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The Advantages of Incorporating Mechanisms from the Salary Arbitration Models of MLB and the NHL in a Salary Arbitration System in MLS

Andrew Real*

I. INTRODUCTION

This article will propose that Major League Soccer ("MLS" or "League") adopt a salary arbitration system similar to that used in both Major League Baseball ("MLB") and the National Hockey League ("NHL").

In a professional sports context, salary arbitration is a system that is implemented to settle salary disputes between a team and a player when salary negotiations fail.¹ Generally, such disputes are consequently submitted to neutral arbitrators who weigh evidence of a player's performance, ability, and leadership, in comparison with other players.² The arbitrator will then accordingly render a binding decision with respect to the amount of compensation to which the player will be entitled.³

The NHL and MLB have such salary arbitration systems that afford players the ability to obtain fair resolutions to their salary disputes.⁴ These salary arbitration systems can confer a variety of benefits for players. For example, the MLB's salary arbitration system has become a significant factor in driving player salaries upward because the system provides players with additional leverage in settling contract disputes.⁵ Likewise, the NHL's salary arbitration system has been identified as a major contributing factor for the "sudden explosion" of player salaries since 1990.⁶

Professional sports leagues that do not contain salary arbitration systems, like the National Football League ("NFL") and National Basketball

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¹ Mélanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS L.J. 189, 191 (2003).

² *Id.*

³ *Id.*

⁴ *Id.* at 193.

⁵ See Ed Edmonds, *A Most Interesting Part of Baseball's Monetary Structure-Salary Arbitration in its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1, 3 (2009).

⁶ Stephen J. Bartlett, *Contract Negotiations and Salary Arbitration in the NHL: An Agent's View*, 4 MARQ. SPORTS L.J. 1, 1 (1993).

Association (“NBA”), often run into problems when disputes between players and their teams over the renegotiation of player salaries arise.⁷ For example, despite generating as much revenue as MLB and NHL combined,⁸ the average salary of NFL players lags behind those leagues by \$2.3 million and \$800,000, respectively.⁹

In 2016, MLS viewership surged to 25.7 million gross, with 55% of viewers in the highly desirable eighteen to forty-nine year-old demographic; live attendance ballooned to an average of 21,692 per game, behind only the MLB and NFL.¹⁰

Moreover, youth soccer is one of the fastest growing sports in the United States for both boys and girls.¹¹ Around 3 million kids play in U.S. Youth Soccer leagues, and “youth soccer participation doubles tackle football now[,] and has over a million more kids than baseball.”¹² Thus, it is evident that the nation’s interest in soccer is the highest it has ever been.¹³

To keep this momentum rolling, MLS should emulate those strategies of other professional leagues that have resulted in growth. The salary arbitration model is one such advantageous strategy.

Part II of this article will provide a summary of the current salary structures and mechanisms of MLS.¹⁴ Part II will also discuss the problems and the origins of the problems associated with MLS’s current salary structures and mechanisms. Part III will summarize how salary arbitration is utilized in MLB.¹⁵ Part III will additionally examine and recommend which beneficial mechanisms of the MLB salary arbitration model should be implemented in MLS. Part IV will summarize how salary arbitration is utilized in the NHL. Part IV will also examine and recommend which

⁷ See, e.g., Scott Bukstein, *A New Solution for Salary Disputes: Implementing Salary Arbitration in the National Basketball Association*, 22 MARQ. SPORTS L. REV. 25, 38–44 (2011); see also, e.g., Roger Quiles, *A Solution to Holdouts in the National Football League: How Salary Arbitration Can Limit a Growing Problem*, 13 CARDOZO J. CONFLICT RESOL. 259, 263–66 (2011).

⁸ See *Which Professional Sports Leagues Make the Most Money?*, HOWMUCH.NET (July 1, 2016), <https://howmuch.net/articles/sports-leagues-by-revenue>.

⁹ Kurt Badenhausen, *The Average Player Salary And Highest-Paid In NBA, MLB, NHL, NFL And MLS*, FORBES (Dec. 15, 2016, 9:34 AM), <https://www.forbes.com/sites/kurtbadenhausen/2016/12/15/average-player-salaries-in-major-american-sports-leagues/#565c26ce1050>.

¹⁰ Mark J. Burns, *MLS Records Banner Year In 2016, Cements Position Among Top U.S. Pro Sports League*, FORBES (Oct. 26, 2016, 9:21 AM), <https://www.forbes.com/sites/markjburns/2016/10/26/mls-records-banner-year-in-2016-cements-position-among-top-u-s-pro-sports-leagues/#757fc96278a2>.

