

**EMERGING CONTRACT BUYOUT CONFLICTS BETWEEN THE NBA AND EUROPEAN TEAMS
OVER ELITE INTERNATIONAL PLAYERS**

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In 1993, when Croatian Toni Kukoc joined the Chicago Bulls three years after they made him the 29th pick in the National Basketball Association (“NBA”) draft, he became one of just five international players in the NBA.¹ Kukoc would go on to become a key figure in the Bulls’ second run of three championships and average 12.2 points and 4.4 rebounds during his career² before retiring in 2006.³

Entering the 2006-07 season, 83 players from 37 different countries were on opening day rosters in the NBA.⁴ No less than 12 foreign born players (an entire active roster) appeared on the combined rosters of the San Antonio Spurs and the Phoenix Suns in the NBA Western Conference Finals, highlighted by two-time league Most Valuable Player (“MVP”) Steve Nash (Canada), 2007 Sixth Man of the Year Leandro Barbosa (Brazil), and all-star Tony Parker (France).⁵ In the same season, Dallas’ Dirk Nowitzki became the first European to win the league MVP.⁶ Two years before, Nowitzki also became the first player who did not attend an American high school or college to be named All-NBA First Team.⁷

¹ *Lifting the Torch: German leads the global revolution*, NBA, May 26, 2005, http://www.nba.com/firsts/dirk_firsts_050526.html.

² *Id.*

³ *Toni Kukoc*, NBA, http://www.nba.com/playerfile/toni_kukoc/career_stats.html (last visited May 9, 2008).

⁴ Elizabeth Merrill, *Suns-Spurs series highlights NBA’s international scope*, ESPN, May 15, 2007, <http://sports.espn.go.com/espn/print?id=2871543&type=story>

⁵ *Id.*

⁶ *Dirk Nowitzki Wins 2006-07 MVP Award*, NBA.com, May 15, 2007, http://www.nba.com/news/dirkmvp_2007.html.

⁷ *Lifting the Torch: German leads the global revolution*, *supra* note 1.

Many basketball pundits credit the rise of the international presence in the NBA with the success of the Dream Team during the 1992 Barcelona Olympics.⁸ “That forever will be the focal point of where the popularity in the sport just hit a springboard and really took off,” said Terry Lyons, the NBA’s former vice president of international communications. “We ended up with just a lot of very, very good athletes picking up a basketball for the first time and then nature takes its course.”⁹

The international barrier was first broken in 1970 when the Atlanta Hawks drafted Mexico’s Manuel Raga and Italy’s Dino Meneghin in the 10th and 11th rounds respectively.¹⁰ Neither ever signed with the team, as the Hawks did not have the \$35,000 to buy them out of their contracts overseas.¹¹ Meneghin, who was voted into the Naismith Basketball Hall of Fame in 2003, went on to play 28 years in Italy and was named the greatest player in the history of international basketball 15 years later.¹²

Drafting an international player often comes with a host of problems. Players must acclimate themselves to a new culture and a new language while being immediately thrown into competition where a new style of basketball is being taught. Moreover, the coach has his own lingo that is not only different from the language the athlete speaks, but is also different from nearly every other coach and system in the league. But, not every problem manifests after the player has arrived in United States and suited up for his team for the first time. For many international athletes, getting to the NBA is an arduous route that first requires him to extricate himself from what is usually a long-term contract binding his

⁸ Elizabeth Merrill, *Suns-Spurs series highlights NBA’s international scope*, *supra* note 4.

⁹ *Id.*

¹⁰ *Lifting the Torch: German leads the global revolution*, *supra* note 1.

¹¹ *Id.*

¹² *Id.*

basketball services to a professional team in Europe — and those buyouts often run into the millions of dollars.

