity to present their case and a rebuttal.[11] The panel is instructed to

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years of Major League service but less than six years of Major League service become eligible for salary arbitration if they do not already have a contract for the next season. Players who have less than three but more than two years of service time can also become arbitration eligible if they meet certain criteria; these are known as "Super Two" players.").

7. *See* MLB CBA, *supra* note 2, at Art. VI, Section E (1)(a) ("General Rule: Any Player with a total of three or more years of Major League service, however accumulated, but with 18 less than six years of Major League service, may submit the issue of the Player's salary to final and binding arbitration without the consent of the Club"); *see also id.* at Art. VI, Section E (1)(b) ("Super 2 Players: In addition, a Player with at least two but less than three years of Major League service shall be eligible for salary arbitration if: (a) he has accumulated at least 86 days of service during the immediately preceding season; and (b) he ranks in the top 22% (rounded to the nearest whole number) in total service in the class of Players who have at least two but less than three years of Major League serviceÉ").

8. *Salary Arbitration*, *supra* note 6.

9. *Id.* ("If the club and player have not agreed on a salary by a deadline in mid-January, the club and player must exchange salary figures for the upcoming season.").

10. Jeff Monhair, *Baseball Arbitration: An ADR Success*, 4 HARV. J. SPORTS & ENT. L. 105, 112 (2013).

MLB salary arbitration employs a format commonly known as "high-low arbitration" or "final offer" arbitration. The player and his team each submit a single number to the arbitrator. After a hearing during which the player and team each have the opportunity to make a presentation, the arbitrator chooses one of the two numbers as the player's salary for the upcoming season.

Id. Arbitrators are jointly selected by the MLB's Labor Relations Department ("LRD") and the Major League Baseball Players' Association ("MLBPA"), but may unilaterally be removed by either party. MLB CBA, *supra* note 2, at Art. VI, E(5) ("The Association and the LRD shall annually select the arbitrators."); *id* at Art. XI, A (9) ("At any time during the term of this Agreement either the Association or the LRD may terminate the appointment of the impartial arbitrator by serving written notice upon him and the other Party . . . .").

11. *See* Theodore K. Cheng, *Baseball Arbitration*, 2 NYSBA LABOR & EMP. L.J. 42, 58 (2017); MLB CBA, *supra* note 2, at Art. VI, E (7) ("Each of the parties to a case

evaluate the case based on several admissible factors,[12] and is not permitted to consider factors beyond the scope of the hearing.[13] At the end of the hearing, the panel must select one of the two filing numbers as the player's salary—swinging the pendulum to one salary submission or the other.[14]

This system provides parties with certain benefits. The final offer procedure encourages parties to make good faith offers.[15] Each side knows that an unreasonable offer or request is less likely to be selected by the panel, so the parties are incentivized to make reasonable offers and demands to each other before submitting their final offers to the arbitrators.[16] A party who overvalues its claims jeopardizes its chance of winning in arbitration.[17] The risk created by the final offer system—of an absolute win or an absolute loss—also strongly incentivizes each side to consider the benefits of a negotiated settlement prior to submitting their final values to an arbitration panel.[18]

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shall be limited to one hour for initial presentation and one-half hour for rebuttal and summation.").

12. MLB CBA, *supra* note 2, at Art. VI, (E)(10)(a). The relevant factors for consideration include: (1) The quality of the Player's contribution to his Club during the past season (including but not limited to his overall performance, special qualities of leadership and public appeal); (2) The length and consistency of his career contribution; (3) Record of the Player's past compensation, (4) Comparative baseball salaries; (5) The existence of any physical or mental defects on the part of the Player; (6) The recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance. Any evidence may be submitted which is relevant to the above criteria, and the arbitration panel shall assign such weight to the evidence as shall appear appropriate under the circumstances. *Id.*

13. *Id.* at Art. VI, (E)(10)(b) ("Evidence of the following shall not be admissible: (i) The financial position of the Player and the Club; (ii) Press comments, testimonials or similar material bearing on the performance of either the Player or the Club, except that recognized annual Player awards for playing excellence shall not be excluded; (iii) Offers made by either Player or Club prior to arbitration; (iv) The cost to the parties of their representatives, attorneys, etc.; (v) Salaries in other sports or occupations.").

14. Monhair, *supra* note 10, at 119.

15. Benjamin A. Tulis, *Final-Offer 'Baseball' Arbitration: Contexts, Mechanisms & Applications*, 20 SETON HALL J. SPORTS & ENT. L. 85, 89 (2010) ("The theory is that . . . final-offer arbitration promotes good faith bargaining and pre-hearing settlement [because] . . . if [a party's] final offer is too extreme, an arbitrator will choose the final offer of the opposing party.").

16. *Id*.

17. *Id.*

18. *Id.*

In addition to incentivizing parties to make reasonable offers, MLB's arbitration process also provides players an avenue for a neutral third party to have input about the player's value. Since the inception of salary arbitration in the 1970s, players have felt that the threat of arbitration is necessary to force their teams to negotiate in good faith.[19] The system has added another layer of protection for these employees attempting to receive fair compensation for their services from their employer.

2. *Grievances*

MLB also employs arbitration to handle disputes under its grievance procedure. The MLB grievance procedures are intended to provide players with a timely process to address the complaints they raise against their employer. Article XI of the MLB CBA defines a grievance as any complaint about the application or interpretation of, or compliance with, any contract agreement entered into between the Major League Baseball Players Association ("MLBPA") or player and the team(s).[20] To resolve a dispute that meets this broad criterion, parties must carry out a two-step grievance process. Under the first step, the player must discuss the issue with a club representative who handles such issues in an attempt to resolve the dispute.[21] If the

19. *See* James Dworkin, *Salary Arbitration in Baseball: An Impartial Assessment After Ten Years*, ARB. J., Mar. 1986, at 63, 64. It is worth nothing that players traditionally lost salary arbitration cases at a higher rate from 1974–2015. Brown, *infra* note 225 (stating players won 42.34% of the 522 hearings). From 2015–2019, however, players have won 56% of the 50 hearings. *Arbitration Tracker for 2016*, MLB TRADE RUMORS, https://www.mlbtraderumors.com/arbtracker2016 [https://perma.cc/PBB9-2PUC]; *Arbitration Tracker for 2017*, MLB TRADE RUMORS, https://www.mlbtraderumors.com/arbtracker2017 [https://perma.cc/4G5L-BJER]; *Arbitration Tracker for 2018*, MLB TRADE RUMORS, https://www.mlbtraderumors.com/arbtracker2018 [https://perma.cc/NG43-4NTR]; *Arbitration Tracker for 2019*, MLB TRADE RUMORS, https://www.mlbtraderumors.com/arbtracker2019 [https://perma.cc/QMF8-7VNH].

20. MLB CBA, *supra* note 2, at Art. XI, (A)(1); *see also* Joshua J. Campbell & Rodney A. Max, *Formal Mediation in Professional Sports*, 1 AM. J. OF MEDIATION 17, 20–21 (2007) (further what qualifies as a grievance). Note, however, that several disputes do not rise to the level of a grievance: "'Grievance' shall not mean a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball. Within 30 days of the date of the action taken, such complaint shall be presented to the Commissioner who promptly shall conduct a hearing . . . [and] render a written decision [that] . . . shall constitute full, final and complete disposition of such complaint, and shall have the same effect as a Grievance decision of the Arbitration Panel." MLB CBA, *supra* note 2, at Art. XI, (A)(1)(b).

21. MLB CBA, *supra* note 2, at Art. XI, (B) Step 1(E)(10)(a) ("Any Player who believes that he has a justifiable Grievance shall first discuss the matter with a representative of his Club designated to handle such matters, in an attempt to settle it.").

matter is not resolved, the player may proceed to the second step and file the grievance within 45 days of the incident.[22]

Under the second step, the player files a grievance to MLB's Labor Relations Department ("LRD") at the league headquarters for further consideration.[23] At this stage, the LRD and the MLBPA must convene within 35 days of the filing of a grievance in an attempt to settle the matter.[24] If no settlement is met, the LRD advises the player in writing of its decision on the matter.[25] If the player or MLBPA disagrees with the LRD's decision, it has 15 days to appeal the decision to receive an impartial arbitration.[26] At the culmination of these two steps, the CBA proscribes arbitration as the "full, final, and complete disposition of the Grievance."[27]

A recent example of this grievance process took place in January 2019, when an arbitrator sided with the Atlanta Braves in a grievance filed by the MLBPA on behalf of Carter Stewart.[28] Stewart was selected in the first round of the 2018 MLB draft by the Braves, but a wrist injury Stewart incurred earlier in the year complicated contract negotiations.[29] After the Braves and Stewart failed to agree to a

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22. *Id*. at Art. XI, (B) Step 1 ("If the matter is not resolved as a result of such discussions, a written notice of the Grievance shall be presented to the Club's designated representative; provided, however, that for a Grievance to be considered beyond Step 1, such written notice shall be presented within (a) 45 days from the date of the occurrence upon which the Grievance is based, or (b) 45 days from the date on which the facts of the matter became known or reasonably should have become known to the Player, whichever is later.").

23. *Id*. at Art. XI, (B) Step 2 ("A Grievance, to be considered in Step 2, shall be appealed in writing by the Grievant or by the Association to a designated representative of the LRD within 15 days following receipt of the Club's written decision.").

24. *Id*. ("A Grievance appealed to or filed at Step 2 shall be discussed within 35 days thereafter (within 2 days if disciplinary suspension or a Grievance involving Player safety and health) between representatives of the LRD and representatives of the Association in an attempt to settle it.").

25. *Id.* ("Within 10 days following such meeting (within 2 days if disciplinary suspension or a Grievance involving Player safety and health), the designated representative of the LRD shall advise the Grievant in writing of his decision and shall furnish a copy to the Association.").

26. *Id.* ("If the decision of the LRD representative is not appealed further within 15 days of its receipt, the Grievance shall be considered settled on the basis of that decision and shall not be eligible for further appeal."); *id.* at Art. XI, (B), Arbitration ("Within 15 days following receipt of the Step 2 decision, the Grievant or the Association may appeal the Grievance in writing to the Panel Chair for impartial arbitration.").

27. *Id*. ("The decision of the Arbitration Panel shall constitute full, final and complete disposition of the Grievance appealed to it.").

28. *See* Associated Press, *Arbitrator Rules for Braves in Carter Stewart Grievance*, ESPN.COM (Jan. 10, 2019), http://www.espn.com/mlb/story/_/id/25729570/arbitrator-rules-atlanta-braves-carter-stewart-grievance [https://perma.cc/J9NQ-5KGJ].

29. *Id*.

deal, the MLBPA filed a grievance, claiming that the Braves had not made Stewart a reasonable offer as mandated by the CBA.[30] The arbitrator ruled for the Braves, who retained their first-round draft pick for the following year, while Stewart was unable to enter into a contract with any other team and returned to college.[31]

B. *National Football League*

The National Football League's dispute resolution process also relies on arbitration. In the NFL, arbitration is the exclusive method of resolving disputes.[32] Though the NFL arbitration requirement applies to other disputes,[33] this Article will focus on the system's most well-known application: player conduct and disciplinary issues.[34]

The hallmark of the NFL's arbitration system is the league commissioner's direct involvement. For player conduct and discipline issues, the NFL's arbitration process begins when the commissioner notifies a player in writing of the prohibited action and the resulting

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30. The draft pick position in which Stewart was drafted had a stipulated "slot" value of $4,980,700 for its signing bonus. *Id.* Major League Rules specify that if a team fails to make an offer of at least 40% of the slot value to a drafted player who is not included in MLB's pre-draft MRI program and later fails a team-administered physical, the player will become a free agent and the team forfeits that draft pick. *Id*.

31. *See id*. After losing his arbitration hearing, Stewart later signed a contract to play in Japan. *See* Associated Press, *Braves Draft Pick Carter Stewart Reaches 6-Year Deal in Japan*, MANTECA/RIPON BULL. (May 23, 2019, 1:28 AM), https://www.mantecabulletin.com/sports/pro-sports/braves-draft-pick-carter-stewart-reaches-6-year-deal-japan/ [https://perma.cc/KG3S-6XPG].

32. *See* Campbell & Max, *supra* note 20, at 24.

33. Arbitration is used in NFL workers' compensation cases as well as injury and non-injury grievances. Workers' compensation disputes depend on the state in which the relevant NFL club is located. *See* NFL CBA, *supra* note 3, at Art. 41(3) ("In any state where a Club . . . has legally elected not to be covered by the workers' compensation laws of that state, the equivalent benefit, if any, to which a player may be entitled under this Article will be determined under the grievance procedure of Article 43 or, where applicable, a separate method of alternative dispute resolution negotiated by the parties. . . ."). For non-injury grievances, parties abide by thorough discovery and prehearing procedures before being heard by a panel of four arbitrators. *Id.* at Art. 43(5) (discovery and prehearing procedures); *id.* at Art. 43(6) (panel of four arbitrators). The NFL uses a Benefits Arbitrator, System Arbitrator, and an Impartial Arbitrator to handle various other disputes beyond the scope of this paper. For further insight into those aspects of the NFL's ADR system, see *id.* at Art. 66; *id.* at Art. 15; *id.* at Art. 16.

34. *See* Heather Scheiwe Kulp & Mario Cuttone, *Deflategate's Labor Legacy: The Centrality of Grievance Procedures in Collective Bargaining Negotiations*, 22 HARV. NEGOT. L. REV. 77, 81 (2016).

punishment.[35] Various punishments are imposed on players for "conduct detrimental to the integrity of, or public confidence in, the game of professional football."[36]

If a player decides to appeal the Commissioner's decision, the player and the NFL Players Association ("NFLPA") must request an appeals hearing, governed by Article 46 of the CBA, to challenge the discipline.[37] The prospective appellants must request arbitration on the case within three days of the Commissioner's written notification of the punishment.[38] If a player fails to request arbitration, the Commissioner's punishment becomes binding and final.[39] If the player does file an appeal in a timely manner, the process proceeds to the next step: arbitration.[40]

The ensuing NFL arbitration process differs from those of other professional sports leagues. One unique feature of the NFL's system is the role of the Commissioner: The Commissioner has the power to appoint the sole arbitrator, but may also serve as the hearing officer in any hearing at his discretion.[41] The ability to preside over the case or designate an arbitrator to the case provides the Commissioner with added authority and finality when handling any dispute concerning player conduct or discipline. After hearing arguments, the arbitrator issues a decision that serves as a "full, final, and complete disposition of the dispute and will be binding."[42] Overall, although

35. NFL CBA, *supra* note 3, at Art. 46(1)(a) ("All disputes involving a fine or suspension imposed upon a player for conduct on the playing field . . . or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA.").

36. *Id*. The NFL CBA provides no definition, however, of what constitutes a detriment to the "integrity of" or "public confidence in" the game of football. *Id.*

37. *See id.* at Art. 42(1)(a) ("Within three (3) business days following such written notification, the player affected thereby, or the NFLPA with the player's approval, may appeal in writing to the Commissioner."); *id.* at Art. 46(1)(a).

38. *Id*.

39. *Id*.

40. *Id*.

41. *Id.* at Art. 46(2)(a) ("For appeals under Section 1(a) above, the Commissioner shall, after consultation with the Executive Director of the NFLPA, appoint one or more designees to serve as hearing officers . . . Notwithstanding the foregoing, the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.").

42. *Id.* at Art. 46(2)(d) ("As soon as practicable following the conclusion of the hearing, the hearing officer will render a written decision which will constitute full, final and complete disposition of the dispute and will be binding upon the player(s), Club(s) and the parties to this Agreement with respect to that dispute. Any discipline imposed pursuant to Section 1(b) may only be affirmed, reduced, or vacated by the hearing officer, and may not be increased.").

the NFL provides a clear process for arbitration, these procedures only provide for a single arbitrator chosen by the Commissioner.

C. *National Basketball Association*

The NBA's ADR system also includes unique features. In particular, the NBA's CBA features a three-tiered arbitration system via which players and the league resolve various disputes. In the first tier, the Commissioner retains the power to determine the outcome of disputes between teams and for on-court conduct.[43] In the second tier, which covers player-team contract disputes, an impartial arbitrator is assigned to resolve disputes regarding player contract issues.[44] In the third tier, a system arbitrator determines issues that pertain to the overall economic system of basketball.[45]

1. *Three-Tiered Arbitration System*

i. *Tier 1: Commissioner Decisions*

The Commissioner reserves the power to determine the outcome of disputes in the first tier of the NBA's dispute resolution system. This first tier includes disputes between teams as well as disputes arising from on-court conduct.[46] The Commissioner has historically had the most direct involvement in this tier.[47]

The most frequent arbitrations under this category are disputes arising from on-court conduct. If the on-court conduct dispute involves a fine of less than $50,000 or a suspension of less than 12 games, the Commissioner makes an initial determination directly;[48]

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43. *See* discussion *infra* Part II (C)(1)(i).

44. *See* discussion *infra* Part II (C)(1)(ii).

45. *See* discussion *infra* Part II (C)(1)(iii).

46. Jeffrey A. Mishkin, *Dispute Resolution in the NBA: The Allocation of Decision Making Among the Commissioner, Impartial Arbitrator, System Arbitrator, and the Courts*, 35 VAL. U. L. REV. 449, 450–51 (2001). However, disputes involving fines of less than $50,000 or a suspension of fewer than 12 games for on-court conduct shall not be determined by arbitration but rather will be determined by the Commissioner. *See* National Basketball Association & National Basketball Players Association, Collective Bargaining Agreement, 2017–2024, January 19, 2017, Art. XXXI, 9(a) [hereinafter NBA CBA].

47. Mishkin, *supra* note 46, at 450.

48. NBA CBA, *supra* note 46, at Art. XXXI, (9)(a) ("A dispute involving (i) a fine of $50,000 or less or a suspension of twelve (12) games or less (or both such fine and suspension) imposed upon a player by the Commissioner (or his designee) for (x) conduct on the playing court (as defined in Section 9(c)(i) below) or (y) for in-game conduct involving another player (as defined in Section 9(c)(ii) below), or (ii) action taken by the Commissioner (or his designee) (A) concerning the preservation of the integrity

if the player disagrees with the Commissioner's decision, the National Basketball Players Association ("NBPA") may appeal the decision back to the Commissioner, who conducts a hearing and issues another decision.[49] If the on-court conduct dispute involves a fine over $50,000 or a suspension of more than 12 games, the Commissioner still makes the initial determination, but the NBPA may appeal the decision to a Player Discipline Arbitrator, who either affirms or reduces the designated penalty.[50] The Player Discipline Arbitrator, either a former player, coach, or general manager or an attorney with experience as an arbitrator, is mutually selected by the NBA and NBPA.[51]

The system's first tier also resolves inter-team disputes, such as charges of tampering.[52] As in the case of discipline disputes resulting in fines of less than $50,000 or suspensions of fewer than 12 games, the Commissioner has the authority to decide tampering disputes.[53] A prominent tampering dispute arose in the mid-1990s when the Miami Heat recruited coach Pat Riley, who had two years left on his contract with the New York Knicks.[54] After Riley resigned from his

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of, or the maintenance of public confidence in, the game of basketball and (B) resulting in a financial impact on the player of $50,000 or less, shall not give rise to a Grievance . . . .").

49. Cheryl Meyers Buth, *Comparing the Player Discipline Provisions of the NFL and NBA Collective Bargaining Agreements: Should There be a Move Toward Uniform Standards across Professional Sports?*, COURTSIDE LAWYER (Sept. 12, 2015, 11:30 PM), https://courtsidelawyer.com/2015/09/12/comparing-the-player-discipline-provisions-of-the-nfl-and-nba-collective-bargaining-agreements-part-two-should-there-be-a-move-toward-uniform-standards-across-professional-sports/#_ftnref4 [https://perma.cc/M5U3-WRN9].

