

Pinch-Hitting for Baseball's Present System—Impartial Arbitration as a Method of Dispute Resolution

Despite recent advances in collective bargaining between players and management, the power of baseball's Commissioner makes dispute resolution unfair to the players. This comment proposes that professional baseball adopt impartial arbitration to resolve disputes.

INTRODUCTION

The settlement of internal disputes in professional baseball often operates unfairly.¹ The Commissioner unilaterally settles disputes between management and the players,² who lack an effective appeal procedure.³ Moreover, management directly controls the application of sanctions against the players,⁴ thus tipping the balance of power in favor of management. In short, practices long since abandoned as archaic in other areas of

¹ For example, recent incidents involving Bill Madlock, third baseman for the Pittsburgh Pirates, and Ferguson Jenkins, pitcher for the Texas Rangers, illustrate the extent of the inequities in the current system of dispute resolution. The Commissioner of Baseball suspended Madlock for allegedly shoving his glove in the face of an umpire. The suspension was to last six games, but Madlock was never told when the suspension was to begin. *N.Y. TIMES*, May 6, 1980, § III, p. 15, col. 2.

Jenkins was suspended for refusing to answer questions following his drug-related arrest in Toronto. The Commissioner ordered the suspension without giving Jenkins an opportunity for a hearing. After Jenkins filed a grievance, an arbitrator ruled that the Commissioner's failure to grant Jenkins a hearing violated the collective bargaining agreement and then ordered that the suspended pitcher be allowed to return to active duty. *N.Y. TIMES*, Sept. 23, 1980, § III, p. 1, col. 3.

² See text accompanying notes 30-39 *infra*.

³ See note 39 and accompanying text *infra*.

⁴ See text accompanying notes 30-39 *infra*.

American labor still prevail in professional baseball.⁵

The Commissioner of Baseball plays an integral and historically powerful part in resolving disputes.⁶ Elected by the team owners, the Commissioner is the final arbiter of complaints between players and management.⁷ As such, his vast powers can infringe on the rights of players.⁸ This power, which lacks definite limitations, creates serious inequities in the current bargaining system.

The power of the Commissioner went unchallenged for over forty years.⁹ In the past fifteen years, however, players have begun to utilize common labor practices effectively to challenge the Commissioner's authority. Through unionization and collective bargaining,¹⁰ players and management have established grievance arbitration,¹¹ salary arbitration¹² and limited free agency.¹³

⁵ See text accompanying notes 84-93 *infra*.

⁶ Traditionally, the Commissioner has acted as the final authority in matters of player discipline, player compensation disputes, performance disputes and interclub controversies. Comment, *Discipline in Professional Sports: The Need for Player Protection*, 60 GEO. L.J. 771, 772 (1972).

⁷ See text accompanying notes 30-39 *infra*.

⁸ *Id.*

⁹ See note 54 *infra*.

¹⁰ The bargaining unit for professional baseball players is the Major League Players Association (MLPA). The MLPA bargains for pensions, minimum salaries, insurance and other working conditions, but individual athletes still negotiate their own salaries. Krasnow & Levy, *Unionization and Professional Sports*, 51 GEO. L.J. 749, 754 (1963).

The MLPA is thus subject to the National Labor Relations Act, which covers those "employee representation committee(s) or plan(s) . . . which exist for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." 29 U.S.C. § 152(5) (Supp. 1980).

¹¹ Grievance arbitration provides a procedure for the resolution of disputes concerning the interpretation of, or compliance with, the provisions of the collective bargaining agreement between employer and employee. Art. X(A)(1), 1976 Basic Agreement (copy on file at U.C. Davis Law Review office).

¹² Salary arbitration provides a procedure for the resolution of disagreements concerning a player's salary. If a club and a player are unable to reach agreement, a player is entitled to submit a claim to an impartial arbitration panel. Art. V(E), 1976 Basic Agreement.

¹³ A free agent is a player whose contract has expired, allowing him to sell his services in an open market. *Mackey v. National Football League*, 543 F.2d 606, 609 n.1 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). Presently, owners and players are engaged in negotiations to further define those circumstances in which free agency is available.

But despite these advances, professional baseball's method of resolving certain disputes remains unchanged.

This comment first examines and criticizes the role of the Commissioner as final arbiter of baseball disputes. As an alternative to the current system, this comment proposes that professional baseball submit all of its disputes to impartial arbitration, as is commonly done in other industries.¹⁴ By allowing both parties to select the arbitrators, impartial arbitration insures fair and unbiased decisions.¹⁵ Moreover, impartial arbitration could replace baseball's current system of dispute resolution without affecting the traditional framework of the game.

I. THE CURRENT SYSTEM OF DISPUTE RESOLUTION

Like other business associations, professional sports leagues are self-governed by a system of articles and by-laws. Professional sports associations are unique, however, insofar as they invest enormous power in a single individual, the Commissioner.¹⁶ The commissioners of all the major professional sports leagues possess similar powers in their governing charters and collective bargaining agreements.¹⁷ Typically, the commissioners

¹⁴ In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the Supreme Court recognized that

[a]rbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Id. at 581.

