



## Baseball Arbitration: An ADR Success

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### ABSTRACT

Major League Baseball's salary arbitration system strikes a unique balance during a player's first six major league seasons between teams completely controlling players and players earning their fair market value. Critically, the system resolves the issue of player salaries prior to, or, at the latest, early in spring training. This system developed somewhat serendipitously over more than a century of court battles, labor negotiations, and back room deals. Despite this ad hoc history, Major League Baseball's salary arbitration system successfully handles and resolves these salary disputes.

Scholars who specialize in dispute resolution have developed a wealth of research on the processes designed to handle a recurring group of disputes. A survey of seminal literature in this field allows for a distillation of the key traits that contribute to the success of a given system. Baseball's salary arbitration system comports with many of the recommended traits found in an effective dispute resolution system. While there remains an open debate as to whether the players should receive more or less of the revenues the sport generates, baseball's salary arbitration system promotes the resolution of salary disputes without substantial disruption, and does so in a way that participants view as fair.

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## I. INTRODUCTION

Major League Baseball (“MLB” or “baseball”) is a big business that generates enormous revenues.<sup>1</sup> Players and team owners constantly struggle over the distribution of these revenues. In individual salary negotiations, players fall into one of three categories. The first category consists of pre-arbitration players, those who lack the requisite Major League Service Time (“MLST” or “service time”)<sup>2</sup> to attain salary arbitration eligibility. These players are bound to their teams, and thus must either accept the team’s offer, hold out, or find a different occupation.<sup>3</sup> The second category includes players with at least six years of MLST that become eligible for free agency upon the expiration of their contracts.<sup>4</sup> Free agents may negotiate with any team and sign with the one that makes the most appealing offer.<sup>5</sup> The third category of players is arbitration eligible, and players in this category generally have between three and six years of MLST.<sup>6</sup> These players, like the pre-arbitration players, remain bound to their teams.<sup>7</sup> When an arbitration eligible player and his team fail to reach an agreement, the two sides submit the dispute to an arbitrator to set the player’s salary for the upcoming year.<sup>8</sup>

This Article focuses on the system under which the players in this middle group must either successfully negotiate their salary with their team, or submit the issue to a third party for a final and binding decision. This structure is part of the collective bargaining agreement (“CBA” or “Basic Agreement”) between the league and the players’ union. Baseball and other professional sports have unusual labor agreements in the sense that individ-

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<sup>1</sup> \$7 billion in 2010. Maury Brown, *MLB Revenues Grown From \$1.4 Billion in 1995 to \$7 Billion in 2010*, THE BIZ OF BASEBALL, [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=5167:mlb-revenues-grown-from-14-billion-in-1995-to-7-billion-in-2010&catid=30:mlb-news&Itemid=42](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=5167:mlb-revenues-grown-from-14-billion-in-1995-to-7-billion-in-2010&catid=30:mlb-news&Itemid=42).

<sup>2</sup> One year of MLST is defined as 172 days on an MLB roster. 2012–2016 Basic Agreement, art. XXI(A)(1) (2012.) [hereinafter 2012 Basic Agreement]. Players are credited one day of MLST for “each day of the championship season a Player is on a Major League Club’s Active List,” and a player may not accumulate more than 172 days MLST in a single championship season. *Id.*

<sup>3</sup> ROGER I. ABRAMS, *THE MONEY PITCH* 31 (2000).

<sup>4</sup> *Id.* at 32.

<sup>5</sup> *See id.*

<sup>6</sup> *Id.* at 31.

<sup>7</sup> *See id.*

<sup>8</sup> *See id.* at 146–47.

ual players are left to negotiate salaries above a collectively bargained minimum salary, at least within the context of the CBA's rules and structures.<sup>9</sup>

This Article aims to provide an overview of dispute systems design ("DSD"), a body of research within the larger framework of alternative dispute resolution and use it to evaluate MLB salary arbitration. MLB salary arbitration developed over a century of mostly antagonistic interactions between players and owners. Despite that ominous history, it is successful because it lowers the costs of resolving disputes, provides a process that the parties perceive as fair, and strikes a balance between the interests of players and owners. Few cases ever reach an arbitrator and there are no holdouts. Salary disputes are resolved before spring training, minimizing the distraction for player and team. Nevertheless, many authors have critiqued the system. However, a holistic view of this system shows that its purported shortfalls function to incentivize negotiated settlements between the parties, with arbitration as a fallback option to guarantee resolution prior to the season's start. This system, the product of an organic evolution, serves the interests of players, teams, and the business of baseball.

Part II of this Article discusses the history of baseball that produced today's salary arbitration system. Part III introduces DSD and three complementary frameworks for analyzing a given dispute system. Part IV uses this DSD research to evaluate MLB salary arbitration. Part V offers a response to the critiques that other authors have levied against various aspects of the system.

## II. THE DEVELOPMENT OF MLB ARBITRATION

### A. History

MLB's labor market began as a free market system.<sup>10</sup> A player's contract lasted only a year, at which point he could market his services to other teams.<sup>11</sup> Teams competing to sign players contributed to rising salaries.<sup>12</sup> Owners worried that player movement, particularly that of star players, would undermine fan allegiances and negatively affect revenues.<sup>13</sup> Owners

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<sup>9</sup> Thomas J. Hopkins, *Arbitration: A Major League Effect on Players' Salaries*, 2 SETON HALL J. SPORT L. 301, 306–07 (1992).

<sup>10</sup> Frederick N. Donegan, *Examining the Role of Arbitration in Professional Baseball*, 1 SPORTS LAW. J. 183–84 (1994).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

also wanted to limit player salaries, and eliminating the competition for a player's services served as an effective means to that end.<sup>14</sup>

The owners' solution to these concerns came out of a secret meeting in 1879, where they agreed to establish the "reserve rule."<sup>15</sup> This rule stated that each team could name five players that other owners agreed not to pursue, even if the player's contract with his current team had expired.<sup>16</sup> Subsequently, the owners expanded the agreement to cover each team's entire roster.<sup>17</sup> Over time the owners moved away from secret pacts and began inserting a reserve clause into each player's contract.<sup>18</sup> This clause bound a player to one team for as long as that team wished to retain his services,<sup>19</sup> and allowed the team, upon the contract's expiration, unilaterally to renew the contract for a one-year term<sup>20</sup> at any figure the team selected.<sup>21</sup> A player could accept the renewal offer, refuse to play in the hope that the owner would pay more, or leave baseball entirely.<sup>22</sup> Thus, owners exerted nearly complete control over player movement and salaries, essentially making the players chattel.

Antitrust challenges to the reserve system found their way to the Supreme Court on three separate occasions. The Court first considered the issue in 1922.<sup>23</sup> The Federal Baseball Club of Baltimore, a team from a rival league, argued that MLB was monopolizing the business of baseball.<sup>24</sup> Justice Oliver Wendell Holmes, writing for the Court, described the business at issue as "giving exhibitions of baseball, which are purely state affairs."<sup>25</sup> In that sense, the Court dismissed the fact that teams and fans traveled across state lines, whether to receive payment for participation or to pay to

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<sup>14</sup> ABRAMS, *supra* note 3, at 10.

<sup>15</sup> Donegan, *supra* note 10, at 184; *see also* Hopkins, *supra* note 9, at 303.

<sup>16</sup> ABRAMS, *supra* note 3, at 10.

<sup>17</sup> Hopkins, *supra* note 9, at 303–04.

<sup>18</sup> *Id.* at 304.

<sup>19</sup> *See* Donegan, *supra* note 10, at 184.

<sup>20</sup> *See id.*; Hopkins, *supra* note 9, at 304.

<sup>21</sup> Hopkins, *supra* note 9, at 304.

<sup>22</sup> *See id.*; Mark L. Goldstein, *Arbitration of Grievance and Salary Disputes in Professional Baseball: Evolution of a System of Private Law*, 60 CORNELL L. REV. 1049, 1065–66 (1975).

<sup>23</sup> *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

<sup>24</sup> *See id.* at 207.

<sup>25</sup> *Id.* at 208.

view the exhibitions, as “a mere incident, not the essential thing.”<sup>26</sup> The Court concluded that MLB’s business was not interstate commerce, and therefore was outside the reach of the antitrust laws.<sup>27</sup> This antitrust exemption allowed the owners to restrict the market for baseball and baseball players.<sup>28</sup> It preserved this system in which clubs controlled players for the duration of players’ careers and did not compete for players in an open market.<sup>29</sup>

The Supreme Court subsequently rejected challenges to the reserve system in 1953 and 1972.<sup>30</sup> In the face of this precedent, the players began looking for alternative avenues to increase their bargaining power. The owners refused all player overtures for increased rights.<sup>31</sup>

In 1954, after prior unionization attempts had fizzled,<sup>32</sup> the players organized the Major League Baseball Players Association (“MLBPA” or “Players Association”).<sup>33</sup> Twelve years later, in 1966, the MLBPA appointed

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<sup>26</sup> *Id.* at 209.

<sup>27</sup> *Id.*

<sup>28</sup> See Jacob F. Lamme, *The Twelve Year Rain Delay: Why a Change in Leadership Will Benefit the Game of Baseball*, 68 ALB. L. REV. 155, 168 (2004).

<sup>29</sup> See *id.*

<sup>30</sup> In *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953), the Court, in a per curiam opinion, declined to overturn *Federal Baseball* in light of Congressional inaction on the matter in the thirty years since that decision, and because baseball had developed “on the understanding that it was not subject to existing antitrust legislation.” *Id.* at 357. The Court decided that any change was more appropriately accomplished through legislation. *Id.* The Court upheld the exemption once more in *Flood v. Kuhn*, 407 U.S. 258 (1972). The Court explicitly found that “[p]rofessional baseball is a business and it is engaged in interstate commerce.” *Id.* at 282. It further described *Federal Baseball* and *Toolson* as “an aberration.” *Id.* However, it was an “aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis* . . . .” *Id.* Again finding that legislation was the more appropriate route to changing the exemption, the Court declined to overturn *Federal Baseball* and *Toolson*. *Id.* at 284. Congress finally did act in 1998, eliminating the antitrust exemption at least as it applied to major league players. 15 U.S.C. § 26(b) (2011). See generally Michael J. Mozes & Ben Glicksman, *Adjusting the Stream? Analyzing Major League Baseball’s Antitrust Exemption After American Needle*, 2 HARV. J. SPORTS & ENT. L. 265 (2011) (full history of baseball’s antitrust exemption). Also note that salary arbitration, as a subject of collective bargaining, is exempt from antitrust scrutiny under the non-statutory labor exemption. *Id.* at 286 n.138.

<sup>31</sup> See Goldstein, *supra* note 22, at 1065.

<sup>32</sup> See, e.g., Hopkins, *supra* note 9, at 305.

<sup>33</sup> Goldstein, *supra* note 22, at 1053.