50. *See* NBA CBA, *supra* note 46, at Art. XXXI, (9)(a).

51. *See id.* at Art. XXXI, (9)(5)(d) ("In the event that the NBA and the Players Association cannot agree on the identity of the Player Discipline Arbitrator, each party shall simultaneously serve upon the other a list of the names of five (5) individuals meeting the criteria set forth in this Section 9(a)(5)(d) and shall alternate in striking names from such list until only one (1) such name remains; and the individual whose name remains on the list shall be selected as the Player Discipline Arbitrator. (A coin-flip or such other procedure as agreed upon by the NBA and the Players Association shall determine which of such parties shall exercise the first strike.)").

52. Tampering is an act through which a team approaches a player (or coach) who is under contract with another team and talks to that player (or coach) about signing a contract. Mishkin, *supra* note 46, at 450. Tampering violates the NBA Constitution. *See* Constitution and By-Laws of the National Basketball Association, October 2018, Art. 35(e), 35A(e), https://ak-static.cms.nba.com/wp-content/uploads/sites/4/2018/10/NBA-Constitution-By-Laws-October-2018.pdf [https://perma.cc/5BT8-VBE5].

53. *See* Mishkin, *supra* note 46, at 450.

54. Shaun Powell, *The Knicks' Tamper Tantrums Are Heating Up*, 219 THE SPORTING NEWS 47 (July 24, 1995).

job with the Knicks and signed with the Heat, the Heat-Knicks dispute came before the NBA Commissioner.[55] The Commissioner acted as the arbitrator in a case that resembled full-blown litigation between the Knicks and the Heat.[56] Though the case ultimately settled, the situation highlights the power reserved to the Commissioner to resolve inter-team disputes under the first level of the NBA's ADR structure.[57]

ii. *Tier 2: Impartial Arbitrator Decisions*

An impartial third party resolves disputes in the second tier, which include certain disputes between players and teams about player contracts[58] and, as noted above, player disciplinary issues resulting in fines over $50,000 or suspensions longer than 12 games.[59]

A prominent second-tier dispute was the Golden State Warriors' case against player Latrell Sprewell, who allegedly choked his coach during a practice.[60] The infraction occurred on the court, but it did not go to the Commissioner for arbitration because it was not in the midst of an NBA game and because the incident gave rise to the termination of Sprewell's contract.[61] Instead, an impartial adjudicator presided over the dispute. Then-Dean of Fordham Law School John Feerick presided as arbitrator, holding that the Warriors were required to reinstate Sprewell's contract and that the NBA was required to shorten Sprewell's one-year suspension.[62]

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55. Mishkin, *supra* note 46, at 450.

56. *Id.*

57. *Id.*

58. NBA CBA, *supra* note 46, at Art. XXXI, (1)(a)(i) ("Except as provided otherwise by this Agreement or by paragraph 9 of the Uniform Player Contract, the Grievance Arbitrator shall have exclusive jurisdiction to determine . . . any and all disputes involving the interpretation or application of, or compliance with, the provisions of this Agreement or the provisions of a Player Contract, including any dispute concerning the validity of a Player Contract or any dispute arising under the Joint NBA/NBPA Policy on Domestic Violence, Sexual Assault, and Child Abuse.") The impartial grievance arbitrator typically has jurisdiction in routine player contract cases: alleged non-payment of obligations under player contracts, bonuses, and clauses requiring players to maintain a certain weight. *See* Mishkin, *supra* note 46, at 453.

59. *See* discussion *infra*, Part II (C)(1)(i).

60. *See* Mike Wise, *Pro Basketball; N.B.A. Star Who Choked Coach Wins Reinstatement of Contract*, N.Y. TIMES (Mar. 5, 1998), https://www.nytimes.com/1998/03/05/sports/pro-basketball-nba-star-who-choked-coach-wins-reinstatement-of-contract.html [https://perma.cc/5R4G-KW2X].

61. *See* Mishkin, *supra* note 46, at 453.

62. Wise, *supra* note 60; *In re* Nat'l Basketball Ass'n on behalf of Player Latrell Sprewell and Warriors Basketball Club and Nat'l Basketball Ass'n 100, 103 (March 5, 1998) (Feerick, Arb.), *reprinted in* Howard L. Ganz, Kevin R. Gilmore, Jeffrey L. Kessler & Bruce S. Meyer, *Opinion and Award: In the Matter of National Basketball*

iii. *Tier 3: System Arbitrator Decisions*

A "system arbitrator" resolves third-tier disputes, which involve issues relating to the overall economic system put in place by the NBA CBA.[63] For example, disputes relating to the overall economic system include disputes that affect how the salary cap is operated and calculated.[64] In system arbitration, the parties jointly request that the International Institute for Conflict Prevention and Resolution ("CPR Institute") provide a list of 11 attorneys who have no conflict of interest.[65] If the parties cannot agree within seven days about who will serve as the system arbitrator, they shall return the list, with up to five names deleted, to the CPR Institute, which shall choose the system arbitrator from the remaining name or names on the list.[66]

In a recent system arbitration case, the NBA and the NBPA requested an arbitrator to resolve a dispute regarding the rights of players who were claimed off "waivers."[67] At issue was whether players claimed off waivers should have access to "Bird Rights," which

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Players Association on Behalf of Player Latrell Sprewell and Warriors Basketball Club and National Basketball Association, 1 Understanding Business & Legal Aspects of the Sports Industry 471 (2000) [hereinafter Sprewell Arbitration].

63. NBA CBA, *supra* note 46, at Art. XXXII (1); *see also* Mishkin, *supra* note 46, at 455 (stating the system arbitrator is given this name because he or she presides over disputes relating to the overall economic system put in place in the CBA, including anything about how the CBA operates and is calculated).

64. *Id*.

65. *See* NBA CBA, *supra* note 46, at XXXII (6)(a) ("In the event that the Players Association and the NBA cannot agree on the identity of a System Arbitrator, the parties shall jointly request the International Institute for Conflict Prevention and Resolution (the "CPR Institute") (or such other organization(s) as the parties may have agreed upon) to submit to the parties a list of eleven (11) attorneys, none of whom shall have, nor whose firm shall have, represented within the past five (5) years any professional athletes; agents or other representatives of professional athletes; labor organizations representing athletes; sports leagues, governing bodies, or their affiliates; sports teams or their affiliates; or owners in any professional sport. If the parties cannot within seven (7) days from the receipt of such list agree to the identity of the System Arbitrator from among the names on such list, they shall return said list, with up to five (5) names deleted therefrom by each party, to the CPR Institute (or such other organization as the parties may have agreed upon), which shall choose from the remaining name(s) on the list the identity of the System Arbitrator.")

66. *Id.*

67. *See* Ben Golliver, *NBPA Wins Jeremy Lin Bird Rights Case in Arbitration with NBA*, CBS Sports (June 22, 2012), https://www.cbssports.com/nba/news/nbpa-wins-jeremy-lin-bird-rights-case-in-arbitration-with-nba/ [https://perma.cc/L74U-3RKC]; for a description of the waiver system, see Larry Coon, *NBA Salary Cap FAQ*, CBA FAQ (Aug. 30, 1999), http://www.cbafaq.com/salarycap.htm#Q64 [https://perma.cc/M4RD-64HK] ("Waivers are a temporary status for players who are released by their team. A team initiates the waiver process by "requesting waivers" on the

allow teams to keep their own players rather than lose them in free agency by making it easier for teams to retain their players' services, especially if the team is over the salary cap.[68] Following the hearing, arbitrator Kenneth Dam decided in favor of the NBPA.[69] This economic dispute between the NBA and the NBPA illustrates types of issues that fall under the third tier of the NBA's ADR system.

D. *National Hockey League*

The NHL's CBA features salary arbitration and grievance processes in which an independent, jointly appointed arbitrator determines the outcome of the dispute. Together with the MLB, the NHL is one of only two sports leagues in the United States that use a salary arbitration process.[70] However, unlike the MLB salary arbitration procedure, the NHL's salary arbitration process permits unilateral initiation of arbitration, does not employ the "pendulum" or "final offer" style of the MLB procedure, and establishes post-arbitration "walk-away rights" for teams, and results in a written decision. The grievance resolution process, on the other hand, is similar to the NBA's system.

1. *Salary Arbitration*

The NHL's salary arbitration process was the model for the MLB's system.[71] The NHL's system provides an equitable process to resolve wage disputes while simultaneously allowing the league to make it difficult for players to obtain unrestricted free agent status.[72] Today, qualifying players receive a hearing at which both the player

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player they are releasing. The player stays "on waivers" for 48 hours (including weekends and holidays), during which time other teams may claim the player and assume his contract. If no team has claimed the player before the end of the waiver period (which is always 5:00 PM Eastern Time), he "clears waivers." The player's contract is terminated and he becomes a free agent. The only way to terminate a contract early is through the waiver process.").

68. Golliver, *supra* note 67.

69. *See id*. However, the NBA and NBPA arrived at a post-decision settlement following the NBA's appeal of the decision. *NBPA System Arbitration against the NBA*, WINSTON & STRAWN LLP: THOUGHT LEADERSHIP, https://www.winston.com/en/thought-leadership/nbpa-system-arbitration-against-the-nba.html [https://perma.cc/MQP8-7RTR].

70. *See* Phillip Miller, *MLB vs. NHL Arbitration - A Brief Comparison*, FORBES (Feb. 5, 2014), https://www.forbes.com/sites/phillipmiller/2014/02/05/mlb-vs-nhl-arbitration-a-brief-comparison/#6b2695674a36 [https://perma.cc/8CYS-RFPU].

71. Stephen M. Yoost, *The National Hockey League and Salary Arbitration: Time for a Line Change*, 21 OH. ST. J. ON DISP. RESOL. 485, 500 (2006).

72. *See* Ryan Lake, *How Salary Arbitration Works in the National Hockey League (NHL)*, LAWINSPORT (Sept. 13, 2016), https://www.lawinsport.com/blog/ryan-lake-

and the team may be present.[73] The hearings are similar to the MLB's: parties submit and present their arguments while providing evidence for their respective cases.[74]

Nevertheless, the NHL's system differs from the MLB's in many key respects.[75] First, either a player or a club may unilaterally initiate an arbitration hearing.[76] Players who seek to have their salary reviewed must request a hearing in early July each year, with cases heard in late July and early August, although the parties may continue to negotiate until the hearing.[77] Teams also may request a hearing in certain circumstances,[78] but must file their submission within 48 hours after the Stanley Cup Finals.[79] While there are no restrictions on how many times a player may request arbitration, he can only be subject to club-elected salary arbitration once in his career.[80]

Next, in contrast to the "pendulum swing" in the MLB's salary arbitration system, the NHL's system allows the arbitrator to award any sum of money within the range of the two requests.[81] While

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blog/item/how-salary-arbitration-works-in-the-national-hockey-league-nhl [https://perma.cc/SRP7-LEUP].

73. NHL CBA, *supra* note 2, at Art. 12.To be eligible for salary arbitration, players must have four years of NHL experience. *Id* at Art. 12.1. The term to reach arbitration, however, is reduced for players who sign their first contract before the age of 20. *Id*.

74. Lake, *supra* note 72, at 1. Admissible evidence in NHL arbitration hearings includes (A) the player's "overall performance" including statistics in all previous seasons; (B) injuries, illnesses, and the number of games played; (C) the player's length of service with the team and in the NHL; (D) the player's "overall contribution" to the team's success or failure; (E) the player's "special qualities of leadership or public appeal"; and (F) the performance and salaries of any player believed to be comparable to the player in the dispute. NHL CBA, *supra* note 3, at Art. 12.9. Parties may not offer evidence in a hearing pertaining to (i) the salary and performance of a comparable player who signed a contract as an unrestricted free agent; (ii) testimonials, videos, and media reports, (iii) the financial state of the team; or (iv) the salary cap and the state of the team's payroll. *Id*.

75. Lake, *supra* note 72.

76. NHL CBA, *supra* note 2, at Art. 12.2 (Notice of Player Elected Salary Arbitration); *id.* at Art. 12.3 (Eligibility for Club-Selected Salary Arbitration).

77. *See* Jamie Fitzpatrick, *Guide to Understanding NHL Salary Arbitration*, THOUGHT CO. (June 12, 2018), https://www.thoughtco.com/nhl-salary-arbitration-explained-2778981 [https://perma.cc/3K44-JMWC].

78. *See* NHL CBA, *supra* note 2, at Art. 12.3.

79. *See id*. at Art. 12.4. The Stanley Cup finals typically end in late May or early June. The last date of the NHL Stanley Cup finals in 2019 was June 12. *See Stanley Cup Playoffs*, NHL.COM, https://www.nhl.com/stanley-cup-playoffs [https://perma.cc/8TG6-FTZS].

80. NHL CBA, *supra* note 2, at Art. 12.3(c).

81. Miller, *supra* note 70.

MLB's final offer arbitration system requires the three-member arbitration panel to select one party's submission to facilitate pre-hearing settlements, the NHL's system is more conventional: It permits arbitrators to examine the facts and select the salary outcome that best fits those facts.[82] Nonetheless, the system has historically succeeded in facilitating pre-hearing settlements between players and teams, similar to the MLB system.[83] The arbitrator's ability to award any salary between the two submissions imposes less risk for the parties than MLB's system does. Nevertheless, the threat of third-party decision-making often enables the parties to find common ground.[84]

Another unique aspect of NHL salary arbitration are the "walk-away rights" teams retain after an arbitration hearing.[85] Although arbitrator decisions are "final and binding on the parties,"[86] teams may walk away from an award issued by an arbitrator if the player initiated the arbitration or if the award is for $3.5 million or more.[87] Clubs may not, however, walk away from a decision following a club-elected hearing.[88] NHL teams typically settle their cases before a hearing at a high rate,[89] but the Boston Bruins used their walk-away

82. *Id.*

83. Allan Muir, *NHL's Wave of Pre-Arbitration Deals a Sign the System is Working*, SPORTS ILLUSTRATED (July 27, 2015), https://www.si.com/nhl/2015/07/27/salary-arbitration-system-working-new-deals-derek-stepan-braden-holtby-colin-wilson [https://perma.cc/DQ5Q-4RHX].

84. *Id*.

85. NHL CBA, *supra* note 2, at Art. 12.10.

86. *Id.* at Art. 12.5(a) ("Subject to Section 12.10, the Salary Arbitrator's decision shall be final and binding on the parties."); *see also* SCOTT ROSNER & KENNETH SHROPSHIRE, THE BUSINESS OF SPORTS, 377–79 (2010) (analyzing the history of the NHL's walk-away rights).

87. NHL CBA, *supra* note 2, at Art. 12.10(a) ("If a Club has elected to arbitrate a one-year SPC, and the award issued is for $3,500,000 or more per annum, then the Club may, within forty-eight (48) hours after the award of the Salary Arbitrator is issued . . . notify the Player or his Certified Agent, if any, the NHLPA and the NHL in writing, in accordance with Exhibit 3 hereof, that it does not intend to tender to the Player an SPC based on the award as determined by the Salary Arbitrator. Upon receipt of that notice, the Player shall automatically be deemed to be an Unrestricted Free Agent.") Note, however, that if the club walks away from the arbitration award for a two-year contract, the player and club will enter into a one-year contract equal to the value awarded for the first year in the arbitration decision. *Id.* at Art. 12.10(b).

88. *Id.* at Art. 12.10(e).

89. In the past five years, 124 players have applied for arbitration, but only five rulings have been made as a result of settlements. Carol Schram, *Jacob Trouba and the Winnipeg Jets Kick Off 2018 NHL Salary Arbitration Season*, FORBES, July 20, 2018, https://www.forbes.com/sites/carolschram/2018/07/20/jacob-trouba-and-the-winnipeg-jets-kick-off-2018-nhl-salary-arbitration-season/#402fe7652962 [https://perma.cc/BHY4-7MZ7]. In 2018, 40 of 44 cases settled before a hearing. Sportsnet Staff, *2018 NHL Arbitration Tracker: 40 of 44 cases settled before hearings*, SPORTSNET (Aug. 6, 2018), https://www.sportsnet.ca/hockey/nhl/nhl-arbitration-tracker-can-

rights in 2006 after a hearing with defenseman David Tanabe.[90] The Bruins' option to "walk away" from the outcome of the arbitration highlights the unique dynamic this feature of the NHL salary arbitration system creates.

A final distinction between NHL salary arbitrations and MLB salary arbitrations is that NHL arbitrations result in written decisions. Following the conclusion of a case, an arbitrator must issue a written decision within 48 hours.[91] In the decision, the arbitrator must disclose (1) the term of the contract (one year or two years), (2) the salary of the player, (3) any inclusion of a minor league salary if necessary, and (4) a statement describing the reasons for the decision as well as a reference to the comparable players on which the arbitrator relied.[92] The written decisions that arbitrators must provide, as well as unilateral initiation by either party, the lack of a "final offer" approach, and clubs' post-arbitration "walk-away rights," distinguish NHL's ADR mechanism for salary disputes from the MLB's.

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senators-sign-mark-stone-long-term/ [https://perma.cc/Z7G8-JJHV]. Twenty-nine of 30 players settled their cases before a hearing in 2017. Luke Fox, *2017 NHL Arbitration Tracker: Results of all 30 cases*, SPORTSNET (Aug. 6, 2017), https://www.sportsnet.ca/hockey/nhl/nhl-arbitration-tracker-2017-restrcited-free-agents-salary-settlement-tatar-arvidsson-sheary-granlund/ [https://perma.cc/4RB9-3P5G]. All 25 cases were settled before a hearing in 2016. Luke Fox, *NHL Arbitration Tracker: All 25 Cases Now Settled*, SPORTSNET (July 31, 2016), https://www.sportsnet.ca/hockey/nhl/nhl-arbitration-tracker-2016-24-cases-hoffman-barrie-dekeyser-palmieri-schenn-schwartz-killorn/ [https://perma.cc/QS6R-KD2M].

90. *Bruins Exercise Walk-Away Option on Tanabe Arbitration*, NHL.COM (Aug. 5, 2006), https://www.nhl.com/bruins/news/bruins-exercise-walk-away-option-on-tanabe-arbitration/c-447266 [https://perma.cc/75P8-XEPD] (referencing General Manager Peter Chiarelli's statement that "using [the walkaway rights] is one of the difficult decisions that must be made while managing a salary cap").

91. NHL CBA, *supra* note 2, at Art. 12.9(n)(i) ("Each salary arbitration decision must be issued by e-mail to each of the parties simultaneously within forty-eight (48) hours of the close of the hearing.").

92. *Id.* at Art. 12.9(n)(ii) ("The decision of the Salary Arbitrator shall establish: (A) the term of the SPC, based upon the Player's or Club's election of a one or two year SPC, as set forth in its brief . . . (B) the Paragraph 1 NHL Salary to be paid to the Player by the Club for the season(s) in respect to which the salary arbitration is conducted; (C) the inclusion or otherwise of a Minor League clause (or clauses) and the amount of Paragraph 1 Minor League Salary to be paid under each of the season(s) in respect to which the salary arbitration is requested; (D) a brief statement of the reasons for the decision, including identification of any comparable(s) relied on.").