The Court's decision in *Warrior & Gulf* was one of three landmark decisions issued simultaneously by the Supreme Court and collectively referred to as the "Steelworkers' Trilogy." The other cases were *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), and *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). In these three rulings the Court elevated labor arbitration to an unprecedented status by holding that the arbitrator played an essential role in interpreting collective bargaining agreements. For further discussion of arbitration, see Abrams, *The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration*, this issue at 549.

¹⁵ See note 106 and accompanying text *infra*.

¹⁶ See text accompanying notes 67-83 *infra*. The reasons for having a strong Commissioner of Baseball apply equally to the other major professional sports.

¹⁷ Compare National Basketball Association, National Football League and Major League Baseball collective bargaining agreements (copies on file at U.C.

approve player contracts,¹⁸ discipline clubs and players,¹⁹ resolve disputes,²⁰ and make administrative rules.²¹ The commissioners cannot, however, take actions which are not either authorized in or reasonably inferred from the terms of an agreement.

Major League Baseball is governed by two basic documents: its original charter and its collective bargaining agreement. The charter, known as the Major League Agreement (MLA),²² defines the Commissioner's authority and responsibilities. Among other things, it grants the Commissioner broad power to act in any way that he sees fit to "protect the game of baseball."²³

Baseball's collective bargaining agreement, the Basic Agreement,²⁴ binds the players association, the Major League Players

Davis Law Review office).

¹⁸ *Detroit Football Co. v. Robinson*, 186 F. Supp. 933, 934-35 (E.D. La.) (upholding football commissioner's power to approve player contracts), *aff'd*, 283 F.2d 657 (5th Cir. 1960); *American League Baseball Club of Chicago v. Chase*, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914) (upholding a baseball commissioner's power to approve player contracts).

¹⁹ *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977) (upholding baseball commissioner's power to discipline clubs and players); *Molinas v. Podoloff*, 133 N.Y.S.2d 743 (Sup. Ct. 1954) (upholding basketball commissioner's power to discipline clubs and players).

²⁰ *Riko Enterprises, Inc. v. Seattle Supersonics Corp.*, 357 F. Supp. 521 (S.D.N.Y. 1973) (upholding basketball commissioner's power to resolve disputes); *Johnson v. Green Bay Packers, Inc.*, 272 Wis. 149, 74 N.W.2d 784 (1956) (upholding football commissioner's power to resolve disputes).

²¹ *National Football League Players Ass'n v. NLRB*, 503 F.2d 12, 16 n.3 (8th Cir. 1974) (recognizing football commissioner's power to make administrative rules).

²² The Major League Agreement is signed by representatives of the National and American Leagues and each of their member clubs. The original charter was executed in 1921, with each club entering a league since that time also signing the charter. The charter established the office of the Commissioner and set forth the rules and regulations under which he operates. (Copy on file at U.C. Davis Law Review office).

²³ Major League Agreement, Art. I. § 2(a). See notes 30-33 and accompanying text *infra*.

²⁴ The Basic Agreement is drawn between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs, and the Major League Baseball Players Association. (Copy on file at U.C. Davis Law Review office).

Professional baseball players are required to sign the Uniform Player's Contract. The Contract sets forth the terms of the employment relationship entered into by the individual players when hired by the club. Rule 9(a) of the Uniform Player's Contract provides:

The Club and the Player agree to accept . . . and comply with all

Association (MLPA),²⁵ and the respective club owners. The agreement creates a grievance arbitration procedure,²⁶ defines matters subject to arbitration²⁷ and sets out the procedures for invoking arbitration.²⁸

Because the charter and the Basic Agreement only vaguely set out the Commissioner's powers, specific conflicts have required the courts to define more precisely the scope of his powers. The courts have used different standards to review a dispute, depending on whether it arose out of the charter or the collective bargaining agreement.²⁹

A. *The Commissioner's Powers under the Major League Agreement*

The Major League Agreement grants the Commissioner broad powers. Pursuant to the charter, the Commissioner can investigate and determine whether or not an act, transaction or practice is "in the best interests of the game of baseball."³⁰ If the Commissioner determines that an act is not in the best interests of baseball, he can take action to "protect the morale of the players and the honor of the game."³¹ The MLA permits the

provisions of the Major League Agreement and the Major League Rules, . . . which are not inconsistent with the provisions of this contract or the provisions of any agreement between the Major League Clubs and the MLPA

²⁵ See note 10 *supra*.

²⁶ Article X of the Basic Agreement provides for an orderly and expeditious procedure for handling and resolving grievances and complaints.

²⁷ Any complaint which involves the interpretation of, or compliance with, the provisions of the Basic Agreement constitutes a grievance and is subject to arbitration. Art. X(A)(1)(a), 1976 Basic Agreement.

²⁸ Any player who believes that he has a justifiable grievance must first discuss the matter with a representative of the club. If the matter is not resolved, the Basic Agreement sets forth a detailed course of procedure for invoking grievance arbitration. Art. X(B), 1976 Basic Agreement.

