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NO BLOCH HEAD: ARBITRATOR'S DECISION BRINGS CHANGE TO THE NHL

By  
Andrew M. Kroeckel\*

I. INTRODUCTION

It is, perhaps, ironic that an arbitrator would invalidate a freely-negotiated contract. Arbitration is, after all, governed by the principle of freedom of contract.<sup>1</sup> But that is exactly what Richard Bloch did on August 9, 2009, ruling that the 17-year, \$102-million contract Ilya Kovalchuk signed with the New Jersey Devils was an invalid circumvention of the NHL's collective bargaining agreement ("CBA"). Bloch's decision answered a question that had been brewing since the National Hockey League ("NHL") and National Hockey League Players' Association ("NHLPA" or "the Association") came to an agreement on a new CBA in 2005, a question that was asked every time a player signed a frontloaded contract designed to expire well after he retired: How much was too much?

For the NHL – and for Bloch – the answer was a contract that paid out ninety-seven percent of the salary over the first 11 years and only three percent over the final six.

II. THE CONTRACT

Kovalchuk, a 27-year-old left-winger from Russia and one of top scorers in the league, signed his new deal with the Devils on July 19, 2010.<sup>2</sup> The 17-year term was a league record, designed to provide Kovalchuk with the money he

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<sup>1</sup> THOMAS E. CARBONNEAU, *ARBITRATION LAW IN A NUTSHELL* 30 (Thomson/West 2009).

<sup>2</sup> Dmitry Chesnokov, *Kovalchuk's Decision: He's a New Jersey Devil Again for 17 years*, YAHOO, July 19, 2010, [http://sports.yahoo.com/nhl/blog/puck\\_daddy/post/Kovalchuk-s-decision-He-s-a-New-Jersey-Devil-ag?urn=nhl-252872](http://sports.yahoo.com/nhl/blog/puck_daddy/post/Kovalchuk-s-decision-He-s-a-New-Jersey-Devil-ag?urn=nhl-252872).

wanted at a rate the Devils could fit under the team salary cap of \$59.4 million.<sup>3</sup> Kovalchuk was scheduled to earn \$6 million in each of the first two seasons of the contract, \$11.5 million over the next five, \$10.5 million in the 2017-18 season, \$8.5 million in 2018-19, \$6.5 million in 2019-20, \$3.5 million in 2020-21, \$750,000 the following season, and \$550,000 for the final five years.<sup>4</sup> Per Article 50.5(d)(ii) of the CBA, for the purposes of calculating a team's total average salary, an individual player's salary is averaged over the length of the contract.<sup>5</sup> Despite its great range of salaries by season, Kovalchuk's deal would have carried a salary cap hit of only \$6 million, a very palatable hit for a player who leads the league in goal scoring since 2001.<sup>6</sup>

The contract also included a "no move" clause, which would have prevented the Devils from removing Kovalchuk from their roster in any of the myriad ways available. The "no move" clause morphed into a "no trade" clause late in the deal, which would have allowed the Devils to waive Kovalchuk, demote him to the minor leagues or otherwise remove his \$6 million cap hit from their books.

The NHL's problem with the Kovalchuk contract was not with the parts, but the sum. In its argument before Bloch, the league conceded that none of the individual elements of the contract violated the CBA, but when taken as a whole the contract seemed to be nothing more than an artificial attempt to lower the cap hit on a contract Kovalchuk had no intention of playing out. That was the league's rationale, anyway, when it invalidated the contract pursuant to Article 26.3 of the CBA, which reads:

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<sup>3</sup> *Id.*

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

<sup>5</sup> The Nat'l Hockey League Collective Bargaining Agreement [hereinafter NHL Agreement] (July 22, 2005), available at <http://www.nhlpa.com/About-Us/CBA/> (follow "Download a Copy of the CBA" hyperlink).

<sup>6</sup> E.J. Hradek, *New Jersey Devils Submit New Ilya Kovalchuk Contract to NHL*, ESPN, <http://sports.espn.go.com/nhl/news/story?id=5504380>.