2. *Grievances*

i. *Contract and CBA-Related Arbitration*

In addition to a unique salary arbitration system, the NHL also has a separate arbitration system to handle issues related to the interpretation and application of the CBA and the Standard Player Contract ("SPC").[93] As part of this process, the NHL and NHLPA submit all grievances they initiate to an impartial arbitrator.[94] Notably, the arbitrator presiding over these disputes is appointed jointly by the parties,[95] as opposed to being appointed by the league commissioner, as in the NFL.[96] Additionally, either party may discharge an arbitrator.[97]

One salient feature of the NHL's grievance resolution system is the role of the grievance committee in the process. Every two months, designated representatives convene to discuss claims, issues, and questions presented by all newly filed grievances.[98] The meetings include discussions of potential resolutions or settlements of those cases before the dispute proceeds to a hearing.[99] Additionally, seven days before any hearing, the sides are compelled to meet about "their respective legal and factual positions" on each disagreement.[100] Such discussions facilitate pre-hearing settlement, and any

93. *Id.* at Art. 17.1 ("A "Grievance" is any dispute involving the interpretation or application of, or compliance with, any provision of this Agreement, including any SPC.").

94. *Id.*at Art. 17.2(c).

95. *Id.* at Art. 17.6 ("There will be one Impartial Arbitrator, appointed jointly by the parties, who shall serve for the duration of this Agreement").

96. *See* discussion *infra*, Part II (B).

97. *See* NHL CBA, *supra* note 2, at Art. 17.6 ("[O]n September 1, 2013 and on each successive September 1, either of the parties to this Agreement may discharge the Impartial Arbitrator by serving written notice upon him/her and upon the other party to this Agreement on or before that date. The parties shall thereupon agree upon a successor Impartial Arbitrator within the following ninety (90) days, or, failing agreement, an ad hoc Arbitrator shall be selected for each arbitrable Grievance under the Labor Arbitration Rules of the American Arbitration Association then in effect, until such time as the parties agree upon a successor Impartial Arbitrator. The Impartial Arbitrator so discharged shall render decisions in all cases he/she previously heard but will hear no further cases.").

98. *Id.* at Art. 17.4(a) ("The NHL and NHLPA will meet every two months to discuss with specificity the claims, issues and/or questions presented by all 'newly filed' Grievances (as defined herein) and to discuss resolution and/or settlement of those Grievances (the 'Grievance Committee'). Newly filed Grievances shall include any Grievances filed between 30 days prior to the last previously held Grievance Committee meeting and 30 days prior to the upcoming Grievance Committee meeting.").

99. *Id*.

100. *Id.* at Art. 17.4(b). ("The parties shall provide each other with a written outline of their respective legal and factual positions regarding newly filed Grievances

information exchanged during the meetings is inadmissible in a hearing.[101]

ii. *System Arbitration*

Like the NBA, the NHL also uses a System Arbitrator for grievances that have larger economic impact.[102] A 2010 dispute surrounding Ilya Kovalchuk's potential contract with the New Jersey Devils was sent to system arbitration.[103] After the Devils offered Kovalchuk a 17-year, $102 million contract, the NHL rejected the deal for attempting to circumvent the salary cap.[104] Given the situation's impact on the free agency system in hockey, the case was sent to System Arbitrator Richard Bloch, who agreed with the NHL and voided the contract.[105]

In summary, each of the four major sports leagues has a unique ADR system for resolving issues that impact their systems. This section provided a background of each system and discussed how the processes have unfolded in certain situations. Part III will analyze where these systems fall short.

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seven (7) days in advance of each Grievance Committee meeting, on a without prejudice basis.").

101. *See id.* at Art. 17.4(c). ("Materials or information exchanged in connection with, or discussed at, Grievance Committee meetings, including without limitation with respect to settlement discussions and offers, shall be inadmissible before the Impartial Arbitrator, provided that materials, information, statements or documents that would otherwise be admissible shall not be rendered inadmissible on account of their being exchanged or discussed at the Grievance Committee meeting.").

102. *Id.* at Art. 48.1 ("A 'System Grievance' is any dispute involving the interpretation or application of or compliance with the provisions of Article 49 Player Compensation Cost Redistribution System, Article 50 Team Payroll Range System, those provisions of Article 26 No Circumvention, Article 9 Entry Level Compensation, Article 10 Free Agency, and any other articles in which the grievance resolution could affect the interpretation or application of the provisions of Article 49 or 50.").

103. *See* Rich Chere, *NHLPA files grievance disputing rejection of Ilya Kovalchuk's contract with Devils*, NJ.COM (July 26, 2010), https://www.nj.com/devils/2010/07/nhlpa_files_grievance_disputin.html [https://perma.cc/TZ6J-UFD6].

104. *See* Morgan Marcus, *A Delayed Penalty: The Implications of the Ilya Kovalchuk Arbitration Decision on the National Hockey League*, 45 J. MARSHALL L. REV. 145, 147 (2011). The contract attempted to pay Kovalchuk 97% of the salary over the first 11 years of the deal and only three percent over the final six. Andrew M. Kroeckel, No Bloch Head: Arbitrator's Decision Brings Change to the NHL, 3 Y.B. ARB. & MEDIATION 371, 371 (2011).

105. *See Nat'l Hockey League v. Nat'l Hockey League Players' Association,* Decision on the Validity of Ilya Kovalchuk's contract 20, 19 n.23 (Aug. 9, 2010) (Bloch, Arb.) [https://perma.cc/BQ2D-ZH6K] (noting that the contract was structured in such a way that it was doubtful that a significant portion of the deal would be performed).

III. Where the Current ADR Methods Fall Short

Although the MLB, NFL, NBA, and NHL have specific procedures in place for resolving disputes or for entering negotiations, their methods often do not meet the goals of the parties involved. This section will examine where these mechanisms fall short of meeting their parties' goals. In particular, the discussion will analyze the salary arbitration processes in the MLB and NHL, and the grievance arbitration mechanisms in the NFL and NBA.

A. *Salary Arbitration*

1. *Major League Baseball*

The MLB's salary arbitration process is known for its ability to encourage teams to make realistic offers, but the system is an inherently adversarial one that creates hostility between players and teams. There are several costs of this system: strain on player-team relations, high financial costs, uncertainty arising from the lack of written decisions, and inefficiencies arising from risk aversion.

i. *Transaction Costs: The Process's Impact on Player-Team Relations*

The MLB's salary arbitration system often has an adverse impact on the relationship between players and their teams. Before arbitration, teams and players submit their final offers to each other before an arbitration panel hears their cases and selects one of the offers.[106] Proponents of the system highlight that this feature promotes good faith bargaining and creates an incentive for parties to make fair offers.[107] While this system may succeed in promoting realistic offers, it also inherently pits players and teams against one another. Salary arbitrations resolve negotiating impasses, but they also are accompanied by significant transaction costs. The salary arbitration system requires teams to convince an arbitration panel—in front of the team's own player—that his deficiencies and limitations necessitate a lower salary, which can lead to animosity between team

106. Cheng, *supra* note 11, at 58.

107. 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, 110–11 (2009) (asserting that final-offer arbitration generates uncertainty that incentivizes parties to enter pre-hearing settlements).

and player, and even requests to be traded.[108] Ultimately, entering a salary arbitration can involve burdensome transaction costs for both players and teams.

The transaction costs of salary arbitration surface in virtually every salary arbitration case, but a set of four arbitration disputes illustrates the problem well: arbitration disputes between Dellin Betances and the New York Yankees (*Betances*), Marcus Stroman and the Toronto Blue Jays (*Stroman*), Trevor Bauer and the Cleveland Indians (*Bauer*), and less recently, the pre-arbitration dispute between Greg Maddux and the Atlanta Braves.

In the 2017 *Betances* arbitration, the pressures of arbitration led to an extremely adversarial proceeding that ultimately damaged the long-term relationship between the player, Dellin Betances, and his team, the New York Yankees. Before the hearing, the New York Yankees submitted a $3,000,000 figure in contrast to Betances's $5,000,000 request.[109] The panel ultimately ruled for the team, setting the stage for an emotional exchange between the parties.[110] Following the decision, Yankees' team president Randy Levine criticized Betances's request, asserting that it "had no bearing in reality."[111] In response, Betances communicated his displeasure with the system and with the Yankees' conduct during the hearing:

> They take me in a room, and they trash me for about an hour and a half . . . I thought that was unfair for me. I feel like I've done a lot for this organization, especially in these last three years. I've taken the ball time after time. Whenever they needed me, I was there for them.[112]

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108. John P. Gillard, Jr., *An Analysis of Salary Arbitration in Baseball: Could a Failure to Change the System Be Strike Three for Small-Market Franchises?*, 3 SPORTS LAW. J. 125, 135 (1996).

109. SI Wire, *Yankees President Feuds with Dellin Betances After Winning Arbitration Case*, SPORTS ILLUSTRATED (Feb. 18, 2017), https://www.si.com/mlb/2017/02/18/yankees-dellin-betances-arbitration-salary-randy-levine [https://perma.cc/C4Q3-M8L4].

110. *Id.*

111. *Id.* Levine continued to disparage Betances's argument, stating, "It's like me saying, 'I'm not the president of the Yankees, I'm an astronaut.'" *Id.*

112. Billy Witz, *Yankees' Dellin Betances Loses in Arbitration, and a War of Words Begins,* N.Y. TIMES, Feb. 18, 2017, https://www.nytimes.com/2017/02/18/sports/baseball/yankees-dellin-betances-arbitration-.html [https://perma.cc/9YXK-CRJ2]. Given the team's criticism of the role Betances played on the team, Betances went on to question whether he should refuse to play during certain situations to protect his own self-interest. *Id.*

The outcome in *Betances* is unfortunate, but it is not uncommon. *Betances* is just one example that highlights the strains salary arbitration inherently places on the relationship between teams and players.[113]

Faced with a similar situation in 2018, Marcus Stroman echoed Betances's sentiments about the arbitration process. In Stroman's arbitration, the Toronto Blue Jays won their offered salary of $6.5 million over Stroman's request of $6.9 million.[114] Following the hearing, Stroman tweeted, "the negative things that were said against me, by my own team, will never leave my mind."[115] Without a formal alternative method through which he could engage in negotiations with his team, Stroman suffered harm more than just financially by the arbitration process.[116] The outcome of his case damaged his relationship with the team; Stroman communicated that he planned to have less interaction and communication with team administration

113. For another example of salary arbitration's impact on player-team relations, see Mark Zuckerman, *Will Taylor and Barraclough Actually Get to Arbitration?*, MID-ATLANTIC SPORTS NETWORK (Jan. 13, 2019), http://www.masnsports.com/nationals-pastime/2019/01/will-the-nats-actually-take-taylor-and-barraclough-to-arbitration.html [https://perma.cc/E96W-EP2X] (discussing Kyle Barraclough's 2019 arbitration hearing with a team he had not even played for yet). In 2019, Kyle Barraclough and the Washington Nationals went to an arbitration hearing over a $275,000 disagreement to determine Barraclough's 2019 salary. *See id.*; Associated Press, *Baseball Notebook: Tepera, Barraclough Lose Cases*, St. Louis Post-Dispatch, Feb. 9, 2019, at B2. Barraclough had just been traded to the Nationals, had not yet played a game for them, and met his new employer for the first time in the arbitration hearing. Zuckerman, *supra* note 113. After losing his arbitration hearing, Barraclough's performance regressed, and he was ultimately released in the middle of the following season. Todd Dybas, *Kyle Barraclough's Departure Final Damning Blow to Nationals' Offseason Bullpen Plan*, NBC SPORTS, Aug. 6, 2019, https://www.nbcsports.com/washington/nationals/kyle-barracloughs-departure-final-damning-blow-nationals-offseason-bullpen-plan [https://perma.cc/58TS-SADH].

114. Richard Griffin, *Stroman Fumes After Losing Arbitration Fight with Blue Jays*, THE STAR (Feb. 15, 2018), https://www.thestar.com/sports/bluejays/2018/02/15/stroman-fumes-after-losing-arbitration-fight-with-blue-jays.html [https://perma.cc/93CM-CNXC].

115. *Id.*; *see also* Marcus Stroman (@MStrooo6), Twitter (Feb. 15, 2018, 12:21 PM), https://twitter.com/MStrooo6/status/964202930583859201 [https://perma.cc/Q7JZ-BZHL].

116. Players have noted that the financial ramifications of an arbitration case are not the most important outcome of the case. For example, pitcher Mike Norris noted after his arbitration loss, "I was either going to wake up rich or richer." DAN HETTINGER, WELCOME TO THE BIG LEAGUES: EVERY MAN'S JOURNEY TO SIGNIFICANCE: THE DARREL CHANEY STORY 104–105 (1994).

moving forward.[117] *Betances* and *Stroman* exemplify how this process conflicts with promoting a healthy working relationship between employees and their employers in Major League Baseball.

Most recently, the flaws with the salary arbitration system were exposed during the 2019 arbitration season when Trevor Bauer had his second straight year with a hearing against the Cleveland Indians.[118] Although character is not among the salary arbitration criteria that salary arbitrators are to consider in reaching their decisions,[119] MLB's LRD spent its final minutes of the case criticizing Bauer's social media usage in an effort to degrade Bauer in front of the panel.[120] Bauer ultimately won the hearing and earned his $13 million submission rather than the Indians' $11 million submission,[121] but he felt his club's "character assassination" was inappropriate.[122]

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117. Marcus Stroman (@MStrooo6), Twitter (Feb. 15, 2018, 1:24 PM), https://twitter.com/MStrooo6/status/964203695914274817 [https://perma.cc/2W2P-NBKK]; *see* Griffin, *supra* note 114.

118. Associated Press, *Trevor Bauer Takes on Indians in Salary Arbitration for Second Year in a Row*, ESPN.COM (Feb. 8, 2019), http://www.espn.com/mlb/story/_/id/25952932/trevor-bauer-takes-cleveland-indians-salary-arbitration-second-year-row [https://perma.cc/3V4R-LRTT].

119. *See* MLB CBA, *supra* note 2, at Art. VI, (E)(10)(b).

120. The club criticized Bauer's charity campaign, in which the dollar amounts he donated contained sexual and drug related connotations. *See* Bob Nightengale, *Trevor Bauer Says he Suffered 'Character Assassination' but Insists There's No Ill Will with Indians*, USA TODAY (Feb. 14, 2019), https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2019/02/14/trevor-bauer-cleveland-indians-arbitration/2869671002/ [https://perma.cc/TZ8U-DQXK]. From Bauer's perspective, the club's presentation was intended to paint him in a negative light:

> Basically [saying] that I'm a terrible human being, which was interesting on their part. I thought that giving to charity, especially because they didn't mention it was a charitable campaign, just mentioned the name. They don't mention that I gave to 68 charities or that I donated over $100,000. Or that the whole point of the campaign was to bring awareness to all those charities. Nothing about that. They tried to tell me I was running my campaign because of those numbers.

Id.

121. Mike Axisa, *Indians' Trevor Bauer Wins Arbitration Hearing, Says it Turned into 'Character Assassination,'* CBS SPORTS (Feb. 14, 2019), https://www.cbssports.com/mlb/news/indians-trevor-bauer-wins-arbitration-hearing-says-it-turned-into-character-assassination/ [https://perma.cc/T5HM-3TRH].

122. Following the hearing, Bauer stated, "The intent behind it, that I would characterize, was to demean my character. That kind of put a black mark on what I thought was a really well-argued case on both sides. There's no room for that . . . Let's just stick to the numbers. Let the numbers decide." *Id*. In response, Cleveland Indians' president of baseball operations Chris Antonetti stated:

> It's obviously not a great process. . . we spend most of our time talking about all the wonderful things our players do and the nature of the process, because you have to argue a position, you have to bring things to light, and things

Arbitration hearings can interfere with player-team relations, but a less recent dispute between Greg Maddux and the Atlanta Braves demonstrates that the institutional presence of arbitration itself can also interfere with these relationships before an arbitration hearing even begins. Pitcher Greg Maddux, who had an outstanding record with his team, was released by the Braves in 2003 after being denied an arbitration hearing.[123] Hurt by the team's decision and his financial situation, Maddux communicated his displeasure: "You'd think after 11 years . . . [T]o not be offered arbitration or even a contract, I'm a little surprised by it . . . But it is the nature of the game now."[124] The nature of the game, in this instance, deprived Maddux of an opportunity to communicate with his club. As then-General Manager John Schuerholz commented, "With the economic circumstances we find ourselves in, we just weren't in position to go to arbitration with these players, because that's such an uncertain process."[125] The arbitration process—and perhaps particularly the "final offer" aspect—created such uncertainty for the parties that they were forced away from an opportunity to resolve the dispute altogether. Without an avenue to communicate their positions in a forum for non-binding discussion, parties continue to be restricted by MLB's salary arbitration structure.

ii. *Financial Costs: The Cost of Salary Arbitration*

In addition to the relational strains salary arbitration places on disputing parties, the financial implications of salary arbitration are also a limitation of the system. To prepare for salary arbitration cases, players and teams often hire outside counsel to litigate on their behalf.[126] On the players' side, this can mean small to mid-size law

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> that players may not do as well. And that's not a comfortable position for any club to go through, but it's a necessary part of the process.

Mandy Bell, *Bauer Wins Arbitration Case with Indians*, MLB.COM, Feb. 13, 2019, https://www.mlb.com/news/trevor-bauer-wins-arbitration-case-c303893242 [https://perma.cc/3M2U-MNE5].

123. Tim Evearitt, *Atlanta Braves: The Day After the Arbitration Deadline*, THE CHATTANOOGAN (Dec. 9, 2003), http://www.chattanoogan.com/2003/12/9/44316/Atlanta-Braves-The-Day-After-The.aspx [https://perma.cc/86QL-HP7X].

124. *Id.*

125. *Id*.

126. On the player side, agents typically argue cases themselves or hire outside counsel at small law firms to handle the case. Jeff Passan, *Passan: Inside the Wild, Wonky World of MLB Salary Arbitration*, ESPN.COM (Jan 10, 2019), http://www.espn.com/mlb/story/_/id/25722707/jeff-passan-wild-wonky-world-mlb-salary-arbitration [https://perma.cc/65Y4-PVBU]. The cost can rise to as high as $55,000, which is paid by the agency. *Id.* Because agents receive only 5% of a player's salary, the cost of a hearing often outweighs the benefits even if the player wins. *Id.*

firms will bill the agency or player per hour in addition to receiving a small percentage of the arbitration award.[127] On the team side, large law firms with higher billing rates often represent the clubs in their cases.[128] While these expenses can be justified in cases with large spreads,[129] parties currently expend significant financial resources on cases with spreads as small as $100,000.[130] Though $100,000 may be significant, the expenses associated with arbitration hearings—which also include arbitrator costs, travel, and lodging for all parties—impose an inefficient allocation of financial resources, even if a party wins.

iii. *Uncertainty Costs: The Lack of Written Decisions*

In addition to the concerns about relations between a player and his team and concerns about the costs, MLB's salary arbitration also creates undesirable uncertainty and lack of direction for future cases.

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127. *Id.* (discussing agency model); Ken Rosenthal, *Trevor Bauer Often Takes an Unconventional Approach and Now That Includes How He Uses Representation*, THE ATHLETIC, Nov. 9, 2019, https://theathletic.com/1363842/2019/11/09/rosenthal-trevor-bauer-often-takes-an-unconventional-approach-and-now-that-includes-how-he-uses-representation/ [https://perma.cc/5P3L-P9R8] (discussing direct legal representation model).

128. Although club-side costs are not publicly available, many clubs hire big New York law firms to handle their cases. *See e.g.*, *Adam Lupion,* PROSKAUER ROSE LLP, https://www.proskauer.com/professionals/adam-lupion [https://perma.cc/N43V-2Y9J]. In 2016, top partners at the firm charged rates near $1,500 per hour. Martha Neil, *Top Partner Billing Rates at BigLaw Firms Approach $1,500 Her Hour*, ABA JOURNAL (Feb 8, 2016), http://www.abajournal.com/news/article/top_partner_billing_rates_at_biglaw_firms_nudge_1500_per_hour [https://perma.cc/KGV3-88WG].