²⁹ See text accompanying notes 52-58 & 60-75 *infra*.

³⁰ Article I, § 2(a) of the Major League Agreement provides:

The function of the Commissioner shall be as follows:

(a) TO INVESTIGATE, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of Baseball, with authority to summon persons and to order the production of documents, and in case of refusal to appear or produce, to impose such penalties as are hereinafter provided.

³¹ Article I, § 4 of the Major League Agreement states:

Commissioner to take whatever preventative, remedial or punitive action he deems appropriate,³² including reprimands, deprivation of a club's representation in joint meetings, suspension, removal or fines.³³

B. The Commissioner's Powers under the Basic Agreement

Professional baseball's collective bargaining agreement, the Basic Agreement,³⁴ has brought some aspects of the dispute-resolution procedure under the scrutiny of modern labor laws.³⁵ Through collective bargaining, players and management established an impartial tripartite panel for the resolution of grievance disputes.³⁶ Many disputes between a player and his club, however, will never come before the arbitration panel, because it does not hear those matters expressly delegated to the Commissioner. The panel only hears complaints involving the interpre-

In the case of conduct by organizations not parties to this Agreement, which is deemed by the Commissioner not to be in the best interests of Baseball, the Commissioner may pursue appropriate legal remedies, advocate remedial legislation and take such steps as he may deem necessary and proper in the interests of the morale of the players and the honor of the game.

³² Article I, § 2(b) of the Major League Agreement provides:

The function of the Commissioner shall be as follows:

(b) TO DETERMINE, after investigation, what preventative, remedial or punitive action is appropriate in the premises, and to take such actions either against Major Leagues, Major League Clubs or individuals, as the case may be.

³³ Major League Agreement, art. I, § 3 provides:

In the case of conduct by Major Leagues, Major League Clubs, officers, employees or players which is deemed by the Commissioner not to be in the best interests of Baseball, action by the Commissioner for each offense may include any one or more of the following: (a) a reprimand; (b) deprivation of a Major League Club of representatives in joint meetings; (c) suspension or removal of any officer or employee of a Major League or a Major League Club; (d) temporary or permanent ineligibility of a player; and (e) a fine, not to exceed Five Thousand Dollars (\$5,000.00) in the case of a Major League or a Major League Club and not to exceed Five Hundred Dollars (\$500.00) in the case of any officer, employee or player.

³⁴ See note 24 *supra*.

³⁵ See text accompanying notes 59-66 *infra*.

³⁶ The tripartite panel of arbitrators is empowered to decide grievances appealed to arbitration. The Players Association and management each appoint an arbitrator, and these two choose a third arbitrator to serve as the impartial arbitrator. Art. X(A)(9), 1976 Basic Agreement.

tation of, or compliance with, the provisions of the collective bargaining agreement.

The Basic Agreement defers to the Commissioner the power to hear and decide any complaints that involve "the preservation, the integrity or the maintenance of public confidence in the game of baseball."³⁷ Furthermore, the Commissioner automatically reviews grievances involving a fine or suspension imposed upon a player for inappropriate conduct on the playing field or in the ballpark.³⁸ In both instances, the decision of the Commissioner is final.³⁹

Unlike the charter, the collective bargaining agreement places clear limitations on what the Commissioner can do. For example, he can only act on matters relating to the preservation of public confidence in the game of baseball or on matters involving player conduct on the field or in the ballpark.⁴⁰ Moreover, the Commissioner cannot resort to the vague provisions of the charter to authorize actions that the collective bargaining agreement prohibits. This is because public policy favors collective bargaining.⁴¹

When acting outside the scope of the collective bargaining agreement, however, the Commissioner may support his actions under the "best interests"⁴² clause of the MLA. As an example, the Commissioner would violate the collective bargaining agreement if he implemented a unilateral change in working conditions without first notifying the Players Association.⁴³ If he did so, he would be acting outside the scope of the collective bargaining agreement, but arguably within the scope of the MLA. Thus, this ability to rely on the vague provisions of the charter makes it relatively easy for the Commissioner to frustrate the

³⁷ Art. X(A)(1)(b), 1976 Basic Agreement.

³⁸ Within 30 days of the date of the action taken, such complaint is automatically presented to the Commissioner, who is directed to conduct a hearing and issue a written decision. *Id.*

³⁹ The decision of the Commissioner constitutes full, final and complete disposition of the complaint and has the same effect as a grievance decision of the arbitration panel. Article X(C)(1), 1976 Basic Agreement.

⁴⁰ See notes 37 & 38 *supra*.

⁴¹ The policy of the National Labor Relations Act is to eliminate the causes of obstructions to the free flow of commerce by encouraging the practice and procedure of collective bargaining. 29 U.S.C. § 151 (Supp. 1980).

⁴² See note 30 *supra*.

⁴³ See text accompanying note 61 *infra*.

intent of the collective bargaining agreement.