No Club or Club Actor, directly or indirectly, may: (i) enter into any agreements, promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kind, whether express, implied, oral or written, including without limitation, any SPC [standard player contract], Qualifying Offer, Offer Sheet, or other transaction, or (ii) take or fail to take any action whatsoever, if either (i) or (ii) is intended to or has the effect of defeating or Circumventing the provisions of this Agreement or the intension of the parties as reflected by the provisions of this agreement, including without limitation, provisions with respect to the financial and other reporting obligations of the Clubs and the League, Team Payroll Range, Player Compensation Cost Redistribution System, the Entry Level System and/or Free Agency.<sup>7</sup>

### III. THE GRIEVANCE

The NHLPA reacted swiftly, filing a system grievance pursuant to Article 48.1 of the CBA, which calls for an arbitral hearing of “any dispute involving the interpretation of or compliance with provisions of Articles 49 ... 50 ... and those provisions of Article 26, Article 9, Article 10 and/or any other article in which the grievance resolution could affect the interpretation or application of the provisions of Article 49 or 50.”<sup>8</sup> Under Article 48.5, the appointed system arbitrator has the authority to compel the appearance of witnesses and the production of documents, and the arbitrator’s decision is “full, final and complete.”<sup>9</sup> Furthermore, the arbitrator does not have the “authority to add to, detract from, or alter in any way

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<sup>7</sup> NHL Agreement, *supra* note 5.

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

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

the provisions of this Agreement or any SPC.”<sup>10</sup> Instead, the arbiter’s role is “not to somehow construct his or her own notions of industrial justice or perceived equities, but to read and apply the CBA’s bargained terms.”<sup>11</sup>

That is how Richard Bloch approached the task before him after the parties mutually agreed to name him the system arbitrator.<sup>12</sup> Under Article 48.5(b), the system arbitrator “to be appointed hereunder shall be an attorney with significant experience with matters requiring financial sophistication and business/accounting experience and as an arbitrator or judge or other decider of contested proceedings.”<sup>13</sup> Bloch was a seasoned arbiter, having worked in the field since the early 1970s.<sup>14</sup> Highlights from his résumé include time as the permanent arbitrator for Major League Baseball, the chief umpire for the United Mine Workers and the Bituminous Coal Operators’ Association and co-umpire for General Motors, the United Auto Workers and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, and National Broadcasting Company.<sup>15</sup> A native of New Jersey and a graduate of Michigan Law School,<sup>16</sup> Bloch was an exceptionally qualified and neutral arbiter who understood that his role was to do nothing more than interpret the CBA as it applied to Kovalchuk’s contract.

Arbitration is hardly a foreign concept in the NHL. The league has submitted to arbitration against Russia’s Continental Hockey League in a dispute

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<sup>10</sup> *Id.*

<sup>11</sup> Nat’l Hockey League v. Nat’l Hockey League Players’ Association, Decision on the Validity of Ilya Kovalchuk’s contract, August 9, 2010 (Bloch, Arb.) [hereinafter *NHL*, Decision on Validity].

<sup>12</sup> Dan Rosen, *Report: Richard Bloch Named Ilya Kovalchuk Arbitrator*, NHL, <http://www.nhl.com/ice/news.htm?id=535281>.

<sup>13</sup> NHL Agreement, *supra* note 5.

<sup>14</sup> NATIONAL MEDIATORS BOARD, RICHARD I. BLOCH RESUME, [http://www.nmb.gov/arbitrator-resumes/bloch-richard\\_res.pdf](http://www.nmb.gov/arbitrator-resumes/bloch-richard_res.pdf) (last visited Apr. 29, 2011).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

over the contract status of a player who signed to play in both leagues.<sup>17</sup> Also, restricted free agents or the individual teams may request arbitration to determine a player's salary.<sup>18</sup> This happens every summer, with 20 players filing for arbitration in 2009 and 31 in 2010.<sup>19</sup> But those are classic labor versus management scenarios. The NHL had yet to bring in an arbitrator to square off against one of its own teams in a dispute over the validity of a freely-negotiated contract that, on its face, falls within the parameters of the CBA.