129. *See, e.g.,* Chandler Rome, *Gerrit Cole wins salary arbitration case with Astros*, Houston Chron., Feb. 13, 2019, https://www.houstonchronicle.com/sports/astros/article/Gerrit-Cole-wins-salary-arbitration-case-Astros-13613825.php [https://perma.cc/FLR2-FRM3] (discussing the $2,075,000 difference between pitcher Gerrit Cole's 2019 $13,500,000 submission and the Houston Astros' $11,425,000 submission); *see also* Bell, *supra* note 122 (discussing the $2,000,000 difference between Trevor Bauer's 2019 $13,000,000 million submission and the Cleveland Indians' $11,000,000 submission).

130. *See, e.g.*, Associated Press, *Foltynewicz, Braves Go to Arbitration over $100,000 Gap*, USA TODAY, Feb 9, 2018, https://www.usatoday.com/story/sports/mlb/2018/02/09/foltynewicz-braves-go-to-arbitration-over-100-000-gap/110266586/ [https://perma.cc/9QPK-52F3]. In 2019, the smallest gap between a team and club was $250,000. *See* John Perrotto, *Michael A. Taylor Case Shows MLB Owners Serious About Arbitration Strategy*, FORBES, Feb 1, 2019, https://www.forbes.com/sites/johnperrotto/2019/02/01/michael-a-taylor-case-shows-mlb-owners-serious-about-arbitration-strategy/#7c05eda168bd [https://perma.cc/9JL6-WQX7].

Whereas the NHL salary arbitration process requires the single arbitrator to issue a written decision following the hearing,[131] MLB's process mandates that the three-arbitrator panel is not to issue a written decision explaining its rationale behind its holding.[132] Further complicating matters is that the CBA itself provides no direction as to how much weight the panel should give to each criterion.[133] Rather, the panel simply fills in the chosen position on a standard contract within twenty-four hours of the conclusion of the hearing.[134]

The recent arbitration between Trevor Bauer and the Cleveland Indians[135] highlights the challenge of standardized form outcomes without a statement of reasons. In that arbitration, the presentation of Bauer's social media might have been part of the reason the club did not prevail in the hearing.[136] Because arbitrators do not file written decisions, however, there is no way for the parties to know which arguments were successful and which were not. Without written decisions, an argument that prevails one year may fail the next, as this lack of transparency also means arbitrators are not held to precedent.[137] Though every case may be different, this feature nevertheless contributes a lack of predictability and consistency in the system. Parties may speculate as to why they lost a case, but they are unable to definitively learn which arguments are favored and which are not as they prepare for future cases.

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131. NHL CBA, *supra* note 2, at Art. 12.9(n)(ii)(D) ("The decision of the Salary Arbitrator shall establish: . . . a brief statement of the reasons for the decision, including identification of any comparable(s) relied on.").

132. MLB CBA, *supra* note 2, at Art. VI, (E)(13) ("The arbitration panel shall be limited to awarding only one or the other of the two figures submitted. There shall be no opinion.").

133. *See id.* at Art. VI, (E)(10); *see also* Michael L. Miller, Final Offer Arbitration and Major League Baseball 8 (Apr. 5, 2011) (unpublished M.Sc. thesis, Eastern Michigan University) [https://perma.cc/B8CE-EF85].

134. MLB CBA, *supra* note 2, at Art. VI, (E)(13) ("The panel chair shall insert the figure awarded in paragraph 2 of the executed Uniform Player's Contract delivered at the hearing and shall forward the Contract to the Office of the Commissioner.").

135. See discussion of the Indians' controversial presentation of character evidence at Bauer's salary arbitration hearing, *supra* notes 118 to 122 and accompanying text.

136. *See* Nightengale, *supra* note 120 (quoting Bauer's speculation that "the arbitrator didn't see [the character assassination] as a negative").

137. *See* Eldon L. Ham & Jeffrey Malach, *Hardball Free Agency—The Unintended Demise of Salary Arbitration in Major League Baseball: How the Law of Unintended Consequences Crippled the Salary Arbitration Remedy—and How to Fix It*, 1 HARV. J. SPORTS & ENT. 64, 92 (2010) ("Perhaps most importantly, arbitrators themselves are left in the dark as to the reasoning behind apparently similar cases decided in the past. . . .").

iv. *Risk Aversion: Entity vs. Individual*

A final important limitation of MLB's salary arbitration system relates to the financial circumstances of the parties involved. The arbitration system has provided players with an opportunity to earn the salary they believe they deserve, but one systemic dimension of the salary negotiation process inherently favors the leagues and teams—differential risk aversion. Relative to larger entities, individuals face more income uncertainty and accordingly exhibit a higher degree of risk aversion.[138] Teams often operate with a payroll of over $100 million, such that fluctuations in individual players' salaries have a fractional impact on the team's overall finances.[139] Individual players, on the other hand, generally first enter the salary arbitration system after having made the minimum MLB salary;[140] and unlike the teams they negotiate against, a single negotiation determines their total outcome. This imbalance is a systemic reason that teams and leagues are more incentivized to arbitrate than players are: Players have a universal reason to be more risk-averse than teams. Recently, this risk aversion has even influenced All-Star players to accept significantly below-market contract extensions because they prefer the long-term security over the uncertainty of salary arbitration.[141] Ultimately, because individual players have more at stake in a given dispute than do the institutions of teams, their built-in risk aversion creates an uneven playing field in salary arbitration.

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138. Luigi Gioso & Monica Paiella, *Risk Aversion, Wealth, and Background Risk*, 6 J. European Econ. Ass'n 1109, 1109 (2008) ("Individuals who are more likely to face income uncertainty or to become liquidity constrained exhibit a higher degree of absolute risk aversion, consistent with recent theories of attitudes toward risk in the presence of uninsurable risks.").

139. *MLB Salaries*, USA Today (Jan. 10, 2019), https://www.usatoday.com/sports/mlb/salaries/2019/team/all/ [https://perma.cc/2WQV-3MSB].

140. The minimum MLB salary was $555,000 in 2019. MLB CBA, *supra* note 2, at Art. VI (A)(1).

141. In 2019, Atlanta Braves' All Star second baseman Ozzie Albies accepted a seven-year, $35 million contract before he was eligible for arbitration. Albies has been criticized for accepting "the worst contract ever," but communicated that he accepted the contract in part "because I want my family to be safe." Associated Press, *Ozzie Albies, Braves Agree to $35M, 7-Year Contract*, USA Today (Apr. 11, 2019),] https://www.usatoday.com/story/sports/mlb/2019/04/11/ozzie-albies-braves-agree-to-35m-7-year-contract/39332783/ [https://perma.cc/SS2V-J9XE]; *see also All-Star Signs the "Worst Contract Ever" by a MLB Player*, Sports Illustrated: John Wall Street Blog (Apr. 22, 2019), https://www.si.com/johnwallstreet/sports-finance/albies-worst-contract/ [https://perma.cc/JM7B-3ZQD].

2. *National Hockey League*

Although the NHL's salary arbitration process is slightly different from MLB's,[142] the league and its players encounter similar issues. Like in MLB,[143] the vast majority of NHL salary arbitration cases settle before the hearing,[144] partially because of how unpleasant the hearings can be.[145] The process is uncomfortable for both the player and the club and can significantly damage their working relationship.[146] Because the adversarial arbitration process pits parties against each other, many players ultimately decide to move to another team when they become unrestricted free agents.[147] In some extreme cases, players have even requested a trade following the process.[148] The NHL has acknowledged the shortcomings of this system and has even proposed to eliminate the entire salary arbitration process on multiple occasions.[149]

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142. *See* discussion *supra* Part II (D).

143. *See* discussion *supra* Part III (A).

144. *See* discussion *supra*, note 89.

145. *See, e.g.*, Craig Custance, *Custance: Inside the Tomas Tartar Arbitration*, THE ATHLETIC (July 22, 2017), https://theathletic.com/77763/2017/07/22/custance-inside-the-tomas-tatar-arbitration/ [https://perma.cc/Q4WN-WHUY] (stating the Detroit Red Wings had never gone to arbitration under GM Ken Holland's tenure because the process was bad for employee relations.).

146. In 1997, New York Islanders' Goalie Tommy Salo was brought to tears during his arbitration hearing because of how personal and contentious the hearing became. Adrian Dater, *NHL Arbitration: Potential for Bruised Feelings Makes Actual Hearings Rare*, BLEACHER REPORT (Jul. 21, 2016), https://bleacherreport.com/articles/2652997-nhl-arbitration-potential-for-bruised-feelings-make-actual-hearings-rare [https://perma.cc/PK93-QXDB]. Salo felt so betrayed by the team and the process, he refused to return to the Islanders following the season. *See* Bibek Das, *Salary Arbitration and the Effects on Major League Baseball and Baseball Players*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 55, 58 (2003)*see also* Adrian Dater, *Tales from Arbitration: NHL Salary Hearings an Old Fashioned Bruisefest*, SPORTS ILLUSTRATED (July 6, 2015), https://www.si.com/nhl/2015/07/06/nhl-salary-arbitation-stories-brendan-morrison-mike-milbury-tommy-salo [https://perma.cc/S6CY-KRNV] ("In 2000, former Philadelphia Flyers GM Bob Clarke was said to have angered John LeClair so much during an 'arbo'" hearing . . . that their working relationship was irreparably damaged."). *But see* Custance, *supra* note 145, for an instance in which an arbitration dispute between player Tomas Tatar and the Detroit Red Wings was unusually cordial and amicable.

147. Lake, *supra* note 72.

148. *Id*.

149. See Joe Lapointe, *N.H.L. and Union Reject Proposals*, N.Y. TIMES (Dec. 15, 2004), https://www.nytimes.com/2004/12/15/sports/hockey/nhl-and-union-each-reject-proposals.html [https://perma.cc/RTF6-DCVN], for 2004 proposal; see also *Full Explanation of NHL Proposal to NHLPA*, NHL.COM, Oct. 17, 2012, https://www.nhl.com/news/full-explanation-of-nhl-proposal-to-nhlpa/c-643572 [https://perma.cc/2AR7-B9AT] for reference to 2012 initial proposal. In 2017, NHL Deputy Commissioner Bill Daly communicated that the league remains opposed to the process of salary arbitration: "As a general matter . . . the League's position on salary arbitration is and has historically been a negative one for various reasons . . . I would doubt very much if we

In addition to its other deficiencies shared with MLB's process—the relational, financial, and transactional costs—the NHL's walk-away rights undermine the tenet of finality in an arbitration hearing.[150] One of the benefits of arbitration is its ability to provide a final resolution for the parties.[151] After weeks of negotiations, the players and their teams may reach an impasse given their differing valuations, and arbitration breaks that impasse by providing an ultimate solution.[152] One party's unilateral option to walk away from the deal after an arbitrator has ruled, however, undermines the system and creates an unproductive power imbalance.[153]

A recent example illustrates the flaws of the walk-away provision. In 2009, the New York Rangers used their walk-away rights after their arbitration with Nikolai Zherdev, ultimately costing him his job in the NHL. Following a hearing in which the Rangers offered $3.25 million and Zherdev requested $4.5 million, the arbitrator awarded Zherdev a salary of $3.9 million.[154] The Rangers decided to walk away from Zherdev's award, which rendered him an unrestricted free agent.[155] Zherdev was unable to find a new contract in the NHL and ultimately signed with a Russian team for the 2009–2010 season.[156] This example demonstrates the flaws in a system within which one party can exit the process without ramification.

Concerns about the NHL's salary arbitration process have been expressed not only by participants but also by arbitrators themselves.

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would ever agree to expand the salary arbitration rights currently provided for under the CBA." Ken Campbell, *Athanasiou, Bennett and the NHL's Problem with Arbitration Rights*, HOCKEY NEWS (Sept. 6, 2017), https://thehockeynews.com/news/article/athanasiou-bennett-and-the-nhl-s-problem-with-arbitration-rights [https://perma.cc/U5G7-WV5W].

150. For a description of walk-away rights, see discussion *supra* Part II (D)(1), stating that teams may walk away from an award issued by an arbitrator if the player initiated the arbitration or if the award is for $3,500,000 or more.

151. ADR Inst. of B.C., *Why Arbitration*, ADR INSTITUTE OF BC, https://adrbc.com/BCAMI/Arbitration/Benefits_of_Arbitration.aspx [https://perma.cc/85M5-NVT9?type=image].

152. *See* Stephen J. Bartlett, *Contract Negotiations and Salary Arbitration in the NHL É An Agent's View*, 4 MARQ. SPORTS L.J. 1, 10–11 (1993).

153. *See* Derek R. Marr, The Puck Stops Here: Analysis of Salary Arbitration in the National Hockey League, 3 (May 7, 2011) (unpublished) [https://perma.cc/T6GZ-SMEG] (arguing that, instead of a process to bridge the gap between the two sides, NHL arbitration has become a bargaining tool for the NHL).

154. *Id.*

155. *Zherdev Bolts to KHL: Report*, CBC SPORTS (Aug. 11, 2009), https://www.cbc.ca/sports/hockey/zherdev-bolts-to-khl-report-1.823062 [https://perma.cc/AN3J-2HRA].

156. *Id*.

In theory, arbitration is an alternative to direct negotiation. However, arbitrators have said that clubs seek to reduce arbitration to a simulation of the outcome of a bargained negotiation.[157] If the parties seek someone to facilitate a bargained negotiation, arbitration is not the avenue they should be pursuing. Arbitrators also bemoan the process's lack of evidentiary standards, the lack of requirements regarding the use or weight of the various factors to be considered, the use and weight of comparable players, and the consideration given to precedent.[158] Like MLB's salary arbitration process, the NHL's system falls short of meeting the parties' needs.

B. *Grievances*

1. *National Football League*

A crucial factor in the effectiveness of any dispute resolution system is that it be considered a fair process by all parties. At this time, the NFL's system falls considerably short of this objective.[159] The NFL's dispute resolution system, particularly for cases of player conduct and discipline, has been at the center of controversy in recent years. At the root of these controversies are concerns that the process is unpredictable. Additionally, the league's current system is seen as procedurally unfair due to its inherently one-sided structure. The lack of mutual trust and satisfaction with the system suggest that the NFL's process could be significantly improved.

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157. *See, e.g.*, Marr, *supra* note 153, at 3 (citing *Brooks Lauch v. Washington Capitals* (July 23, 2007)) ("The Club also suggests that the goal of the Arbitrator must be to replicate, to the extent possible, the *real* bargaining process and place the player in the appropriate salary category, taking into account all relevant factors and arbitral standards and principles. One of these principles to be observed is the distinction between freely negotiated contracts and awarded salaries.").

158. *Id.*

159. *See, e.g.*, Tessa J. Kajdi, *Is There Something Arbitrary about the NFL's Arbitration Process?*, SYRACUSE L. REV. LEGAL PULSE (Nov. 2, 2017), https://lawreview.syr.edu/nfl-arbitration-process/ [https://perma.cc/6VSE-KCT6]; *see also* Loren Korkin, *The Key to Fixing the NFL's Arbitration Process: Negotiation*, FUI L. REV. BLOG (Oct. 6, 2017, 1:30 PM), https://law.fiu.edu/key-fixing-nfls-arbitration-process-negotiation/ [https://perma.cc/E72R-N87X].

i. *The Process Is Unpredictable*

One of the primary concerns with the NFL's ADR system is the lack of predictability that results from arbitrary reasoning and procedural inconsistency.[160] This unpredictability undermines the credibility of the NFL's ADR system.[161] At the center of this criticism is the assertion that Commissioner Goodell has wielded his power inconsistently, haphazardly resolving whether or not to decide particular cases, notwithstanding their apparent similarity.[162] At times, this unpredictability prolongs disputes, which are resolved only when the parties seek court intervention.

In 2012, for example, Commissioner Goodell appointed former Commissioner Paul Tagliabue to hear the appeals of four New Orleans Saints players who were suspended by the league for their involvement in the team's "Bountygate" scandal, in which members of the New Orleans Saints were accused of paying out bonuses, or "bounties," for injuring opposing team players.[163] Although Goodell had the power to serve as the arbitrator, he removed himself from the case when the NFLPA requested he do so.[164] Goodell reasoned that his predecessor's experience and reputation for integrity made him

160. *See* John Burritt McArthur, *The Tom Brady Award and the Merit of Reasoned Awards*, 8 HARV. J. SPORTS & ENT. L. 147, 190-91 (2014) (noting Commissioner Goodell's failure to justify an exercise of authority and to connect his liability findings to the available evidence, and asserting that these weaknesses made it difficult to predict whether the arbitrations would endure); *see also* Thomas G. Eron, *Monday Morning Quarterback: 4 Lessons from Deflategate*, LAW360 (Sept. 14, 2015, 11:31 AM), http://www.law360.com/articles/701490/monday-morning-quarterback-4-lessons-fromdeflategate [https://perma.cc/44UK-CKBE] (noting that the NFL Commissioner's "sharp change in discipline" had been viewed as arbitrary in federal court).

161. Jennifer R. Bondulich, *Rescuing the "Supreme Court" of Sports: Reforming the Court of Arbitration for Sport Arbitration Member Selection Procedures*, 42 BROOK. J. INT'L L. 275, 318 (2016) ("[T]he inconsistent actions of the [NFL] commissioner . . . undermined the public trust of both the league and the commissioner . . . .").

162. *Id.*

163. *See* In the Matter of New Orleans Saints Pay-for-Performance/"Bounty" (December 11, 2012) (Tagliabue, Arb.), *available at* http://www.nfl.com/news/story/0ap1000000109668/article/paul-tagliabues-full-decision-on-saints-bounty-appeal [https://perma.cc/T2DU-22FV] [hereinafter *Tagliabue's Decision*].

164. *See* Mark Maske, *Roger Goodell Appoints Paul Tagliabue to Decide NFL Players' Bounty Appeals*, WASH. POST (Oct. 19, 2012), https://www.washingtonpost.com/sports/roger-goodell-appoints-paul-tagliabue-to-decide-nfl-players-bounty-appeals/2012/10/19/105f665e-1a23-11e2-ad4a-e5a958b60a1e_story.html?noredirect=ON [https://perma.cc/JY4P-JBFC].

the ideal arbitrator for the situation.[165] During the arbitration, however, Tagliabue reversed Goodell's decision to suspend each of the players associated with the case.[166]

Three years after Goodell's own predecessor reversed the Commissioner's initial decision, Goodell opted to appoint himself as the arbitrator for the league's next high-profile dispute[167]: the "Deflategate" controversy between Tom Brady and the NFL in 2015.[168] Following the hearing, Goodell upheld his initial decision to suspend Brady.[169] The case, *National Football League Management Council v. National Football League Players Association,*[170] was subsequently litigated in the Southern District of New York[171] and appealed to the Second Circuit.[172] During the appeal, Tagliabue and several prominent labor arbitrators criticized Goodell for exceeding the scope of his authority.[173] In a Second Circuit amicus brief, labor arbitrator Kenneth Feinberg asserted that the nation's "trust and confidence in arbitration" suffered as a result of Goodell's arbitrary use of his powers

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165. *See id*.

166. *See Tagliabue's Decision*, *supra* note 163.

167. *See* Jonathan Clegg, *Goodell Appoints Himself Arbitrator of Brady Appeal*, WALL ST. J. (May 15, 2015), https://www.wsj.com/articles/goodell-appoints-himself-arbitrator-of-brady-appeal-1431703420 [https://perma.cc/CHE4-TDRR].