C. Obtaining Judicial Review

In addition to the provisions which give the Commissioner final say in disputes,⁴⁴ other MLA provisions are designed to limit the opportunities of players to obtain judicial review of the Commissioner's decisions. The MLA contains a provision requiring the parties to waive their right of recourse in the courts.⁴⁵ Each individual player's contract also contains a general provision requiring the player to comply with the regulations of the MLA.⁴⁶ Courts generally uphold such waiver clauses⁴⁷ and have even refused to scrutinize the Commissioner's decisions where he has acted arbitrarily or unfairly.⁴⁸

Aggrieved parties are not in all circumstances precluded from seeking judicial review. Courts have held that a waiver-of-recourse clause is invalid as against public policy where the waiver of rights was not voluntary, knowing, intelligently made or negotiated by parties occupying equal bargaining positions.⁴⁹ Courts

⁴⁴ See note 39 *supra*.

⁴⁵ Major League Agreement, art. VII, § 2 provides:

The Major Leagues and their constituent clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive such right of recourse to the courts as would otherwise have existed in their favor.

⁴⁶ See note 24 *supra*.

⁴⁷ Courts view the inclusion of the waiver-of-recourse clause in the Major League Agreement as a manifestation of the contracting parties' desire to insulate themselves from judicial review of the Commissioner's decision. See *generally* Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 542 (7th Cir. 1978).

Even in the absence of a waiver-of-recourse provision in an association charter, Courts ordinarily will not intervene in questions involving the enforcement of by-laws and matters of discipline in voluntary associations. See, e.g., American Fed'n of Technical Eng'rs v. La Jeunesse, 63 Ill. 2d 263, 347 N.E.2d 712, 715 (1976). It has been suggested that, because the waiver-of-recourse provision is not in each club's association charter, the clubs should not be bound by such a clause. Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 545 (7th Cir. 1978).

⁴⁸ Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978).

⁴⁹ E.g., D.H. Overmeyer v. Frick, 405 U.S. 174, 184 (1972). It might be argued that the entire MLA is invalid as against public policy because it was not voluntarily, knowingly or intelligently agreed upon by the parties. However, this argument has yet to be judicially addressed. If ever presented, this argument would fail because courts are hesitant to make such decisions that would

will also review a Commissioner's decision, or any other professional baseball regulation, allegedly illegal or in violation of the charter or by-laws.⁵⁰ Finally, judicial review is available where the association has failed to follow the basic elements of due process of law.⁵¹

1. Judicial Scrutiny of the Commissioner's Acts under the Major League Agreement

The above exceptions notwithstanding, courts rarely disturb actions of the Commissioner taken pursuant to the Major League Agreement. His authority under the charter is to protect the best interests and the morale of the game.⁵² This mandate is so broad that courts are unable to apply any but the barest standard of review to such actions.⁵³ Not surprisingly, the MLA has proved to be a useless benchmark against which to scrutinize the fairness of the Commissioner's decisions.

Recently, for example, the Seventh Circuit upheld the Commissioner's power to void the sale of players between clubs if he felt that it was "in the best interests of baseball."⁵⁴ A court has

have such a drastic impact on the game of baseball. In *Flood v. Kuhn*, 407 U.S. 258 (1972), the Court recognized that

the orderly way to eliminate error or discrimination in [baseball] . . . is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action.

Id. at 279.

⁵⁰ *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 544 (7th Cir. 1978).

⁵¹ "Strict adherence to judicial standards of due process would be arduous and might seriously impair the . . . proceedings of voluntary associations, [but] the procedure must not be a sham designed merely to give colorable propriety to an inadequate process." *Id.* at 544 n.65.

⁵² See notes 30-33 *supra*.

⁵³ See, e.g., *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978); *Atlanta Nat'l Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977).

⁵⁴ In *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978), the Commissioner of Baseball, Bowie Kuhn, voided the sale by the Oakland A's of two players to the Boston Red Sox for \$2 million and one player to the New York Yankees for \$1.5 million. The owner of the A's, Charles O. Finley, challenged the Commissioner's action, the first such judicial challenge of the Com-

also held that the Commissioner has inherent authority to issue directives and orders,⁵⁵ and to act as the ultimate interpreter of these orders and directives pursuant to the "best interests" clause.⁵⁶

Because challenging an action by the Commissioner under the charter has proved fruitless, players have turned to the collective bargaining agreement as a basis for challenging the Commissioner's authority. This tactic has two advantages. First, there is no waiver-of-recourse clause standing between the player and judicial review.⁵⁷ Second, the strong policies of labor laws and their interpretations by courts provide a more concrete standard by which to judge the Commissioner's actions.⁵⁸

2. Judicial Scrutiny of the Commissioner's Acts under the Basic Agreement

Unlike the charter, professional baseball's collective bargaining agreement is subject to the provisions and policies⁵⁹ of the National Labor Relations Act,⁶⁰ which regulates employer-em-

missioner's power in over 40 years. Kuhn purported to act under powers granted him by the Major League Agreement and the Major League Rules. By selling players, the Commissioner contended, Oakland was being debilitated, and the competitive balance of baseball was being lessened through the buying of talented players by the more affluent clubs. The court upheld the Commissioner's actions. *Id.* at 527.