Marvin Miller as its president.<sup>34</sup> Under Miller's leadership, collective bargaining produced modest gains for the players. In negotiations with the league in 1968, the MLBPA achieved a breakthrough when it secured grievance arbitration.<sup>35</sup> Up to that point, "grievance disputes were 'resolved' when the player paid his fine or sat out his period of suspension . . . ."<sup>36</sup> Grievance arbitration was a marked improvement over the previous system, under which MLB could unilaterally impose disciplinary fines and suspensions on players. However, the players' gain was limited because the MLB commissioner served as sole arbitrator.<sup>37</sup> Players found this system problematic because the commissioner, as the owners' employee, was far from impartial.<sup>38</sup>

The MLBPA gained additional legitimacy and bargaining power when the National Labor Relations Board ("NLRB") asserted jurisdiction over the business of baseball.<sup>39</sup> This decision confirmed that MLB's antitrust exemption would not similarly insulate MLB from labor regulation.<sup>40</sup> Shortly thereafter, during the 1970 collective bargaining negotiations, the players secured an independent arbitrator for grievances.<sup>41</sup> The new system called for a tripartite panel to hear grievances; the panel would be composed of one player representative, one league representative, and one neutral arbitrator.<sup>42</sup>

During the negotiations leading to the 1973 agreement, the owners made their first proposal for salary arbitration.<sup>43</sup> These negotiations came shortly after the Supreme Court in *Flood v. Kuhn* rejected for a third time an antitrust challenge against the reserve system.<sup>44</sup> The owners hoped that salary arbitration would quell the players' demands for a total demolition of

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<sup>34</sup> Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball*, 5 SPORTS LAW. J. 221, 226 (1998).

<sup>35</sup> Goldstein, *supra* note 22, at 1054.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; see also Hopkins, *supra* note 9, at 307; Jason M. Pollack, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645, 1661 (1999).

<sup>38</sup> Goldstein, *supra* note 22, at 1054–55.

<sup>39</sup> See Am. League of Prof'l Baseball Clubs, 180 NLRB 190, 192 (1969–1970).

<sup>40</sup> William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61, 66 (2004).

<sup>41</sup> Pollack, *supra* note 37, at 1662. Note that the commissioner retained full control over matters implicating "baseball's integrity or public confidence in the game." *Id.*

<sup>42</sup> Goldstein, *supra* note 22 at 1057 n.35.

<sup>43</sup> *Id.* at 1067.

<sup>44</sup> *Flood v. Kuhn*, 407 U.S. 258, 284 (1972).



the reserve system.<sup>45</sup> After exchanging demands, the two sides finally agreed to implement salary arbitration.<sup>46</sup>

MLB salary arbitration employs a format commonly known as “high-low arbitration” or “final offer arbitration.”<sup>47</sup> The player and team each submit a single number to the arbitrator.<sup>48</sup> After a hearing during which the player and team each have the opportunity to make a presentation,<sup>49</sup> the arbitrator chooses one of the two numbers as the player’s salary for the upcoming season.<sup>50</sup>

Salary arbitration as established in 1973 has remained largely unchanged, save for modifications to player eligibility thresholds and to the number of arbitrators that hear each case.<sup>51</sup> The 2012 Basic Agreement provides that “[a]ny Player” who has accumulated the required MLST “may submit the issue of the Player’s salary to final and binding arbitration . . . .”<sup>52</sup>

Under the 1973 Basic Agreement, any player with two or more years of MLST could utilize salary arbitration.<sup>53</sup> It is important to keep in mind, however, that in 1973 there was still no set procedure for a player to reach free agency.<sup>54</sup> As long as teams complied with contractual terms, they could retain a player’s rights forever. That, however, would change in only a few short years.<sup>55</sup>

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<sup>45</sup> Goldstein, *supra* note 22, at 1067.

<sup>46</sup> See *id.* at 1067–68; see also Ed Edmonds, *A Most Interesting Part of Baseball’s Monetary Structure—Salary Arbitration in its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1, 3 (2009); Gould, *supra* note 40 at 67.

<sup>47</sup> David L. Snyder, *Automatic Outs: Salary Arbitration in Nippon Professional Baseball*, 20 MARQ. SPORTS L. REV. 79, 82 (2009).

<sup>48</sup> 2012 Basic Agreement, art. VI(E)(4).

<sup>49</sup> *Id.* art. VI(E)(7).

<sup>50</sup> *Id.* art. VI(E)(13).

<sup>51</sup> See *infra* Part II.B.

<sup>52</sup> 2012 Basic Agreement, art. VI(E)(1).

<sup>53</sup> Jeff Euston, *CBA Summaries 1973–1975*, THE BIZ OF BASEBALL, [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=682:1973-1975&catid=45:cba-summaries&Itemid=76](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=682:1973-1975&catid=45:cba-summaries&Itemid=76).

<sup>54</sup> Catfish Hunter, a star pitcher in this era, famously reached unrestricted free agency during this period when an arbitrator declared that Charles Finley, the owner of the Oakland Athletics, had caused the team to breach its contract with Hunter, rendering the contract null and void. See Murray Chass, *Owners Worry Over Reserve Clause Suit*, N.Y. TIMES, Jan. 3, 1975; Red Smith, *Portrait of a 6-Foot Millionaire*, N.Y. TIMES, Jan. 10, 1975.

<sup>55</sup> See *infra* notes 61–69 and accompanying text.



Early efforts to use this process negatively impacted player-team relationships. The first hearing was held in February 1974 between the Minnesota Twins and pitcher Dick Woodson.<sup>56</sup> Woodson demanded \$30,000 per year while the Twins offered only \$23,000.<sup>57</sup> Woodson won the \$30,000 salary he requested, but both sides were unhappy with the outcome.<sup>58</sup> Woodson felt that Carl Griffith, the Twins' owner, had treated him poorly throughout the process.<sup>59</sup> Griffith, like all the owners, was frustrated by the diminished control over the players under the new system, and he expressed his displeasure by trading Woodson across the country to the New York Yankees that same season.<sup>60</sup>

Two years later, MLB received a seismic shock when arbitrator Peter Seitz essentially struck down the reserve system.<sup>61</sup> The player's union brought a grievance on behalf of pitchers Andy Messersmith and Dave McNally. Both players had played out the prior year under "renewed" contracts.<sup>62</sup> At that time, the reserve clause in the uniform player contract ("UPC") stated that the team had the right to "renew" the player's contract if the two sides could not reach an agreement on a deal.<sup>63</sup> The owners claimed that the "renewed" deal included the same reserve clause, while the players claimed that the contractual relationship terminated at the end of the option year.<sup>64</sup> Noting that the owners' interpretation of the contract would allow teams to renew the contract in perpetuity,<sup>65</sup> Seitz determined

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<sup>56</sup> Edmonds, *supra* note 46, at 1; ABRAMS, *supra* note 3, at 143.

<sup>57</sup> Edmonds, *supra* note 46, at 1.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2; ABRAMS, *supra* note 3, at 143.

<sup>61</sup> See *Prof'l Baseball Clubs*, 66 Lab. Arb. Rep. (BNA) 101 (1975) (Seitz, Arb.).

<sup>62</sup> *Id.* at 101. McNally had been effectively retired, having sustained injuries that prevented him from pitching. His team, however, had held onto his rights, and Marvin Miller asked him to join the suit. His team then sought to sign McNally to a contract to prevent the challenge to the reserve clause. JOHN HELYAR LORDS OF THE REALM, 167-68 (1994).

<sup>63</sup> *Prof'l Baseball Clubs*, 66 Lab. Arb. Rep. (BNA) at 110.

<sup>64</sup> *Id.* The owners had previously avoided any challenge on this issue because the player had to play the option year without signing a contract in order to bring such a challenge. This hurdle created heavy risk for the player who was playing without a contract. As the UPC contained the reserve clause, if a player signed the deal, the team explicitly gained the option year again. Any time a player threatened to play out the season under the option year, that player's team would offer financial inducements (increased salaries or extra guaranteed contract years) to induce the player to sign a contract. See HELYAR, *supra* note 62 at 130-33.

<sup>65</sup> *Prof'l Baseball Clubs*, 66 Lab. Arb. Rep. (BNA) at 112.

that such a broad power required an explicit grant in the contract.<sup>66</sup> The UPC did not contain such an explicit grant, and thus, in Seitz's view, did not grant a team "the right to renew a contract at the end of a renewal year."<sup>67</sup> Finding no contractual relationship between player and team at the end of the renewal year, Seitz declared Messersmith and McNally free agents.<sup>68</sup> The federal courts upheld Seitz's ruling against the owners' protestations.<sup>69</sup>

Facing the possibility that any player could reach free agency merely by playing out one option year, the owners finally agreed to collectively bargain the issue of the reserve clause.<sup>70</sup> Although *Messersmith* essentially granted the players widespread free agency, Miller knew players would be hurt if free agents flooded the market.<sup>71</sup> He believed it was prudent to constrict the market for free agent players in order to increase competition among teams for those players and thereby produce higher salaries.<sup>72</sup> Of course, Miller could not reveal that fact to the owners, and acted as though he wanted unfettered free agency for the players.<sup>73</sup> The two sides reached a compromise in the 1976 Basic Agreement which stated that a player with six years of MLST would be eligible for free agency.<sup>74</sup> Prior to this agreement, players with two years of MLST could seek salary arbitration; thus the new agreement effectively created three classes of players: (1) those with less than two years of MLST, whose contracts owners could set at any amount at or above the league minimum; (2) players with between two and six years of MLST,

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<sup>66</sup> *Id.* at 113.

<sup>67</sup> *Id.* at 114.

<sup>68</sup> *Id.* at 117.

<sup>69</sup> See *Kan. City Royals Baseball Corp. v. Major League Baseball Players Assoc.*, 532 F.2d 615 (8th Cir. 1976).

<sup>70</sup> Hopkins, *supra* note 9, at 309. This willingness to bargain the reserve system in the aftermath of *Messersmith* demonstrates the extent to which parties always bargain "in the shadow of the law," or "the outcome that the law will impose if no agreement is reached." See Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, YALE L.J. 950, 968–69 (1979). In this instance, *Messersmith* altered the landscape from one in which the reserve clause made free agency essentially unattainable for players to one in which free agency was imminently available.

<sup>71</sup> ABRAMS, *supra* note 3, at 30; HELYAR, *supra* note 62, at 181–84.

<sup>72</sup> ABRAMS, *supra* note 3, at 30; HELYAR, *supra* note 62, at 181–84.

<sup>73</sup> HELYAR, *supra* note 62, at 181–84.

<sup>74</sup> Hopkins, *supra* note 9, at 309; 1976–1979 Basic Agreement, art. XVII(B)(2) (1976).

who could seek salary arbitration; and (3) players with six or more years of MLST who were eligible for free agency.<sup>75</sup>

Free agency and salary arbitration had the joint effect of drastically increasing player salaries.<sup>76</sup> The limits on free agency served Miller's intended effect of reducing the supply of players on the open market, augmenting the competition and resultant salaries for those players.<sup>77</sup> In arbitration, players could compare themselves to players who had received deals on the open market, creating a trickle-down effect from the free agent salaries to arbitration-eligible players.<sup>78</sup> Furthermore, this tie between free agency and salary arbitration forced lower revenue teams to pay players similarly to the higher revenue teams.<sup>79</sup>

In the thirty-six years since the 1976 Basic Agreement, the owners have mounted various attempts to regain the power they had prior to *Messersmith*.<sup>80</sup> These efforts include both legitimate means, such as collective bargaining, and more subversive strategies, such as collusion. As a general matter, the relationship between players as a group and owners as a group has been nothing short of acrimonious before, during, and since *Messersmith*. There have been eight labor stoppages since 1972.<sup>81</sup> There have been, however, signs of substantial improvement in this relationship over the last fifteen years, and there has not been a labor stoppage since the 1994 strike.<sup>82</sup>

In 1980, the owners attempted to eliminate arbitration and institute a fixed salary scheme.<sup>83</sup> Although the players rebuffed these proposals, in 1985 the owners successfully bargained for an increase to the eligibility re-

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<sup>75</sup> See Gould, *supra* note 40, at 69.