168. For general background and a timeline of the dispute, see ESPN.com, *Deflategate Timeline: After 544 Days, Tom Brady Gives In*, ESPN: NEW ENGLAND PATRIOTS BLOG (Sept. 3, 2015), https://www.espn.com/blog/new-england-patriots/post/_/id/4782561/timeline-of-events-for-deflategate-tom-brady [https://perma.cc/V8P9-YRNR].

169. Final Decision on Article 46 Appeal of Tom Brady, at 19–20 (July 28, 2015) (Commissioner Goodell, Arb.), *available at* http://static.nfl.com/static/content/public/photo/2015/07/28/0ap3000000504265.pdf [https://perma.cc/N54K-EVJF]. Commissioner Goodell's decision was vacated in federal district court proceedings in the Southern District of New York, but ultimately reinstated by the Second Circuit. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449, 463 (S.D.N.Y. 2015), *rev'd,* 820 F.3d 527 (2d Cir. 2016).

170. 125 F. Supp. 3d 449 (S.D.N.Y. 2015), *rev'd,* 820 F.3d 527 (2d Cir. 2016).

171. *Id.*

172. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527 (2d Cir. 2016).

173. Brief of Kenneth R. Feinberg as Amicus Curiae in Support of Appellees' Petition for Panel Rehearing or Rehearing En Banc, at 3–5, NFL Mgmt. Council v. NFL Players Ass'n, 820 F.3d 527 (2d Cir. 2016) (No. 15-2801), 2016 WL 3098523, at *3–*5 [hereinafter Feinberg Amicus Brief]; Phil Perry, *'Legendary' arbitrator's amicus brief slams Goodell for arbitration work*, NBC SPORTS, June 1, 2016, https://www.nbcsports.com/boston/new-england-patriots/legendary-arbitrators-amicus-brief-slams-goodell-arbitration-work [https://perma.cc/S8N8-38F2]; *see also* Mark Heisler, *Move Over Deflategate: Tagliabue Rips Goodell In NFL's Worst Internal Rift*, FORBES, Jan. 26, 2015, https://www.forbes.com/sites/markheisler/2015/01/26/move-over-deflategate-tagliabue-rips-goodell-in-nfls-worst-internal-rift/#978ffe27bb37 [https://perma.cc/T8T4-BYQQ].

to enforce his "'own brand of industrial justice."[174] Feinberg asserted that Goodell's decision had ramifications beyond professional sports:

> [M]ore troubling [than the fact that he exceeded his authority], [Commissioner Goodell] used the vehicle of arbitration as a mechanism to rewrite the underlying bargain between the parties, to the sole advantage of his organization as against Brady and the Players Association. If this type of bias or capricious notions of industrial justice are upheld, the public should—and will—lose faith in the systems of arbitration and private dispute resolution that have become a parallel component of our justice system . . . Fair process before a fair tribunal cannot be an aspiration; it is an unwaivable, inviolable necessity.[175]

One year after this national criticism, Goodell decided in 2017 to assign an arbitrator to the NFL's next high-profile arbitration rather than review the suspension of Dallas Cowboys Running Back Ezekiel Elliott himself.[176] Goodell's inconsistent delegations in similar cases—each featuring a high-profile dispute over alleged player misconduct—implies there is no clear principle for which cases the Commissioner will decide and which an appointed third party will resolve. Procedural unpredictability and unclear reasoning within the Commissioner's adjudications compound the uncertainty. The unpredictable determinations about whether—and how—Goodell will serve as his own reviewer have left players, the union, industry professionals, and even former colleagues to criticize the dispute resolution system as it has been carried out during his tenure.[177] Indiscernible reasoning and lack of predictability limit the efficacy of the process and incite post-arbitration litigation.

ii. *The Process Is Partial*

In addition to doubts regarding the system's consistency, another chief criticism of the NFL's grievance and dispute resolution process is a concern about arbitrator neutrality—or lack thereof.[178] The Commissioner's ability to unilaterally appoint arbitrators or to serve

174. Feinberg Amicus Brief, *supra* note 173, at 3–4 (citing Stolt-Nielsen v. Animal Feeds Int'l Corp., 559 U.S. 662, 671).

175. *Id*. at 8.

176. A.J. Perez, *Commissioner Roger Goodell Tasks Former NFL Executive to Hear Ezekiel Elliott's Appeal*, USA TODAY (Aug. 16, 2017), https://www.usatoday.com/story/sports/nfl/cowboys/2017/08/16/commissioner-roger-goodell-tasks-former-nfl-executive-hear-ezekiel-elliotts-appeal-harold-henderson/572791001/ [https://perma.cc/A8M3-BSUG].

177. Heisler, *supra* note 173.

178. *See* Eric L. Einhorn, *Between the Hash Marks: The Absolute Power the NFL's Collective Bargaining Agreement Grants Its Commissioner*, 82 BROOK. L. REV. 393,

as the arbitrator himself has pushed the NFLPA and its players to challenge this authority in court in search of a more equitable process.[179] The NFLPA and its players have argued that self-or unilateral appointment is grounds for vacation under the Federal Arbitration Act[180] (FAA).[181] The resulting litigation has been divisive and high-profile.[182]

In 2016, the NFL suspended Minnesota Vikings Running Back Adrian Peterson indefinitely and fined him a sum equivalent to six games' pay for "conduct detrimental to . . . the game of professional football."[183] Peterson appealed his suspension, proceeding to arbitration.[184] The NFL appointed arbitrator Harold Henderson, a former senior official of the NFL who was the president of a charity affiliated with the league, to hear Peterson's challenge.[185] The NFLPA requested that Henderson recuse himself due to his close ties to the

405 (2016); Theresa Mullineaux, *The NFL's Arbitration Bias: A Powerful Commissioner Makes Impartiality Questionable, and A Process Flawed*, 36 ALTERNATIVES TO HIGH COST LITIG. 35, 36 (2018).

179. *See, e.g.*, Mark Kantor, *Eighth Circuit Affirms Arbitrator's Suspension of NFL's Peterson*, A.B.A. LITIG. SECTION: ALT. DISP. RESOL. PRACTICE POINTS (Aug. 8, 2016), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2016/8th-circuit-affirms-arbitrators-suspension-nfl-peterson.html [https://perma.cc/DS5B-6R4Y] (discussing recent cases).

180. 9 U.S.C. § 1–16 (2012).

181. *See, e.g.,* NFL Players Ass'n v. NFL, 831 F.3d 985, 998 (8th Cir. 2016); Williams v. NFL, 582 F.3d 863, 885–86 (8th Cir. 2009); NFL Mgmt. Council v. NFL Players Ass'n, 820 F.3d 527, 548 (2d Cir. 2016).

182. *See, e.g.,* Tom Pelissero, *NFLPA Files Federal Lawsuit in Bid to Reinstate Adrian Peterson*, USA TODAY SPORTS (Dec. 15, 2014, 10:47 AM), https://www.usatoday.com/story/sports/nfl/vikings/2014/12/15/adrian-peterson-lawsuit-nflpa-union-suspension/20430417/ [https://perma.cc/PW6N-AMK3]; Sally Jenkins, *Roger Goodell's Insistence on Acting as Emperor Makes the NFL Vulnerable to a Legal Smackdown*, WASH. POST: SPORTS (Aug. 21, 2015), https://www.washingtonpost.com/sports/redskins/deflategate-judge-doesnt-seem-likely-to-rubber-stamp-roger-goodells-decisions/2015/08/21/034f8a26-4747-11e5-846d-02792f854297_story.html [https://perma.cc/G22F-KXTA]; Rachel Axon, Tom Pelissero & Lorenzo Reyes, *Tom Brady's Deflategate Testimony, Phone Records Revealed in NFLPA Filing*, USA TODAY (Aug. 4, 2015, 5:40 PM), https://www.usatoday.com/story/sports/nfl/patriots/2015/08/04/tom-brady-new-england-deflategate-testimony-phone-records/31126443/ [https://perma.cc/Y5R9-A8Z6]; Michael Hurley, *Roger Goodell, NFL Blasted For Bias, Dishonesty, Fraud in N.Y. Law Professor's Deflategate Court Filing*, CBS BOSTON (Dec. 18, 2015, 11:41 AM), https://boston.cbslocal.com/2015/12/18/roger-goodell-nfl-blasted-for-bias-dishonesty-fraud-in-n-y-law-professors-deflategate-court-filing/ [https://perma.cc/DWK2-LGL7].

183. Nat'l Football League Players Ass'n on behalf of Peterson v. Nat'l Football League, 831 F.3d 985, 989 (8th Cir. 2016).

184. Kantor, *supra* note 179.

185. *Id*.

NFL, but Henderson refused; he ultimately upheld Peterson's suspension.[186] The decision suggests a lack of impartiality in the NFL's system—and subsequent court proceedings indicate that litigation will not remedy the problem.

After the arbitration decision was issued, the NFLPA and Peterson filed suit in federal court, seeking to vacate the decision on the grounds that the arbitrator was "evidently partial" under the FAA.[187] The district court held in favor of the NFLPA and Peterson and vacated the award,[188] but the Eighth Circuit ultimately reversed the district court's decision and reinstated the arbitrator's award.[189] The Eighth Circuit held that because the union (NFLPA) and the employer (NFL) collectively bargained for a procedure that allowed the NFL to select an arbitrator with close ties to the NFL, the arbitration process and award were valid.[190]

Although, under current law, Commissioner Goodell has been faithful to the league's collective bargaining agreement in appointing a partial arbitrator, the process has nonetheless led to divisive litigation and negative public perception. *Peterson* is an example of a fundamental neutrality issue in the NFL's system—one that undermines the legitimacy of its outcomes.

iii. *The System Is Seen as Procedurally Unfair*

Notwithstanding the Eighth Circuit's conclusion in *Peterson*, the NFL's system is still criticized as procedurally unfair due to neutrality and predictability concerns. Under Article 46 of the NFL CBA, Commissioner Goodell has a disproportionate amount of power and

186. *Id*.

187. Peterson, 831 F.3d at 992 (citing 9 U.S.C. § 10(a)).

188. Nat'l Football League Players Ass'n on behalf of Peterson v. Nat'l Football League, 831 F.3d 985 (8th Cir. 2016).

189. *See* Peterson, 831 F.3d at at 989 ("We conclude that the parties bargained to be bound by the decision of the arbitrator, and the arbitrator acted within his authority, so we reverse the district court's judgment vacating the arbitration decision."); *id.* at 999 (remanding with directions).

190. *Id.* at 998 ("The Players Association does not identify any structural unfairness in the Article 46 arbitration process for which it bargained. The Association's fundamental fairness argument is little more than a recapitulation of its retroactivity argument against the merits of the arbitrator's decision. We have never suggested that when an award draws its essence from the collective bargaining agreement, a dissatisfied party nonetheless may achieve vacatur of the arbitrator's decision by showing that the result is 'fundamentally unfair.'").

control, raising serious issues of procedural fairness in disputes between labor and management.[191] The Commissioner's ability to appoint either himself or the third party of his choice grants him great ability to control the outcome of every dispute.[192] Not only does he unilaterally decide certain cases in the first instance, but he can also control every subsequent appeal: He can review them on his own and also delegate that power to another individual of his choice as needed.[193]

Even when a third-party arbitrator presides over the dispute, procedural fairness issues remain. From the NFLPA's perspective, arbitrary, unchallengeable actions by an arbitrator threaten the entire fabric of labor relations in football.[194]

The problem with the NFL's dispute resolution system for player conduct issues is not whether the Commissioner has the legal authority to act as the judge, jury and executioner; he does.[195] The problem is that the NFL's process creates increased hostility between parties and that the process lacks legitimacy due to its inconsistency and lack of impartiality. The long-term consequences of that lost confidence could be significant. Although the law may be settled, this contentious issue between the league and players is decidedly not resolved.

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191. *See* Korkin, *supra* note 159.

192. *Id.* (citing NFL CBA, *supra* note 3, at Art. 46(2)(a)).

193. *See id*. (noting that Commissioner Goodell typically delegates arbitral authority to a third party with whom he has close ties).

194. *See* Brief for U.S. Labor Law & Industrial Relations Professors as Amicus Curiae Supporting Petition for Panel Rehearing and Rehearing *En Banc* at 7, Nat'l Football League Mgmt. Council v. Nat'l Football League Players *Ass'n*, 820 F.3d 527 (2d Cir. 2016) (No. 15-2801) (asking whether, "[w]hen parties agree to arbitrate . . . they also agree to an arbitrary process where that arbitrator may . . . ignore generally accepted principles of industrial due process" and arguing that "parties will no longer be able to trust arbitration as a fundamentally fair process, thereby discouraging its use as a dispute resolution method that protects industrial peace"); *see also* Brief for Appellees Nat'l Football League Players Ass'n and Tom Brady at 1–8, Nat'l Football League Mgmt. Council, 820 F.3d 527 (2d Cir. 2016), 2015 WL 8464802, at 60–61 (advocating for approval of district court decision in favor of Brady and asserting Goodell's decisions were fundamentally unfair and violated due process).

195. Peterson, 831 F.3d at at 989; Adam Kilgore, *Roger Goodell has the Power, Court Rules in Upholding Tom Brady Suspension*, WASH. POST (Apr. 25, 2016), https://www.washingtonpost.com/sports/redskins/appeals-court-reinstates-tom-bradys-suspension-upholds-roger-goodells-power/2016/04/25/b6542076-0b11-11e6-bfa1-4efa856caf2a_story.html?utm_term=.71f174c8c9c3 [https://perma.cc/9EB2-EHQX].

2. *National Basketball Association*

Although the NBA's three-tier system has proven effective in accelerating dispute resolution, it has shortcomings that have negatively impacted the league and its players: inflexibility, resulting in ongoing post-resolution tensions; and ambiguity in the tiered system, resulting in confusion and costly litigation.

i. *The System Is Inflexible*

The NBA's dispute resolution process lacks the flexibility to create solutions that accommodate the parties' interests and values. The arbitration hearing regarding the suspension of Latrell Sprewell is a prime example of the system's flexibility problem.

Latrell Sprewell made front-page news when he tried to choke his coach, P.J. Carlesimo, during practice on December 1, 1997.[196] The Warriors suspended Sprewell for ten games the same day, opting two days later to terminate his contract.[197] Then-NBA Commissioner, David Stern, decided to impose a one-year suspension on December 3.[198] On December 4, Sprewell and the NBAPA filed a grievance against the Warriors and the NBA;[199] after nine days of arbitral hearings, appointed Grievance Arbitrator John Feerick reduced the NBA's suspension to 68 games, and reversed the Warriors' termination.[200] Feerick's decision to reinstate Sprewell was controversial and drew criticism from then-Commissioner David Stern:

> The answer is now well established: you cannot choke your boss and hold your job unless you play in the N.B.A. and you are subject to arbitrator Feerick's jurisdiction. However affirming it was of the Commissioner's authority, it missed the opportunity to send a message with respect to all the good things sports can stand for. On that basis, we are more than a little disappointed.[201]

196. Jorge L. Ortiz, *Warrior Violence: Star Attacks Coach*, S.F. EXAMINER, Dec. 2, 1997, at 1.

197. Sprewell Arbitration, *supra* note 63, at 81 (10-game suspension); *id.* at 83 (termination).

198. *Id.* at 85.

199. *Id.* at 3.

200. *Id.* at 3 (nine days of hearings); *id.* at 103 (reduction of suspension to 68 games); *id.* at 100 (reversal of termination); *see also* Wise, *supra* note 60 (suspension of one year equivalent to 82 games).

201. Wise, *supra* note 60.

Although Feerick's decision provided finality for the parties,[202] it also created an awkward situation for the player and the team—it is unlikely that the parties wished to work together in the future, given the nature of the events.[203] The NBA's rigid dispute resolution process dispensed of the dispute, but it ultimately was unable to resolve the adversarial dynamic between the parties.

ii. *The Tiered System Is Unclear*

The NBA's tiered arbitration system has also caused parties to enter costly litigation before even determining the tier in which their dispute is located. In *National Basketball Ass'n v. National Basketball Players Ass'n, Ron Artest, Stephen Jackson, Anthony Johnson & Jermaine O'Neal*,[204] heard in the Southern District of New York in 2005, the main issue was the commissioner's authority to suspend players for misconduct during a game.[205] The issue stemmed from an altercation during an infamous game between the Indiana Pacers and Detroit Pistons on November 19, 2004.[206] With less than one minute remaining, an in-game skirmish led to a brawl in the stands between fans at the game and Pacers' players Ron Artest, Stephen Jackson, and Jermaine O'Neal after a fan threw a beverage at Artest.[207]

Two days later, then-Commissioner David Stern suspended Artest for the entire season, Jackson for 30 games, and O'Neal for 25 games.[208] The NBPA appealed the suspensions to the grievance arbitrator under Article XXXI of the CBA, claiming the suspensions were

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202. *See* Sprewell Arbitration, *supra* note 63, at 100, 103; *see also* Thomas A. Baker III & Dan Connaughton, *The Role of Arbitrability in Disciplinary Decisions in Professional Sports*, 16 MARQ. SPORTS L. REV. 123, 151 (2005) (expressing that Feerick's decision called for a ruling that would allow Sprewell to "put the tragic event behind him").

203. Baker & Connaughton, *supra* note 202, at 150–51 (describing Sprewell and Carlesimo's interactions).

204. No. 04 Civ. 9528, 2005 WL 22869, at *1 (S.D.N.Y 2005).

205. *Id.* at *1.

206. Baker & Connaughton, *supra* note 202, at 123–24.

207. For a full video of the incident, see Cuphat, *Pacers / Pistons Brawl (2004) Original*, YOUTUBE (Jan 11, 2018), https://www.youtube.com/watch?v=udyqIh4nJ3Y [https://perma.cc/GN84-LU2F].

208. Baker & Connaughton, *supra* note 202, at 124. Five other players were also suspended for their involvement in the incident. *Comparing the Player Discipline Provisions of the NFL and NBA Collective Bargaining Agreements*, COURTSIDE LAWYER (Sept. 12, 2015), https://courtsidelawyer.com/2015/09/12/comparing-the-player-discipline-provisions-of-the-nfl-and-nba-collective-bargaining-agreements-part-two-should-there-be-a-move-toward-uniform-standards-across-professional-sports/#_ftn5 [https://perma.cc/Z4N2-MB7L].

"inconsistent with the terms of the CBA and applicable law, and without just cause."[209] The NBA responded by arguing that any appeal from a disciplinary ruling is solely within the Commissioner's purview, and thus not arbitrable.[210]

On December 3, 2004, the grievance arbitrator issued an initial decision that he had jurisdiction to determine the arbitrability of the grievance because it exceeded the scope of the Commissioner's first tier of review,[211] and urged the NBA to attend a hearing the following week.[212] The arbitrator conducted a hearing the following week and upheld all suspensions except O'Neal's, whose suspension was reduced by ten games for lack of just cause.[213] The NBA filed in federal court, asking the court to declare that the arbitrator had no jurisdiction to hear the dispute.[214] The court refused, finding that the suspension was arbitrable, and that the arbitrator's decision was valid.[215]

Ultimately, the court's holding affirmed the arbitrator's conclusion: The case was arbitrable because it exceeded the scope of the Commissioner's first tier of review. Although the arbitrator reached the proper conclusion, the system fell still short. The CBA's tiered arbitration system provides the proper dispute resolution mechanism for most situations, but its defined boundaries can cause costly edge-case litigation where the CBA's text does not clearly categorize an unanticipated situation.[216] In the Pacers' player-fan brawl dispute, the parties arguably relitigated an issue already accounted for in the CBA, at high financial cost.