¹¹ See Chris Demaria, *What Are the Most Popular Youth Sports?*, LIVESTRONG (Sept. 11, 2017), <https://www.livestrong.com/article/99949-popular-youth-sports/>.

¹² Shane Paul Neil, *Soccer Is Here, for Real This Time*, HUFFINGTON POST (Apr. 4, 2016, 1:01 PM), https://www.huffingtonpost.com/shane-paul-neil/soccer-is-here-for-real-t_b_9730440.html (concluding that “youth participation, health of its minor leagues, and valuations of its clubs show that [soccer’s] rapid growth is both real and spectacular.”).

¹³ *Id.*

¹⁴ Collective Bargaining Agreement Between Major League Soccer and Major League Soccer Players Union: February 1, 2015 – January 31, 2020 (detailing the current salary structure of MLS).

¹⁵ For an especially in-depth discussion on the mechanisms of the MLB and NHL, see Aubut, *supra* note 1, at 201–12.

beneficial mechanisms of the NHL salary arbitration model should be implemented in MLS.¹⁶ Part V will anticipate and explain some of the limitations and criticisms inherent to a potential MLS salary arbitration model. Finally, part VI will conclude that the potential benefits of implementing the proposed MLS salary arbitration model outweigh any potential limitations.

This article will center its arguments around the idea that a salary arbitration system represents the development of a compensation system that is more fair and equitable for its players. The development of such a system will thereby allow MLS to continue its expansion as a major professional sports league. However, it is important to note that this article does not intend to propose and fully detail a wholly new and working MLS salary arbitration system. Such a gargantuan task would be Sisyphean considering the continually changing landscape of the expanding MLS. Rather, this article aims to demonstrate how the implementation of specific, reasonable salary arbitration mechanisms, appropriated from MLB and the NHL, can help the exponentially growing MLS evade the mistakes of its older brothers.

II. THE CURRENT SALARY SYSTEM OF MAJOR LEAGUE SOCCER, AND THE PROBLEMS ASSOCIATED WITH THE CURRENT SALARY SYSTEM.

A. *The Current Salary System of MLS*

Unlike other professional sports leagues in the United States, “it is [MLS], and not the team owners, that determines where players play and how much they’re paid.”¹⁷ The reasoning behind this unique League control is partly historical. When MLS’s forefather, the North American Soccer League (“NASL”), was originally founded, it was the country’s top professional circuit.¹⁸ The NASL failed largely because one of its teams, the Cosmos, paid huge sums to sign stars like Pelé and Franz Beckenbauer, which set off bidding wars that bankrupted rival teams.¹⁹

To avoid such a fate, MLS was structured as a single-entity, limited liability corporation where the shareholders are the team owners.²⁰ Therefore, the League sets budgets to control player salaries, and controls allotment of foreign-born players to teams.²¹

¹⁶ See Bukstein, *supra* note 7, at 45–52 (providing, in-depth, a similar discussion on the implementation of a salary arbitration model into the structures of the NBA).

¹⁷ Aaron Elstein, *Major League Soccer, Not Team Owners, Sets Players’ Pay*, CRAIN’S N.Y. BUS. (Apr. 2, 2017, 12:01 AM), <http://www.crainsnewyork.com/article/20170402/SMALLBIZ/170339971/major-league-soccer-not-team-owners-sets-players-pay>. The league itself determines player salary “to a degree unequalled” by the NBA, NHL, MLB, and even the NFL. *See id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

B. *Problems with MLS's Current Salary System*

Under the current Collective Bargaining Agreement (“CBA”), which was ratified July 16, 2015, MLS instituted a free agency system for the first time in its history.²² While this represented a step forward for players, the free agency system is extremely limited. Free agency applies only to players who are twenty-eight years old, with at least eight years of experience in MLS, and are below the maximum salary.²³ Additionally, the CBA puts limits on how much a free agent player’s new salary can increase.²⁴ If a player is making less than \$100,000, then the increase is capped at 25%, if the player is making \$100,000 to \$200,000, then the increase is capped at 20%, and if the player is making more than \$200,000, then the increase is capped at 15%.²⁵

The limited nature of MLS’s current free agency system exemplifies essentially only a symbolic, rather than financial, victory for the players.²⁶ In fact, there were a handful of anonymous quotes from players who were fully prepared to strike for better terms, and all indications were that seven out of the twenty clubs that participated in the negotiation voted against the agreement.²⁷ According to one anonymous player at the CBA negotiation, “[p]layers are disappointed and upset with the union reps and Bob Foose.”²⁸ The player continued, “[n]ot only did this deal destroy the future of the American player, it barely helps the current group of players.”²⁹

This frustration is understandable considering that the twenty-eight and eight formula means only around 10% of current MLS players are eligible for free agency.³⁰ This means that 90% of players are stuck playing for the teams the League tells them to play for at a salary dictated by the League without negotiation or discussion.