Section I of this paper will discuss the NBA's current system for dealing with international contract buyouts for incoming athletes and identify problems as a result of the inadequate regulations governing such buyouts. Sections II and III will detail how the National Hockey League ("NHL") and Major League Baseball ("MLB") have addressed similar buyout situations as a result of the influxes of international players in their leagues. Finally, Section IV will compare those systems to the current NBA system and recommend the adoption of a transfer agreement between the NBA, the International Basketball Federation ("FIBA"), and the European leagues similar to the current agreement between the NHL, its international governing body, and the corresponding European signatories.

I. The Current Player Transfer System in the NBA

Contract buyouts for professional athletes seeking to join the NBA have gained attention in recent years because several high profile international prospects have been prevented from joining the NBA as a result of multimillion dollar buyouts in their contracts with European teams.¹³ Spaniard Juan Carlos Navarro made his debut in the NBA this season for the Memphis Grizzlies after finally negotiating a buyout with his European club, Winterthur FC Barcelona.¹⁴ Navarro was originally drafted by the Washington Wizards in

¹³ Chris Ekstrand, *The best is yet to come: NBA teams increasingly stash talent overseas*, SPORTS ILLUSTRATED, May 19, 2006,

http://sportsillustrated.cnn.com/2006/writers/chris_ekstrand/05/19/draft/index.html

¹⁴ Navarro was the 40th overall pick in 2002. *Id.*

2002.¹⁵ Washington later traded Navarro to Memphis in July 2007 because the team had exceeded the salary cap and could not afford to bring him over from his European club.¹⁶ Barcelona agreed to lower Navarro's buyout to \$2 million because of his many years of service with the team, but threatened to raise his buyout to \$14 million in his next contract if his draft rights were not traded so he could join the NBA for the 2007-08 season.¹⁷ A \$14 million buyout would have effectively prevented the 27-year-old Navarro from ever playing in the NBA.¹⁸

Similarly, the San Antonio Spurs traded the draft rights to Argentinean forward Luis Scola to the Houston Rockets prior to the 2007-08 season after holding his rights since the 2002 draft when they made him the 56th pick.¹⁹ The Spurs wanted to bring Scola over from Spain, but could not negotiate a buyout with Tau Ceramica, the European club that held his rights, because Tau demanded nearly \$15 million in exchange for releasing Scola from his contract.²⁰ He made his debut after paying Tau a reported \$3 million.²¹

Large buyouts have become a significant problem facing the best international draftees when they attempt to jump from the top European leagues to the NBA. This is a

¹⁵ Ivan Carter, *Wizards Deal Navarro for Grizzlies' Pick*, WASHINGTON POST (August 4, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/03/AR2007080301961.html>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Ivan Carter, *Wizards Deal Navarro for Grizzlies' Pick*, WASHINGTON POST (August 4, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/03/AR2007080301961.html>.

¹⁹ Johnny Ludden, *Spurs-Mavs notebook: Scola makes progress on buyout from Spanish team*, SAN ANTONIO EXPRESS-NEWS (May 14, 2006), available at <http://www.mysanantonio.com/sports/basketball/nba/spurs/stories/MYSA051406.14C.BKNspurs.notebook.892e582.html>.

²⁰ *Id.*

²¹ Johnathan Feigan, *Rockets in Position to sign Spanish-league Star*, HOUSTON CHRONICLE (July 13, 2007), available at <http://www.chron.com/disp/story.mpl/sports/bk/bkn/4965031.html>.

problem that will no doubt multiply in the next few years as more teams use the second round of the NBA draft to select inexperienced international talent. By choosing young, unproven international athletes, NBA franchises can “park” a prospect overseas to let them develop without having to use a roster spot on a player who will only sit on the bench for a few years until he is ready to contribute.²² “Instead of immediately signing a drafted player who ends up being cut or languishes on the bench without any playing opportunity, NBA teams can wait for the player to develop while playing meaningful minutes in a high-level European league like those in Spain, Italy, Greece and France.”²³ It is a low-risk maneuver because few second round picks actually make an opening day roster.²⁴ The best case scenario is to bring a player over after his current contract expires. However, if a player develops rapidly or a team needs the player, he may wish to join the NBA team that owns his rights and must negotiate a buyout with his current team before he can move to the NBA.