#### IV. THE PARTIES' ARGUMENTS

##### A. *The League*

The CBA contains no express language forbidding any of the terms of the Kovalchuk contract, not the total dollar amount, not the length, not the movement clauses.<sup>20</sup> In fact, the only provision that sets limits on the earning capacity of an individual player with full rights as an unrestricted free agent is Article 50.6, which places the maximum salary an individual player can earn per season at 20 percent of the team salary cap.<sup>21</sup> The league conceded this fact, instead arguing that the contract as a whole, and the effect it would have on the Devils' salary cap, was an impermissible circumvention of the CBA.<sup>22</sup> In its argument before Bloch, the league stated, "We believe this SPC constitutes an improper manipulation of payroll room, improperly and currently lowering its average Club salary and

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<sup>17</sup> SportsBusinessDaily.com, KHL Agrees to Arbitration over Radulov, but NHL Rejects Terms, <http://www.sportsbusinessdaily.com/article/124100> (last visited September 29, 2010).

<sup>18</sup> NATIONAL MEDIATORS BOARD, *supra* note 14.

<sup>19</sup> Foxsports.com, *Niemi Among 31 Filing for Arbitration*, <http://msn.foxsports.com/nhl/story/Niemi-among-31-filing-for-salary-arbitration-070610> (last visited September 10, 2010).

<sup>20</sup> See NHL Agreement, *supra* note 5.

<sup>21</sup> *Id.*

<sup>22</sup> NHL, Decision on Validity.

potentially giving the Club an artificial and inappropriate increase above the upper limit, although nominally remaining within.”<sup>23</sup>

Much of this belief stemmed from what the league termed the “illusory” final six years of the contract. Twenty-seven when he signed the deal, Kovalchuk would have been 43 years old when the contract expired, well beyond the age players normally play to, the league argued.<sup>24</sup> Furthermore, 97 percent of the deal would have been paid out during the first 11 years, giving Kovalchuk little reason to play out the contract, at least financially.<sup>25</sup> As if that were not enough, the league contended, the transition from a “no move” clause to a “no trade” clause late in the deal was an indication the Devils expected Kovalchuk to retire or otherwise not be with the team, and this “no trade” clause would allow the team to remove the \$6 million cap hit from their books.<sup>26</sup>

All told, the NHL claimed, these terms would allow the Devils to sign a star player at a substantially lower average rate while still paying Kovalchuk the high rate of salary that he wanted.

*B. The Players’ Association*

The Players’ Association’s reading of the CBA was much narrower, much plainer. Because the CBA does not expressly prohibit any of the terms of the contract Kovalchuk signed, the Players’ Association contended, there was no need to inquire further.<sup>27</sup> The Association pointed to the preamble of Article 26.3, which reads: “Article 26 is designed to prohibit and prevent conduct that circumvents the term of this Agreement, while not deterring conduct permitted by the Agreement,

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

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

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

<sup>27</sup> NHL, Decision on Validity.

the latter conduct not being a circumvention.”<sup>28</sup> Essentially, the Association argued, without a bargained-for restriction, “there can be no resulting evasion of the CBA’s letter or spirit.”<sup>29</sup>

## V. THE RULING

Bloch took a measured approach to answering the question at hand, first determining whether it was even possible for a contract that was permissible on its face to be impermissible in spirit. Bloch paid particular attention to the language of Article 26, which explicitly prohibits “‘understandings of any kind’ that serve to devitalize CBA restrictions, or, indeed, that are intended to do so.”<sup>30</sup> Taking the broad approach, Bloch concluded, was necessary in order for all of the clauses in Article 26 to be read together. Taken together, Bloch reasoned, the language of Article 26 indicates the league and the Association intended not only to consider whether the individual terms of the agreement conformed to the CBA, but whether the agreement as a whole had “the effect of defeating or circumventing the CBA.”<sup>31</sup>

With this framework in mind, Bloch set about deciding whether Kovalchuk’s 17-year pact with the Devils had the effect of circumventing the CBA. In ruling the contract was drawn up in such a way as to skirt the edges of the CBA, Bloch accepted the league’s arguments about the whole of the contract being greater than the sum of its parts.<sup>32</sup> Bloch noted the age Kovalchuk would have been when the contract expired, the dramatic drops in salary late in the deal, the substantial frontloading of payment, and the ease with which the Devils would be able to remove Kovalchuk from their roster late in the deal all as obvious attempts, in the aggregate, to “artificially extend the term of that agreement, thereby

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

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

<sup>32</sup> *NHL*, Decision on Validity.



decreasing the annual salary cap figure and increasing the Club's payroll room that serves to defeat the intentions of the parties as manifested in the Team Payroll Range provisions." <sup>33</sup>

## VI. THE IMPACT

Regardless of the outcome, this was going to be the first and only hearing of its kind. Had Bloch ruled in favor of the Devils, the precedent would have been set, the contract would have stood and teams would have continued to hand out long-term, frontloaded contracts as a means of signing star players at reduced rates. By invalidating the contract, Bloch not only returned Kovalchuk to the purgatory that is free agency, but he also opened the door for the invalidation of several other contracts that similarly strained the integrity of the CBA.<sup>34</sup> Moreover, invalidated contracts could lead to unhappy players, and unhappy players could lead to another work stoppage when the CBA expires in 2012, something the league cannot afford after losing the entire 2004-05 season to a lockout.

