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ADHESIVE ARBITRATION: THE SUSTAINING GRACE FOR THE FUTURE OF THE WORLD'S
MOST PROFITABLE SPORTS LEAGUES

By
Evan Goldsmith*

I. INTRODUCTION

The four major American sports leagues, the National Football League (“NFL”), the National Basketball Association (“NBA”), Major League Baseball (“MLB”) and the National Hockey League (“NHL”), generated an estimated twenty-five billion U.S. dollars in revenues for 2012.¹ The NFL ranks as the highest revenue-generating professional athletics league in the world, with the MLB coming in second, the NBA coming in fourth, and the NHL coming in as the sixth highest revenue-generating athletics league.² While these leagues generate such a high amount of revenue, all stoppages of work go against the conventional business plan and prevent the generation of income. These high revenue-generating leagues have recently experienced more “lockouts” than in the past, as the owners and players associations argue vehemently over their share of the revenues.

Athletes and referees are generally considered the weaker negotiating party based on the high number of individual needs the player’s and referee’s associations must accommodate during negotiations. However, athletes and referees can be in a stronger position to bargain than employees in other venues, especially given their extremely unique and highly developed skills.³ To avoid a continuous cycle of being the weaker bargaining party and being locked out by the owners, the athletes and referees in the four major American sports leagues (“the leagues”) should demand a mandatory arbitration clause be included in their collective bargaining agreements (“CBAs”). Ideally, this clause will call for binding arbitration by a neutral arbitrator if the players and referees cannot come to an agreement with the owners before the end of the prior contract terms. If the prior contract expires with no new contract between the players/referees and the owners, then each would propose the terms of their ideal contract to the arbitrators, and

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¹ See generally Cork Gaines, *Sports Chart Of The Day: NFL Revenue Is Nearly 25% More Than MLB*, BUSINESS INSIDER (Oct. 19, 2012, 2:41 PM), <http://www.businessinsider.com/sports-chart-of-the-day-nfl-revenue-still-dwarfs-other-major-sports-2012-10> (The \$25 million dollars was amongst all four leagues for the 2011-2012 season. The NFL generated an estimated \$9.5 million, the NBA generated an estimated \$4.3 million, the MLB generated an estimated \$7.7 million and the NHL generated an estimated \$3.2 million.).

² See generally Chris Isidore, *Why Football is Still a Money Machine*, CNNMONEY (Feb. 1, 2013, 10:00 AM), <http://money.cnn.com/2013/02/01/news/companies/nfl-money-super-bowl/index.html>.

³ See Alexandra Baumann, *Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On*, 32 NAT’L ASS’N L. JUD. 251, 297-98 (2012) (discussing the differences in hiring replacement workers in athletic work stoppages versus a traditional employment stoppages).

the arbitrators will create terms of a new CBA to try and accommodate both parties. This proposition will prevent future inequitable agreements and ultimately avoid future lockouts. The Supreme Court has continued to support adhesive arbitration, and the recent decision in *A T & T Mobility, LLC v. Concepcion*⁴ (“*Concepcion*”) has again upheld adhesive arbitration agreements, evidencing that in today’s world most consumer contracts are adhesive, and the courts have no issue enforcing them.⁵ Additionally, the Supreme Court in the *Steelworkers Trilogy*⁶ held that labor agreements can include adhesive arbitration clauses, forcing employees to either agree to the employment contract, including any arbitration agreements, or be without employment.⁷

With the addition of a mandatory arbitration agreement in each of the four major sports’ CBAs, the leagues will continue to operate smoothly and, ideally, the terms of the CBAs will become a happy medium for the demands of both parties. With the enforcement of mandatory arbitration, negotiations will either become more efficient and effective, or the leagues will risk placing the CBA’s terms in the hands of an arbitral committee. Having the athletes impose a mandatory arbitration provision in the next revision of each leagues’ CBA will be a wise implementation by a traditionally weaker party, which is the opposite of the current trend in adhesive arbitration.

This article will first provide background information regarding the leagues and their recent history with lockouts and work stoppages. Next, this article will demonstrate the difference between American and European labor and consumer arbitration, as an example of a current approach to protecting traditionally weaker parties. This explanation will then be applied to show why the leagues’ athletes are the weaker party in CBA negotiations, but how the athletes can protect themselves in future CBA negotiations. Finally, this article will suggest how the addition of mandatory arbitration at the termination of a CBA’s terms will improve the efficiency and fairness of the leagues.

II. THE INCREASING REOCCURRENCE OF LOCKOUTS IN THE FOUR AMERICAN PROFESSIONAL SPORTS LEAGUES

A. *The NFL’s Back-to-Back Lockouts*

In the past two years, the NFL has experienced two separate lockouts with their employees. The NFL’s current and prior CBAs do not have mandatory arbitration agreements that force arbitration once a CBA is about to expire. In 2011, the NFL

⁴ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

⁵ See generally *Concepcion*, 131 S. Ct. at 1740; *Prima Paint Corp. v. Flood & Conklin Mfr. Co.*, 388 U.S. 395 (1967); *Doctor’s Ass’n v. Cararotto*, 517 U.S. 681 (1996); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999).

⁶ See generally *United Steelworkers of Am. v. Enter. Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960) [hereinafter *The Steelworkers Trilogy*].