In conclusion, current ADR systems in each of the four major professional sports leagues have flaws: various pecuniary and non-

209. 2005 WL 22869, at *1.

210. *Id* at *2.

211. 2005 WL 22869, at *3.

212. *Id.*

213. *Id.* at *4.

214. *Id.* at *1.

215. *Id.*

216. The case turned on whether the infraction was on-court or off-court behavior; under player contracts, only the league commissioner can punish on-court behavior, and players have no right to appeal to an arbitrator. NBA lawyer Jeffrey Mishkin argued that the fight with fans was on-court behavior, considering the players were wearing "NBA uniforms on national television," while counsel for the NBPA Jeffrey Kessler argued any interaction with a fan is arbitrable. Associated Press, *Judge: Arbitrator Had Right to Shorten Penalty,* ESPN.COM, (Dec. 31, 2004), http://www.espn.com/nba/news/story?id=1955959 [https://perma.cc/MRY7-4JE5].

pecuniary costs, undesirable relationship tradeoffs, and public perception challenges. Part IV outlines the ways that mediation could resolve the shortcomings of existing dispute resolution processes.

IV. How Mediation Can Help Improve Dispute Resolution in Each of the Four Major Sports Leagues

Each major league sport's dispute resolution systems have identifiable shortcomings. A more optimal resolution of player-league disputes requires a flexible, interest-accommodating system to specifically attend to the needs of each party. Mediation has the potential to be an extremely valuable addition to the process for leagues, teams, players, and unions when they attempt to resolve disagreements or drive negotiations forward. For many reasons, mediation is a valuable alternative or complementary option to the ADR mechanisms presently available.

A. *Mediation is a Valuable Alternative or Complementary Option to Other ADR Methods*

Mediation is a "voluntary, non-binding, 'without prejudice' process that uses a neutral third party (mediator) to assist parties in a dispute to reach a mutually agreed settlement without having to resort to a court."[217] Among the most beneficial qualities of mediation are its abilities to protect the common interests of the parties, reduce transactional and relational costs, provide parties with shared power over the process, as well as maintain flexibility, confidentiality, and efficiency. Because of its many benefits, mediation is the preferred ADR process of Fortune 1,000 companies.[218] Like other large, complex organizations, professional sports organizations would derive meaningful value from adding mediation to their dispute resolution arsenals—benefits that would result in a better overall process than existing the ADR practices: permitting outcomes that hew closer to party interests, reducing tangible and intangible costs, and enhancing confidentiality, among other benefits.

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217. Ian S. Blackshaw, Sport, Mediation, and Arbitration, 19 (2009).

218. Thomas J. Stipanowich & J. Ryan Lemare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1,000 Corporations*, 19 Harv. Negot. L. Rev. 1, 10 (2014).

1. *Protecting the Interests of the Parties*

Mediation was originally designed to resolve conflicts in small communities analogous to today's sports leagues.[219] In such intricate and intimate settings, mediation provided an opportunity for the parties to determine their own outcomes rather than have a third party decide it for them.[220] This is a primary benefit of mediation. It protects the interests of the parties, promoting a high degree of self-directedness and creativity, which allows them to construct a bespoke solution that comes closer to their desired outcome than other systems permit.[221] Proponents of mediation praise its ability to "foster[ ] healthier communication between disputants."[222] While litigation and arbitration emphasize parties' differences, mediation helps parties find their shared values instead.[223]

2. *Reducing Transaction and Relational Costs*

Disputes between labor and management often involve complex and highly sensitive information and relationships. Given the professional working relationships these parties must maintain, there should be little desire by either party to risk spoiling the nature of the relationship. Yet the systems currently used in the MLB, NFL, NBA, and NHL threaten the roots of these relationships, imposing high transactional and relational costs. Because mediation seeks to preserve these working relationships, it can provide immense value in professional sports.[224]

The MLB CBA currently provides no formal role for mediation, but simply having this option available could help parties preserve

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219. *See* JEROLD AUERBACH, JUSTICE WITHOUT LAW? 55 (1984).

220. *See id*; *see also See Model Standards of Conduct for Mediators*, A.B.A., Standard I: Self-Determination, Sept. 2005, https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.pdf [https://perma.cc/YTS7-A83Z].

221. *See*, Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S7–S10 (1989).

222. Kathleen C. Wallace, *A Proposal for the United States Olympic Committee to Incorporate Formal Mediation Within Its Grievance Process*, 16 MARQ. SPORTS L. REV. 59, 65 (2005).

223. *See* Jacqueline Nolan-Haley, *Mediation: The 'New Arbitration,'* 17 HARV. NEGOT. L. REV. 61, 69 (2012) (stating that the negotiation process, perhaps assisted by mediation, allows participants to "craft individualized justice on their own terms based on their own interests and values").

224. *See* Lon L. Fuller, *Mediation: Its Form and Functions*, 44 S. CAL. L. REV. 305, 325 (1971) ("Mediation has the] capacity to reorient parties toward each other not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions to each other.").

their relationships before being forced into a costly adversarial proceeding.[225] Salary arbitration cases like *Stroman, Betances*, *Maddux*, and *Barraclough* provide a helpful example. In those cases, the publicity and adversarial nature of arbitration strained relationships between players and their teams as each sought to defend their "final offers." But the problem is broader than the just a handful of cases; the past five years have seen a historic resurgence in the frequency of salary arbitration in the MLB.[226] Systematic change is needed to prevent further relationship erosion.

The use of mediation in other baseball contract negotiations suggest it could be effectively used in salary arbitration. When Alex Rodriguez and the New York Yankees reached an impasse while negotiating a new contract for Rodriguez, the two parties agreed to mediation to help facilitate their negotiations.[227] The Rodriguez example is one in which the parties nearly wasted a mutually beneficial opportunity, but because they turned to mediation to uncover their underlying interests, they were able to achieve a deal with which both parties were pleased. Mediation in contract negotiations is not explored frequently enough and could be expanded to the salary arbitration context.

3. *Providing Parties Shared Power Over the Process*

An additional benefit of mediation is its ability to provide parties with procedural fairness. This fairness stems from mediation's goal

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225. Sam B. Smith, *Show Me the Mediation!: Introducing Mediation Prior to Salary Arbitration in Major League Baseball*, 42 HOFSTRA L. REV. 1007, 1034 (2014).

226. *See* Maury Brown, *Who's Winning The MLB Salary Arbitration Game? Here's Data From 1974 to 2015*, FORBES (Feb. 23, 2015), https://www.forbes.com/sites/maurybrown/2015/02/23/whos-winning-the-mlb-salary-arbitration-game-heres-data-from-1974-to-2015/#601c1ac61558 [https://perma.cc/G6GR-KQGC]. During the 1980s, there was an average of 21.3 salary arbitration hearings per offseason; in the 1990s, there was an average of 13.7; in the 2000s, there was an average of seven hearings; and from 2010 to 2014, there was an average of only 4.2 hearings, including none in 2013. *See* Christopher R. Deubert, *The Return of Salary Arbitration*, SPORTS LAW BLOG (Mar. 15, 2018), http://sports-law.blogspot.com/2018/03/the-return-of-salary-arbitration-in.html [https://perma.cc/K4Q2-EWUN. The trend against using arbitration, however, has changed since 2013: In 2015, there were 14 hearings, with 15 in 2017, 22 in 2018, and 10 in 2019. *Id*; *Arbitration Tracker for 2019*, *supra* note 19. Twenty arbitration hearings were scheduled for 2020. Jeff Todd, *2020 Arbitration Filing Numbers*, MLB TRADE RUMORS (Jan. 10, 2020, 7:07 PM), https://www.mlbtraderumors.com/2020/01/2020-arbitration-filing-numbers.html [https://perma.cc/4BCP-UV2M].

227. Mark Grabowski, *Both Sides Win: Why Using Mediation Would Improve Pro Sports*, 5 HARV. J. SPORTS & ENT. 189, 207–08 (2014).

of enabling the parties themselves the opportunity to fashion a mutually acceptable resolution to their dispute with the help of a neutral third party.[228] As explained in the discussion of the NFL's grievance system,[229] the system is currently plagued by arbitrator bias and procedural unpredictability.

Mediation in the NFL would likely reduce the partiality of grievance outcomes. First, unlike the Commissioner and those he currently appoints to resolve NFL disputes, neutral mediators are systematically trained to operate in a unbiased manner and facilitate a neutral environment.[230] Additionally, even if a mediator is not entirely unbiased, the ramifications of this bias are significantly more limited than an arbitrator's bias: Unlike an arbitrator's award, mediated settlements are fashioned and agreed to by the parties themselves.[231] There is no harm of coercion to accept an offer because a mediator has no power to impose a settlement. Accordingly, as one proponent has stated: "By definition, a settlement reached through mediation is an efficient outcome; all the disputants and stakeholders prefer it to no agreement at all, or to any other feasible outcome."[232] The implication of this point is that utilizing mediation could provide value to parties by facilitating discussions that shield the parties from the system's current procedural shortcomings.

Mediation is not designed to help one party "win" and the other "lose." Rather, it is designed to allow parties an opportunity to find common ground. Without adequate communication, solutions will be impossible as each party seeks to "win" the dispute. An avenue like mediation that would provide the parties an opportunity to communicate their interests and positions would enable them to engage in a system that provides procedural fairness. The alternative is continued relationship disintegration with no end in sight.

4. *Overcoming Arbitration's Rigidity*

Mediation's ability to provide parties with power over their process does not only address procedural fairness concerns; it also can create opportunity for more flexible resolutions. The Sprewell arbitration decision, for example, illustrates how the parties' undesirable

228. *See* Feinberg, *supra* note 221, at 7.
229. See discussion *supra*, Part III (B)(1).
230. Peter B. Kupelian & Brian R. Salliote; *The Use of Mediation or Resolving Salary Disputes in Sports*, 2 T.M. COOLEY J. PRAC. & CLIN. L. 383, 393 (1999).
231. *See* Feinberg, *supra* note 221, at 12.
232. L. SUSSKIND, L. BACOW & M. WHEELER, RESOLVING ENVIRONMENTAL DISPUTES 2 (1983).

outcome could have been different if mediation had been utilized. In *Sprewell*, Arbitrator Feerick's options were constrained to either finding for the team (and upholding their decision to terminate his contract) or the player (and thereby reinstating him).[233] In this sense, his role was focused on whether the player engaged in the prohibited behavior under the CBA, and if so, whether he must apply the punishment scheme as required by the CBA. Ultimately, neither party was satisfied with the outcome.[234] In fact, despite obtaining a favorable arbitration decision, Sprewell proceeded to bring an action in federal court claiming an antitrust violation against the suspension that the league initially imposed.[235] Likewise, in "final offer"-style baseball arbitration, arbitrators must pick either the player's or the club's proposed salary, creating a rigid set of binary resolutions that may not be appropriate in all circumstances.

If the parties instead had used a mediator, they would have had the opportunity to engage in more creative option generation, potentially better addressing the needs of all parties. Although nothing prevents parties from engaging in settlement discussions on their own, the process is much more likely to render fruitful results when guided by the assistance of a neutral third party. Without the protections of confidentiality and impartiality that mediation provides, unguided negotiations between parties are unlikely to generate adequate creativity or information sharing, and accordingly may be less likely to resolve the dispute without assistance.[236]

5. *Protecting Other Shared Values*

i. *Confidentiality*

Mediation also provides several other benefits, including confidentiality.[237] As seen in the NFL's *Brady* and *Elliott* disputes and MLB's *Stroman*, *Betances*, and *Bauer* arbitrations, publicity can intensify hostility between the parties even as it facially resolves their dispute. In highly publicized industries like professional sports, parties are often better served by leaving the details of a dispute and resulting proceedings in the room where they are settled. Unlike the

233. See discussion of Sprewell arbitration, *supra* Part II.(B)(2)(i).

234. Mishkin, *supra* note 46, at 454.

235. *Id.*

236. *See* Kupelian & Salliote, *supra* note 230, at 393.

237. *Alternative Dispute Resolution: Mediation Services*, B. Ass'n of S.F., https://www.sfbar.org/adr/resolve-a-dispute.aspx [https://perma.cc/S3CC-TVAK].

disputes mentioned above, which are public, mediations are confidential.[238] Thus, mediation could add significant value in professional sports disputes, where parties might have something to gain by attempting to keep information confidential before resorting to an adversarial, public process.

The fact that mediation can accommodate a shared interest in confidentiality also highlights a more general truth: Mediation permits parties to use their shared interests to forge mutually beneficial solutions.[239] In other sports industry contexts, mediation has turned "lose-lose" situations into "win-win" situations.[240] Mediation could do the same for professional sports arbitration. For example, in *Sprewell*, both parties had something to lose by making the altercation public: Sprewell may have lost reputational value that would help him command a higher salary in the future, while the Warriors reduced their chances of potentially trading Sprewell, since it is more difficult to trade a player with a poor reputation.[241] Confidential mediation would allow both parties to preserve something of value. While imposed decisions leave parties at odds because there is a designated winner and loser, mediation allows for mutual satisfaction in a resolution because of its ability to provide parties with power over their own settlements.[242] Even when parties are unable to settle at the mediation stage, they often both exit in a better position based on the progress they made through the open lines of communication mediators can facilitate.[243]

The ability to craft win-win solutions for parties is part of why mediation has been known to increase parties' chances of coming to a negotiated resolution.[244] This benefit is valuable in the context of professional sports. When leagues and unions are in a dispute with

238. *Id*.

239. Dale Eilerman, *Collaboration in Resolving Problems*, MEDIATE.COM (Jan. 9, 2007), https://www.mediate.com/articles/eilermanD8.cfm [https://perma.cc/KXG7-HK8N].

240. *See* Daniel P. Dozier, *The National Hockey League Negotiations: Will Mediation Make a Difference?*, PRESS, DOZIER & HAMELBURG (Nov. 29, 2012), https://www.pressdozierlaw.com/blog/the-national-hockey-league-negotiations-will-mediation-make-a-difference/ [https://perma.cc/Y72V-X8M5].

241. Sprewell Arbitration, *supra* note 63, at 82 (finding that the Warriors "knew a trade would not easy" following publicity of the physical altercation).

242. *See* Wallace, *supra* note 222, at 65.

243. Smith, *supra* note 225, at 1034.

244. John O'Shea, *Mediation: Success or Failure?*, BLM LAW (Jan. 26 2017, 5:11 PM), https://www.blmlaw.com/publications/21587/pdf/Mediation_success%20or%20failure.pdf [https://perma.cc/NP75-6QU3].

pressure mounting, mediation can help facilitate open lines of communication that guide the conversations further. Mediation provides equal ground upon which parties can negotiate, whereas more ad hoc negotiation may be less organized or balanced.[245] Mediation can keep negotiations productive.[246]

ii. *Time and Cost Efficiency*

Another primary benefit of mediation is that it is time-efficient.[247] Mediation can save parties time spent in litigation by helping them avoid prolonged discovery and pre-trial hearings, or at least narrow their scope.[248] In professional sports, having a more efficient tool to resolve disputes would enable players to allocate their time and resources to training and would allow management to return their focus to their business affairs managing the team or league.

For example, mediation could have saved the parties valuable time in a recent high-profile dispute when the NFL suspended Dallas Cowboys running back Ezekiel Elliott. The dispute was first brought to federal court in the Eastern District of Texas, as *NFL Mgmt. Council v. NFL Players Ass'n* [*Elliott I*].[249] In *Elliott I*, Judge Mazzant granted Elliott a temporary restraining order and a preliminary injunction, preventing the NFL from implementing its suspension until the conclusion of litigation.[250] However, the victory was short-lived: The NFL Management Council quickly appealed to the Fifth Circuit in *NFL Players Ass'n v. NFL* [*Elliott II*].[251] In *Elliott II,* the Fifth Circuit vacated the lower court's decision to grant an injunction, permitting the league to implement its suspension as litigation continued.[252] However, the matter didn't end there. Five days later and a thousand miles away, in *NFL Mgmt. Council v. NFL Players Ass'n*

245. *See* Rick Voyles, *Managing an Imbalance of Power*, MEDIATE.COM (Oct. 25, 2004), https://www.mediate.com/articles/voylesR3.cfm [https://perma.cc/J99K-CUPJ].

246. *See* Mark Grabowski, *Both Sides Win: Why Using Mediation Would Improve Pro Sports*, 5 HARV. J. SPORTS & ENT. 189 (2014).

247. *See* Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OH. ST. J. ON DISP. RESOL. 1, 9–13 (1998).

248. *Id; see also* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1359–60, 1366.

249. 270 F. Supp. 3d 939 (E.D. Tex. 2017).

250. *Id.* at 955.

251. 874 F.3d 222 (5th Cir. 2017).

252. *Id.* at 229.

[*Elliott III*],[253] the parties continued to dispute whether the suspension could be temporarily enjoined.[254] In *Elliott III*, Judge Crotty again enjoined the NFL from enacting its suspension, this time for 13 days.[255] When considering whether to impose a longer-term preliminary injunction for the remainder of the litigation, however, the Southern District of New York reversed course. In *NFL Mgmt. Council v. NFL Players Ass'n,* [*Elliott IV*],[256] Judge Failla declined to issue a preliminary injunction, permitting the NFL to enact its suspension.

While the dispute was still ongoing, the NFLPA released a statement addressing the issues with the NFL's conflict resolution process:

> Commissioner discipline will continue to be a distraction from our game for one reason: because NFL owners have refused to collectively bargain a fair and transparent process that exists in other sports. This 'imposed' system remains problematic for players and the game, but as the honest and honorable testimony of a few NFL employees recently revealed, it also demonstrates the continued lack of integrity within their own League office.[257]

This litigation back-and-forth imposes costs on both parties. *Elliotts I* through *IV* dragged on for the majority of the NFL season in 2017 and created distractions for all parties involved.[258] The "Deflategate" case created similar distractions, as it spanned nearly two years.[259]

The players want to play, the teams and unions want them to play, and the leagues want to maximize business opportunities while preserving public goodwill. Instead of prolonging a dispute through costly and adversarial litigation, mediation provides an opportunity for parties to look to the future rather than perseverate on the

253. No. 17-CV-06761-KPF, 2017 WL 4685113 (S.D.N.Y. Oct. 17, 2017).

254. *Id.* at *1.

255. *Id.*

256. No. 17 CIV. 6761 (KPF), 2017 WL 6406043 (S.D.N.Y. Oct. 31, 2017).

257. Charean Williams, *NFLPA Statement Says League Office Continues to Have "Lack of Integrity,"* PRO FOOTBALL TALK (Sept. 8, 2017), https://profootballtalk.nbcsports.com/2017/09/08/nflpa-statement-says-league-office-continues-to-have-lack-of-integrity/ [https://perma.cc/6TYV-GYUM].

258. *See* Mark Maske, *Ezekiel Elliott Loses Latest Court Battle, Clearing Way for NFL to Enforce Suspension*, WASH. Post (Oct. 30, 2017), https://www.washingtonpost.com/news/sports/wp/2017/10/30/ezekiel-elliott-loses-latest-court-battle-clearing-way-for-nfl-to-enforce-suspension/?utm_term=.992820a964a6 [https://perma.cc/G896-52JS].

259. *See* Around the NFL Staff, *Tom Brady Suspension Case Timeline*, NFL.COM (July 15, 2016), http://www.nfl.com/news/story/0ap3000000492189/article/tom-brady-suspension-case-timeline [https://perma.cc/J3CG-3PZS].

past.[260] This efficient resolution of issues is in the best interests of all parties. *Elliott* and *Brady* are two examples of many that demonstrate the need for timely mediated dispute resolutions.