<sup>76</sup> *Id.*

<sup>77</sup> John P. Gillard, Jr., *An Analysis of Salary Arbitration in Baseball: Could a Failure to Change the System by Strike Three for Small-Market Franchises?*, 3 SPORTS LAW. J. 125, 133 (1996).

<sup>78</sup> *Id.* at 133–34.

<sup>79</sup> Gould, *supra* note 40, at 69.

<sup>80</sup> Michael J. Cozzillio, *From the Land of Bondage: The Greening of Major League Baseball Players and the Major League Baseball Players Association*, 41 CATH. U. L. REV. 117, 144–46 (1992).

<sup>81</sup> John Helyar, *Fat Lady Sings: How Fear and Loathing In Baseball Standoff Wrecked the Season—Styles of Confrontation Made a Bad Situation Worse*, WALL ST. J., Sep.15, 1994, at A1.

<sup>82</sup> See Peter Gammons, *Baseball Deserves Kudos for Sealing Deal: New CBA Ensures Continued Labor Peace Through 2016*, MLB.COM (Nov. 22, 2011, 3:25 PM), [http://mlb.mlb.com/news/article.jsp?ymd=20111122&content\\_id=26025840&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20111122&content_id=26025840&vkey=news_mlb&c_id=mlb).

<sup>83</sup> Edmonds, *supra* note 46, at 5.

quirement, such that players needed three years of MLST to seek salary arbitration.<sup>84</sup> Additionally, revisions to the language in the 1985 Basic Agreement directed arbitrators to pay “particular” attention to comparable players in the same service class<sup>85</sup> or one service class higher, although arbitrators were still free to look to other comparable players, including free agents, where “appropriate.”<sup>86</sup> Strict adherence to this guideline theoretically would limit the inflationary effect of free agent salaries upon arbitration salaries.

During this period, the owners attempted to achieve through collusion what they failed to gain through bargaining.<sup>87</sup> The owners secretly agreed not to participate in free agency, and not to make offers to other teams’ free agents.<sup>88</sup> This coordinated action violated the 1985 Basic Agreement, which prohibited clubs from colluding amongst themselves.<sup>89</sup> The players eventually brought and won a series of grievances against the owners.<sup>90</sup> During the 1990 labor negotiations, the owners agreed to pay treble damages for future instances of collusion.<sup>91</sup>

The 1990 negotiations also saw the owners renew their efforts to eliminate salary arbitration through collective bargaining. The owners demanded a salary cap and a “pay for performance” scheme for players with less than six years of MLST,<sup>92</sup> and even locked out the players for a month during spring training.<sup>93</sup> Ultimately, these efforts not only failed to secure the own-

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<sup>84</sup> Gould, *supra* note 40, at 71.

<sup>85</sup> A service class includes players with the same number of MLST years.

<sup>86</sup> Gould, *supra* note 40, at 71–72.

<sup>87</sup> See Hopkins, *supra* note 9, at 314.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.* at 315. In an ironic twist, it was the owners who had insisted upon the insertion of this clause during the 1976 collective bargaining to prevent joint player holdouts like the one Los Angeles Dodgers pitchers Sandy Koufax and Don Drysdale executed in 1966. See ABRAMS, *supra* note 3, at 28–29. The owners demanded a bar to such collusive action, and the union insisted that the owners make a similar pledge. *Id.*

<sup>90</sup> Hopkins, *supra* note 9, at 315. Players brought a separate grievance for each year of collusion.

<sup>91</sup> *Id.* at 315–16.

<sup>92</sup> Edmonds, *supra* note 46, at 5. A salary cap typically limits what teams can spend on player salaries in a single year. In this instance, the owners proposed a system that allotted a gross percentage of revenues to the players. See HELYAR, *supra* note 62, at 441. The pay-for-performance proposal “would rank (and pay) younger players according to their stats.” *Id.*

<sup>93</sup> Edmonds, *supra* note 46, at 5.

ers' desired gains, but also enabled the players actually to regain some of the ground they had surrendered in 1985. The 1990 Basic Agreement defined a new category of "Super Two" players (those with more than two years of MLST who were also in the top 17% of service time<sup>94</sup> for players with between two and three years of MLST) who had access to arbitration like players having between three and six years of MLST.<sup>95</sup>

The 1994 negotiations were one of the more damaging encounters between players and owners, even leading to the cancellation of the World Series.<sup>96</sup> After extended in-season negotiations, the players went on strike in August.<sup>97</sup> In December, the owners declared a bargaining impasse and announced that they unilaterally would eliminate arbitration and impose a salary cap.<sup>98</sup> After the NLRB found that salary arbitration and free agency were mandatory bargaining subjects,<sup>99</sup> then-Judge Sonia Sotomayor issued a temporary injunction that restrained the owners from unilaterally imposing those changes,<sup>100</sup> and the Second Circuit affirmed.<sup>101</sup> The players ended their strike shortly after the issuance of Judge Sotomayor's injunction.<sup>102</sup> On November 26, 1996, the two sides finally reached an agreement on a new deal.<sup>103</sup>

The current century thus far has produced only minor clashes over and changes to the system. The 2000 season saw the expansion of panels to three arbitrators, rather than the single arbitrator who previously had decided

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<sup>94</sup> See 1990–1993 Basic Agreement, art. VI(F)(1) (1990).

<sup>95</sup> *Id.* This definition was slightly changed in the 2012 agreement to include players in the top 22% of service time. See 2012 Basic Agreement, art. VI(E)(1)(b).

<sup>96</sup> See generally Edmonds, *supra* note 46, at 5.

<sup>97</sup> *Silverman v. Major League Baseball Player Relations Comm.*, 67 F.3d 1054, 1058 (2d Cir. 1995).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1058–59. The teams and players "filed cross-charges of unfair labor practices" with the NLRB. *Id.* at 1058. The NLRB found that "these matters were related to wages, hours, and other terms and conditions of employment and were therefore mandatory subjects for collective bargaining." *Id.* at 1059. This finding was important because after the expiration of a collective bargaining agreement, "an employer may not alter terms and conditions of employment involving mandatory subjects until it has bargained to an impasse over new terms." *Id.* Thus, the clubs' unilateral changes constituted an unfair labor practice because the teams had not bargained to impasse.

<sup>100</sup> See *id.* at 1059.

<sup>101</sup> *Id.* at 1062.

<sup>102</sup> See Murray Chass, *Baseball Players and Owners Appear Close to New Deal*, N.Y. TIMES, Aug. 11, 1996.

<sup>103</sup> Gould, *supra* note 40, at 77.

cases.<sup>104</sup> In the recently completed 2012 Basic Agreement, the players secured slightly broader eligibility, as the Super Two category was expanded to include the players in the top 22% of service time of those players with between two and three years of MLST.<sup>105</sup>

### B. Salary Arbitration Mechanics

The current CBA provides that any player who has accrued the requisite MLST “may submit the issue of the Player’s salary to final and binding arbitration without the consent of the Club.”<sup>106</sup> Eligible players either have between three and six years of MLST, or fit in the Super Two category.<sup>107</sup> Thus, for either set of eligible players both the athlete and the team unilaterally can subject the other to binding arbitration. For any other player, the team and player jointly may consent to arbitration.<sup>108</sup> In the case of a player with less service time than the eligibility requirement, the owner unilaterally can set the player’s salary, so the owner has no reason to consent to arbitration. In contrast, there are instances where a player with more than six years of MLST and his team would consent to arbitration.<sup>109</sup>

The CBA lays out a timeline for the system.<sup>110</sup> There is a deadline by which the player or team must submit to arbitration,<sup>111</sup> and a slightly later

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<sup>104</sup> See Edmonds, *supra* note 46, at 6. Three-arbitrator panels had been used for some cases beginning in 1995, and the 2000 agreement made tripartite panels a permanent change. See *id.*

<sup>105</sup> See 2012 Basic Agreement, art. VI(E)(1).

<sup>106</sup> *Id.* art. VI(E)(1)(a).

<sup>107</sup> *Id.* art. VI(E)(1)(b). Under the current CBA, a Super Two is “a Player with at least two but less than three years of Major League service . . . [and] at least 86 days of service during the immediately preceding season . . . [who] ranks in the top 22% . . . in total service in the class of Players who have at least two but less than three years of Major League service . . . .” *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> David Ortiz of the Boston Red Sox provides a recent example. Ortiz accepted the team’s arbitration offer following the 2011 season after failing to secure a multi-year deal in free agency. See *David Ortiz, Red Sox Agree to Deal*, ESPN.COM (Feb. 13, 2012, 6:39 PM), [http://espn.go.com/boston/mlb/story/\\_/id/7570133/david-ortiz-boston-red-sox-agree-deal-arbitration](http://espn.go.com/boston/mlb/story/_/id/7570133/david-ortiz-boston-red-sox-agree-deal-arbitration). Ortiz and the Red Sox ultimately agreed to a one-year deal for \$14.575 million just before the arbitration hearing. *Id.*

<sup>110</sup> See 2012 Basic Agreement, art. VI(E)(2–5, 13).

<sup>111</sup> See *id.* art. VI(E)(2).

deadline by which the two sides must exchange their proposed figures.<sup>112</sup> The player and team may continue to negotiate even after these deadlines.<sup>113</sup>

Each side submits to the arbitrators a proposed salary for the upcoming season.<sup>114</sup> Although players and teams can continue negotiating after this exchange of figures, some teams use a “file-and-go” strategy, cutting off negotiations after the exchange of figures and committing to a hearing.<sup>115</sup>

Tripartite panels preside over salary arbitration hearings.<sup>116</sup> Each year, the MLB Labor Relations Department (“LRD”), representing the owners, and MLBPA jointly select the arbitrators.<sup>117</sup> At the hearing, the two sides submit a signed and executed UPC with a blank space left for the salary figure.<sup>118</sup> Each side has one hour to present its case, and a half hour for rebuttal.<sup>119</sup> The arbitrators “make every effort to” issue a decision within twenty-four hours of the hearing.<sup>120</sup> The CBA restricts the arbitrator’s decisions by providing that “the arbitration panel shall be limited to awarding only one or the other of the two figures submitted.”<sup>121</sup> Arbitrators do not issue written opinions.<sup>122</sup> As a practical matter, the dispute’s pivot point is the midpoint between the player’s request and the team’s offer.<sup>123</sup> If the panel finds the player is worth more than the midpoint, the player wins, and if the panel finds the player is worth less than the midpoint, the team

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<sup>112</sup> *See id.*

<sup>113</sup> *See id.* art. VI(E)(3).