⁷ See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. at 580.

experienced a lockout with their players, which lasted nearly four and a half months and required the cancellation of the yearly “Hall of Fame” game.⁸ The second lockout, which took place in 2012, involved the NFL’s referees and generated a large amount of criticism based on the NFL’s response.⁹

The players’ lockout involved key concerns by both the owners and the players. While the owners were interested in reducing the players’ share of the overall revenue, the players were concerned with the number and type of practices, the amount of physical contact allowed during practices, their health/injury protection, and retirement benefits available to the players.¹⁰ These concerns, all valid, would have affected not only the current state of the league, but would have also had a profound long-term effect because of the ten year length of the contract. The owners were able to negotiate with both current and future interests in mind, but the players had to focus more on the most favorable terms they could require for this CBA. With such high stakes, the best solution is to remove the negotiation process from the interested parties’ hands and allow a neutral arbitrator to draft a new CBA which will impose fair terms.

In 2012, the NFL’s lockout with the referees lasted from June 2012 to July 2012, but only affected three weeks worth of games.¹¹ The major issues that surrounded this lockout included the league’s desire to make the referees full-time employees while simultaneously lowering their salaries and pension plans.¹² After the failure to reach an agreement, the NFL decided to hire replacement referees and hoped for a catalyst for future negotiations between the parties.¹³ The lockout with the referees was one that showed a rare weakness for the league, as a series of chaotic events took place in the three week absence of the officials and led to mounting criticism and questions

⁸ See Brad Biggs and Vaughn McClure, *Hall of Fame Game Canceled as Players Mull Deal*, CHICAGO TRIBUNE (July 11, 2011), available at http://articles.chicagotribune.com/2011-07-22/sports/ct-spt-0722-olivet-bears-chicago--20110722_1_bears-and-rams-training-camp-free-agents; see also Roger Goodell Signs 10-Year CBA, ESPN (Aug. 6, 2011, 3:00 AM), http://espn.go.com/nfl/stories/_id?6836275/roger-goodell-nflpa-demaurence-smith-signs-cba-hall-fame-steps.

⁹ See Jahmal Corner, *NFL Referees Agree to Deal With League to End Lockout*, REUTERS (Sept. 27, 2012, 4:01 AM), available at <http://www.reuters.com/article/2012/09/27/us-nfl-refs-deal-idUSBRE88Q05120120927> (discussing the increased pressure on the NFL to reach a deal to reinstate the referees in order to save the quality and consistency of officiating in the NFL).

¹⁰ See Patrick Rishe, *Who Won The 2011 NFL Lockout?*, FORBES (July 21, 2011, 10:44 PM), available at <http://www.forbes.com/sites/sportsmoney/2011/07/21/who-won-the-2011-nfl-lockout/4/>.

¹¹ See Sam Farmer, *NFL Officials: Quality of Games Could Suffer with Replacement Officials*, LA TIMES (July 18, 2012), available at <http://articles.latimes.com/2012/jul/18/sports/la-sp-nfl-referees-20120719>.

¹² See Mike Garafolo, *NFL, Referees End Lockout After Reaching New Labor Deal*, USA TODAY (Sept 27, 2012, 1:52 AM), available at <http://usatoday30.usatoday.com/sports/nfl.story/2012/09/27/nfl-referees-end-lockout-after-reaching-new-labor-deal/57846906/1>; see also David Vinjamuri, *The Referee Lockout Is Hurting The NFL Brand*, FORBES (Sept. 25 2012, 4:47 PM), available at <http://www.forbes.com/site.davidvinjamuri/2012/09/25/the-referee-lockout-is-hurting-the-nfl-brand/>.

¹³ See Farmer, *supra* note 11.

surrounding the NFL.¹⁴ Due to the increasing amount of pressure, the NFL quickly came to an agreement to bring the original officials back to work. Had an arbitration clause been included in the referees' prior CBA, the replacement referees may never have been needed, and the integrity of the league could have avoided criticism.

B. The NBA's Recent Experiences with Lockouts

Dating back to 1995, the NBA has had four lockouts, with the most recent taking place at the beginning of the 2011-2012 season. Like the other leagues, the NBA has never had a mandatory arbitration clause in any CBA to force arbitration upon the expiration of the previous CBA. The first lockout, in 1995, lasted only three months, and the situation was unique because the lockout took place between the players and the players union, not the owners.¹⁵ The lockout occurred outside the regular season and did not cause any games to be missed.

The NBA was unable to go one year without another lockout, because in 1996 the players were locked out for mere hours, making it the shortest lockout in professional athletics history.¹⁶ The lockout's only issue was revenue sharing, as the league wanted to split evenly a fifty million U.S. dollar television contract to allow for higher player salaries, while the players wanted more than the twenty five million U.S. dollars offered.¹⁷

The NBA's first major lockout occurred before the 1998-1999 season. This lockout led to the cancellation of 464 games over 191 days.¹⁸ The major points of contention between the National Basketball Players Association ("NBPA") and the owners were a proposed limit on players' salaries and a strict rookie pay scale to limit salaries.¹⁹ Overall, the agreement between the two sides was viewed as a huge victory for the owners, while the players only received minor benefits.²⁰ One of the most important consequences from the 1998-1999 lockout was the public display of internal divide and

¹⁴ See Garafolo, *supra* note 12; see also Vinjamuri, *supra* note 12.

¹⁵ See Daniel Bukszpan, *10 Game Changing Pro Sports Lockouts and Strikes*, CNBC (last visited May 18, 2014), available at <http://www.cnbc.com/id/41968930/page/9>.

¹⁶ See Clifton Brown, *PRO BASKETBALL; Deal Is a Lock, Not a Lockout, For the N.B.A.*, THE NEW YORK TIMES (July 10, 1996), available at <http://www.nytimes.com/1996/07/10/sports/pro-baseketball-deal-is-a-lock-not-a-lockout-for-the-nba.html>.