With buyouts reaching into the millions of dollars for the best players, the burden of the buyout is almost solely on the athlete. Under the NBA Collective Bargaining Agreement, a team may contribute only \$500,000 toward the buyout.²⁵ That multimillion

²² Chris Ekstrand, *supra* note 13.

²³ *Id.*

²⁴ Jonathan Watters, *The NBA's New CBA, the DL, the IL, and what it all means for the NCAA*, DRAFT EXPRESS, Nov. 21, 2005, available at <http://www.draftexpress.com/article/The-NBA-s-new-CBA,-the-DL,-the-IL,-and-what-it-all-means-for-the-NCAA-1127/>. According to Watters, selection in the second round has often been considered a “death knell” for an aspiring basketball player’s NBA career. However, he points out that the 18 of 20 2005 2nd round draft picks made NBA rosters the following season.

²⁵ 1999 National Basketball Players Association Collective Bargaining Agreement, art. VII, § 3(e)(1). Any amount in excess of \$500,000 paid or to be paid by or at the direction of any NBA Team to (i) any basketball team other than an NBA Team, or (ii) any other entity, organization, representative or person, for the purpose of inducing an international

dollar burden is working to keep some of the best international talent out of the league, but for now, the NBA has refused to consider it an NBA problem.²⁶ Rather, the NBA has maintained that the solution must come from the sport's international governing body, FIBA.²⁷

There are two major problems that are spurring the growth of contract buyouts that stem from a lack of cohesive regulation by FIBA, the NBA, or the European Leagues. The first problem, which will be addressed in Section A, is that there is no limit on the length of contracts athletes are allowed to sign in the European Leagues. The second problem, addressed in Section B, is FIBA's refusal to create a minimum age limit for professional athletes to sign a contract.

A. No Limit on Contract Length

The first major problem with the increasing size of buyouts stems from the FIBA's refusal to limit the length of contracts member organizations can sign with athletes.²⁸ "The problem is not the buyout; it's the length of the contract," agent Marc Cornstein says. "If you have somebody signed for six more years, how do you figure out what the buyout is? At what point is it negotiation? At what point is it extortion?"²⁹ Nothing in the current FIBA rules and regulations regulates the length of contracts athletes can sign with their

player (as defined in Article X, Section 1(c)) to enter into a Player Contract or in connection with securing the right to enter into a Player Contract with an international player shall be deemed Salary (in the form of a signing bonus) to the player.

²⁶ Sean Deveney, *Imports come with a price*, SPORTING NEWS, Oct. 6, 2003, available at http://findarticles.com/p/articles/mi_m1208/is_40_227/ai_108649712.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

clubs, leaving each league to come up with its own regulations.³⁰ Forced to compete with the NBA for international talent, European clubs have little incentive to limit the length of contracts or lower contract buyouts, and, therefore, risk losing the best players in their leagues without recompense.

B. No Minimum Age Limit

The second major problem with current international contracts is FIBA's inaction regarding minimum age limits. While the NBA has moved to a 19-year-old minimum age limit before its players can be eligible for the NBA draft,³¹ FIBA has done nothing to prevent member organizations from signing players at much younger ages.³² Serbian Darko Milicic, a 2003 NBA draft pick, was forced to pay his European team Hemofarm an eight-figure buyout over the first four years of his NBA career in order to secure his freedom from a 10-year contract he signed in 1999 at age 15.³³ Denver Nuggets center Nene narrowly dodged a similar situation as a teenager in Brazil when he decided at the last second not to sign a seven-year contract with a Spanish club.³⁴ "Obviously there is a problem when a 14-year-old signs a contract for 10 years," said former NBA deputy commissioner Russ Granik, who stepped down in 2006. "But there is nothing we can do. Perhaps FIBA can, or perhaps it is something that should be handled as a European legal

³⁰ See generally FIBA Internal Regulations, available at <http://www.fiba.com/pages/eng/fc/FIBA/ruleRegu/p/openNodeIDs/916/selNodeID/916/fibaRegu.html>.