<sup>114</sup> *Id.* art. VI(E)(4).

<sup>115</sup> *See* Edmonds, *supra* note 46, at 28–29. The Florida Marlins and Tampa Bay Rays are two teams who typically employ this strategy. *See id.* at 29. Some teams use “file-and-go” as an added incentive to wrap up salary disputes earlier in the off-season. Hearings require substantial preparation, so file-and-go teams treat the exchange date as the point at which they invest fully in preparing for the hearing. Committing to a hearing at that point may serve as an attempt to avoid potential wasted resources in preparing for a hearing only to settle just beforehand. *Id.* at 28–29.

<sup>116</sup> 2012 Basic Agreement, art. VI(E)(5).

<sup>117</sup> *Id.* If the collective bargaining agents fail to agree on a list of arbitrators, they request a list of arbitrators from the American Arbitration Association, then take turns striking names from the list until they are left with the desired number of arbitrators.

<sup>118</sup> *Id.* art. VI(E)(4).

<sup>119</sup> *Id.* art. VI(E)(7).

<sup>120</sup> *Id.* art. VI(E)(13).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Edmonds, *supra* note 46, at 33; ABRAMS, *supra* note 3, at 148.



wins.<sup>124</sup> After filling out the player's contract with the awarded salary, the arbitrators send the contract to the parties.<sup>125</sup> Arbitration awards allow for less creativity than negotiated contracts, in that they consist of a single number and allow neither bonus nor incentive provisions.<sup>126</sup>

The CBA outlines the factors that the panel may consider in making its determination of the player's value.<sup>127</sup> Permissible evidence may include: (1) the player's "contribution to his Club (including but not limited to his overall performance, special qualities of leadership and public appeal)"<sup>128</sup> in the preceding season (often called the platform year); (2) the player's "career contribution"; (3) the player's past compensation; (4) the salaries of comparable players<sup>129</sup>; (5) any "physical or mental defects" of the player; and (6) the Club's recent performance, which can include "[l]eague standing and attendance as an indication of public acceptance."<sup>130</sup> Conversely, the panel is prohibited from considering: (1) "[t]he financial position of the Player and the Club;" (2) commentary from the media, except for "recognized annual Player awards for playing excellence . . . ;" (3) prior offers made by either side; (4) costs of representation; and (5) "[s]alaries in other sports or occupations."<sup>131</sup>

It is worth contemplating how the evidence arbitrators can consider differs from the evidence that teams and players consider during internal negotiations and free agent negotiations. Players and teams can look at anything in deciding on an appropriate salary. For example, teams certainly will consider their own ability to pay a salary, while players often will take into account a team's chances for success, as well as the team's geographical location. In arbitration, a team's ability to pay is irrelevant. With regard to team success, arbitrators consider the player's contribution to the team's past record, but future projections are largely irrelevant in arbitration. Arbitration weighs past performance most heavily, comparing that production against

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<sup>124</sup> Edmonds, *supra* note 46, at 33.

<sup>125</sup> *Id.*; ABRAMS, *supra* note 3, at 164.

<sup>126</sup> Ethan Lock & Allan DeSerpa, *Salary Increases Under Major League Baseball's System of Final Offer Salary Arbitration*, 2 LAB. LAW. 801, 804 (1986); Jeffrey D. Schneider, *Unsportsmanlike Conduct: The Lack of Free Agency in the NFL*, 64 S. CAL. L. REV. 797, 836 (1991).

<sup>127</sup> 2012 Basic Agreement, art. VI(E)(10).

<sup>128</sup> *Id.* art. VI(E)(10)(a).

<sup>129</sup> *Id.* The CBA requires the player to be compensated with "particular attention . . . to the contracts of Players with [MLST] not exceeding one annual service group" above that of the player. *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* art. VI(E)(10)(b).

players with similar amounts of service time. When teams and players negotiate, they can consider any individualized factors. Arbitration limits the scope of information considered in setting a player's salary.

### C. *Impact of Salary Arbitration*

The advent of salary arbitration (in tandem with free agency) has contributed to significant increases in player compensation. Players nearly always receive substantial raises in arbitration.<sup>132</sup> In most cases, however, players still receive less than their "market value" or "marginal revenue product," defined as the extra revenue the player's performance generates for the club.<sup>133</sup>

It is no surprise that arbitration awards players large raises. Those in arbitration fall between the categories of players with little negotiating leverage and free agents who can negotiate with every team. Players eligible for arbitration have negotiating leverage for the first time.<sup>134</sup> As such, arbitration salaries should trend upward, bridging the distance between the reserve system and free agency. However, as mentioned above, this upward trend does not result from arbitration alone; rather, arbitration works in tandem with free agency to increase salaries by limiting the supply of players in free agency.<sup>135</sup> This artificial restriction on player supply increases competition among teams for those players; the higher salaries that result flow to arbitration players, who can draw comparisons to players one class above them in service time.<sup>136</sup> Players with five years of MLST can compare themselves to free agents, those with four years can compare themselves to those with five years, and so on down the line. Therefore, players entering arbitration for the first time typically receive a substantial increase in salary after earning close to the league minimum the prior year.<sup>137</sup>

A comparison of Ryan Howard, first baseman for the Philadelphia Phillies, and Prince Fielder, former first baseman for the Milwaukee Brewers (now with the Detroit Tigers), illustrates salary arbitration's impact.<sup>138</sup> Howard made his major league debut in 2005, winning the Rookie of the

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<sup>132</sup> John L. FizeL, *Play Ball: Baseball Arbitration After 20 Years*, 49 DISP. RESOL. J. 42, 45 (1994).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See *supra* notes 76–79 and accompanying text.

<sup>136</sup> See 2012 Basic Agreement, art. VI(E)(10)(a).

<sup>137</sup> Edmonds, *supra* note 46, at 17–19.

<sup>138</sup> *Id.* at 19.

Year award.<sup>139</sup> He received the National League Most Valuable Player award in 2006<sup>140</sup> and was eligible for salary arbitration as a Super Two after the 2007 season.<sup>141</sup> Fielder also reached the majors in 2005, just a little while after Howard, but missed the Super Two cutoff after the 2007 season, meaning he was not eligible for arbitration.<sup>142</sup> While Howard beat the Phillies in arbitration and earned \$10 million for the 2008 season,<sup>143</sup> the Brewers exercised their right to set Fielder's salary and paid him \$670,000.<sup>144</sup>

Salary arbitration has led some teams to adopt a strategy of signing players to long-term deals early in their careers.<sup>145</sup> These contracts provide the players with financial security, guaranteeing millions of dollars. However, if the player develops as strongly as both the player and team expect, he ultimately will be drastically underpaid relative to his market value. The player trades off possible future earnings for present guarantees. The club gains cost certainty, and sets itself up for a potential salary bargain if the player develops well, and simultaneously shoulders the risk of a financial loss if the player does not meet expectations.

### III. DISPUTE SYSTEMS DESIGN OVERVIEW

Before considering how baseball's salary arbitration system comports with DSD research, it is critical to introduce DSD as a body of research. To start, some definitions are needed. A dispute occurs when "one person (or organization) makes a claim or demand on another who rejects it."<sup>146</sup> A dispute system is the process or processes "adopted to prevent, manage or resolve a stream of disputes connected to an organization or institution."<sup>147</sup>

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<sup>139</sup> *Street Wins AL Rookie of Year; Howard Wins NL*, ESPN.COM (Nov. 7, 2005), <http://sports.espn.go.com/mlb/news/story?id=2216645>.

<sup>140</sup> *Howard Beats Out Pujols to Win NL MVP Award*, ESPN.COM (Nov. 22, 2006), <http://sports.espn.go.com/mlb/news/story?id=2669508>.

<sup>141</sup> *See Howard's \$10M Win in Arbitration Sets New High-Water Mark*, ESPN.COM (Feb. 22, 2008), <http://sports.espn.go.com/mlb/news/story?id=3256452>.

<sup>142</sup> *See* Edmonds, *supra* note 46, at 18–19.

<sup>143</sup> Jayson Stark, *Arbitration Payout Puts Howard in Uncharted Salary Territory*, ESPN.COM (Feb. 21, 2008), [http://sports.espn.go.com/mlb/spring2008/columns/story?columnist=stark\\_jayson&id=3257829](http://sports.espn.go.com/mlb/spring2008/columns/story?columnist=stark_jayson&id=3257829).

<sup>144</sup> Edmonds, *supra* note 46, at 19.

<sup>145</sup> *Id.* at 23–24.

<sup>146</sup> WILLIAM J. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 4 (1993).

<sup>147</sup> Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 126 (2009).

In other words, a dispute system is a structured method to resolve specific types of disputes; DSD, then, is the research around disputes and dispute systems. The overall goal of DSD is to resolve disputes.<sup>148</sup> Turning “opposed positions . . . into a single outcome” marks the resolution of the dispute.<sup>149</sup> The system of MLB salary arbitration encompasses both the various stages of negotiations between player and team and the arbitration hearings themselves.

This DSD overview will begin with foundational concepts regarding disputes and dispute resolution. The discussion will then describe three theoretical models for designing and evaluating dispute systems. The interrelations between these models serve to structure an analysis of MLB salary arbitration.

#### A. *Dispute Elements: Interests, Rights, Power*

Professors William Ury, Jeanne Brett, and Stephen Goldberg (“Ury”) posit that “[i]nterests, rights, and power . . . are three basic elements of any dispute.”<sup>150</sup> Parties may choose to focus on any or all of these elements in resolving a dispute.<sup>151</sup> Parties can “(1) reconcile their underlying interests, (2) determine who is right, and/or (3) determine who is more powerful.”<sup>152</sup>

Within the three-element framework, “[i]nterests are needs, desires, concerns, fears—the things one cares about or wants.”<sup>153</sup> In a dispute, the parties take positions, defined as “the tangible items they *say* they want.”<sup>154</sup> In baseball, a player and team each take a position in demanding or offering a given salary. While money may represent the dominant interest for both sides, there are often more interests at play. The player may see the money as a means of getting respect from the team,<sup>155</sup> caring for his family, providing the freedom to pursue other interests, or simply as part of obtaining fair treatment. These interests underlie the player’s salary demand. The team, on

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<sup>148</sup> Lisa Blomgren Bingham et al., *Dispute Systems Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 4 (2009).

<sup>149</sup> URY ET AL., *supra* note 146, at 4.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 4–5.

<sup>153</sup> *Id.* at 5.

<sup>154</sup> *Id.*

<sup>155</sup> See ABRAMS, *supra* note 3, at 109 (describing the role of “respect” in Mo Vaughn’s contract negotiations with the Boston Red Sox during the 1998 season and following offseason).

the other hand, might worry about how other teams perceive it, or about setting a precedent for future salary negotiations with this player or other players.<sup>156</sup> The team also wants to attract fans to the ballpark and put a successful product on the field. Although the importance of money should not be understated, positions only scratch the surface of the parties' interests.