B. *Case Example: How Mediation Helped During the 2012–2013 NHL Labor Lockout*

One example of the successful utilization of mediation was exhibited during the NHL's labor lockout in 2012.[261] The parties' commitment to mediation demonstrated how beneficial the mechanism can be, even when the stakes are high. Although mediation was not able to help save the 2004–2005 NHL season,[262] the NHL and NHLPA's willingness to try mediation again nearly a decade later to break bargaining impasses successfully saved part of the 2012–2013 season.[263]

In January of 2013, after the expiration of the CBA, the NHL was on the brink of canceling its entire season due to negotiation gridlock between team owners and players.[264] As a result, part of the season had already been canceled and Commissioner Gary Bettman declared a lockout of NHLPA members.[265] With the two sides nearly $200 million apart on a key issue, revenue sharing distributions,[266] canceling the entire season did not seem out of the question.[267] At the time, Commissioner Bettman estimated owners were losing out on up to $20 million per day and players were losing up to $10 million per day.[268] The inability to finalize an agreement meant the parties lost more than they were arguing over, yet they remained unable to secure a deal.[269]

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260. Fredrike P. Bannink, *Solution-Focused Mediation: The Future with a Difference*, 25 CONFLICT RESOL. Q. 163, 166 (2007).

261. Grabowski, *supra* note 227, at 193.

262. *See* Paul D. Staudohar, *The Hockey Lockout of 2004–05*, MONTHLY LAB. REV., Dec. 2005, at 23, 23.

263. *See* Grabowski, *supra* note 227, at 193.

264. *Id.* at 190.

265. *Id*.

266. The parties agreed to a 50/50 split of revenues, but the players asked for $393 million to compensate for previously signed individual contracts while the owners offered $211 million. Kevin Allen, *NHL, Players Meet with Mediators, Plan to Talk Again,* USA TODAY (Nov. 28, 2012), https://www.usatoday.com/story/sports/nhl/2012/11/28/nhl-mediation-labor-talks/1731793/ [https://perma.cc/X3KP-FNQ8].

267. *See* Grabowski, *supra* note 227, at 190.

268. Allen, *supra* note 266.

269. Mark Jones, *NHL Lockout: How Mediation Could Save the 2012–2013 Season*, BLEACHER REPORT (Nov. 29, 2012), https://bleacherreport.com/articles/1426327-nhl-lockout-how-mediation-could-save-the-2012-2013-season [https://perma.cc/T43Z-2HSH].

With less than one week to reach a new CBA to save the season from outright cancellation, the NHL and NHLPA agreed to meet with a mediator from the U.S. Federal Mediation and Conciliation Service (FMCS) to continue the negotiations.[270] After multiple caucuses with the mediator and an additional 16-hour mediation session, the NHL and NHLPA jointly announced they had reached an agreement to end the league's 113-day lockout.[271]

In his sessions with the parties, the mediator facilitated open communication and ultimately helped the parties align their interests.[272] While the players were interested in long-term protection given the nature of their shorter careers, the NHL owners were interested in maximizing profits for each year of league revenues.[273] Through the mediated sessions, the parties discovered a way to trade on the issues; both obtained a result they desired without having to sacrifice a piece they valued as highly.[274]

The NHL and NHLPA's brave departure from the norm highlighted the opportunities mediation can facilitate. The parties acknowledged the benefit the mediator provided during this crucial period.[275] However, before a mediator could hope to help break an impasse, the parties had to be willing to allow the mediator to facilitate discussions in the first place. This process generally has not been explored in salary arbitration, grievances, or player disputes, but the 2012–2013 NHL lockout suggests the benefits of mediation could be successfully expanded to those contexts.

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270. Ira Podell, *NHL Lockout 2012: Mediator Gets League, Union Back Together*, WASH. TIMES (Jan. 5, 2013), https://www.washingtontimes.com/news/2013/jan/5/nhl-lockout-2012-mediator-gets-league-union-back-t/ [https://perma.cc/VF37-JSNL]; the mediators had been utilized earlier in the process as well, as they met with the parties in November of 2012. Allen, *supra* note 266.

271. Pon Staff, *Dispute Resolution, NHL Style: Tradeoffs and Dispute Resolution—How yo Effectively Compromise at the Bargaining Table*, HARV. L. PROGRAM ON NEGOT. (May 1, 2018), https://www.pon.harvard.edu/daily/dispute-resolution/dispute-resolution-nhl-style/ [https://perma.cc/TMP5-EKXM]; Kevin Allen, *NHL, Union Reach Tentative Agreement to End Lockout*, USA TODAY SPORTS (Jan. 6, 2013), https://www.usatoday.com/story/sports/nhl/2013/01/06/nhl-union-agreement-lockout/1811799/ [https://perma.cc/4DTG-EYP3]. For discussion of the overwhelming praise mediator Scot L. Beckenbaugh received for assisting the parties resolve their dispute, *see* Grabowski, *supra* note 227, at 192.

272. Pon Staff, *supra* note 271.

273. *Id*.

274. *See id*.

275. Braden Shaw, *The Solution to NHL Collective Bargaining Disputes: Mandatory Binding Arbitration*, 10 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 53, 60 (2014) ((quoting NHL deputy commissioner Bill Daly) ("The mediator has obviously done a great job. Slow process, but at least the parties are talking and working through issues.").

V. The Limitations of Mediation and Proposed Solution

Mediation can be a valuable addition to the ADR procedures currently in place, but it is not a cure-all solution. Although mediation has demonstrable benefits, there are notable prerequisites and limitations as well. Prerequisites include mutual commitment to the process and ripeness of disputes. A major limitation includes mediation's inability to set precedent. Acknowledging these prerequisites and limitations, this Article proposes a solution to the current state of salary arbitration and player discipline disputes, particularly for the MLB and NFL. There are hurdles of implementing the proposed solutions given the leagues' collectively bargained systems, but the proposed solutions could reasonably be integrated even given those obstacles.

A. *Prerequisites and Limitations of Mediation*

1. *Mutual Commitment to the Process is Required*

Successful mediation is like a successful relationship; it requires commitment by both sides.[276] Without such commitment, issues linger, parties become cemented in their positions, and progress becomes stifled.[277] One party's desire to settle a dispute is not enough to guarantee an effective mediation.[278] A primary prerequisite to productive mediation is that there must be mutual commitment to the process.[279]

In addition to a mutual commitment to the process, the parties must also have a good faith engagement to the process. Although similar, these commitments are distinct. A party may fully be committed to engage in the mediation process, but it is possible the party has ulterior motives for doing so. For example, although mediation is

276. Paul Fisher, *A Parachute for Parties in Litigation*, Mediate.com (Nov. 28, 2000), https://www.mediate.com/articles/fisher2.cfm, [https://perma.cc/9MZ9-7DT2].

277. Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why it Does*, 72 Harv. Bus. Rev. 120, 122–23 (1994).

278. Stephanie Carter, *The Importance of Party Buy-In in Designing Organizational Conflict Management Systems*, 17 Mediation Q. 61, 63 (1999) (noting that "any new organizational dispute system will likely be opposed by those who believe they were winning under the new system"); Gary Smith, *Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not*, 36 Osgoode Hall L.J. 847, 856–873 (1998) (arguing that mediation can only work when both parties are willing); Stephen B. Goldberg & Jeanne M. Brett, *Getting, Spending—and Losing—Power in Dispute Systems Design*, 7 Negot. J. 119, 127–128 (1991) (discussing power imbalances as obstacles—but not insurmountable ones—to democratizing dispute systems).

279. Smith, *supra* note 278, at 879 ("If mediation is forced upon unwilling parties, the likely consequence will be the failure and disrepute of the process.").

intended to be a confidential process,[280] it is nonetheless possible parties will engage in an attempt to use the session for discovery of facts.[281] Utilizing mediation for discovery purposes is common and can undermine the value of the process if one party is partaking only for such reasons.[282]

A lack of commitment to the mediation process recently plagued a dispute between the NFL and the NFL Referee's Association ("NFLRA"). In 2012, the NFL referees were locked out of work during a labor dispute with the NFL.[283] In an attempt to remedy the situation, the NFLRA proposed mediation.[284] The NFLRA quickly learned, however, that for mediation to help disputants resolve their conflict, there must be high commitment to engage in the process by both sides. Although the NFL ultimately consented to mediation, the NFLRA the did not believe the NFL's engagement to mediation was made in good faith.[285] Accordingly, the NFLRA filed an unfair labor practice claim against the NFL, asserting that the NFL always intended to lock the referees out and that its mediation efforts were not genuine.[286] In filing its claim, the NFLRA asserted that "the league never intended to work towards a fair agreement, even through mediation."[287] The parties ultimately came to a negotiated agreement after the mediation, but this example nevertheless underscores a

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280. *Model Standards of Conduct for Mediators*, *supra* note 220, at Standard V: Confidentiality.

281. Rinky S. Parwani, *Mediation is Not Meditation: How to Stay Active and Engaged*, A.B.A.: GP SOLO MAG., Jan–Feb. 2015, at 10, 12.

282. Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent,* 152, 157 (2013) ("[S]ome lawyers . . . have become skilled in mediation tricks [such as] using mediation for discovery purposes . . . ."); Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 267 (stating that "using mediation . . . as a fishing expedition" is a favorite strategy of certain lawyers in a mandatory mediation environment).

283. *See* Gary Mihoces, *Timeline for NFL Replacement Officials*, USA TODAY SPORTS (Sept. 25, 2012), https://usatoday30.usatoday.com/sports/nfl/story/2012/09/25/timeline-for-nfl-replacement-officials/57841924/1 [https://perma.cc/E3RF-9T3M].

284. Post Staff Report, *Officials Say NFL Planned Lockout*, N.Y. POST (July 18, 2012), https://nypost.com/2012/07/18/officials-say-nfl-planned-lockout/ [https://perma.cc/JXS8-EYDN].

285. *See* Associated Press, *NFL and On-Field Officials Agree to Mediation*, NFL.COM (May 24, 2012), http://www.nfl.com/news/story/09000d5d82953303/article/nfl-and-onfield-officials-agree-to-mediation [https://perma.cc/WN4J-SJC3].

286. Charge Against Employer, Nat'l Football League Referees Ass'n v. Nat'l Football League, No. 02-CA-129611 (NLRB June 19, 2012) [https://perma.cc/EV5U-LW5Y].

287. *See* Joel Thorman, *NFL Referees File Unfair Labor Practices Charge Against NFL*, SB NATION (June 21, 2012), https://www.sbnation.com/nfl/2012/6/21/3107147/nfl

crucial prerequisite to effective mediation: commitment to the process from both parties.[288]

The 2012–2013 NHL labor lockout also illustrates the problem caused by a lack of mutual commitment to the mediation process.[289] Although the NHL and NHLPA ultimately relied on mediation to help finalize their CBA agreement,[290] the parties' initial unwillingness cost them greatly.[291] Experienced mediators offered their services in November 2012, but the parties resisted mediation until January 2013.[292] The fact that the parties were able to reach an agreement relatively quickly after a mediator assisted the negotiations suggests that a mediator could have helped the parties reach an agreement as early as November.[293] Instead, however, the NHL and NHLPA chose to continue to battle between themselves.[294] As a result, the parties did not reach an agreement until January, after 625 games of the season had been lost.[295]

2. *Disputes Must Be Ripe for Mediation*

Another prerequisite to productive mediation is that the disputes must be ripe for mediation. In some situations, the parties may not be ready to embrace the presence of a mediator.[296] In other situations, mediation's effectiveness can be limited because there simply is no zone of possible agreement.[297] Forcing parties to mediate these

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-referees-unfair-labor-practices [https://perma.cc/W4Q7-UT9S] (quoting an NFL press release).

288. Justin Schenck, *Federal Mediation and Conciliation Service Plays Key Role in NFL-NFLRA Agreement*, HERBERT SMITH FREEHILLS: ADR NOTES (Oct. 1, 2012), https://hsfnotes.com/adr/2012/10/01/the-federal-mediation-and-conciliation-service-plays-key-role-in-nfl-nflra-agreement/ [https://perma.cc/56YK-5J82].

289. *See* Shaw, *supra* note 275, at 68.

290. *See* discussion *supra* Part IV (B)(1).

291. From the league side, NHL deputy commissioner Bill Daly pointed out that "[a] mediator can only be helpful if both sides are willing to embrace it and compromise' and added that he "didn't think that the introduction of a mediator into the process was timely or that it would necessarily further the process." Shaw, *supra* note 275, at 68. From the NHLPA, Donald Fehr added that the NHLPA would be "averse" to the presence of a mediator in the negotiating process. *Id*.

292. Shaw, *supra* note 275, at 68.

293. *See id*.

294. *Id*.

295. *Id*.

296. I. WILLIAM ZARTMAN, RIPENESS: THE HURTING STALEMATE AND BEYOND, IN INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR 225 ("Parties resolve their conflict only when they are ready to do so . . . .").

297. Jack G. Marcil & Nicholas D. Thornton, *Avoiding Pitfalls: Common Reasons for Mediation Failure and Solutions for Success*, 84 N.D. L. REV. 861, 865–66 (2008) (explaining that court-ordered mediations may fail when parties feel there is no room

cases would not only be a potential waste of time, but it also a waste of resources.

The 2012–2013 NHL lockout represents an example of the first situation: when disputes are not ripe for mediation. Although mediation ultimately helped the NHL and NHLPA agree to a new CBA in January 2013, mediation could not solve the dispute in November 2012.[298] At the time, the parties acknowledged they simply were not ready to make the necessary concessions to get a deal done.[299] Mediation can be most successful when parties have reached a stalemate that is harmful to both sides.[300] Until that point, however, mediation may be unable to offer a way out for the parties.[301]

The *Bauer* salary arbitration case represents the second limitation: situations when there is no possible zone of agreement between the parties. Given his disagreement with how the MLB compensates its players, Trevor Bauer has communicated that he intends to only

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for mutual agreement); *s*Kevin Gibson., Leigh Thompson, & Max H. Bazerman, *Shortcomings of Neutrality in Mediation: Solutions Based on Rationality*, 12 NEGOT. J. 69, 73 (1996) ("If it becomes clear that no [ ] bargaining zone exists, a mediator should encourage impasse as efficiently as possible.").

298. *See* Stephen Whyno, *NHL Lockout 2012: Federal Mediation Part of the Talks*, WASH. TIMES (Nov. 26, 2012), https://www.washingtontimes.com/news/2012/nov/26/nhl-lockout-2012-federal-mediation-part-of-the-tal/ [https://perma.cc/6HDH-LYF6].

299. Following two days of mediation, NHL Deputy Commissioner Bill Daly communicated that the mediators felt the parties simply were not ready to make progress toward a resolution yet: "After spending several hours with both sides over two days, the presiding mediators concluded that the parties remained far apart, and that no progress toward a resolution could be made through further mediation at this point in time. We are disappointed that the mediation process was not successful." Ira Podell, *NHL Lockout: Federal Mediators Fail to Help Find Breakthrough in Talks, Two Sides Still 'Far Apart'*, THE STAR (Nov. 30, 2012), https://www.thestar.com/sports/hockey/2012/11/30/nhl_lockout_federal_mediators_fail_to_help_find_breakthrough_in_talks_two_sides_still_far_apart.html [https://perma.cc/S56V-MQ6U]. NHLPA Executive Director Donald Fehr echoed these sentiments:"The mediators informed the parties that they did not think it was productive to continue the discussions further today . . . The mediators indicated that they would stay in contact with the league and the NHLPA, and would call the parties back together when they thought the time was right." *Id*.

300. *See* ZARTMAN, supra note 296, at 228 ("When parties find themselves locked in a conflict from which they cannot escalate to victory and this deadlock is painful to both of them (although not necessarily in equal degrees or for the same reasons), they seek a way out.").

301. *See* Molly M. Melin, *When States Mediate*, 2 PA. ST. J.L. & INT'L AFF. 78, 89 (2013) ("Disputants that have reached a hurting stalemate are "ripe" for mediation, since they cannot envision a successful outcome or an end to unbearable costs if they continue current strategies. Mediation offers a "way out" of an increasingly costly conflict").

sign one-year contracts for his entire career.[302] Following his arbitration case in 2019, Bauer asserted he would be in an arbitration hearing in 2020 as well.[303] Forcing Bauer into a mediation session with the Indians surely would have been a fruitless effort, likely only serving to drive the parties further apart given their contentious salary arbitration history.

3. *Mediation Does Not Set Legal Precedent*

Mediation can help parties resolve their disputes in an amicable manner, but a final limitation of mediation is that it does not set legal precedent. When deciding whether to engage in mediation, it is important for parties to understand the importance of establishing precedent.[304] For example, when the Eighth Circuit denied Adrian Peterson's suspension appeal in 2016, the court supported its holding with longstanding precedent in NFL labor history within the Eighth Circuit.[305] This would not have been possible if those previous disputes were resolved during mediation. As parties in the MLB, NFL, NBA, and NHL consider whether mediation is the proper remedy for their cases, they must consider that although mediating disputes will provide opportunities for individualized solutions, it will not require a mediator to follow binding case law. Accordingly, the ultimate resolution will not create precedent for other parties to follow in the future. Mediation has many advantages that make it worthwhile in the context of professional sports, but its inability to set legal precedent highlights a limitation of mediation's efficacy for all problems that call for precedential effect.

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302. Bob Nightengale, *Trevor Bauer's Radical Idea on MLB Contracts Could Benefit Everyone*, USA TODAY, Feb. 14, 2019, https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2019/02/14/trevor-bauer-indians-contracts-free-agent/2874691002/ [https://perma.cc/E6W6-ZNW5] ("'I'll go year-to-year my entire career,' said Bauer, 'Why would you lock yourself in a situation that may not make you happy? I think that's highly inefficient. Everybody is afraid of risk. Everyone is scared . . . Obviously, something has to change at the collective bargaining table[.]'").

303. Bell, *supra* note 122 ("'I'm going to set the record raise or the record salary in arbitration for a [fourth-year arbitration-eligible] starting pitcher,' Bauer said. '[ ]Next year, I'll expect to be paid in line with what my season in 2019 is worth, which will never be agreed upon before a hearing. So, I don't see a way we avoid it.'"). After being traded to the Cincinnati Reds in 2019, Bauer ultimately settled his 2020 case for a $17.5 million salary without resorting to arbitration. Associated Press, *Reds' Trevor Bauer Agrees to $17.5M Deal to Avoid Arbitration*, ESPN.COM (Jan. 10, 2020, 10:33 PM), https://www.espn.com/mlb/story/_/id/28459806/reds-trevor-bauer-agrees-175m-deal-avoid-arbitration [https://perma.cc/J38X-U8QP].

304. *See* Feinberg, *supra* note 221, at S6, S21–S23.

305. *See* Kantor, *supra* note 179.

B. *The Proposed Solution*

The processes through which teams, leagues, players, and unions revolve their disputes is governed by the collectively bargained procedures found in the respective league CBAs. Altering the system would require the unions and leagues negotiate an agreement to officially allow mediation to become part of these procedures. That is no easy task. This Article, however, proposes that the MLB, NFL, NHL, and NBA add mediation to their dispute resolution arsenals in the salary arbitration, player discipline, and grievance arbitration contexts.

1. *Salary Arbitration*

For the MLB and NHL, the league should implement a mandatory mediation session prior to the hearing of a salary arbitration case. In both the MLB and NHL, there is a period of time between when a salary arbitration hearing is scheduled and when the salary arbitration hearing is conducted.[306] During that period, the parties could engage in a facilitated mediation without overhauling the current process.