³¹ Chad Ford, *Age minimum, bigger cap, shorter contracts*, ESPN, June 21, 2005, <http://sports.espn.go.com/nba/news/story?id=2091116>.

³² See generally FIBA Internal Regulations, *supra* note 30.

³³ Sean Deveney, *supra* note 26.

³⁴ *Id.*

issue. But we can't get involved in a worldwide lawsuit."³⁵ Former NBA player Maciej Lampe's agent Keith Kreiter also criticized FIBA's refusal to institute an age limit, saying "[m]ost of these kids are from hard backgrounds. You put a piece of paper in front of them and tell them to sign it, they're going to. And it holds up as a contract? That's ridiculous."³⁶

Longtime NBA sports writer Sean Deveney, however, places much of the burden on the NBA to create change, calling FIBA an "unwieldy bureaucracy not much concerned with policing its teams."³⁷ According to Deveney, the NBA has the money and influence to make FIBA institute an age limit, limit the length of contracts, and create a "sane buyout system for contracts worldwide[] to prevent teams from exploiting teenagers."³⁸

Regardless of who is at fault for the current system, or who is responsible for changing the system, the growth of international players and the parallel growth of their buyouts from European contracts has become a significant problem for the NBA. "This is the next big issue. Players are getting hurt by this, and eventually the league will get hurt by this, too. The writing is on the wall," Cornstein said.³⁹

Both the NHL and MLB have already reached agreements with foreign leagues to eliminate contractual difficulties when importing international players to their respective leagues. The following two sections of this paper will address the agreements each league has instituted.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

II. The International Ice Hockey Federation-NHL Player Transfer System

The NHL has long been at the forefront of the international player movement stage. Approximately 30 percent of the NHL's players come from Europe, with the NHL signing on average 45-60 players each year.⁴⁰ The proliferation of European players in the NHL led them to negotiate a "Player Transfer Agreement" ("PTA") with the International Ice Hockey Federation ("IIHF") in 1995 that allowed European hockey players to transfer to the NHL in exchange for monetary concessions by the NHL.⁴¹ Under the current agreement, which runs from 2007-2011, players under contract may leave their European or NHL team and join a team in the other league.⁴² Six countries — the Czech Republic, Finland, Sweden, Germany, Slovakia, and Switzerland — signed the agreement with the NHL and the IIHF.⁴³

The following section will discuss the details of the current PTA. Section B will address the Russian Hockey Federation's ("RHF") challenges of the NHL's recruitment of several high-profile Russian hockey players, most notably Evgeni Malkin.

A. The 2007-2011 Player Transfer Agreement

The 2007-2011 PTA requires undrafted players be signed by June 15 and drafted players to be signed by June 1 each year.⁴⁴ A player that has been selected in the NHL draft

⁴⁰ *Russia refuses to sign transfer agreement with NHL*, USA TODAY, May 9, 2007, http://www.usatoday.com/sports/hockey/nhl/2007-05-09-russia-transfer-agreement_N.htm.

⁴¹ *Six countries ratify IIHF agreement*, TSN.CA, July 13, 2007, http://www.tsn.ca/news_story.asp?id=213424.

⁴² If a player is drafted in the opposite league, he must join the team that holds his rights. If he is not drafted in the other league, then he may sign with any team. *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

may be signed until July 15 or August 15 in the year they are drafted.⁴⁵ Free agents may be signed by an NHL team at any time.⁴⁶ In return, the NHL pays a \$9 million development fee to IIHF, who distributes the fee to member organizations, for the first 45 players to leave Europe for the NHL.⁴⁷ If more than 45 IIHF players are signed, the NHL pays an additional \$200,000 for each player.⁴⁸ If an NHL draftee is signed after July 15 of the year he was drafted in, the NHL must also pay an additional \$100,000.⁴⁹ The NHL also compensates the IIHF (and, by extension, the European leagues) for players who are signed by NHL clubs but who are not on the team's roster for at least 30 games their first season.⁵⁰