⁵⁵ *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1221 (N.D. Ga. 1977).

⁵⁶ *Id.*

⁵⁷ See text accompanying notes 45-48 *supra*.

⁵⁸ See text accompanying notes 60-75 *infra*.

⁵⁹ See, e.g., *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 882 (S.D.N.Y. 1975), *aff'd on other grounds*, 556 F.2d 686 (2d Cir. 1977) (court recognized that "the intent of Congress was and is to encourage collective bargaining as the means of settling labor disputes . . . [and that] this policy constitutes a federal commitment to a bargaining system.").

⁶⁰ 29 U.S.C. §§ 151-166 (1976). Every industry that is "in or affecting" interstate commerce is subject to the provisions of the National Labor Relations Act. *NLRB v. Fainblatt*, 306 U.S. 601 (1939). In *Flood v. Kuhn*, 407 U.S. 258 (1972), the Supreme Court held that professional baseball was a business engaged in interstate commerce. In *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 409 F. Supp. 233, 245 (W.D. Mo.), *aff'd on other grounds*, 532 F.2d 615 (8th Cir. 1976), the court recognized that the collective bargaining agreement between the players and club owners

is governed by the same federal law applicable to any other collective bargaining agreement The fact that the employees hap-

ployee relationships. This provides the courts with a better means of reviewing the Commissioner's actions, since a direct violation of the collective bargaining agreement is both easier to recognize and actionable.

The Commissioner does not have the authority to make changes which affect employment conditions established under terms of the collective bargaining agreement.⁶¹ Nor can he impose rules or disciplinary sanctions against a player without complying with the terms of the collective bargaining agreement.⁶² Moreover, unlike the charter, the collective bargaining agreement usually provides a remedy for actions taken in violation of its terms. For example, the Basic Agreement provides that when the Commissioner violates the terms of the agreement, a grievance arbitration panel will settle the dispute.⁶³

Even where a provision of the Basic Agreement appears to sanction an action by the Commissioner, a court may enjoin

pen to be baseball players and the industry happens to be business organizations owning baseball clubs does not permit the application of a different rule of law than that applicable to all employers and all recognized labor organizations in any other industry which affects commerce

⁶¹ *National Football League Players Ass'n v. NLRB*, 503 F.2d 12 (8th Cir. 1974) (unfair labor practice charge alleging that the Commissioner's unilateral adoption of rule imposing automatic fine against any player who left the bench during a fight was a refusal to bargain). See also *Meat Cutters v. Jewel Tea*, 381 U.S. 676, 679 (1965); *National Football League Management Council & Nat'l Football League Players Ass'n*, 203 N.L.R.B. 958, 83 L.R.R.M. 1203 (1973). In the latter case the Players Association contended that the use of artificial turf was a "condition of employment" and, as such, a proper subject for collective bargaining. The Board held that management's unilateral change in a working condition was a violation of the collective bargaining agreement.

⁶² In *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977), the court recognized that, if the Commissioner disciplined a player without complying with the provisions of the collective bargaining agreement, the Commissioner breached that agreement. The collective bargaining agreement had established that if any club contacted a free agent before the free agent draft, tampering violations would be found by the Commissioner. The owner of the Atlanta Braves, Ted Turner, had contacted a free agent, Gary Matthews, and made him a contract offer before his services had terminated with his present club. Commissioner Kuhn ruled that Turner was guilty of tampering, levied a fine against Turner and denied the Atlanta Braves a first-round draft choice. Turner subsequently filed suit and successfully challenged the Commissioner's authority to enforce the collective bargaining agreement and to impose sanctions in that situation.

⁶³ See note 36 *supra*.

such action.⁶⁴ If a player can show that the enabling provision was not established through arms-length bargaining, a court will not consider it part of the agreement.⁶⁵ A stricter standard of review is applied to the agreement, unlike the charter, because of the policy favoring collective bargaining.⁶⁶

A problem with the collective bargaining agreement as a check on the Commissioner's powers is that it often expressly allows the Commissioner to act as an arbiter of disputes.⁶⁷ Nevertheless, the Commissioner is limited by the terms of the agreement and subject to federal regulations of arbitration procedures.⁶⁸ Courts must judge the Commissioner's actions in light of the Federal Arbitration Act (FAA),⁶⁹ which prescribes the procedures that govern the arbitration process⁷⁰ and the kinds of evidence that will be admissible,⁷¹ and which ensures due process in arbitration proceedings.⁷² Moreover, the courts can apply

⁶⁴ See generally *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

⁶⁵ In *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977), the court held that the absence of arms-length collective bargaining was evidenced by the fact that "in neither of the two collective bargaining sessions which resulted in the collective bargaining agreement was there any trade-off or *quid pro quo* whereby the union agreed to the 'Rozelle Rule' in return for other benefits." *Id.* at 616. If the Rule had been a trade-off for an employee concession, it would have been upheld as part of the agreed-upon collective bargaining pact. However, without such an exchange, the court considered the Rule to be outside the agreement and subject to public policy considerations. See also *Meat Cutters v. Jewel Tea*, 381 U.S. 676 (1965).