Common means of interest-focused dispute resolution include negotiation, where the parties exchange ideas and proposals to reach an agreement, and mediation, where a third party facilitates dialogue between the parties.<sup>157</sup> These methods rely on the parties sharing information with each other to help them understand the other side's underlying interests. Interest-based negotiation is also referred to as "*problem-solving negotiation*, so called because it involves treating a dispute as a mutual problem to be solved by the parties."<sup>158</sup>

In contrast to interest-based dispute resolution, a rights-based dispute resolution system relies "on some independent standard with perceived legitimacy or fairness to determine who is right."<sup>159</sup> Rights can be formal, like those in a contract. They also can be based on "socially accepted standards" that contemplate fairness.<sup>160</sup> For example, the Phillies' renewal of Ryan Howard in 2007 implicated notions of fairness. After Howard won the NL MVP award in 2006, the Phillies exercised their contractual right to renew his contract for \$900,000.<sup>161</sup> While Howard may have felt that his performance warranted a higher figure, the team may have felt that a salary at twice the league minimum, which they could have paid him under the rights of renewal, was sufficiently generous. The right to renew in this example is a formal right, and less concrete standards of fairness shaped the exercise of the right. The typical means of resolving a rights-based dispute is some form of adjudication, including arbitration.<sup>162</sup> Such adjudicative proce-

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<sup>156</sup> See *id.* at 114 ("Salary negotiations thus have a spillover effect on a ball club" because teams must negotiate with a full roster of players.). See also *id.* at 101 (discussing how the team wants to make all of its players happy).

<sup>157</sup> URY ET AL., *supra* note 146, at 6.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 7.

<sup>160</sup> *Id.*

<sup>161</sup> Ken Mandel, *Phillies Renew Howard's Contract*, MLB.COM (Mar. 3, 2007), [http://mlb.mlb.com/news/article.jsp?ymd=20070302&content\\_id=1822474&vkey=spt2007news&fext=.jsp](http://mlb.mlb.com/news/article.jsp?ymd=20070302&content_id=1822474&vkey=spt2007news&fext=.jsp)

<sup>162</sup> URY ET AL., *supra* note 146, at 7.

dures often involve a third party who renders a binding decision on the parties following presentations and argument.

Power, the third dispute resolution element, is “the ability to coerce someone to do something he would not otherwise do.”<sup>163</sup> Often, a party relying on power will “impose[ ] costs on the other side or threaten[ ] to do so.”<sup>164</sup> A hypothetical alteration of Ryan Howard’s negotiation with the Philadelphia Phillies prior to the 2007 season shows how either side’s reliance on power could have dramatically changed the tone of the negotiation. The Phillies could have threatened to renew Howard’s salary at an amount lower than \$900,000, while Howard could have threatened to hold out if the team did not meet his salary demands. In this hypothetical clash of power-based strategies, the prevailing party would likely be the one “who is less dependent on the other.”<sup>165</sup> Such resolutions, however, are not without costs, as explained below.

Interests, rights, and power necessarily interact. Ury illustrates these elements as three concentric circles, with interests inside of rights inside of power, explaining that “[t]he reconciliation of interests takes place within the context of the parties’ rights and power.”<sup>166</sup> Power and rights frame the range in which parties can negotiate over interests. In Howard’s case, for example, the team’s unilateral ability to set his salary drastically limited his ability to negotiate for higher pay based upon interests. Ury’s illustration proves useful as a structure for ordering processes, whereby rights and power serve only as backups when interest-based negotiations reach an impasse.<sup>167</sup>

Baseball’s processes emphasize different elements in this structure based on a player’s service time. For those players not yet eligible for arbitration, teams hold a strong power option because they unilaterally can renew the player’s contract.<sup>168</sup> Therefore, interest-based negotiations are more limited. A player’s only recourse, other than holding out, is to file a grievance

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 8.

<sup>166</sup> *Id.* at 9. See also Mnookin, *supra* note 70, at 968 (discussing how rules set negotiation boundaries in the divorce context, such that “legal rules . . . give each [party] certain claims based on what each would get” if they failed to reach agreement through negotiation).

<sup>167</sup> Bingham et. al., *supra* note 148, at 3.

<sup>168</sup> Ken Rosenthal & Jon Paul Morosi, *Marlins’ Salary Plan May Anger Union*, FOXSPORTS.COM (Feb. 23, 2012, 10:45 AM), <http://msn.foxsports.com/mlb/story/miami-marlins-renew-young-players-contracts-at-league-minimum-possible-dispute-022212>.

alleging that the team did not bargain in good faith.<sup>169</sup> However, there are costs to teams that simply rely on their power to renew a player's contract. For example, players could be angry, and relationships may suffer.<sup>170</sup> Arbitration offers players a rights-based option and checks a team's power, creating a more robust interest-based negotiation.<sup>171</sup>

The identity and character of the designer of any given system can impact the system's fairness and legitimacy. There are three basic options: one party can unilaterally institute a system, two parties can jointly negotiate a dispute resolution system, or a third party can impose such a system.<sup>172</sup> The latter two options generally produce fairer systems than unilateral design.<sup>173</sup> In MLB, the league and the Players Association collectively bargain the contours of the salary arbitration process as part of the Basic Agreement. This structure allows the two sides to refine the system when they negotiate the underlying CBA.<sup>174</sup>

### B. Evaluating Approaches to Dispute Resolution

There are many different models for evaluating dispute resolution systems. Three in particular help to frame this analysis: cost-benefit, procedural justice, and structural assessment. They are not mutually exclusive, but complement each other by focusing on different aspects of the analysis. Ury's cost-benefit analysis includes four criteria: transaction costs, satisfaction with outcomes, relationship effects, and resolution durability.<sup>175</sup> Procedural justice literature examines parties' perceptions of process fairness.<sup>176</sup> Finally, Professors Smith and Martinez conduct a structural assessment that analyzes a system's goals, processes, stakeholders, necessary resources, and success and

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*; see also Jeff Euston, *Contract Renewal Round-Up: Players 0-3 Years*, THE BIZ OF BASEBALL (Mar. 19, 2007), [http://bizofbaseball.com/index.php?option=com\\_content&task=view&id=897&Itemid=41](http://bizofbaseball.com/index.php?option=com_content&task=view&id=897&Itemid=41) (using the 2007 Howard negotiation to describe the frustration that can result from unilateral renewal).

<sup>171</sup> See Mnookin, *supra* note 70, at 997 (stating that background factors, including "the preferences of the parties, the entitlements created by law, transaction costs, attitudes towards risk, and strategic behavior will substantially affect the negotiated outcomes.").

<sup>172</sup> Bingham et al., *supra* 148, at 6.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 9.

<sup>175</sup> URY ET AL., *supra* note 146, at 11.

<sup>176</sup> See Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753 (2004).



accountability.<sup>177</sup> These complementary models guide an evaluation of MLB salary arbitration.

### 1. Ury Cost-Benefit Analysis

Ury conducts a cost-benefit analysis based on a system's transaction costs, the parties' satisfaction with the outcomes, the effects on the relationship between the parties, and the recurrence of disputes.<sup>178</sup> Transaction costs are the "costs of disputing."<sup>179</sup> These costs range from economic costs to opportunity costs to the emotional energy expended.<sup>180</sup> The different categories overlap. For example, in a salary dispute, a player could hold out and miss time. The player loses money while he has no contract and does not play, and both the team and player suffer without the player training and performing.<sup>181</sup> Even if a player misses no games, his performance can suffer.<sup>182</sup> As explained in more detail below, MLB salary arbitration resolves contractual disputes before spring training, and there are no holdouts, eliminating much of this type of opportunity cost.

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<sup>177</sup> See Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 Harv. Negot. L. Rev. 123, 128 (2009).

<sup>178</sup> URY ET AL., *supra* note 146, at 11.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> For comparison, in the National Football League ("NFL"), where there is no salary arbitration mechanism, there are holdouts every year. See Tim Dahlberg, *NFL Holdouts a Rite of Summer for Many Teams*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d80994e19&template=without-video&confirm=true> (last visited Oct. 17, 2012). In 2010, Vincent Jackson, then a wide receiver for the San Diego Chargers, held out the first seven games of the season in a salary dispute, and played in only six games that year. *Chargers Wide Receiver Will End a Long Holdout*, NY-TIMES.COM (Oct. 21, 2010), <http://www.nytimes.com/2010/10/22/sports/football/22nfl.html>. The Chargers suspended Jackson an additional three games upon his return.

<sup>182</sup> In an example drawn from the NFL, Philadelphia Eagles wide receiver DeSean Jackson held out the first eleven days of training camp prior to the 2011 season. *DeSean Jackson Holdout Was a Win-win*, PHILLY.COM (Aug. 9, 2011), [http://articles.philly.com/2011-08-09/sports/29867536\\_1\\_eagles-training-camp-desean-jackson-control-contracts](http://articles.philly.com/2011-08-09/sports/29867536_1_eagles-training-camp-desean-jackson-control-contracts). He subsequently had the lowest receiving yard and touchdown totals since his rookie year. *DeSean Jackson Stats*, ESPN.COM, [http://espn.go.com/nfl/player/stats/\\_/id/11283/desean-jackson](http://espn.go.com/nfl/player/stats/_/id/11283/desean-jackson) (last visited Mar. 24, 2012). The Eagles stumbled to an 8-8 record. *Philadelphia Eagles 2011 Schedule*, ESPN.COM, [http://espn.go.com/nfl/team/schedule/\\_/name/phi/year/2011](http://espn.go.com/nfl/team/schedule/_/name/phi/year/2011) (last visited Oct. 17, 2012).

Ury's second factor, satisfaction with outcomes, assesses the extent to which an outcome meets the parties' interests.<sup>183</sup> It asks whether the parties perceive both the outcome and the process that led to the outcome as fair.<sup>184</sup> Ury's third factor, relationship effects, looks at the impact of the dispute and its resolution on the parties' "ability to work together" moving forward.<sup>185</sup> The last factor, recurrence, assesses "whether a particular approach produces durable resolutions."<sup>186</sup> This factor includes whether the parties adhere to the resolution the process produces.<sup>187</sup>

## 2. Procedural Justice

Procedural justice literature conducts the same inquiry as Ury's second factor, satisfaction with outcomes. Procedural justice assesses parties' perceptions of process fairness. It posits "that participant satisfaction with outcomes is a function of opportunities to control and participate in the process, present views, and receive fair treatment from the [decision-maker]."<sup>188</sup> Fairness of the process, apart from the actual result, independently impacts parties' satisfaction with the outcome.<sup>189</sup> Professor Nancy Welsh suggested there were four criteria that influenced perceptions of procedural justice;<sup>190</sup> other authors later labeled these criteria as voice, neutrality, trustworthiness, and dignity.<sup>191</sup> Voice is the opportunity to tell one's story.<sup>192</sup> People tend to perceive a process as more fair when they can present their story to the decision-maker. Neutrality concerns the decision-maker, setting an ideal of one who is impartial, listens to the parties, is transparent about the process, and applies rules consistently across disputes.<sup>193</sup> Trustworthiness captures

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<sup>183</sup> URY ET AL., *supra* note 146, at 11.