The NHL loses little in signing the agreement, which contains a reciprocal offer for NHL players to transfer to IIHF leagues, because it is “considered the top hockey league in the world.”⁵¹ In exchange, NHL teams are granted an exclusive window in which they can sign their European draft picks away from their IIHF teams.⁵² Unfortunately for many players who elect to join the NHL, only 48 of 161 players that left Europe to play in North America in 2001-2003 made it to the NHL.⁵³ Many of those players “toil in the junior leagues” or return home, “[o]ften as lesser players.”⁵⁴

B. Russia's Challenge of NHL Recruitment of Russian Prospects

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Jenny Wiedeke, *Many Slovaks and Czechs go west—for better and worse*, INTERNATIONAL ICE HOCKEY FEDERATION (2001), available at http://db2.iihf.com/cgi-bin/db2www.exe/news/news.d2w/archive_2001.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

The PTA between IIHF member teams and the NHL has been challenged by the RHF, which refused to sign the previous 2005-07 PTA or the current PTA.⁵⁵ The RHF has been critical of the NHL's efforts to sign Russian hockey players away from its own teams.⁵⁶ "They all like to talk about democracy, the American way, and then they shamelessly steal our best players," said Gennady Velichkin, the general director of Metallurg Magnitogorsk of the RHF.⁵⁷ Metallurg sued the NHL and the Pittsburgh Penguins in 2006 after Evgeni Malkin fled his contract with Metallurg and sought to join the Penguins.⁵⁸ Malkin was drafted by Pittsburgh in the first round of the 2004 NHL draft and remained with Metallurg for the following season, but when Malkin tried to leave to join the Penguins, the RHF demanded a substantial sum to allow him to transfer because they had not signed the transfer agreement.⁵⁹ The NHL refused, saying they didn't owe RHF anything because the Russian federation had not signed a transfer agreement.⁶⁰ Malkin subsequently signed a new one-year contract with Metallurg but left to join the Penguins a few days later after exercising a clause in Russian labor law that allowed employees to terminate their contracts with two weeks written notice.⁶¹ Malkin claimed that the new contract had been signed under duress.⁶²

⁵⁵ Jeff Klein and Karl-Eric Reif, *Malkin's talent is not in dispute, but his contract is*, NEW YORK TIMES (Nov. 12, 2006), available at <http://www.iht.com/articles/2006/11/12/sports/nhl.php>

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Jason Cato and Karen Price, *Arbitration committee rules against Malkin*, PITTSBURGH TRIBUNE-REVIEW (Sept. 16, 2006), available at http://www.pittsburghlive.com/x/pittsburghtrib/s_470833.html.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

A Russian tribunal later ruled against Malkin because professional athletes are subject to different labor laws in Russia. Under Russian Federal Sports Law No. 80-FZ, “athletes may only transfer to another team, either in Russia or abroad, ‘after the expiration of the term of the Sports Activities Contract and fulfillment of all obligations stipulated in such contract.’”⁶³ The U.S. District Court for the Southern District of New York, however, denied Metallurg’s request for an injunction to keep Malkin from playing in the NHL and later dismissed Metallurg’s suit for compensation, holding “the team had not established it had suffered ‘irreparable harm’ due to Malkin's departure.”⁶⁴

The NHL hopes that the Malkin decision, as well as similar holdings involving Washington Capitals star Alexander Ovechkin,⁶⁵ Edmonton’s Alexei Mikhonov, and Calgary’s Andrei Taratukhin, prompts the RHF to join other IIHF countries as signatories of the Player Transfer Agreement.⁶⁶ Said NHL Deputy Commissioner Bill Daly,

We are hopeful that today's decision will persuade the plaintiff Russian clubs to discontinue their strategy of litigation and to join with the Russian Ice Hockey Federation, through their representative, the International Ice Hockey Federation, in good faith negotiations intended to facilitate Russia's participation in the global agreement that governs European players' transfer to the NHL.⁶⁷

Like both the NBA and the NHL, MLB has also come under scrutiny for its methods of bringing international players into the fold. The following section addresses the

⁶³ *Id.*

⁶⁴ Metallurg had to sue in the U.S. District Courts to get jurisdiction because the Penguins operate in the U.S. *U.S. District Court throws out injunction against Malkin*, YAHOO! SPORTS, Feb. 1, 2007,

<http://sports.yahoo.com/nhl/news?slug=penguinsmalkin&prov=st&type=lgns>.