¹⁷ See Brown, *supra* note 16.

¹⁸ See Steve Aschburner, *Lockout Revisited, 10 Years Later*, SPORTS ILLUSTRATED (July 8, 2008, 5:00 PM), available at http://sportsillustrated.cnn.com/2008/writers/steve_aschburner/07/08/lockout.revisited/index.html.

¹⁹ See Phil Taylor, *To The Victor Belongs The Spoils*, SPORTS ILLUSTRATED (Jan. 18, 1999), available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1014974/1/index.htm>.

²⁰ See *id.*

suffering the players experienced as the lockout continued.²¹ The players were unable to continue as a unified front against the owners throughout the lockout, considering some players became desperate to settle and no longer could hold out for a better deal.²²

The NBA's most recent lockout, prior to the 2011-2012 season, spanned over 161 days and cancelled 480 games. One of the lockout's main issues was the league's revenue sharing, with both sides wanting more access to a higher percentage of the revenue generated by the league.²³ Ultimately, the new CBA allowed the players to receive only forty nine percent of the revenue generated, which was down from the fifty seven percent that the players received under the prior CBA.²⁴ As protection from the current trend of rights being removed from the players, a mandatory arbitration clause at the expiration of the prior CBA will help create more fair terms between the owners and the athletes.

C. The MLB's Minimal Experience with Lockouts

The MLB has experienced fewer lockouts, even though the MLB has experienced more work stoppages because of player walk-outs. The MLB has been more successful than other leagues in timely negotiating a CBA agreement so their players remain on the field, and involve their players in the negotiation process to give them proper knowledge of what they are negotiating for.²⁵ The 1994-1995 MLB strike was considered one of the world's worst sports outages, when the players walked out in the middle of the season and the strike affected two seasons.²⁶ While this was not a lockout by the owners, it had the same effect since players refused to work based on the belief the owners were acting in a collusive manner behind their backs, keeping millions of dollars out of the players' hands.²⁷ The strike led to the cancellation of the 1994 playoffs and World Series, and shortened the 1995 season - a total of 950 games were not played.²⁸ Bad blood between

²¹ See *id.*

²² See Taylor, *supra* note 19.

²³ See Larry Coon, *Breaking Down Changes in the New CBA*, ESPN (Nov. 11, 2011), available at http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one.

²⁴ See *id.*

²⁵ See Major League Baseball Players, *History of the Major League Baseball Player's Association*, MLBPLAYERS.COM, (last visited May 18, 2014), available at <http://mlb.mlb.com/pa/info/history.jsp>.

²⁶ See Adam Lazarus, *NFL Lockout: Ranking the Fallouts from Worst Sports Labor Disputes Ever*, BLEACHER REPORT (Mar. 2, 2011), available at <http://bleacherreport.com/articles/624943-nfl-lockout-ranking-the-fallout-from-worst-sports-labor-disputes-ever/page/10>.

²⁷ See Kevin Baker, *Millionaires v. Billionaires*, PBS (Nov. 13, 2013, 9:09 PM), available at <http://www.pbs.org/baseball-the-tenth-inning/dark-days/millionaires-vs-billionaires/>.

²⁸ See Allen Barra, *Baseball's Costliest Walk*, THE WALL STREET JOURNAL (Oct. 28, 2009, 12:01 AM), available at <http://online.wsj.com/news/articles/SB10001424052748704335904574497433535880354>; see also The Baseball Zealot, *Baseball Shortened Seasons*, THE BASEBALL ZEALOT (Aug. 21, 2009), <http://www.thebaseballzealot.com/statistics/baseball-shortened-seasons>.

the players and the owners was the primary cause of the strike, when it was discovered that the owners colluded to intentionally keep down the value of salaries. This problem was eventually corrected by mandatory salary arbitration, which stemmed from grievances filed by the players.²⁹ The major crux of the negotiations centered around the reduction of salaries, as the owners wanted to institute a hard salary cap and the players wanted their salaries to continue growing.³⁰ A final agreement between the owners and the players took significant time, as the players came back to work for the 1995 season without a CBA. A mandatory arbitration clause in the MLB's CBA will prevent unfair CBA negotiations, and would allow the terms of the CBA to be neutral and favorable to both parties, either through negotiations by the parties, or a decision by a neutral arbitrator. Because the MLB already has significant experience with arbitration, through their use of salary arbitration, the MLB would be well positioned to expand their arbitration proceedings to include the creation of future CBAs.

D. The NHL's Three Lockouts

Since 1994 the NHL has experienced three separate lockouts, totaling a loss of 2,208 games.³¹ By numbers alone, the NHL has missed the most games due to lockouts, a factor many critics claim is the reason the NHL is the least successful American major sports league.³² Despite the frustration caused by repeated lockouts, the NHL has recently witnessed an increase in attendance, membership, revenue, and television audiences.³³ The NHL's current and prior CBAs do not have mandatory arbitration agreements similar to the one being proposed.

The 1994-1995 NHL season experienced a player lockout because an agreement could not be reached in drafting a new CBA. The lockout extended for three months, one

²⁹ See Barra, *supra* note 28; see also The Baseball Zealot, *supra* note 28.

³⁰ See *id.*

³¹ See Jeff Z. Klein, *Breaking Down N.H.L.'s Three Lockouts*, THE NEW YORK TIMES (Oct. 2, 2012, 6:00 PM), available at http://slapshot.blogs.nytimes.com/2012/10/02/breaking-down-n-h-l-s-three-lockouts/?_r=0; see also Jeff Z. Klein, *Sides Sign Agreement; Training Camps to Open*, NEW YORK TIMES (Jan. 12, 2013), available at <http://www.nytimes.com/2013/01/13/sports/hockey/nhl-and-players-union-finalize-agreement.html>.