⁶⁶ See note 59 *supra*.

⁶⁷ See notes 37 & 38 and accompanying text *supra*.

⁶⁸ In *National Football League Players Ass'n v. NLRB*, 503 F.2d 12 (8th Cir. 1974), the court held that when a commissioner acts as a final arbiter, he must act within the terms of the collective bargaining agreement. In addition, the court held that it may be a violation of the FAA for a commissioner to act as a final arbiter because he is not a disinterested party. *Id.* at 16 n.3.

⁶⁹ 9 U.S.C. §§ 1-12 (1976). In *Sociedad Armadora Aristomenes Paname, S.A. v. Tri-Coast S.S. Co.*, 184 F. Supp. 738, 741 (S.D.N.Y. 1960), the court recognized that federal courts applying Title 9 should "encourage arbitration and uphold awards whenever they justly may."

⁷⁰ 9 U.S.C. § 4 (1976).

⁷¹ Section 7 of the Federal Arbitration Act provides that arbitrators may summon witnesses and compel them to bring any book, record, document or paper which may be deemed material as evidence in the case. 9 U.S.C. § 7 (1976).

⁷² Arbitrators perform a "judicial function," and the rule that all judicial

FAA standards to any act of the Commissioner that they find to constitute "arbitration."⁷³ By liberally interpreting the term "arbitration," a court can make the FAA an effective weapon with which to compel the Commissioner at least to afford a player the opportunity to present evidence and cross-examine witnesses.⁷⁴

Even with the added protection of the collective bargaining agreement, however, the charter continues to grant the Commissioner almost unlimited discretionary power in other areas.⁷⁵ The continuing control over a player's fate exercised by the Commissioner calls for a more just system of settling disputes. The expansion of impartial arbitration, already in limited use in professional baseball, would eliminate many of the inequities of the current system.

II. DEFENSES AND CRITICISMS OF THE CURRENT SYSTEM OF DISPUTE RESOLUTION

A. *Defenses of the Current System*

The owners originally gave the Commissioner broad powers because they felt that centralized power would benefit professional baseball.⁷⁶ Thus, before proposing significant changes in this system, it must be considered whether the imposition of impartial arbitration would eliminate the advantages of having a powerful, centralized authority.

Preservation of the image and integrity of professional baseball is crucial to its continuing success. The public will support professional sports only when it views the games as competitive and fair.⁷⁷ Team owners argue that this image of integrity re-

proceedings affecting persons' rights and obligations are conditioned on notice and opportunity to be heard is applicable to arbitration. *Seldner Corp. v. W.R. Grace & Co.*, 22 F. Supp. 388 (D. Md. 1938).

⁷³ See, e.g., *Professional Sports, Ltd. v. Virginia Squires Basketball Club*, 373 F. Supp. 946 (W.D. Tex. 1974); *Riko Enterprises, Inc. v. Seattle Supersonics Corp.*, 357 F. Supp. 521 (S.D.N.Y. 1973).

⁷⁴ *Id.* See also *National Football League Players Ass'n v. NLRB*, 503 F. 2d 12, 16 n.3 (8th Cir. 1974).

⁷⁵ See notes 30-33 and accompanying text *supra*.

⁷⁶ The league established the position of a single, independent Commissioner of Baseball as a result of the "Black Sox" scandal, in which White Sox players tried to fix the 1919 World Series. For a detailed account of these events, see E. ASINOF, *EIGHT MEN OUT* (1963). See also notes 78-83 and accompanying text *infra*.

⁷⁷ *Id.*

quires a powerful commissioner, one capable of taking discretionary actions to preserve the competitive balance and the integrity of the game.⁷⁸ The owners also argue that the broad provisions in the charter, such as the "best interests" clause,⁷⁹ allow the Commissioner to act with the long-range interest of the game in mind.⁸⁰ Thus, for example, they feel that the Commissioner's broad, centralized authority enables him to take effective action against image-destroying problems such as drug abuse and gambling.⁸¹

Finally, under the current system, the administration of the game is centralized. Since the Commissioner has the authority to both formulate and interpret rules,⁸² there is no possibility of conflicting interpretations. Moreover, centralized control also ensures efficient, speedy and uniform application of rules and procedures.⁸³

B. Criticisms of the Current System

The principal flaw in having the Commissioner decide disputes between players and management is that the Commissioner is naturally partial towards management. The Commissioner is not a neutral third party. He is appointed by and implicitly subject to control by his employer.⁸⁴ This is naturally so because the owners determine and pay the Commissioner's

⁷⁸ See, e.g., *Molinas v. Podoloff*, 133 N.Y.S.2d 743 (Sup. Ct. 1954); *Milwaukee Amer. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

⁷⁹ See note 30 *supra*.

⁸⁰ See note 78 *supra*.