⁶⁵ *Moscow Dynamo v. Ovechkin*, 412 F.Supp. 2d 24 (D.D.C. Jan. 18, 2006).

⁶⁶ *Legal challenge against Malkin fails*, TSN.CA, Nov. 15, 2006,

http://www.tsn.ca/nhl/news_story/?ID=184456&hubname=nhl

⁶⁷ *Id.*

posting agreement between MLB and Japan's Nippon Professional Baseball League ("NPB").⁶⁸

III. Major League Baseball-Nippon Professional Baseball's Posting System

In 2006, the Boston Red Sox won the exclusive right to negotiate with Japanese star pitcher Daisuke Matsuzaka after offering \$51.1 million in a sealed bid via MLB and NPB's "posting system."⁶⁹ That bid only granted the Red Sox the right to negotiate with Matsuzaka; it took another \$52 million to earn Matsuzaka's services for six years.⁷⁰

The first part of this section will address how the current posting system operates. The second part will look at several of the problems with the posting system, including possible antitrust challenges.

A. How the Posting System Operates

In MLB, Japanese prospects are brought to the United States via NPB's posting system. The system, implemented to prevent Japanese teams from losing young star players to MLB without compensation, applies only to athletes currently under contract with a Japanese team (regardless of nationality).⁷¹ The posting system does not apply to free agents or players with 10 or more years of service in the Japanese professional leagues.⁷²

⁶⁸ This paper will not address any agreements between MLB and any other foreign leagues or associations.

⁶⁹ *Matsuzaka, Red Sox reach agreement on six-year deal*, ESPN, Feb. 23, 2007, <http://sports.espn.go.com/mlb/news/story?id=2696321>.

⁷⁰ Incentives could bring the total of Matsuzaka's contract to \$60 million over six years. *Id.*

⁷¹ Posting System, BASEBALL REFERENCE, http://www.baseball-reference.com/bullpen/Posting_System (last visited Oct. 23, 2007).

⁷² *Id.*

Unlike the NHL-IIHF Player Transfer Agreement, the posting system is not reciprocal – it does not allow for the transfer of players from MLB to Japan.⁷³ Before a player can be posted – made available – he and his Japanese team must come to a mutual agreement to post the player.⁷⁴ Once a player is posted — and he must be posted between November 1 and March 1 — his team notifies the league office, which then notifies the MLB Commissioners’ Office.⁷⁵ The Commissioner’s Office holds a four-day silent auction during which teams submit sealed bids for the exclusive rights to negotiate with the player for his services.⁷⁶ The Commissioner’s Office subsequently notifies the Japanese team of the highest bid, which may then choose whether to accept or decline it within four days.⁷⁷ If the bid is accepted, the MLB team and the player then have 30 days to come to terms on a contract.⁷⁸ Only if the player signs a contract with the MLB team does the Japanese team receive the bid amount as a transfer fee.⁷⁹ If the player and the MLB team are unable to agree on a contract, the MLB team retains the fee and the player returns to Japan, ineligible to re-enter the posting system until the following year.⁸⁰

Japan’s posting system was created in 1999 after extensive negotiation between MLB and NPB in response to former MLB pitcher Hideo Nomo’s defection from Japan in 1995.⁸¹ Following the 1994 season, Nomo and his Japanese club, the Kintetsu Buffaloes, engaged in a contract dispute when Nomo requested agent representation and a multi-year