³² See Scott Burnside, *The Lockout and The Damage Done*, ESPN (Jan. 6, 2013, 8:45 PM), available at http://espn.go.com/nhl/story/_/id/8817964/ (discussing the possible future harms of another lockout for the NHL, claiming the brand damage may make it difficult to repair the required relationships with the fans that help drive an increase in revenue).

³³ See Sara Bibel, *Regular Season NHL Viewership on NBC Sports Network is Best on Cable in Nearly Two Decades*, TV BY THE NUMBERS (Apr. 30, 2013), available at <http://tvbythenumbers.zap2it.com/2013/04/30/regular-season-nhl-viewership-on-nbc-sports-network-is-best-on-cable-in-nearly-two-decades/180420>; see also Curtis Eichelberger, *NHL Borrows From NFL As It Pursues Bigger TV Contract (Update1)*, BLOOMBERG (May 29, 2009, 11:37 PM), available at <http://www.bloomberg.com/apps/news?pid=newsarchives&sid=aGY7pu.INAhA>.

week, and three days, forcing the league to cancel 468 games.³⁴ The player lockout was predominantly based on the fact that the NHL Players Association (“NHLPA”) could not come to an agreement with the owners over several issues, including the implementation of a salary cap, the length of the season, and revenue sharing between the teams.³⁵

The second player lockout the NHL experienced occurred in the 2004-2005 season and caused the whole season to be forfeited because the players and owners both failed to reach an agreement.³⁶ The player-opposed salary cap became a major issue between the two sides, and it took nearly ten months for an agreement to be constructed.³⁷

Following the 2004-2005 season cancellation, the NHL experienced another player lockout eight years later, at the beginning of the 2012-2013 season. The major points of contention concerned revenue sharing, limits on the players’ contractual rights, and a push by the NHLPA to abolish the salary cap.³⁸ The players agreed to take a seven percent drop in the share of revenue in return for their request to eliminate the salary cap. Ultimately the players were not granted their request, but they were still forced to accept the seven percent drop in revenue sharing.³⁹ Based on the large amount of criticism toward the NHL for their repeated lockouts, the implementation of mandatory arbitration at the expiration of the prior CBA could help ensure continuous play for the NHL.

III. WHAT FAIL-SAFES ARE AVAILABLE TO THOSE INVOLVED IN ARBITRAL PROCEEDINGS?

A. *Consumer Transactions: American v. European*

The approach to arbitration in consumer transactions is significantly different in the United States compared to most European countries.⁴⁰ The recent activity by the

³⁴ See Klein, *supra* note 31.

³⁵ See Jamie Fitzpatrick, *NHL Lockouts and Strikes: A History*, ABOUT.COM (last visited Oct. 14, 2013), available at <http://procehockey.about.com/od/history/a/Nhl-Lockouts-And-Strikes-A-History.htm>.

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

³⁹ See Travis Hughes, *NHL Lockout Over; Let’s Answer All of Your Questions*, SBNATION (Jan. 7, 2013, 8:35 AM), available at <http://www.sbnation.com/nhl/2013/1/7/3733442/nhl-lockout-over-questions-answers>.

⁴⁰ See Jean R. Sternlight, *Is The U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumers and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 831-50 (2002) (describing the fundamental differences between the protection courts provide in European and American arbitration).

American courts, as seen in *Concepcion*, has been to allow for arbitration agreements between consumers and merchants, regardless of the levels of adhesion found in the arbitration clause.⁴¹ The Supreme Court in *Concepcion* was protective of arbitration and ensured that arbitration, in accordance with Federal Arbitration Act (“FAA”) §2, continued to be a viable and valid form of conflict resolution for merchants.⁴² The Supreme Court wanted to ensure that the procedural advantages, specifically speed and informality, were upheld with the enforcement of arbitration.⁴³ Since *Concepcion*, the Supreme Court upheld adhesive arbitration clauses in American consumer contracts in *American Express Co. v. Italian Colors* (“Italian Colors”). In *Italian Colors* the Supreme Court enforced an arbitration clause that denied class arbitration and forced individual consumers to pursue arbitration even if the costs significantly outweighed the possible recoveries.⁴⁴ The Court was not concerned with the unlikelihood of arbitration proceedings ever taking place under these arbitration contracts, but was more interested in allowing the party in a stronger position of bargaining (the merchant), to enforce the arbitration clauses imposed on the weaker party (the consumer).⁴⁵ The Supreme Court is clear in *Italian Colors*, regardless of the unlikelihood, difficulties, or impracticalities in bringing forward an arbitration clause, that the arbitration clause will be found valid and enforceable.⁴⁶ American courts have continued to uphold the enforceability of adhesive arbitration clauses, even if arbitration is against the consumers’ will, or effectively negates the purpose of pursuing arbitration, as in *Italian Colors*.

Additionally, the Supreme Court has effectively taken away the right of States to create legislation that will protect consumers from adhesive mandatory arbitration by enforcing the FAA as the controlling law.⁴⁷ In American consumer transactions, the Supreme Court has relegated consumers to a weaker position of bargaining by allowing merchants to impose adhesive arbitration clauses upon the consumer and delegate the terms of the arbitration contracts without any input from the consumers. The courts have realized that consumer contracts in the United States have predominantly become contracts of adhesion, yet the courts continue to allow the arbitration clauses to be enforced against the powerless consumer.⁴⁸

⁴¹ See *Concepcion*, 131 S. Ct. at 1750 (The Court explains that almost all consumer contracts are now executed on an adhesive basis, and the court is unwilling to throw out all arbitration clauses based purely on adhesion in the creation of the contract.).