To prevent any of that from happening, the NHL and the NHLPA took Bloch's decision and fashioned its logic into the CBA. To prevent teams from signing players to deals that violate the spirit of the CBA, the two sides agreed to implement a bright-line rule to govern these types of contracts. Any contract that extends past a player's 41<sup>st</sup> birthday will be valued in one of two ways: (1) The value of the years of the contract before the player's 41<sup>st</sup> birthday will be averaged to determine the player's cap hit, (2) while the years at age 41 and later will be

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<sup>33</sup> *Id.*

<sup>34</sup> Elliotte Friedman, *Another Kovalchuk Arbitration Case Could Cost the NHL*, CBC SPORTS, <http://www.cbc.ca/sports/blogs/elliottfriedman/2010/09/another-kovalchuk-arbitration-case-could-cost-nhl.html>.

considered for their actual value.<sup>35</sup> The NHL and NHLPA also agreed that for any long-term contract that averages more than \$5.75 million for the three highest years, a player aged 36-40 will count at a minimum of \$1 million against the salary cap.<sup>36</sup>

Furthermore, the two sides agreed that all contracts signed before September 4, 2010 would stand as written (including the new 15-year, \$100 million deal Kovalchuk ultimately signed with New Jersey), ending the possibility the league would cancel the contracts of several prominent players who had signed similar but not quite as blatant deals as Kovalchuk.<sup>37</sup> Had the league canceled those contracts, the NHLPA no doubt would have cried foul and the league would have had a number of new cases on its hands. And with the precedent firmly set by the Kovalchuk decision, the players' association would have done everything it could to keep Bloch away from the proceedings, opening up a new round of squabbles.<sup>38</sup>

## VII. CONCLUSION

Spurred on by Bloch's decision, the parties' decision to amend the CBA was for the best. Despite upholding the NHL's rejection of the contract on the grounds that it circumvented the CBA, Bloch did not set out the parameters for what was an acceptable contract; merely what was, in this case, unacceptable.<sup>39</sup>

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<sup>35</sup> Tim Panaccio, *NHL Modifies Contracts, Salary Cap Valuations*, CSN PHILLY, [http://www.csnphilly.com/09/04/10/NHL-Modifies-Contracts-Salary-Cap-Valuat/landing\\_flyers.html?blockID=304360&feedID=695](http://www.csnphilly.com/09/04/10/NHL-Modifies-Contracts-Salary-Cap-Valuat/landing_flyers.html?blockID=304360&feedID=695).

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

<sup>37</sup> *Id.*

<sup>38</sup> Jim Kelley, *NHL Had to Tread Carefully with Ilya Kovalchuk's Contract*, SPORTS ILLUSTRATED, [http://sportsillustrated.cnn.com/2010/writers/jim\\_kelley/09/02/niemi.kovalchuk.notes/index.html](http://sportsillustrated.cnn.com/2010/writers/jim_kelley/09/02/niemi.kovalchuk.notes/index.html).

<sup>39</sup> *Id.*

That was his charge, as he saw it, “not to somehow construct his or her own notions of industrial justice or perceived equities.”<sup>40</sup>

If the purpose of arbitration is to deliver a cheaper, more efficient and more expert resolution to a dispute,<sup>41</sup> Bloch did his job in that regard, too. And even if he didn’t intend for it to, his swift and fair resolution ultimately brought about positive change, as the NHL put down its hammer,<sup>42</sup> the NHLPA protected its players, and the game of hockey was able to move forward.

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<sup>40</sup> *NHL*, Decision on Validity.

<sup>41</sup> See THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 1* (5<sup>th</sup> ed., Thomson/West 2009).

<sup>42</sup> Kelley, *supra* note 38.