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

contract.⁸² Instead of negotiating with the Buffaloes, Nomo “exploited a loophole agreement between Japanese baseball and the major leagues: if a player retired, he was free to play for whomever he wished.”⁸³ Nomo retired from Japanese baseball only to join MLB and win the 1995 National League Rookie of the Year award for the Los Angeles Dodgers.⁸⁴ MLB sportswriter Tom Singer called the posting agreement a “more equitable arrangement than in pre-posting days when, on the rare occasions Japanese talent did hit our shores, someone was sure to get burned.”⁸⁵

The posting system first gained attention in November 2000 when the Orix Blue Wave posted MLB all-star and 2001 American League Most Valuable Player Ichiro Suzuki.⁸⁶ The Seattle Mariners won the rights to negotiate with Suzuki by submitting a \$13.1 million bid.⁸⁷ Six years later, Matsuzaka’s bid was nearly four times that amount.

B. Problems with the Posting System

With the number of Japanese players in the major leagues increasing from 9 in 2006 to 13 on opening day rosters in 2007, the posting system has faced increased public attention and criticism.⁸⁸ Negotiations between the Red Sox and Matsuzaka went down to the wire with an accord being reached just hours before the expiration of the Red Sox’s 30-

⁸² S.L. Price, *The Ichiro Paradox*, TIME, July 8, 2008, available at <http://www.time.com/time/magazine/article/0,9171,300682-2,00.html>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Tom Singer, *Matsuzaka posting system’s latest gem: relationship between MLB, Japan League long and storied*, MLB.com, Nov. 14, 2006, http://mlb.mlb.com/news/article.jsp?ymd=20061114&content_id=1740635&vkey=hotstove2006&fext=.jsp.

⁸⁶ S.L. Price, *supra* note 81.

⁸⁷ Posting System, *supra* note 71.

⁸⁸ Press Release, MLB, Record 246 players born outside the U.S. (April 3, 2007) (on file with author).

day negotiating window.⁸⁹ Matsuzaka's agent, Scott Boras, reportedly considered challenging the legality of the posting system in an American court if a deal could not be reached with the Red Sox.⁹⁰ Boras called the posting system "flawed," saying, "[t]he greater the player, the greater the penalty, because the more a club values the player, the more they pay for the post."⁹¹ Assuming Boras could find jurisdiction in American courts and enforce any decision in Japan, he could argue that the posting system violates federal antitrust laws as an unfair restraint of trade because it would inhibit an influx of Japanese talent to the major leagues.⁹² While baseball has traditionally enjoyed a federal antitrust exemption, "[i]n 1998, Congress did revoke the exemption to allow MLB players to sue over agreements 'directly relating to or affecting employment of major league baseball players.'"⁹³ That argument is unlikely to succeed, however, because it comes with a whole host of problems, not least of which is whether Matsuzaka is even a major league baseball player.

Antitrust questions are not the only problems with the Japanese posting system. First, because it is a blind bid, teams are bidding against themselves to earn the right to negotiate. Second, the system encourages Japanese clubs to collude with their players: a team may induce a player to accept a bid by a MLB team in exchange for a portion of the transfer fee. Finally, the system incentivizes MLB teams to offer exorbitant bids to outbid their opponents and then lowball the Japanese player as a means of keeping him away from

⁸⁹ *Matsuzaka, Red Sox reach agreement on six-year deal*, *supra* note 69.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Jeffrey Standen, *Is Posting of Japanese Baseball Players Legal?* THE SPORTS LAW PROFESSOR, Dec. 12, 2006, <http://thesportslawprofessor.blogspot.com/2006/12/is-posting-of-japanese-baseball.html>

⁹³ *Id.*

the competition. If the bid is accepted, the MLB team controls the exclusive rights to negotiate with that player for an entire year; if negotiations break down, the player is prohibited from entering the posting system again until the following year and the MLB team gets its bid back.⁹⁴ So, at worst, a team can keep a player from a hated rival for a year. “[B]ecause of the anonymous bidding system, clubs can offer over-large, non-serious bids each auction with apparent impunity.”⁹⁵