In MLB salary arbitration, teams increasingly have begun to follow the "file and trial" arbitration strategy, in which the teams and players do not negotiate between submitting their filing numbers and attending their hearing.[307] In 2019, for example, the filing deadline for teams and players was January 10, but arbitration hearings did not begin until January 28.[308] Requiring teams and players to engage in a mandatory mediation during that period would help some parties avoid the issues associated with arbitration. The mediation

306. In the MLB, there were nearly 3 weeks between the last day to settle a case before scheduling a hearing and the actual beginning of arbitration hearings in 2019. Mike Axisa, *2018–19 MLB Offseason Key Dates: Free Agency, Winter Meetings, Hall of Fame, Awards and More*, CBS SPORTS (Oct. 29, 2018), https://www.cbssports.com/mlb/news/2018-19-mlb-offseason-key-dates-free-agency-winter-meetings-hall-of-fame-awards-and-more/ [https://perma.cc/HC5E-NU65]. Similarly, in the NHL, there were over two weeks between the filing date and the beginning of hearings. *44 NHL Players File for Salary Arbitration*, NHL.COM (Aug. 3, 2018), https://www.nhl.com/news/44-nhl-players-file-for-salary-arbitration/c-299423134 [https://perma.cc/7K5Y-DSK6].

307. *See File and Trial*, MLB.COM, http://m.mlb.com/glossary/transactions/file-and-trial [https://perma.cc/F7DK-JL2K] ("'File and Trial' is a club strategy pertaining to salary arbitration. Essentially, 'file and trial' clubs approach the arbitration figure exchange date as a hard deadline; if the club and player are unable to avoid arbitration prior to exchanging salary figures, the club no longer negotiates on one-year deals with that player. Typically, 'file and trial' clubs will still be open to discussing multi-year contracts in the weeks between exchanging figures and heading to an arbitration hearing, however.").

308. Axisa, *supra* note 306.

would come at no time delay to the parties, given the current multiple-week period in which the parties currently do not communicate with each other. Under this proposal, if the player and team are unable to agree to mutually acceptable terms during the mediation, they could agree to partake in an additional voluntary opportunity to mediate or proceed to salary arbitration on their designated hearing date.

It is important to note, however, that the MLBPA expected all 30 teams to employ the "file and trial" strategy in 2019.[309] This pattern indicates that teams are unlikely to welcome the idea of mediation in the near future. Nonetheless, the reasons to implement mediation at this stage are strong. Additionally, of the 15 players who did not reach settlements by the January 10, 2019 deadline, five ultimately agreed to a multi-year contract with their clubs to avoid a hearing.[310] These settlements do not explicitly contradict MLB's "file and trial" strategy, because they are multi-year contracts rather than one-year deals, but these post-deadline settlements still indicate potential room to negotiate before a hearing, particularly where additional variables—like multiple years—afford more flexibility to negotiations.

Critics to this proposal may argue that implementing a mediation period prior to an arbitration hearing would increase costs for the parties. In an industry in which revenues are over $10 billion and minimum salaries are $555,000, however, the parties currently are expending their limited time and financial resources on cases with spreads as small as $100,000.[311] Providing an opportunity for the parties to convene in an effort to reach a settlement before they expend additional resources on case preparation would bring the system flexibility and value.

Given the costs, risks, and potential workplace relationship ramifications of an arbitration hearing, parties are incentivized to settle.[312] Preparing for cases is a time-extensive endeavor, but allowing the parties to negotiate in a structured, facilitated setting

309. Brett Taylor, *Another Sign of the Times? Players Union Believes ALL 30 TEAMS Are Now "File and Trial"*, BLEACHER NATION (Nov. 16, 2018), https://www.bleachernation.com/2018/11/16/another-sign-of-the-times-players-union-believes-all-30-teams-are-now-file-and-trial/ [https://perma.cc/6ZGU-6WFW].

310. T.J. McFarland, Chris Devenski, Luis Severino, Aaron Nola, and Nolan Arenado reached multi-year agreements with their clubs. *Arbitration Tracker for 2019*, *supra* note 19.

311. Todd, *supra* note 226; *see also* discussion *supra* in Part III (A)(1)(ii).

312. See discussion *supra*, Part II (A)(1).

would enable the parties to discuss the potential for settlement. Although not all cases would settle—many are simply too far apart—the benefits of implementing a system of this nature outweigh the costs and practical obstacles.

2. *Grievances*

Similar hurdles apply to implement grievance mediation in the collective bargaining agreement structure. However, it remains a possibility, particularly for the NFL: NFLPA Executive Director DeMaurice Smith has stated that the CBA—which is set to expire in 2020—will not be extended without necessary changes.[313] Some of those changes are directly related to the current dispute resolution system.[314] One possible such change—the one this Article proposes—is to require mediation before parties enter a binding arbitration hearing.

Commissioner Goodell's broad authority to serve as the arbitrator or appoint someone in his place has important implications for bargaining purposes.[315] In order to achieve success in limiting this authority during arbitration proceedings, the NFLPA would have to make significant concessions of its own at the bargaining table. Negotiating for a clause to implement mediation as part of the dispute resolution system, however, would be more feasible and could still serve the interests of all parties. A mandatory mediation session with a jointly appointed mediator prior to an arbitration hearing would not resolve the NFL's current power imbalance at the arbitration stage for player discipline issues, as the mediation would still occur in the shadow of partial arbitration; however, the opportunity to negotiate more flexibly could still result in more desirable outcomes for the players and the NFLPA if they use the mediation as an opportunity to create additional value through cooperation—enlarging the pie for all parties.

313. Mark Maske, *NFLPA: "There's Not Gonna Be an Extension of the CBA Without Changes*," WASH. POST (Jan. 25, 2017, 12:19 PM), https://www.washingtonpost.com/news/sports/wp/2017/01/25/nflpa-theres-not-gonna-be-an-extension-of-the-cba-without-changes/?utm_term=.dca906160c1e [https://perma.cc/5VPS-LV4T].

314. *See id*. (quoting Smith as asserting that neutral resolution of drug discipline claims was an "important issue[ ]").

315. *See* Einhorn, *supra* note 178, at 405.

3. *CBA Logistics*

Given the collective bargaining structure under which each league operates, the parties must mutually agree to the proposed solutions as a component of the larger operating document; the proposed solutions are consistent with this dynamic. However, the proposed solutions must also account for additional issues, including mediator selection and enforcement of mediated settlements.

i. *Selection of Mediators*

Of primary importance for instituting any mediation framework is the selection of the mediator. Fortunately, in mediation the problem of "the repeat-player" effect[316] is likely more attenuated than in arbitration.[317] making the selection of a mediator somewhat less controversial. Because arbitrators necessarily determine the outcome of cases, each league has created a system in which the players union and league jointly select the arbitrators and individually have the ability to dismiss an arbitrator.[318] If the parties can agree to this

316. Yoost, *supra* note 71, at 512 (noting that if one party is always involved in selecting the arbitrators, while the other party is involved only once or not at all, the arbitrators will tend to favor the selecting party).

317. *See* Carrie Menkel-Meadow, *Do the Haves Come Out Ahead in Alternative Judicial Systems: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 46 (1999) (suggesting that non-binding mediation in progressive dispute resolution schemes will "deal[ ] with" the issue of repeat player effect). But see Donna Erez-Navot, *The Repeat Player Effect in Child Protection Mediation: Dangers of and Protections Against Second-Class Justice for Marginalized Parties*, 16 Cardozo J. of Conflict Resol. 831, 847 (2015) (asserting that the repeat-player effect does persist in mediation, at least in certain contexts).

318. Note, however, that the NFL's Article 46(1)(a) disputes are an exception to this statement, as the commissioner retains full discretion on who presides over the hearing. NFL CBA, *supra* note 3, at Art. 46 § 2(a)("For appeals under Section 1(a) above, the Commissioner shall, after consultation with the Executive Director of the NFLPA, appoint one or more designees to serve as hearing officers . . . the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.") In other NFL disputes, arbitrators are jointly selected and can be dismissed by either party at any time. *Id.* at Art. 15 § 6 ("In the event that the NFL and NFLPA cannot agree on the identity of a System Arbitrator, the parties agree to ask the CPR Institute (or such other organization(s) as the parties may agree) for a list of eleven attorneys (none of whom shall have nor whose firm shall have represented within the past five years players, player representatives, clubs or owners in any professional sport . . . [T]he System Arbitrator shall continue to serve for successive two-year terms unless notice to the contrary is given either by the NFL or the NFLPA . . . The NFL and the NFLPA may dismiss the System Arbitrator at any time and for any reason upon their mutual consent.").

For MLB salary arbitration hearings, the MLBPA and LRD jointly select the arbitrators. MLB CBA, *supra* note 2, at Art. IV, (E)(5) ("The Association and the LRD shall annually select the arbitrators. In the event they are unable to agree by January 1 in any year, they jointly shall request that the American Arbitration Association

system for arbitration, they would likely also be able to do so for mediation, given that a mediator cannot impose a binding decision upon the parties.[319] A possible roster of mediators, which MLB utilizes for its grievance arbitration system when the parties are unable to agree on arbitrators, could be sourced from the American Arbitration Association.[320]

ii. *Memorialization and Enforcement*

A second matter worth considering is the memorialization and enforcement of mediated settlements. Currently, each league's CBA provides a procedure for arbitration decisions and their enforcement.[321] For the implementation of mediation to be successful, it is critical that the system have comparable validity.

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furnish them lists of prominent, professional arbitrators. Upon receipt of such lists, the arbitrators shall be selected by alternately striking names from the lists. All cases shall be assigned to three-arbitrator panels. The Association and the LRD shall designate one arbitrator to serve as the panel chair.").

In the NBA, the parties jointly select a single Grievance Arbitrator for the duration of the CBA, and either party may fire the arbitrator. NBA CBA, *supra* note 46, at Art. XXXI, (7) ("The parties to this Agreement shall agree upon the appointment of a Grievance Arbitrator, who shall serve for the duration of this Agreement; provided, however, that as of September 1, 2017, and as of each successive September 1, either of the parties to this Agreement may discharge the Grievance Arbitrator by serving written notice upon him/her and upon the other party to this Agreement during the period July 27 through August 1 immediately preceding each such September 1; and provided, further, that as of the April 30 of the last Season covered by this Agreement (or any extension thereof), either of the parties may discharge the Grievance Arbitrator by serving written notice upon him/her and upon the other party to this Agreement during the period March 26 through March 31 . . . ."). NHL salary arbitrators are impartial and selected jointly by the parties. NHL CBA, *supra* note 2, at Art. 12.6(a) ("The League and the NHLPA shall jointly appoint eight (8) Salary Arbitrators who are members of the National Academy of Arbitrators"); *see also id.* at Art. 17.6 ("There will be one Impartial Arbitrator, appointed jointly by the parties, who shall serve for the duration of this Agreement; provided, however, that on September 1, 2013 and on each successive September 1, either of the parties to this Agreement may discharge the Impartial Arbitrator by serving written notice upon him/her and upon the other party to this Agreement on or before that date.").

319. *Mediator Ethics Guidelines*, JUDICIAL ARBITRATION AND MEDIATION SERVICES, https://www.jamsadr.com/mediators-ethics/ [https://perma.cc/6KXJ-LNKR].

320. MLB CBA, *supra* note 2, at Art. VI, (E)(5); for the qualifications of the American Arbitration Association, see *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/document_repository/Qualification_Criteria_for_Admittance_to_the_AAA_National_Roster_of_Arbitrators.pdf [https://perma.cc/CYB8-PV37].

321. For MLB's Salary Arbitration system, see MLB CBA, *supra* note 2, at Art. VI, (E)(13) ("The panel chair shall insert the figure awarded in paragraph 2 of the executed Uniform Player's Contract delivered at the hearing and shall forward the Contract to the Office of the Commissioner."); For MLB's Grievance Arbitration System, see *id. at* Art. XI(B) ("The decision of the Arbitration Panel shall constitute full, final

To ensure this validity, each CBA must detail several aspects of enforcement. First, the CBA must require that the parties in attendance have the authority to agree to a settlement.[322] Without full authority by both sides, the parties will be unable to reach a settlement even with the most productive discussions.[323] In the absence of the person whose authority is necessary in order to settle, it is critical that the persons at the mediation at least receive written authority or consent to settle on their behalf.[324]

The next critical aspect of enforcement is to that all final terms be reduced to a written document that is signed by both parties. Creating a memorandum of settlement that is reviewed by both sides ensures that the parties agree the settlement is binding.[325] For salary dispute purposes, such a written agreement could be the same as

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and complete disposition of the Grievance appealed to it."). For the NFL's System Arbitration, see NFL CBA, *supra* note 3, at Art. 15 § 9 ("Any decision issued by the System Arbitrator or the Appeals Panel may be enforced only against a Club or Clubs or the League, as applicable, found to have violated this Agreement. In no event may the System Arbitrator or Appeals Panel order relief, or assess any monetary award, against an individual Club owner, officer, or non-player employee."). For the NFL's Impartial Arbitrator, see *id.* at 16 § 3 ("Rulings of the Impartial Arbitrator shall upon their issuance be final and binding upon all parties, except as expressly specified under this Agreement or as expressly agreed to among all parties.") For the NFL's Non-Injury Grievance Arbitration, see *id.* at Art. 43 § 8, ("The decision of the arbitrator will constitute full, final and complete disposition of the grievance, and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement."). For the NFL's Commissioner Discipline, see *id.* at Art. 46 § 2(d), ("As soon as practicable following the conclusion of the hearing, the hearing officer will render a written decision which will constitute full, final and complete disposition of the dispute and will be binding upon the player(s), Club(s) and the parties to this Agreement with respect to that dispute."). For the NBA's Grievance Arbitration system, see NBA CBA, *supra* note 46, at Art. XXXI, (6) ("The award shall constitute full, final and complete disposition of the Grievance, and shall be binding upon the player(s) and Team(s) involved and the parties to this Agreement."). For NHL Salary Arbitration, see NHL CBA, *supra* note 2, at Art. 12.6(n)(ii)(a) ("The decision of the Salary Arbitrator shall establish: (A) the term of the SPC, based upon the Player's or Club's election of a one or two year SPC, as set forth in its brief and as consistent with this ArticleÉ"). For the NHL's Grievance Arbitration system, see *id.* at Art. 17.13 ("The decision of the Impartial Arbitrator will constitute full, final and complete disposition of the Grievance, as the case may be, and will be binding upon the Player(s) and Club(s) involved and the parties to this Agreement.").

322. *See* Ruth D. Raisfeld, *How Mediation Works: A Guide to Effective Use of ADR*, 33 EMP. REL. L.J. 1, 8 (2007) (stating that it is essential for the parties to come to the mediation with full settlement authority).

323. *See* Marcil & Thornton, *supra* note 297, at 872–73 ("When a disputant or attorney does not have the authority to close a deal or settle the matter, the mediation grinds to a halt.").

324. *See id.*

325. *See* Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 84 (2001).

the arbitration written agreements: filling in the salary in the player's contract for the following season.[326] For other player discipline disputes and grievances, the parties could reduce the specific terms of the settlement to a written form that fits the situation. Whereas arbitration and court decisions are constrained in the solutions they can provide, mediated settlements provide flexibility for the parties to craft the settlements to fit their specific disputes.[327]

Mediator selection and settlement enforcement are two crucial logistical issues the leagues must consider in providing validity to a mediation-enhanced ADR system, but they are not the only concerns. Additional, more systemic logistical issues would affect each league's decision to implement mediation into its unique CBA; the choices would reflect the power dynamics at the negotiating table and the tradeoffs that the parties are willing to strike with respect to other important issues.

Even where a league successfully implements mediation, mediation will not always be the cure-all answer. Without mutual commitment to the process by both parties, mediation will be unsuccessful. Additionally, although mediation has the ability to help parties form individualized remedies for their disputes, it does not have the ability to cement legal precedent for future disputes that arise; however, because parties do not cede control to a third party, the lack of controlling precedent does not pose the same problem as in a pure arbitration system. Thus, despite its limitations, mediation is an efficient avenue for parties to explore before resorting to other conflict resolution procedures. While there are significant collective bargaining hurdles to overcome in implementing mediation as a formal dispute resolution procedure in the MLB, NFL, NBA, and NHL, there are several possible options would be sensible for the leagues and unions to consider moving forward.

VI. Conclusion

Disputes over labor are common, and there is no indication this prevalence will change.[328] There will always be disagreements in the

326. *See* discussion *supra* Part II.(A)(1)(iii).

327. *See* MLB CBA, *supra* note 2, at Art. VI, (E)(13) ("The panel chair shall insert the figure awarded in paragraph 2 of the executed Uniform Player's Contract delivered at the hearing and shall forward the Contract to the Office of the Commissioner.").

328. The American Arbitration Association, the largest alternative dispute resolution institution in the world, has handled over four million cases, with many in the field of labor. *See* Press Release, Am. Arbitration Ass'n, American Arbitration Association Releases Study Measuring the Cost to Business of Delays in Dispute Resolution

labor industry regarding compensation and disciplinary decisions, because management and labor of any industry will disagree over how to distribute company earnings and how to resolve disputes.[329] The four professional sports leagues are no exception; as long as there are large amounts of money at stake, salary disputes, player discipline, and grievance issues will continue to persist.

The current ADR systems in the MLB, NFL, NBA, and NHL utilize arbitration to resolve their disputes. Although arbitration can be an effective ADR mechanism, its utilization often falls short of the shared goals and interests of the parties. In these settings, arbitration can have a negative impact on the working relationships between parties, can be limited in the solutions it is able to provide, and can even lead to divisive litigation.

While arbitration is the most common ADR technique used in professional sports, mediation is underutilized and could benefit teams, players, and leagues if explored more often. In the limited situations in which mediation has been used thus far in professional sports, it has proven to add value for the parties, aiding them in resolving their disputes in a mutually beneficial manner. Given the benefits of mediation and its success in these limited contexts, its usage should be expanded to the salary arbitration, player discipline, and grievance contexts in the four major professional sports leagues. This utilization would offer parties autonomy over their problems in a less adversarial and more time efficient manner.

Ultimately, mediation is not a perfect process for all disputes, but it is one that can provide value to the current system. Forcing parties simply to participate in mediation is not enough to settle a dispute in an effective manner. Mediation requires the engagement of the parties. It requires that the particular situation be of the nature that mediation is able to effectively remedy. Mediation itself does not reduce costs or time.[330] Sitting in a room with a neutral third party does not automatically help parties resolve their conflicts.[331] What mediation can do, however, is facilitate discussions

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(May 1, 2017), https://www.adr.org/sites/default/files/document_repository/AAA_ICDR_Press_Release_2017_AAA%20Releases%20Study%20Measuring%20the%20Cost%20of%20Delays%20in%20Dispute%20Resolution.pdf [https://perma.cc/J8UZ-5ZFD].

329. *See* Michael Arace, *NHL's Lost Season: Nuclear Winter,* COLUMBUS DISPATCH, Feb. 17, 2005, at El. "The reason" for the 2004–05 NHL lockout and eventual season cancellation was that "the NHL and its players association couldn't resolve how to split revenues from the $2.1 billion industry." *Id.*

330. *See* McEwen, *supra* note 247, at 3.

331. *See id.*

that address values and interests that are important to both sides. Even if the parties are ultimately unable to settle, mediation will likely provide them an opportunity to narrow their dispute, because of the open lines of communication that mediation can create. Additionally, even if parties do not settle during mediation, they often settle privately following mediation sessions.

Based on an assessment of the benefits mediation could provide in the context of salary disputes and conduct-related grievances, mediation is currently underutilized in the MLB, NFL, NBA, and NHL. Providing an opportunity to aid parties through mediation could benefit teams, leagues, unions, and players immensely. The question now is whether the parties will let that happen.