⁸¹ See note 79 and accompanying text *supra*.

⁸² Art. I, § 2(d) of the Major League Agreement states that the functions of the Commissioner shall be "to formulate, and from time to time announce, the rules of procedure to be observed by the Commissioner and all other parties in connection with the discharge of his duties."

⁸³ See *Milwaukee Amer. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

⁸⁴ See *id.* at 299, where the court noted that "the Commissioner of Baseball has all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial *pater familias*." See also *American League of Professional Baseball Clubs & Ass'n of Nat'l Baseball League Umpires*, 180 N.L.R.B. 190 (1969). There, the NLRB noted that "[t]he system appears to have been designed almost entirely by employers and owners, and the final arbiter of internal disputes does not appear to be a neutral third party freely chosen by both sides, but rather an individual appointed solely by the member club owners themselves." *Id.* at 191.

salary,⁸⁵ adopt the rules and regulations under which he operates,⁸⁶ and retain the power to dismiss him.⁸⁷ These same owners will eventually consider renewal of the Commissioner's contract.⁸⁸ Under such conditions, it is unlikely that the Commissioner will exercise his or her powers impartially.

Moreover, the present system encourages partiality to management because it calls upon the Commissioner to decide matters in which his own authority or actions are questioned. For example, the Commissioner both promulgates rules and decides disputes concerning player conduct and personnel procedures.⁸⁹ At the same time, he is also responsible for ruling on the validity of disciplinary actions which he himself imposed.⁹⁰ Thus, the Commissioner might promulgate a rule and later, while acting as arbiter, be called upon to decide whether or not he has authority to promulgate that rule.⁹¹ To grant the Commissioner the unilateral power to interpret the very orders he issued invites unfair decision making.

While centralized authority continues to have several advantages, these advantages must be balanced against the disadvantages of that system. Ultimately, the advantages of the current system do not justify the interference with the rights of the players that the current system permits. The lack of an effective

⁸⁵ The EXPENSES of the Office of the Commissioner including the salaries of the Commissioner and of the Secretary-Treasurer shall be paid from the funds in the office of the Commissioner. The Major Leagues shall contribute equally . . . the funds needed to meet authorized expenditures to the extent that the funds in the office of the Commissioner may at any time prove inadequate.

Art. VI, Major League Agreement.

⁸⁶ See note 22 *supra*.

⁸⁷ Article I, §§ 6 & 7 of the Major League Agreement provide:

Sec. 6. The Commissioner shall hold office for seven (7) years and shall be eligible to succeed himself

Sec. 7. The election of any Commissioner hereunder shall be at a joint meeting of the two Major Leagues; the vote shall be by clubs and by written ballot, and to elect shall require the affirmative vote of not less than three-fourths (¾) of the clubs of each league

A Commissioner Pro Tem may be elected to serve for any period less than seven (7) years, with all of the powers and duties which are conferred upon the Commissioner pursuant to this Agreement.

⁸⁸ *Id.*

⁸⁹ See note 82 *supra*.

⁹⁰ See note 62 and accompanying text *supra*.

⁹¹ *Id.*

appeal procedure,⁹² the unilateral settlement of disputes⁹³ and the unfair sanctions⁹⁴ imposed against the players by the Commissioner all point to the need for change.

III. IMPARTIAL ARBITRATION AS A METHOD OF DISPUTE RESOLUTION

Bringing those disputes presently within the domain of the Commissioner before an impartial panel would eliminate much of the unfairness in the current system. Arbitration would eliminate the bias that naturally arises from the relationship between the club owners and the Commissioner.⁹⁵ Impartial arbitration would not hurt professional baseball's image. If properly informed, the public would develop even greater confidence in the game, since its procedures would be more in line with democratic principles.⁹⁶

Impartial arbitration has several advantages over direct judicial review of the Commissioner's actions. First, since the grounds for vacating an arbitrator's decision are highly structured,⁹⁷ the panel's decisions are easier to review than a trial court's decision. Second, because impartial arbitration devotes

⁹² See note 39 and accompanying text *supra*.

⁹³ See text accompanying notes 30-39 *supra*.

⁹⁴ *Id.*

⁹⁵ See text accompanying notes 84-88 *supra*.

⁹⁶ If an impartial arbitration panel were established, the public would recognize the legitimacy of a fair decision and continue to attend games. If the public is dissatisfied and unsure that the operation of baseball is fair, they tend not to support the game. See, e.g., *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

⁹⁷ Section 10 of the Federal Arbitration Act provides that an arbitrator's decision may be reversed:

(a) Where the award was procured by corruption, fraud or undue means.