⁴² See *id.*

⁴³ See *id.* at 1749.

⁴⁴ See *Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁴⁵ See *id.* at 2314.

⁴⁶ See *id.*

⁴⁷ See *Sternlight*, *supra* note 40.

⁴⁸ See generally *Concepcion*, 131 S. Ct. at 1740; see also *Italian Colors*, 133 S. Ct. at 2304.

In comparison, the European court system refuses to allow arbitration clauses to be oppressive and be enforced against the will of the consumer.⁴⁹ One of the most clear examples that European law will not enforce an adhesive arbitration agreement stems from a European Union directive entitled “Unfair Terms in Consumer Contracts.”⁵⁰ The directive explicitly held that unfair terms imposed by merchants would not be enforced and were to be considered invalid.⁵¹ The directive explained that any contractual term not individually negotiated by the consumer was to be considered unfair if it caused a significant imbalance in the consumer’s rights.⁵² The European Union directive was adopted by multiple countries concerned with the judicial rights of their consumers, including the United Kingdom, France, and Germany.⁵³ The European Union continued to take the stance that forcing a consumer to agree to arbitration prior to understanding the specific issues or disputes was unfair, because it forced consumers to arbitrate issues before the consumer knew of the facts of their disputes or their rights associated with those facts.⁵⁴ The European Union has taken a strong stance that arbitration will not be enforced, and likely cannot even be contracted, without an understanding consent by the consumers, which likely can only be done after the dispute has risen.⁵⁵ Because arbitration under the European Union’s practice can only be conducted voluntarily, the consumer has the power to ensure that any arbitration will not be done against their will because the consumer can agree to enter binding arbitration only after they have compiled all of the facts and understand the rights they are contracting away. Unlike the United States, which allows for pre-dispute agreements to arbitrate, some European countries allow the consumers to ultimately veto all arbitral proceedings to protect the consumer’s right to seek proper remedy for their harm.

B. Labor and Employment Transactions: American v. European

The disparity between the United States and European approach to consumer protection are mirrored in the realm of labor and employment arbitration. American labor arbitration predominantly stems from three early cases, known as the *Steelworkers Trilogy*.⁵⁶ Essentially, the *Steelworkers Trilogy* set up four major principles when dealing

⁴⁹ See Council Directive 93/13 art. 6, 1993 O.J. (195) 29 (EU).

⁵⁰ See generally Sternlight, *supra* note 40; see also Council Directive, *supra* note 49.

⁵¹ See Sternlight, *supra* note 40, at 844-45.

⁵² See *id.* See also Peter B. Rutledge and Anan W. Howard, *Arbitrating Disputes Between Companies and Individuals: Lessons from Abroad*, 65-APR DISP. RESOL. J. 30, 33 (2010).

⁵³ See Rutledge and Howard, *supra* note 52 at 30, 33-34.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See generally The Steelworkers Trilogy.

with arbitration clauses in labor agreements.⁵⁷ The court determined that arbitration clauses were a matter of contract; therefore the deal that was negotiated and agreed to would be upheld, regardless of unconscionability or fundamental unfairness.⁵⁸ The court continued to recognize that arbitration in labor agreements would be analyzed by the courts to determine if the contract at issue was actually agreed to, but once an arbitration agreement was found to exist and was agreed to, the court would review none of the merits and would place strong favor on the arbitrator continuing with the arbitration process.⁵⁹ The American stance on labor arbitration, illustrated by the *Steelworkers Trilogy*, particularly *A T & T Technologies v. Communications Workers of America*, has been to enforce all arbitration clauses as agreed to, even if the agreement was forced upon the employee and adhesive in nature. American employees have traditionally been viewed as the weaker party. As such, the employees either have the choice to sign a contract that includes a pre-issue arbitration clause or refuse to work.⁶⁰ Ultimately, if an employee wants to be hired or retained, they are required to sign the employment contract as it is presented to them, regardless of the fact that they may object to the arbitration agreement.⁶¹

In contrast to the American stance on labor arbitration, European countries take a similar approach to labor arbitration as they do for consumer arbitration.⁶² Generally, European courts will not enforce resolution of employment disputes through private adjudication if the employee does not want to go forward without the protections offered by the legal system.⁶³ European Union Member States generally are reluctant to enforce mandatory arbitration for employment issues and would prefer to protect employees by engaging in other forms of non-binding alternative dispute resolution before enforcing arbitration.⁶⁴ While individual employment disputes are generally guided away from mandatory arbitration, CBAs have been allowed to develop through arbitration, and sometimes have even been mandated to do so.⁶⁵ Like European consumer arbitration agreements, the weaker party (i.e., employees) in labor agreements has the right to refuse

⁵⁷ See *AT&T Technologies v. Commc'n Workers of Am.*, 475 U.S. 643, 648-51 (1986).

⁵⁸ See *id.* at 651.

⁵⁹ See generally *id.*

⁶⁰ See *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 501-02 (6th Cir. 2004).

⁶¹ See *id.*

⁶² See generally Sternlight, *supra* note 40.

⁶³ See *id.*

⁶⁴ See Yasmine Tarasewicz, *International Labor and Employment Arbitration: A French and European Perspective*, 28 A.B.A.J. LABOR AND EMP'T LAW 349, 364 (2012).