Reflecting this frustration, a 2016 survey conducted by ESPN FC showed that 84% of MLS players polled believed themselves to be underpaid compared to the rest of the world.³¹ It is likely that this enormous response

²² MLSsoccer staff, *MLS Players Union Announces that it has Ratified Collective Bargaining Agreement*, MLS (July 16, 2015, 5:17 PM), <https://www.mlssoccer.com/post/2015/07/16/mls-players-union-announces-it-has-ratified-collective-bargaining-agreement>.

²³ *Id.*

²⁴ Daryl Grove, *10 Things You Need to Know about the New MLS CBA*, PASTE (Mar. 5, 2015, 5:00 AM), <https://www.pastemagazine.com/articles/2015/03/10-things-you-need-to-know-about-the-mls-cba.html>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Liviu Bird, *MLS Player Involved in CBA Talks Says Many 'Upset,' 'Disappointed' with Deal*, SPORTS ILLUSTRATED (Mar. 4, 2015), <https://www.si.com/planet-futbol/2015/03/04/mls-cba-deal-players-union/>. Bob Foose is the MLS Players Union executive director.

²⁹ *Id.*

³⁰ Grove, *supra* note 24.

³¹ Nick Borriello, *ESPN Survey of MLS Players Reveals Salary Frustrations*, SBNATION (Mar. 22, 2016, 2:29 PM), <https://www.souderatheart.com/2016/3/22/11286104/espn-survey-of-mls-players-reveals-salary-frustrations>.

also reflected “lingering feelings of bitterness left over from a long and protracted battle over a new [CBA] prior to the 2015 season.”³² Furthermore, “[w]hen asked what one thing they would change about MLS, 44% of players said the salaries.”³³ Additionally, 66% of MLS players responded that they would leave for Europe if they were given the chance.³⁴

C. *How the Single-Entity Structure Causes Many of MLS’s Problems Regarding Player Compensation*

As elaborated above, as a consequence of the failure of the NASL, the developers of MLS thought such a risk-friendly structure would appeal to investors, giving the League a greater chance of survival.³⁵ However, many of the current problems associated with MLS’s salary system are inherent to MLS’s single-entity structure.

One such problem is that, under MLS’s single-entity structure, when a player signs a deal, it is between the player and the League as a whole, rather than between the player and any individual team.³⁶ As a consequence of this structure, teams do not compete with one another in signing players—players simply go where the league assigns them.³⁷ If the player desires otherwise, then he is left with no other option except to leave the League. This current state of limited movement for players is clearly unfair to the players, and is unlike any of the other major American professional sports leagues.

Furthermore, choosing where to play is only one aspect of free agency, and arguably not the most important one to the players. The more significant objective of free agency “is the ability to negotiate a salary on the free market.”³⁸ If MLS had true free agency, a player would theoretically be free to go to any club to look for a contract offer, and then use the leverage that his ability to freely choose gives him to discuss more favorable terms with other clubs until one team has won the player’s “signature with some combination of the most attractive salary, most prominent role in the team, and best chance to win.”³⁹

However, as it stands now, the League has already restricted every free agent salary negotiation.⁴⁰ Under MLS’s abrogated version of free agency, the League has mandated that “each of their franchises will only have to pay

³² *See id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Heike K. Sullivan, *Comment: Fraser v. Major League Soccer: The MLS’s Single-Entity Structure is a “Sham”*, 73 TEMP. L. REV. 865, 865–66 (2000).