IV. The Solution to the Emerging NBA Buyout Conflict

The value of sports teams and their players are rapidly rising. On average, an NBA franchise was worth \$353 million in 2007, a nine percent increase from the previous year.⁹⁶ In 1983, the average player salary was \$275,000; since then, salaries have grown by 806 percent, reaching \$5.2 million in 2006-07.⁹⁷ Clearly, sports teams and their players are becoming more valuable assets each year. With NBA teams selecting foreign players more often in the second round and allowing them to remain overseas for a few years before bringing them over, European teams have an increasing incentive to lock up those same players to long-term contracts during their teens and attach huge buyout provisions; after all, the European teams are in the same business as the NBA – making money. European clubs have no reason, without pressure from FIBA or their own legal systems, to allow NBA teams to enter their primary market and snap up their best players. Further, the

⁹⁴ See *supra* note 80.

⁹⁵ Jeffrey Standen, *Posting, Japanese Style*, THE SPORTS LAW PROFESSOR, Nov. 12, 2006, <http://thesportslawprofessor.blogspot.com/2006/11/posting-japanese-style.html>.

⁹⁶ Kurt Badenhausen, *It's how you play the game*, FORBES (Feb. 12, 2007), available at <http://members.forbes.com/forbes/2007/0212/084.html>.

⁹⁷ Darren Rovell, *NBA refs: Pay Raise Might Help Integrity of Game*, CNBC, July 20, 2007, <http://www.cnbc.com/id/19876494>.

European courts have no reason whatsoever to act to protect NBA interests. Moreover, one can argue that the courts have no reason to adopt a minimum age for players to sign contracts because a teenager handed a multimillion dollar contract is not exactly being harmed. Conversely, one could argue that there is sufficient harm as a byproduct of the length of the contract to prompt the European courts to act.

Since the European courts are unlikely to act on behalf of the NBA, the better solution would be for the NBA to use its influence with FIBA to force the organization to adopt an age limit, a contract-length limit, a buyout ceiling, or some combination thereof. What could result from the current lack of FIBA legislation is a spiraling system of ever-growing buyout provisions similar to what appears to be the beginning of a period of exponential growth in posting fees in MLB.

The NBA should also exert its influence on FIBA to negotiate a player transfer agreement more akin to the NHL's agreement with the IIHF than MLB's Japanese posting system. If the NBA adopted a posting system like MLB's it would invite a host of problems whereby teams with more money than their rivals could outbid opponents for the top talent, seriously damaging the competitive balance among the teams. Moreover, the posting system, as it stands, has no checks to prevent the exponential growth of posting fees. In less than 10 years, posting fees have grown to \$50 million. In another 10 years, with deep pocket teams like the New York Yankees and Boston Red Sox, posting fees could reach \$100 million just for the right to *talk* to a player if MLB does not force some checks into the system.

On the other hand, the NBA would not hurt itself by entering into a player transfer agreement like the NHL's that restricts the number of players who can join the NBA from

European teams. In exchange for a few million dollars each year, players signed by a European team would be free to negotiate a contract with the team that owns their rights during a prescribed negotiation window each year. Likewise, during that time, European franchises would be free to negotiate with NBA players to join their leagues. Offering the European leagues reciprocity would likely cause no harm to the NBA as the NBA is acknowledged as the best basketball league in the world. Not only is the competition the best in the NBA, but the salaries are the highest. Only marginal players, players on a team who routinely record “DNP-CDs,” would be tempted to travel overseas for increased playing time, and even those players would be eager to return to the NBA, perhaps as better players for having received more playing time.⁹⁸ In exchange, the NBA would get the rights to negotiate and claim the top foreign talent each year without having to worry about complicated buyout provisions, long-term contracts, and their young draft picks being locked up in their teens as assets to use in a fundraising effort by European teams at the expense of the NBA team that owns the player’s rights.

⁹⁸ Did not play—coach’s decision.