⁶⁵ See Tarasewicz, *supra* note 64, at 364.

arbitration if they believe it will be a reduction or removal of their substantive rights.⁶⁶ European law includes a “fail safe” provision that allows the employee to either uphold the arbitration agreement or deny it and proceed to a judicial forum.⁶⁷ This “fail safe” provision is afforded to employees in Europe, but is not available to American employees because the Supreme Court has continuously ruled in favor of employers, taking away American employees’ rights to a proper judicial remedy.⁶⁸

C. American Athletics

American athletics naturally have disparity in bargaining power between the owners and the players.⁶⁹ When a CBA has expired or is about to expire, the negotiation between the owners and the leagues’ players association centers around each side wanting more money, and the athletes wanting more rights than the previous deal afforded.⁷⁰ Since the inception of players associations, the owners have failed to take them seriously and traditionally have been unwilling to completely fulfill their demands.⁷¹ In the NFL, some of the original bargaining processes demonstrate that the players began with a terrible bargaining position and were repeatedly ignored.⁷² For example, in 1958, the NFLPA made continuous threats to file an antitrust lawsuit to obtain certain concessions, including a benefit plan, medical and life insurance, and retirement benefits for retired players when they reached the age of 65, from the owners.⁷³ Initial threats, however, were considered futile because of the merger between the NFL and the American Football League (“AFL”), which created two separate players associations, and, on numerous occasions, the owners pitted one players association against the other.⁷⁴ In 1968, the NFLPA brought a list of demands required to be fulfilled in exchange for player employment, but the owners refused to meet these demands because the owners knew the AFL Players Association would be willing to continue

⁶⁶ See Tarasewicz, *supra* note 64, at 364.

⁶⁷ See *id.*

⁶⁸ See *id.* See also The Steelworkers Trilogy.

⁶⁹ See Baumann, *supra* note 3.

⁷⁰ See *id.*

⁷¹ See *id.* See also generally Kevin Wells, *Labor Relations in the National Football League: A Historical and Legal Perspective*, 18 SPORTS LAW. J. 93 (2011).

⁷² See Wells, *supra* note 71, at 95-101.

⁷³ See *id.* at 95; see also NFL Players Association, *History*, NFLPLAYERS.COM (last visited, May 18, 2014), available at <https://www.nflplayers.com/About-us/History/>.

⁷⁴ See Wells, *supra* note 71, at 95-96.

playing under the original terms.⁷⁵ The NFLPA refused to concede their demands and went on strike, only to later agree to less than satisfactory employment terms.⁷⁶

The NFL has given numerous examples of the inherently weak bargaining position of the athletes and referees. Particularly in 1971, following the hiring of a more aggressive NFLPA executive director, the NFLPA made specific demands, and when those demands were not met the players went on strike.⁷⁷ The owners took absolutely no action, believing they could win their case in court. Only five weeks later, before the case could proceed to court, the NFLPA gave up on their demands and ended their strike.⁷⁸ This strike caused no gain in the NFLPA's bargaining position, and serves as another example demonstrating how the owners impose their will on the athletes without giving much, if anything, in concession.⁷⁹

The most persuasive proof that the athletes are the weaker party arose from the 1987 NFL strike.⁸⁰ The players tried to assert their demands in a proposal to alter the free agency system and went on strike when the owners refused to concede to the player's demand to remove hurdles that impeded free agency mobility amongst players.⁸¹ The owners foresaw a work stoppage and sought to procure insurance by contacting replacement players in case of a strike.⁸² When the strike occurred, the NFL owners continued the season with replacement players, but allowed any player on strike to cross the picket line and play whenever they wanted to be paid again.⁸³ More than 200 players accepted the offer and crossed the picket line, severely hurting any chance the NFLPA had at forcing a deal to get the players back.⁸⁴ Shortly after some players crossed the picket line, the remaining players agreed to end the strike and return to work, even though none of their demands were met by the owners.⁸⁵ Time after time, the players have attempted to create a work stoppage, and, time after time, the owners have taken a hard stance by either making no concessions, or, in recent stoppages, making minimal

⁷⁵ See Wells, *supra* note 71, at 96.

⁷⁶ See *id.*

⁷⁷ See Baumann, *supra* note 3, at 261-62.

⁷⁸ See *id.* at 262.

⁷⁹ See *id.*

⁸⁰ See Wells, *supra* note 71, at 97-98.

⁸¹ See *id.* at 98.

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See Wells, *supra* note 71, at 98.

concessions to continue operations. Since the beginning, the players have been in a weaker position to bargain, and that has continued into today's era of athletics.

A rare example of athletes possessing the stronger position of bargaining power occurred in 2006 when a new NFL CBA, favorable to the players, was drafted to increase the amount of money available to players and grant the players a sixty percent split of the revenue generated by the league.⁸⁶ This deal was meant to be in place for seven years, but the owners, once again, showed that they have the upper hand in negotiations and can effectively control the players at will.⁸⁷ A mere two years after agreeing to the player friendly conditions, the owners voted to opt out of the CBA at the earliest possible time.⁸⁸ Even if the players are able to acquire a CBA with fair terms, the owners have built in safety carve-outs that allow for them to cancel the terms of the agreement and create a new, more favorable deal, at the cost of the players.⁸⁹