³⁶ Billy Haisley, *MLS Players and Owners Agree to Keep League Mired in Mediocrity*, DEADSPIN (Mar. 05, 2015, 2:35pm), <https://deadspin.com/mls-players-and-owners-agree-to-keep-league-mired-in-me-1689634743>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

at most 125% of a player's previous salary."⁴¹ This free agency structure thereby anchors a player's options for negotiation to his last contract, while failing to fully account for how much that player has improved since that player's last contract.⁴²

Additionally, because the League is a single entity, League officials have the entirely inequitable power of having their subsidiaries, the teams, fully restrict the movement and negotiation power of a player by commanding a team to not offer the player a contract at all.⁴³

In fact, the League has already shown that it is not above using this central-planning power to orchestrate player movement.⁴⁴ Further, the League's restriction of player movement is not even limited to players within the MLS.⁴⁵ For example, in 2012, the League stopped sought-after defender Olof Mellberg from transferring to Toronto F.C. from his club in Greece.⁴⁶ It was suspected that the League blocked his transfer because, as a Scandinavian, Mellberg appealed to none of the sizable ethnic minorities the League covets as fans.⁴⁷ While the Toronto players and fans were understandably furious, the League, as a single entity, is entitled to "manipulate its incoming contracts to place certain players in specific cities."⁴⁸

When the League meddles with the competitive landscape, it is the fans as well as the League itself that lose. While the League maneuvers in such a way as to ostensibly keep the competitive balance even amongst every team to keep fan interest, commentators and fans cannot help but feel that the League favors the larger market teams, like Los Angeles and New York, given those larger-market teams are often seen to be less hampered by such maneuvers.⁴⁹ This perceived favoritism may or may not be true, but the ever-present specter of League meddling undoubtedly turns off many long-term and potential fans. For a league that is in its relative infancy and still needs

⁴¹ *Id.*; see also Paul Tenorio, *MLS and players reach deal, avoid strike; Orlando City season to begin on time*, ORLANDO SENTINEL (Mar. 4, 2015), <https://www.orlandosentinel.com/sports/os-mls-players-avoid-strike-orlando-city-20150304-post.html>.

⁴² See Haisley, *supra* note 36.

⁴³ *Id.*

⁴⁴ See, e.g., Cathal Kelley, *Toronto FC's Hands Tied by Meddling MLS: Kelly*, THE STAR (Oct. 28, 2012), https://www.thestar.com/sports/soccer/tfc/2012/10/28/toronto_fcs_hands_tied_by_meddling_mls_kelley.html; See also Grant Wahl, *How Seattle's Stunning Clint Dempsey Deal Got Done*, SI (Aug. 5, 2013), <https://www.si.com/soccer/2013/08/05/clint-dempsey-seattle-sounders-mls>; Barry Petchesky, *How MLS Made Sure Clint Dempsey Landed in Seattle*, DEADSPIN (Aug. 5, 2013, 2:21PM), <https://deadspin.com/how-mls-made-sure-clint-dempsey-landed-in-seattle-1030615076> (detailing another example of the League meddling with player transfers).

⁴⁵ See Kelley, *supra* note 44.

⁴⁶ See *id.*

⁴⁷ *Id.*

⁴⁸ Petchesky, *supra* note 44.

⁴⁹ See Kelley, *supra* note 46; see also Luke O' Brien, *MLS Salaries Make No Secret of MLS Plan to Create NY-LA Rivalry*, DEADSPIN (May 9, 2011, 2:55PM), <https://deadspin.com/5800045/mls-salaries-make-no-secret-of-mls-plan-to-create-ny-la-rivalry>.

more fans and viewers, such a public perception can be extremely harmful to the League's growth.

Nevertheless, the single-entity structure is here to stay for the foreseeable and indefinite future. In *Fraser v. Major League Soccer*, the Court of Appeals for the First Circuit upheld the League's single-entity structure.⁵⁰ Therefore, this article will necessarily advocate for the implementation of a salary arbitration system within the confines of the League's single-entity structure.

III. AN OVERVIEW OF THE SALARY ARBITRATION MODELS OF MAJOR LEAGUE BASEBALL, AND AN ARGUMENT FOR IMPLEMENTING BENEFICIAL MECHANISMS OF IT IN MAJOR LEAGUE SOCCER

A. *The MLB Salary Arbitration Model*

Major League Baseball uses "final-offer" arbitration as its salary arbitration system.⁵¹ Final-offer arbitration can be summarized as follows:

[P]layers are separated into three categories: (1) pre-arbitration players; (2) players eligible for salary arbitration; and (3) free agents. These categories are based on the player's service time (i.e., the number of years and days of major league service a player has in their career). A team has the contractual rights to a player until that player has six years of service time and becomes a free agent. A pre-arbitration player will generally be a player who has less than three years of service time while a player who has at least three, but less than six years of service time will be eligible to enter the salary arbitration process.⁵²

According to the MLB, "Once a player becomes eligible for salary arbitration, he is eligible each offseason (assuming he is tendered a contract) until he reaches six years of Major League service."⁵³ It is at that point that a player becomes eligible for free agency.⁵⁴

⁵⁰ *Fraser v. Major League Soccer*, 284 F.3d 47, 71 (1st Cir. 2002) (affirming the district court's judgments in favor of the defendant (League) on the plaintiffs' (the players) claims under the Sherman and Clayton Acts against the single-entity structure).