(b) Where there was evident partiality or corruption in the arbitrators or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to . . . hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual final and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (1976).

less time and energy to procedural niceties,⁹⁸ it is often less costly than a judicial proceeding.⁹⁹ Finally, impartial arbitration would afford the parties more protection from publicity than a judicial proceeding, since the parties can agree not to release the arbitrator's decision to the public.¹⁰⁰ While such an agreement may often be inappropriate because of the public's interest in professional baseball, privacy can aid in fast and efficient decision-making. Such a decision-making process would help avoid the bad publicity caused by protracted and heated internal disputes, which are often aggravated by the press.¹⁰¹

Establishing an impartial arbitration panel to resolve disputes would merely extend the method already used to resolve certain grievance and salary disputes.¹⁰² The Basic Agreement currently provides a detailed procedure outlining the allocation of hearing costs,¹⁰³ the conduct of the hearings¹⁰⁴ and the standards to be

⁹⁸ See note 14 *supra*. Unlike the courts, in impartial arbitration, the parties are free to make the proceedings as structured or informal as their particular relationship requires. This is an advantage because it allows the parties to fashion the proceedings in order to meet their needs. See, e.g., F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* (3d ed. 1973).

⁹⁹ See, e.g., *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

¹⁰⁰ Article V(E)(5) of the 1976 Basic Agreement provides that the arbitrator is not to release an opinion or the arbitration award except to the club, the player, the Players Association and the Player Relations Committee.

¹⁰¹ Impartial arbitration of certain grievance disputes and salary arbitration have helped the game enormously. One effect has been to improve the players' bargaining position. Although initially the majority of the decisions favored the owners, the players have prevailed where large salaries were involved and wide differences existed between management's and the player's offer. The existence of salary arbitration also has contributed to higher salaries for many players who did not go to arbitration. Management tends to offer higher salaries when it knows that a player will likely receive these higher salaries through resort to the arbitration process. Furthermore, the number of players involved in impartial arbitration is declining each year, indicating that the procedure is stimulating negotiations and realistic settlements. Correspondence with the Major League Baseball Player Relations Committee (copy on file at U.C. Davis Law Review office.).

¹⁰² See notes 11 & 12 *supra*.

¹⁰³ These costs include administrative costs, expenses for counsel and travel expenses. Article V(E)(11), 1976 Basic Agreement.

¹⁰⁴ Article V(E)(9) of the 1976 Basic Agreement includes time limits for presenting arguments and rebuttal and also provides for private and confidential hearings.

employed at hearings.¹⁰⁵ Although these procedures presently apply only to salary and certain grievance disputes, they could provide an equally sound basis for an impartial system of dispute resolution.

In addition to an impartial arbitration procedure, professional baseball should adopt corollary procedures and rules that will ensure impartiality and meet the special requirements of the sport. Selection of arbitrators, for example, should seek to strike a balance between players and management. A good method would be to have both the Players Association and management appoint an arbitrator, each of whom would in turn choose a third arbitrator to serve as chairperson.¹⁰⁶ This method would provide a fair balance while keeping decision-making in the hands of those most familiar with the game of baseball.

Rules also should be adopted to require quick decisions.¹⁰⁷ Quick settlement of disputes is necessary to prevent delays that may affect the performance of the player involved. A protracted, emotional dispute may impair a player's concentration, particularly if a severe penalty, such as suspension, may be the final result.

Instituting impartial arbitration to resolve disputes would not eliminate the office of the Commissioner. He would still have the authority to promulgate rules and regulations, but only if his actions were not violative of the collective bargaining agreement. The Commissioner would also retain ceremonial duties and continue to be the official spokesperson for the game. This would satisfy the owners' desire to have a centralized figure who will promote public confidence in the office and further the integrity

¹⁰⁵ Art. V(E)(12), 1976 Basic Agreement.

¹⁰⁶ Art. X(A)(9) of the Basic Agreement provides that, in the event that the party arbitrators are unable to agree upon the appointment of the arbitrators, they must jointly request that the American Arbitration Association furnish them a list of prominent, professional arbitrators. With this list, each side alternates in striking names until only one remains.

Other industries use different forms of arbitration. These include temporary (ad hoc) or permanent arbitrators, boards composed of neutral arbitrators or a single arbitrator. F. ELKOURI & E. ELKOURI, *supra* note 98, at 68-87.

¹⁰⁷ The Basic Agreement recognizes the need for a dispute to be resolved quickly. Article V(E)(5) states that an arbitrator shall make every effort to render a decision not later than 24 hours following the close of the hearing. On the other hand, the grievance procedure, Article X(B) of the Basic Agreement, provides for a hearing within 15 days of the receipt of a Club's filing of a written decision.

of the game. Furthermore, the Commissioner would retain the power to initiate complaints with the impartial arbitration panel.

CONCLUSION

Professional baseball's dispute-resolution system operates unfairly because it accords too much discretionary authority to the Commissioner. As the final arbiter of disputes, he has vast powers that can infringe on the rights of the players. Moreover, the Commissioner's close relationship to the club owners prevents him from acting impartially. Only recently have players begun to use common labor principles in the courts to challenge the Commissioner's authority.

Despite these recent challenges, the fact remains that the power of baseball's Commissioner makes dispute resolution unfair to players. This comment proposes that professional baseball resolve disputes through quick and efficient impartial arbitration. Only then will the players be assured a fair method of resolving disputes.

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