The unity of owners versus the unity of the players further reflects the superior bargaining power of the owners. The owners of each league constitute a small number (thirty two in the NFL, and thirty in the NBA, NHL, and MLB). These thirty individuals can more easily act as a concerted force with similar desires and needs.⁹⁰ Because of their small numbers, it is easy for the owners to come across as one unified entity.⁹¹ In comparison, there is a large number of disparate desires and needs when it comes to the athletes.⁹² Each league contains thousands of athletes, in addition to the thousands of athletes that will be in the league over the course of the upcoming years governed by the CBA being bargained for. Because of the large number of athletes and the numerous competing interests, it is almost impossible to hold a unified approach to negotiations.⁹³ These competing interests hinder the ability to negotiate and place the players in a weaker bargaining position in every negotiation, normally leading to the players taking more extreme measures in an attempt to achieve some of their requests.⁹⁴ American athletes in the four major American athletic leagues are comparable to consumers and other employees in the context of labor agreements. Athletes, just like employees, can either accept the contract offered to them or watch as alternative employees are hired. Because there is little the employee can do to negotiate their employment contract, they operate on

⁸⁶ See Wells, *supra* note 71, at 100.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See Baumann, *supra* note 3, at 295-96.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See Baumann, *supra* note 3, at 295-96.

a take-it-or-leave-it basis. When the players association negotiates with the owners, athletes are afforded opportunities to negotiate some of the major terms of their contracts; however, all of their demands will not be granted because the owners still have the opportunity to lock out the players or find replacements.

IV. HOW TO SOLVE THE DISPARATE BARGAINING POWER IN AMERICAN ATHLETICS

The rise of lockouts and work stoppages in the American major athletic leagues has given great concern to the owners, athletes, sponsors, television companies, and fans alike. There is a growing concern that the owners and athletes could continue to argue with one another at increasing rates, causing seasons for each league to be lost over failed negotiations. The protection that European consumer and labor law has given to weaker parties in arbitration should be replicated and included in all future CBAs in America's four major sporting leagues to properly protect athletes' interests.

As described above, a large number of European countries afford the weaker bargaining party (consumers and employees) the protection of choosing not to arbitrate a claim, even if there is an arbitration agreement in the governing contract.⁹⁵ This protection affords the weaker party the final say if they want to proceed with their claim in a forum other than the court after learning the facts of their dispute.⁹⁶ While arbitration affords some significant benefits that the court system does not, such as speed, efficiency, informality, and customized proceedings there can be a significant loss of rights, when the choice to arbitrate is imposed by the stronger party upon the weaker party without a choice.⁹⁷ Ultimately, the European justice system has afforded weaker parties the choice to arbitrate, to protect their rights from the stronger party imposing their will on the weaker party.⁹⁸ The weaker party in the four major athletic leagues (athletes) should be afforded the same protection from the stronger party (owners) by preventing lock outs. The players would substantially benefit if they were to demand a clause in the next CBA that allowed for them to choose mandatory, binding arbitration upon the expiration of the CBA if a new deal does not exist. In addition to keeping the players on the "field," it is mutually advantageous to allow a neutral arbitrator(s) to develop terms of a new CBA, which would prevent a lockout of the sports league until the parties reconvene to further negotiate. The arbitration clause the players should impose could be modeled after European employment arbitration, which suggests that during the construction of the new CBA terms the athletes should not strike and the owners should not lock out the players. As such, operations will continue as usual while the arbitrator(s) construct the terms to a new CBA.⁹⁹

⁹⁵ See generally Sternlight, *supra* note 40; see also Rutledge and Howard, *supra* note 52.

⁹⁶ See Tarasewicz, *supra* note 64, at 364.

⁹⁷ See *id.* at 362.

⁹⁸ See generally Sternlight, *supra* note 40; see also Rutledge and Howard, *supra* note 52.

⁹⁹ See May Olivia Silverstein, *Introduction to International Mediation and Arbitration: Resolving Labor Disputes in the United States & The European Union*, 1 AM. U. LAB. & EMP. L.F. 101, 116 (2011).

This proposal should be a player-initiated addition to the next CBA. The proposition would require that at the expiration of the CBA, if a new CBA was not agreed to through negotiations between the owners and the players, mandatory arbitration would start to create the terms of a new CBA effective immediately. Each side to the arbitration would select an arbitrator, and those two arbitrators would select a third to act as the lead arbitrator, who would ensure the creation of a CBA with fair terms for both the owners and the players if the other two arbitrators could not reach an agreement. If, at any time prior to the expiration of the prior CBA, the parties agree to an extension to the current CBA or develop a new CBA, arbitration would be postponed until the next expiration date. Additionally, it should be suggested that both parties continue to operate as usual while the new CBA is being drafted by the arbitrators. This will remedy one of the major issues caused by a failure to negotiate in a timely matter - lock outs and strikes. The mandatory arbitration clause should become a fundamental part of the CBA, and should not be revoked any time after enactment.

The mandatory arbitration proposal would carry multiple long term benefits for the weaker negotiation party (i.e., the athletes). First, the players would be given a right that finally places them on a level bargaining field with the owners. As delineated throughout this article, the owners of each league has had an upper hand in bargaining for CBA terms throughout history. Beyond negotiations, players have no real power, aside from striking, which only places minimal pressure on the owners.¹⁰⁰ The options are limited, and only a few players are able to move on to other leagues in the world.¹⁰¹ As stated before, the players do not remain a unified front when they strike or face a lock out, and eventually the players have to concede some of their demands to reach a new CBA and resume their employment.¹⁰² Allowing the players to force arbitration and develop a binding CBA would allow the athletes to remain unified in negotiations before the expiration of the old CBA, and if their demands are not met to a satisfactory level, arbitration will commence to hopefully create an equitable deal for both sides. Similar to European consumer and labor arbitration rules, athletes could avoid arbitration by agreeing to an offer presented by the owners, or reject the offer and allow arbitration to take place.¹⁰³ While the European courts are concerned with the removal of consumer and employee rights by forcing arbitration, with the imposition of mandatory arbitration for CBAs, the courts would be taking an active role in protecting the employees' (athletes

¹⁰⁰ See Pete Cunningham, *Former Michigan Athletes Deal with NFL, NBA Lockouts*, (July 15, 2011, 10:43 AM), available at <http://www.annarbor.com/sports/um-basketball/manny-harris-larry-foote-deshawn-sims-brandon-graham-nba-lockout-nfl-lockout/>.