<sup>184</sup> *Id.* at 12. Note that this inquiry is the same as that in the procedural justice literature. See *infra* Part III.B.2.

<sup>185</sup> URY ET AL., *supra* note 146, at 12.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 403 (2001).

<sup>189</sup> Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 5 (2011).

<sup>190</sup> See Welsh, *supra* note 176, at 763–64.

<sup>191</sup> Hollander-Blumoff & Tyler, *supra* note 189, at 5–6.

<sup>192</sup> Welsh, *supra* note 176, at 763.

<sup>193</sup> Hollander-Blumoff & Tyler, *supra* note 189, at 5.

the parties' perception of whether the decision-maker tried to achieve the right outcome in accordance with the process.<sup>194</sup> Dignity assesses the extent to which the parties perceive the process accorded them and their legal rights proper respect.<sup>195</sup>

These four factors influence parties' perceptions of process fairness independent of the distributional outcome. Essentially, people feel less bad about adverse outcomes if they perceive the process as fair and just.<sup>196</sup> More importantly, people are more likely to comply with the results of a fair process.<sup>197</sup>

### 3. Structural Assessment

Smith and Martinez conduct a structural assessment to evaluate potential dispute resolution systems for an organization.<sup>198</sup> This framework focuses on a system's goals, structure, stakeholders, resources, success, and accountability.<sup>199</sup> Goals include both the types of conflicts the system is intended to address and what the system seeks to accomplish.<sup>200</sup> Process includes the various options available within the system, as well as the extent to which the system contains disputes rather than having them spill into, for example, the legal system.<sup>201</sup> Stakeholders are the parties the system affects.<sup>202</sup> This metric considers stakeholder groups' relative powers, and the input those groups had in designing the system.<sup>203</sup> Resources are defined as the system's funding, and whether that funding provides sufficient support in light of the system's goals.<sup>204</sup> Finally, a system's success and accountability are determined by inquiring whether the system's operation, accessibility, and results are transparent.<sup>205</sup>

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 6.

<sup>196</sup> *Id.* at 5.

<sup>197</sup> *Id.*

<sup>198</sup> See Smith & Martinez, *supra* note 177, at 129.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* System goals are desired outcomes, ordered based on priority for purposes of later evaluation. *Id.* at 129–30.

<sup>201</sup> *Id.* at 130–31.

<sup>202</sup> *Id.* at 131.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 131–32.

<sup>205</sup> *Id.* at 132.

These three frameworks work in tandem to facilitate an evaluation of MLB's salary arbitration system. First, Smith and Martinez's structural assessment model helps to define the goals of the system. Second, the system's costs are considered under Ury's model, its fairness is assessed under the procedural justice literature, and structural assessment focuses on how the system captures the parties' interests as well as the actual results. This hybrid evaluation is explained below.

#### IV. EVALUATING MLB SALARY ARBITRATION

This evaluation starts with an application of Smith and Martinez's structural assessment model to describe the system's goals. The goals set the baseline against which the system can be evaluated, considering both cost-benefit principles and procedural justice. The system's success is assessed relative to those goals. The primary stakeholders considered in this assessment are the players and teams, and to a lesser extent, the business of baseball and the fans of the game. After laying out the system's goals, five specific characteristics of MLB Salary Arbitration are discussed. The first two draw upon cost-benefit analysis, the third utilizes the procedural justice paradigm, and the last two are informed by structural assessment. Considering the models discussed above, and the goals elaborated below, this system is a successful dispute resolution system. It encourages teams and players to settle salary issues on their own and provides an arbitration hearing as a fallback to ensure resolution of any dispute no later than spring training. The critiques levied against this system, discussed in section V, raise valid concerns. However, the characteristics alleged to be problems actually enhance the settlement imperative at the system's core. Thus, viewed as a whole, the system is an alternative dispute resolution success.

##### *A. Goals*

MLB salary arbitration's primary goal is to set a player's salary for the coming season. The broader goal is for the player and team to mutually agree upon the player's salary for the coming season and prevent prolonged disputes. The system also aims to treat the parties fairly to further player and team interests. Under the Smith and Martinez model, the disputes within the system's reach are salary disputes. If the matter reaches an arbitration panel, the player's salary for the coming season is the only question

considered.<sup>206</sup> Hearings are “designed to award players of comparable ability and experience a similar salary based on objective criteria by a neutral, disinterested decision maker.”<sup>207</sup>

### B. *Strengths of MLB Salary Arbitration*

Five examples serve to demonstrate the strength of MLB salary arbitration. First, the system lowers the costs of resolving salary disputes and avoids holdouts, comporting with cost-benefit analysis.<sup>208</sup> Second, in accordance with cost-benefit analysis, the system lowers costs by encouraging the parties to negotiate reasonably, and it incentivizes settlement prior to a hearing.<sup>209</sup> Third, it largely fits the procedural justice model because it is perceived as fair. Fourth, in line with structural assessment, it establishes a middle ground between the reserve system and free agency that advances the interests of players, owners, fans, and the game as a whole. Fifth, the outcomes demonstrate the system’s success at producing settlement prior to a hearing. In total, the combination of these factors ameliorates the potential negative effects of contentious salary negotiations.

#### 1. Cost-Benefit: Lowers the Costs of Dispute Resolution

MLB salary arbitration ensures the resolution of salary issues for eligible players prior to the start of spring training, minimizing costs under the Ury framework. Arbitration sets a preseason deadline for resolving disputes, so as to avoid significant disruptions to team and player.<sup>210</sup> In this regard, the system functions perfectly: “[u]nlike the experience in other professional sports, there are no ‘holdouts’ in baseball among players eligible to use the salary arbitration process.”<sup>211</sup> Furthermore, hearings serve as a rights-based

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<sup>206</sup> John E. Sands, *Baseball Arbitration and the ‘Engineering’ of Effective Conflict Management*, 13 DISP. RESOL. MAG. 10, 11 (2007).

<sup>207</sup> Donegan, *supra* note 10, at 204.

<sup>208</sup> Hopkins, *supra* note 9, at 331.

<sup>209</sup> ABRAMS, *supra* note 3, at 148–49.

<sup>210</sup> See Sands, *supra* note 206, at 10. (“It meets the twin objectives of encouraging good faith negotiations between clubs and players yet assuring that all covered players’ contracts will be completed and signed before the start of spring training.”); see also Hopkins, *supra* note 9, at 335 (“These disputes can breed team dissension, fan frustration and alienation, which may be reflected at the turnstiles and in the Nielson ratings.”).

<sup>211</sup> Roger I. Abrams, *Inside Baseball’s Salary Arbitration Process*, 6 U. CHI. L. SCH. ROUNDTABLE 55, 72 (1999).

backup when interest-based negotiations do not produce an agreement. This ordering fits Ury's preferred structure for lowering the costs derived from a dispute resolution system.<sup>212</sup> A hearing could deleteriously impact the player-team relationship, but that outcome is less costly than having the dispute linger into the season.<sup>213</sup> These relationship concerns will be discussed in more detail below, but it is important to note that there are no holdouts in MLB, unlike in the NFL, where they are prevalent.<sup>214</sup> Under the Ury framework, the system reduces transaction costs because players do not miss training time with the team. A hearing could have a negative impact on the relationship, but the system encourages the parties to settle prior to a hearing, and there are in fact few hearings each year. Similarly, settlement allows both parties to "win," while hearings have a winner and a loser.<sup>215</sup> Finally, the results are durable in that players and teams abide by the results of the process.

## 2. Cost-Benefit: Promotes Reasonable Bargaining and Settlement

The system encourages the parties to negotiate reasonably, reducing the costs of dispute resolution.<sup>216</sup> If the matter goes to arbitration, the panel must choose between the figures that the player and team submit.<sup>217</sup> Whichever party submits a figure closer to the player's "real market value" will prevail.<sup>218</sup> Contrasting this system to one where the arbitrator can select a compromise between the submitted figures illustrates the strengths of the MLB system. Under a compromising system, parties are more likely to submit aspirational numbers than reasonable figures.<sup>219</sup> In MLB's system, however, "the best final position is the more reasonable one."<sup>220</sup> Once the parties exchange numbers, they have a period of time prior to the hearing in which

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<sup>212</sup> URY ET AL., *supra* note 146, at 15.

<sup>213</sup> See Hopkins, *supra* note 9, at 335 n.254 (discussing examples of holdouts' negative impacts on the 1991 Cincinnati Reds). Additionally, as will be discussed in more detail below, the system's design encourages settlement, and the low number of cases each year suggests that it does so effectively.

<sup>214</sup> See *supra* notes 181–82.

<sup>215</sup> ABRAMS, *supra* note 3, at 149.

<sup>216</sup> *Id.* at 148; Conti, *supra* note 34, at 231.

<sup>217</sup> ABRAMS, *supra* note 3, at 148.

<sup>218</sup> *Id.*; see also Donegan, *supra* note 10, at 191–92 (describing how each side must submit a reasonable figure to the arbitrator or they will lose by default).

<sup>219</sup> ABRAMS, *supra* note 3, at 149; Conti, *supra* note 34, at 231.

<sup>220</sup> ABRAMS, *supra* note 3, at 149.

they can settle.<sup>221</sup> Therefore, the system forces the parties to commit to a position that must be reasonable to have any chance of winning, and then gives them time to bargain between those reasonable positions.

The system allots time for bargaining, and its design encourages settlement prior to a hearing.<sup>222</sup> First, as noted above, the final-offer arbitration leads to a convergence of offers, increasing the “opportunity for settlement.”<sup>223</sup> Second, the risk of damage to the player-team relationship (Ury’s third prong) inherent to a hearing will incentivize settlement.<sup>224</sup> Teams’ presentations to the panel highlight the players’ flaws and performance deficiencies to demonstrate why the player’s value is closer to the team’s offer. Third, settling allows the parties to forge creative agreements.<sup>225</sup> While settled agreements can use incentive and bonus clauses to bridge differences in estimates of the player’s value, contracts that result from binding arbitration cannot include these options.<sup>226</sup> Parties also can agree on deals that cover multiple seasons.<sup>227</sup> Hearings produce a defined salary for only one year.<sup>228</sup> Fourth, arbitrators issue no opinions,<sup>229</sup> so neither side knows for certain what issues proved dispositive in the case.<sup>230</sup> Settling reduces these unknown variables, and allows the player and team to shape the agreement to their needs.<sup>231</sup>

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<sup>221</sup> See 2012 Basic Agreement, art. VI(E)(3).

<sup>222</sup> Fizel, *supra* note 132, at 43–44; ABRAMS, *supra* note 3, at 61–63.

<sup>223</sup> ABRAMS, *supra* note 3, at 149; see also Donegan, *supra* note 10, at 192; Fizel, *supra* note 132, at 44 (“Unreasonable salary proposals have less chance of acceptance in this no-compromise environment. Cognizant of this risk, each party will make concessions in order to submit what it believes to be a reasonable salary offer.”).

<sup>224</sup> See URY ET AL., *supra* note 146, at 12.

<sup>225</sup> ABRAMS, *supra* note 3, at 149.