¹⁰¹ See *id.*

¹⁰² See generally Baumann, *supra* note 3.

¹⁰³ See Kelly Parfitt, *Consumers Want to be in Europe; Corporations Want to be in the U.S.: How to Reform Mandatory Consumer Arbitration Agreements to be Fair to Both Parties*, SELECTED WORKS, at 9 (Dec. 2009), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=kelly_parfitt.

and referees) rights by allowing for arbitration if, during the negotiation of a new CBA, the terms were inherently unfair.¹⁰⁴

The second benefit that would arise from enacting a player's ability to force arbitration is the creation of truly fair CBA terms. When the players are given the right to force arbitration, the owners must negotiate in good faith and present fair terms, otherwise the ability to make the terms of the CBA will be taken out of the owners' hands and given to the arbitrators. A group of three neutral arbitrators will likely be able to generate terms that are fair for both sides and make CBA agreements void of owner favorable terms. Furthermore, the arbitrators will likely impose neutral terms that are not overly favorable to either side. Similarly, the players and owners will be more likely to negotiate in better faith, absent the inherent disparity in bargaining power. This process may make the terms of the CBA more equal. The owners may even be more willing to grant small concessions to the players, and vice versa, in exchange for small returns. For example, if players are concerned with the amount of money placed in health and safety programs and the owners want to have control over a larger part of the revenue, the parties might be willing to make concessions to appease the other party since the arbitration process will not guarantee their demands are met. This is different from the current process because now each party attempts to hold out long enough until the other party is forced to concede, so the stronger party ultimately receives most, if not all, of their demands. With mandatory arbitration, if each side is fearful of putting their desires into the hands of the three arbitrator panel, they should be more willing to strike a deal before the expiration of the CBA.

A third benefit of mandatory arbitration upon the expiration of a CBA is the continued operation of the sports league. As mentioned above, the NFL, NBA, MLB, and NHL are some of the most profitable professional sports leagues, and with each lockout that takes place, billions of dollars are lost.¹⁰⁵ With this proposed arbitration clause there should no longer be extended periods of work stoppages, because once a CBA expires (assuming negotiations fail prior to the expiration), work will continue while the arbitration panel works to create a new CBA with fair terms, as the European labor courts prefer.¹⁰⁶ Ultimately, this will ensure the players continue to receive their salaries, the period between CBAs will be shorter, and a new deal will be in place shortly, as opposed to the indefinite lockouts that have become frequent under the current system.¹⁰⁷ Also, the owners can continue to generate revenue and operate as the new terms of the CBA are

¹⁰⁴ See Parfitt, *supra* note 103; see also Sternlight, *supra* note 40.

¹⁰⁵ See generally Report: *In A lockout, \$1B in Losses?*, ASSOCIATED PRESS (Oct. 14, 2010, 7:15 AM), available at <http://sports.espn.go.com/nfl/news/story?id=5681923>; see also Dashiell Bennett, *Arenas Could Lose \$1 Billion Dollars in NBA Lockout*, BUSINESS INSIDER (Aug. 24, 2011, 4:55 PM), available at <http://www.businessinsider.com/arenas-could-lose-1-billion-dollars-in-nba-lockout-2011-8>; see also David Roth *NBA Lockout: More Than \$4.3 Billion at Stake*, THE FISCAL TIMES (Oct. 15, 2011), available at <http://www.thefiscaltimes.com/Articles/2011/10/15/NBA-Lockout-More-Than-4-Point-3-Billion-at-Stake>.

¹⁰⁶ See Silverstein, *supra* note 99, at 116.

¹⁰⁷ See *id.*

established.¹⁰⁸ Lastly, the fans will be able to continue enjoying the sports that have become engrained in our culture, and the numerous individuals and organizations that rely on these leagues as sources of income can continue to make a profit. With this suggested provision, lockouts and work stoppages in American athletics could soon be a thing of the past.

V. CONCLUSION

In conclusion, the current negotiation practices in the American athletic leagues between owners and the athletes is one that is heavily controlled by the owners. The athletes have little bargaining power, and this has shown over the course of history. Even with the ability to stop work, athletics continue to take place, normally after the athletes give up on their demands. European countries have decided to protect the rights of the weaker bargaining party in both consumer and employment arbitration by giving the weaker bargaining power the ability to choose to decline an arbitration agreement in their contracts to maintain fairness and justice. The four major Players Associations should demand and ensure that their next CBA agreement includes mandatory arbitration between the owners and the athletes or referees if they cannot come to an agreement on an extension on their prior CBA. This right would ensure equitable terms in future CBAs, create future ease in negotiating CBA terms, and guarantee continuous operations of their leagues. Without some protection from the owners, athletes will continue to be disadvantaged without any chance of advancing their bargaining powers or their rights. The mandatory arbitration proposal allows for the players to be properly represented and place themselves on equal footing with the owners, something that has never taken place since the inception of each league.

¹⁰⁸ See Silverstein, *supra* note 96, at 116.