<sup>226</sup> Cf. Hopkins, *supra* note 9, at 311. Bonuses are payments contingent upon certain events, such as the number of plate appearances for a batter or the number of starts for a starting pitcher. The parties may also include bonus clauses for traditional baseball awards, such as making the all-star team or winning the Cy Young or Most Valuable Player awards. *Id.*

<sup>227</sup> ABRAMS, *supra* note 3, at 149.

<sup>228</sup> See 2012 Basic Agreement, art. VI(E)(4, 13).

<sup>229</sup> *Id.* art. VI(E)(13) (“There shall be no opinion.”).

<sup>230</sup> Fizel, *supra* note 132, at 42.

<sup>231</sup> See Cecilia Morgan, *Employment Dispute Resolution Processes 2004*, 11 TEX. WESLEYAN L. REV. 31, 36 (2005) (“The solutions are more flexible because the parties choose how to implement their agreements.”).



### 3. Procedural Justice: Enhances Perceived Fairness

MLB salary arbitration comports with many of the procedural justice tenants. Such a design should improve parties' perceptions of the fairness of the process and results. As a threshold matter, the fact that the MLBPA and the league collectively bargained for the current salary arbitration system enhances the parties' perceptions of the system's fairness, as disputants generally experience mutually designed systems as fairer than systems that one party unilaterally imposes upon another.<sup>232</sup> The various salary negotiating phases meet the four procedural justice criteria of voice, neutrality, trustworthiness, and dignity.<sup>233</sup> The hearings might appear to fall short on neutrality and trustworthiness, but these features reflect an intentional design that serves the overall goal of facilitating settlement prior to a hearing.<sup>234</sup>

#### *a. Voice*

The system satisfies the voice criterion at each stage of the process. Interest-based negotiations allow each side to control its story's presentation and to participate in the decision-making process. If negotiations fail to produce a resolution, the parties go before an arbitration panel. Each side presents its story to the panel. While the criteria set forth in the Basic Agreement place some limits on permissible information,<sup>235</sup> players and teams are afforded wide latitude in making presentations.

#### *b. Neutrality*

Negotiations satisfy the neutrality criterion, but panels, while impartial, render decisions without explanation. A neutral system would have a decision-maker that is impartial, transparent about the process, and makes consistent decisions over time.<sup>236</sup> When player and team negotiate, they collectively serve the decision-making role. Each side is partial, but they exert joint control over the process. The MLBPA and LRD collectively select the

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<sup>232</sup> Bingham et. al., *supra* note 148, at 6. The individual disputants (in this case Player and Team) need not have designed the system themselves. An organization ostensibly representing their interests (MLBPA and the owners' representatives) collectively bargained the system. *Id.*

<sup>233</sup> For a description of the criteria, see Hollander-Blumoff & Tyler, *supra* note 189, at 5–6.

<sup>234</sup> See *infra* Parts IV.B.3.b–c.

<sup>235</sup> 2012 Basic Agreement, art. VI(E)(10).

<sup>236</sup> Hollander-Blumoff & Tyler, *supra* note 189, at 5.

arbitrators, and both have veto power in the selection process, so the player and team in any hearing know that someone representing their interests approved the panel. However, the fact that arbitrators issue no opinions, written or otherwise, makes individual decisions more opaque. It is difficult to know whether different arbitrators consistently apply the criteria listed in the Basic Agreement. This fact does not detract from the system for two reasons. First, it increases the incentive for parties to settle prior to a hearing. Settling allows the parties to retain control over the decision. If they do go to a hearing, they can be confident in the decision-maker's impartiality because their collective representative selected the panel. Second, the MLBPA and LRD can look at results across cases to analyze the consistency of outcomes.

*c. Trustworthiness*

Joint player and team participation during negotiations fulfills the trustworthiness criterion,<sup>237</sup> because each side retains a decisional veto and can seek to further its own interests. The lack of disclosed panel opinions raises similar problems for trustworthiness as it does for neutrality. Were the system trustworthy, participants would perceive arbitrators as trying to determine the player's actual value and choosing the submitted position closest to that value. The reasoning behind the result is opaque without opinions, so it is unclear whether the panel actually listens to the presentations. However, the MLBPA and LRD jointly select the arbitrators each season. If either side were concerned that an arbitrator was not trying to reach the right outcome according to the criteria specified in the Basic Agreement, they would be able to veto that arbitrator in subsequent years.<sup>238</sup> Thus, the mutual selection of arbitrators enhances the system's trustworthiness for the player and team participating in a given hearing. Additionally, arbitrators are "experienced neutrals, typically members of the honorary National Academy of Arbitrators, who have resolved labor grievance cases for decades."<sup>239</sup> Arbitrators have both a wealth of experience and substantial outside indicators of reliability.

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<sup>237</sup> "Trust" is the idea that the decision-maker seeks to reach a result that is right and good for the parties. See Hollander-Blumoff & Tyler, *supra* note 189, at 5–6.

<sup>238</sup> See 2012 Basic Agreement, art. VI(E)(5).

<sup>239</sup> ABRAMS, *supra* note 3, at 147.

*d. Dignity*

Finally, the system also respects the dignity of both parties during negotiations and at hearings. One unusual feature of these salary disputes is that the player cannot shop his services to another employer. In this industry, the player is tied to one team until he accumulates enough MLST to reach free agency, and the team wants the player to perform well. Both sides have incentives to treat the other with courtesy and respect. At hearings, arbitrators must treat the parties with dignity or they will not be selected in subsequent years. At a hearing, there is a danger that a player will perceive the team's presentation as disrespectful.<sup>240</sup> This adds to the incentive to settle, because each side would prefer not to have to go through that potentially uncomfortable process.<sup>241</sup>

#### 4. Structural Assessment: Balances Interests of Owners and Players

Salary arbitration is a compromise between the reserve system and free agency,<sup>242</sup> balancing team and player interests. Eligible players obtain salaries closer to their market values, and owners retain players at least until they accumulate six years of MLST.<sup>243</sup> With multiple minor league levels, MLB has a longer apprenticeship for players than the other major sports. Player development is expensive for teams. Arbitration nudges player salaries upward, but it also allows teams to retain players and recoup the costs and expenses of developing players in the minor leagues.<sup>244</sup> Additionally, delaying free agency serves the game's broader interests. Fans cheer for more than a uniform; they cheer for players. Arbitration keeps players with one team for a long time, giving fans a chance to develop deeper ties to players. Greater fan interest helps the business, because fans generate revenue. Similarly, the system enhances the league's competitive balance. If free agency came earlier, big market teams like the New York Yankees and Boston Red Sox would buy all the top young talent, while lower revenue teams like the

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<sup>240</sup> See ABRAMS, *supra* note 3, at 164.

<sup>241</sup> *Id.* at 149.

<sup>242</sup> Conti, *supra* note 34, at 223.

<sup>243</sup> *Id.* at 222–23.

<sup>244</sup> *Id.* Minor league teams do sell tickets and generate their own revenues. In many instances, teams keep players in the minor leagues for reasons other than a player's developmental benefit. See, e.g., Frankie Piliere, *Call Ups Begin As Super Two Season Passes*, SCOUTINGBASEBALL.COM (June 14, 2011), <http://sbb.scout.com/2/1079645.html>.

Pittsburgh Pirates and the Tampa Bay Rays would be perennially weak due to an inability to retain their top talent.<sup>245</sup>

These business benefits address the economic reality that players want to be paid what the market will bear and owners want to pay players less. Arbitration delays free agency for a couple of years, helping to increase the business's total revenues. Furthermore, the interest in wealth maximization, though perhaps predominant, is one of many interests. Players, for example, want to provide for their families, play well, be respected, and have good relationships with their teams and teammates. Owners want the team to be successful and profitable, which requires the players to perform to their highest capabilities. Owners also want to have good relationships with players. For the reasons described above, arbitration furthers these interests.

##### 5. Structural Assessment: High Settlement Rates Demonstrate Success

High settlement rates and low numbers of hearings each year demonstrate that the system effectively encourages the parties to reach negotiated agreements.<sup>246</sup> This effect has become more pronounced over time. From 1974 to 1993, 46% of eligible players filed for arbitration.<sup>247</sup> That means more than half of all eligible players settled before the deadline to file for arbitration. Nearly 80% (1398 out of 1765) of the players who filed for arbitration settled with their team prior to a hearing.<sup>248</sup> In this period, 91% of all eligible players resolved the salary dispute through negotiation. Only 9%, or 360 total cases, went before an arbitrator.<sup>249</sup> Twenty percent (360 out of 1765) of the players who filed for arbitration ended up before an arbitrator.<sup>250</sup> In this time period, there was only one year with fewer than ten hearings, with a peak number of cases in 1986 (35).<sup>251</sup> 1987 had the highest percentage of hearings, with 16% of all eligible players going before

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<sup>245</sup> See generally JONAH KERI, *THE EXTRA 2%* (2011).

<sup>246</sup> Ideally, one would examine the number of players eligible for arbitration each year as a baseline, and then compare the number of cases heard to that figure. However, that data is not readily available for the period from 1994–present. Therefore, this paper looks at the number of hearings relative to the number of players who filed for arbitration over the last eighteen years.

<sup>247</sup> Fizel, *supra* note 132, at 44. 1765 players filed for arbitration out of the 3825 eligible players. *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

an arbitrator.<sup>252</sup> Overall, there was an average of ninety-eight filings and twenty cases heard per year over these eighteen seasons.<sup>253</sup> Teams won 200 out of 360 cases, or just under 56%.<sup>254</sup>

From 1994 to 2004, 857 players filed for arbitration, an average of seventy-eight per year.<sup>255</sup> Only 101 of those cases went to a hearing,<sup>256</sup> for an average of roughly nine per year. Those 101 cases amount to less than 12% of the cases filed, meaning that in more than 88% percent of these salary disputes, the player and team were able to reach agreement without a hearing. That figure shows improvement upon the already impressive 20% rate at which players who filed for arbitration went before an arbitrator over the system's first eighteen years. The 12% rate does not account for the players eligible for arbitration who agreed with their teams prior to the filing deadline. The inclusion of that group would further demonstrate the system's success at encouraging teams and players to reach negotiated settlements.

Over the last eight years, the frequency of hearings has decreased further. Since 2005, there have been between three and eight arbitration hearings each year, with an average of approximately five-and-a-half hearings per season.<sup>257</sup> In 2011, 137 players were eligible for salary arbitration, and 119 filed.<sup>258</sup> Only three players, or 2.5% of those who filed, went to hearings.<sup>259</sup> In 2012 there were 172 arbitration eligible players,<sup>260</sup> and 142 players

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.* Arbitration was suspended from 1976–1977 due to the lack of a collective bargaining agreement. *Id.*

<sup>254</sup> *Id.* at 45.

<sup>255</sup> *Salary Arbitration Summary: 1974–2004 Seasons*, THE BIZ OF BASEBALL, <http://bizofbaseball.com/data/arbitrationresults.pdf>.

<sup>256</sup> *Id.*

<sup>257</sup> Maury Brown, *Arbitration Scorecard*, THE BIZ OF BASEBALL, [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=719&Itemid=116](http://bizofbaseball.com/index.php?option=com_content&view=article&id=719&Itemid=116).

<sup>258</sup> Maury Brown, *Salary Arbitration Filings*, THE BIZ OF BASEBALL, [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=492&Itemid=65](http://bizofbaseball.com/index.php?option=com_content&view=article&id=492&Itemid=65).

<sup>259</sup> Brown, *supra* note 257.

<sup>260</sup> Tim Dierkes, *2012 Arbitration Eligible Spending By Team*, MLBTradeRumors (Feb. 20, 2012, 2:38PM), <http://www.mlbtraderumors.com/2012/02/2012-arbitration-eligible-spending-by-team.html>.

filed.<sup>261</sup> In forty-four cases, the player and team exchanged numbers.<sup>262</sup> Only seven cases, or 5% of those filed, went before a panel.<sup>263</sup>

Setting aside the issue of eligibility, which has an enormous distributional impact, the system works for the players who can access it. The frequency of hearings generally has decreased over time, demonstrating that the system effectively encourages teams and players to resolve these disputes amongst themselves while providing a backup option to ensure the dispute's resolution prior to spring training.

## V. RESPONSE TO CRITIQUES OF MLB ARBITRATION

System critiques address either distributional issues or process issues. Though the process issues are the primary focus here, the distributional issues are briefly framed and addressed.

### A. *Distributional Issues*

The primary distributional critique is that the system creates a no-lose situation for players.<sup>264</sup> The system nearly always generates a substantial raise for the player. However, that effect is precisely the point of arbitration. Prior to becoming eligible, players make close to the league minimum salary. Players are vastly underpaid relative to their market values during their first three years, so it is no surprise that arbitration produces increased salaries.<sup>265</sup> Arbitration brings a player closer to his open market value without forcing the player's team to compete for his services.<sup>266</sup>

A related critique suggests that arbitration leads to salaries beyond that which a player could get on the open market.<sup>267</sup> There are three responses to this critique. First, Marvin Miller intended this effect, and the parties collectively bargained the system. Arbitration, in combination with free agency, does produce greater salaries than if every player were a free agent. Miller

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<sup>261</sup> Maury Brown, *Detailed Salary Info For 142 MLB Salary Arbitration Players*, THE BIZ OF BASEBALL, [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=5604:detailed-salary-info-for-142-mlb-salary-arbitration-players-available-for-download&catid=72:salary-arbitration&Itemid=183](http://bizofbaseball.com/index.php?option=com_content&view=article&id=5604:detailed-salary-info-for-142-mlb-salary-arbitration-players-available-for-download&catid=72:salary-arbitration&Itemid=183).

<sup>262</sup> Maury Brown, *Arbitration Figures*, THE BIZ OF BASEBALL, [http://bizofbaseball.com/index.php?option=com\\_content&task=view&id=599&Itemid=72](http://bizofbaseball.com/index.php?option=com_content&task=view&id=599&Itemid=72).

<sup>263</sup> See Brown, *supra* note 257.

<sup>264</sup> Conti, *supra* note 34, at 235.

<sup>265</sup> Fizel, *supra* note 132, at 45.

<sup>266</sup> See Conti, *supra* note 34, at 235–37.

<sup>267</sup> Donegan, *supra* note 10, at 193.

wisely bargained for arbitration knowing that the limited free agent market would drive up free agent salaries and benefit players as a whole. Arbitration allows players to achieve higher salaries without depressing the market. Second, arbitration benefits the business as a whole because, as described above, it facilitates fan interest and competitive balance, thereby offsetting the salary costs to owners with increased revenue. Third, teams are not bound to pay an arbitration eligible player. A team can decline to offer the player a contract, making him a free agent,<sup>268</sup> or if it loses arbitration it can attempt to trade the player.<sup>269</sup> These options give a team the freedom not to pay a player more than the team's view of the player's worth.

## B. Process Issues

### 1. Single-Choice Arbitration

Baseball arbitration's defining feature is the single-choice model. Critics of this model argue that it constrains the arbitrator.<sup>270</sup> If both sides submit unreasonable figures, the arbitrator must pick one of them, so one side reaps a windfall while the other absorbs a substantial loss.<sup>271</sup> This hypothetical is no reason to alter this facet of the system. One cannot force parties to behave reasonably. One can only provide incentives to do so. Additionally, if both parties submit ridiculous numbers it heightens the settlement incentive, because each side faces a greater potential loss.

### 2. Relationship Effects

Another feature distinguishing baseball from non-professional sports businesses is the fact that players are bound to a team. Player and team generally remain together after the resolution of the salary issue, sometimes for many years.<sup>272</sup> The player, in fact, has no choice in the matter prior to attaining free agency. Arbitration, some claim, risks harm to the player-team relationship, as teams are often forced to present information denigrat-

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<sup>268</sup> Conti, *supra* note 34, at 237.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 231.

<sup>271</sup> *See id.*

<sup>272</sup> For example, after Ryan Howard beat the Phillies in arbitration in 2008, he subsequently signed two contracts with the team; the latter one, signed in April of 2010, runs through the 2017 season. *See Philadelphia Phillies*, BASEBALL PROSPECTUS: COT'S BASEBALL CONTRACTS, [http://www.baseballprospectus.com/compensation/cots/?page\\_id=116](http://www.baseballprospectus.com/compensation/cots/?page_id=116) (last visited Oct. 17, 2012).



ing a player's performance, or even information that could humiliate a player.<sup>273</sup> Hearings temporarily place team and player in an adversarial forum, with no process in place to smooth the transition back to their joint goal of winning a championship.

The response to this critique is that a hearing serves as a backstop in case negotiations fail. Player and team ideally will resolve the dispute themselves, and the potential problems with a hearing merely serve to lower the best alternative to a negotiated agreement ("BATNA") for both sides. Furthermore, teams have an interest in maintaining good relationships with players, both for future negotiations and because they want players to play well. These interests serve to reduce antagonism even when disputes go before an arbitration panel.

### 3. Lack of Written Opinions

Arbitrators have only twenty-four hours to render a decision, and there are no written opinions.<sup>274</sup> These facets of the system, some claim, produce opaque decisions. Nevertheless, the outcomes have some precedential weight in future cases.<sup>275</sup> The critique concludes that written opinions would improve the system because both sides could see whether the arbitrators paid attention to the proper evidence and tried to reach the right outcome.

Despite arguments to the contrary,<sup>276</sup> MLB should not institute written opinions in arbitration because it would detract more from the system than it would add. Twenty-four hours is enough time for an arbitration panel with this level of expertise and experience to render thoughtful decisions.<sup>277</sup> More importantly, written opinions would not necessarily give the parties more information than they currently possess. Teams and players see and experience these presentations. They know what the other side argued, and it is logical to conclude that the prevailing party more successfully presented the data favorable to their position.

Additionally, arbitrators issuing written opinions would have reason to obfuscate their rationale to some degree. Either the MLBPA or the LRD can effectively fire an arbitrator by vetoing that arbitrator's selection in subse-

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<sup>273</sup> Bibek Das, *Salary Arbitration and the Effects on Major League Baseball and Baseball Players*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 55, 58 (2003).

<sup>274</sup> 2012 Basic Agreement, art. VI(E)(13).

<sup>275</sup> See *id.* art. VI(F)(12).

<sup>276</sup> Conti, *supra* note 34, at 245.

<sup>277</sup> See Abrams, *supra* note 3, at 147.

quent years.<sup>278</sup> The press almost certainly would get hold of any opinions, resulting in critiques and talk show fodder. For these reasons, arbitrators may not be completely forthright in opinions, thus adding little revelatory information to outcomes. Opinions also take time to write, and therefore would drag out the duration of disputes.

A related argument in favor of written opinions posits that arbitrators simply alternate between finding for players and teams to avoid the appearance of bias. Opinions, on the other hand, would force arbitrators to justify decisions. There are two responses to this critique. First, correlation does not amount to causation. An equally plausible explanation for the roughly equal results for players and teams is that the system's design forces the parties to submit reasonable figures that are fairly close together. Reasonable figures logically would produce roughly equal wins and losses over time. Second, some teams perform markedly better than others in arbitration. For example, the Washington Nationals have six wins against two losses in arbitration over the last eight years, while the Tampa Bay Rays have an unblemished five wins in that span.<sup>279</sup> The Miami Marlins, meanwhile, have one win against five losses in that time.<sup>280</sup> These sample sizes are certainly too small to draw firm conclusions, but it is doubtful that some teams would do consistently better than others if the results were random.

Finally, the lack of written opinions maintains mystery around the system, increasing the parties' incentives to resolve the dispute themselves, which is the system's primary goal. While written opinions might enhance the perceived fairness of hearings, they would detract from the system as a whole.

#### 4. Criteria

One final critique argues for changes in the arbitration criteria. There are two forms to this critique. First, that the Basic Agreement should prioritize the various criteria.<sup>281</sup> Second, that the criteria should better measure a player's value to the team.<sup>282</sup>

The league and MLBPA could collectively bargain changes to the Basic Agreement that would assign weight to certain criteria in arbitration. In particular, they could assign weight to recent performance, such as the most

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<sup>278</sup> See 2012 Basic Agreement, art. VI(E)(5).

<sup>279</sup> Brown, *supra* note 257.

<sup>280</sup> *Id.*

<sup>281</sup> Hopkins, *supra* note 9, at 332.

<sup>282</sup> See Gillard, *supra* note 77, at 139.

recent two years.<sup>283</sup> This issue is largely distributional, and one for the parties to resolve. It would impact arbitrators' determinations of player value, not the system's process.

Critics of the current system also suggest that arbitration could be adjusted to take account of teams' varying profitability.<sup>284</sup> Rather than comparing salaries of players with similar performance and service time, one could direct arbitrators to focus on the impact a player has on his team's profitability.<sup>285</sup> This change would be problematic because it would make the system less fair for both players and teams. Players have no control over the team that drafts them, and essentially would be punished for being drafted by a small market team. It would be unfair for large market, high-revenue teams to pay higher arbitration salaries for the same level of performance. Inconsistent outcomes across cases would undermine the system's trustworthiness under the procedural justice analysis.

## VI. CONCLUSION

MLB salary arbitration serves as a model for alternative dispute resolution systems. The MLBPA and the owners likely will continue to bargain over the distributional issue of which players have access to the system, but the system works for eligible players. It meets Ury's standard by emphasizing interest-based negotiations and providing a rights-based backup if negotiations should fail. It satisfies the procedural justice criteria for a fair dispute resolution system. Under the structural assessment model, it represents the interests of players and teams, and the results demonstrate its success.

That final point bridges theory to reality. There are no holdouts in baseball. Salaries disputes are resolved before spring training, minimizing distractions to both the player and team. The system effectively incentivizes settlement prior to hearing, and the results are corroborative. It treats the parties fairly and respectfully. MLB salary arbitration works for players, teams, and the business of baseball.

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<sup>283</sup> Hopkins, *supra* note 9, at 332.

<sup>284</sup> Gillard, *supra* note 77, at 139.

<sup>285</sup> *Id.*