⁵¹ Justin Sievert, *Breaking Down the MLB Salary Arbitration Process*, SPORTING NEWS (Jan. 12, 2018), <http://www.sportingnews.com/mlb/news/mlb-salary-arbitration-process-breakdown-spring-training-2016/4jkawqkcz8i17cb4rhqjxseh>.

⁵² *Id.* Additionally, there is a special class of players, called "Super 2s". A Super 2 is a player who has between two and three years of service time, has at least 86 days of service time during the second year, and ranks in the top 22 percent of players who fall into that classification. A Super 2 player will have three years as a pre-arbitration eligible player and four arbitration years while a player who doesn't earn Super 2 status will have three years of salary arbitration following their four pre-arbitration year. *Id.* For simplicity, this note will not address how the Super 2 categorization can be applied to MLS.

⁵³ *Salary Arbitration*, MLB (Last Accessed Jan. 30, 2018 6:40 PM) <http://m.mlb.com/glossary/transactions/salary-arbitration>.

⁵⁴ *Id.*

Procedurally, “teams must offer eligible players arbitration by December 12th, or else those players are non-tendered and released.”⁵⁵ After that date, “players and teams have until January 17th to reach an agreement, or else both sides must submit their salary demands to an arbitration panel,”⁵⁶ and the team “and player must exchange salary figures for the upcoming season” by that time as well.⁵⁷ “Hearings are [then] conducted throughout the first few weeks of February.”⁵⁸ Moreover, in “the week prior to the exchange of arbitration figures is when the vast majority of arbitration cases are avoided” as the player agrees to a one or multi-year contract.⁵⁹

Under the current MLB CBA, a three-arbitrator panel is used to arbitrate salary disputes between a player and his team.⁶⁰ The panel is handpicked by the MLB Players Association (“MLBPA”) and the MLB Labor Relations Department (“MLBLRD”).⁶¹ The MLBPA, which represents the player, and MLBLRD, which represents the team, each put forth salary proposals that are presented in a hearing before the panel.⁶² The panel then uses a wide-range of criteria to determine which party’s proposal to accept.⁶³

The criteria to be considered by the panel are:

[T]he quality of the Player’s contribution to his Club during the past season . . . the length and consistency of his career contribution, the record of the Player’s past compensation, comparative baseball salaries . . . the existence of any physical or mental defects on the part of the Player, and the recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance.⁶⁴

The parties may submit any evidence relevant to those criteria, and the arbitration panel weighs the evidence under the circumstances.⁶⁵

After hearing arguments from both sides, the panel selects the salary figure of either the player or the club (and only selects one of the two figures) as the player’s salary for the upcoming season.⁶⁶

⁵⁵ *Salary Arbitration*, FANGRAPHS <https://www.fangraphs.com/library/business/mlb-salary-arbitration-rules/> (last updated Jan. 30, 2018 3:23 AM).

⁵⁶ *Id.*

⁵⁷ *Salary Arbitration* (MLB), *supra* note 53.

⁵⁸ *Salary Arbitration*, *supra* note 55.

⁵⁹ *Salary Arbitration* (MLB), *supra* note 53 (noting also that “[m]ulti-year deals, in these instances, serve as a means to avoid arbitration for each season that is covered under the new contract.”).

⁶⁰ 2017–2021 MLB Collective Bargaining Agreement, art. VI, § E(5), <http://www.mlbplayers.com/pdf9/5450407.pdf>.

⁶¹ *Id.*

⁶² *Id.* at § E(4).

⁶³ Quiles, *supra* note 7, at 269.

⁶⁴ *Id.* (including factors for player performance such as special qualities of leadership and public appeal).

⁶⁵ *Id.*

⁶⁶ *Salary Arbitration* (MLB), *supra* note 53.

B. *The Beneficial Mechanisms of the MLB Salary Arbitration Model that Should be Implemented in MLS*

There are benefits to both the players and teams conferred by the MLB's salary arbitration system.⁶⁷ During the first three years of service, a pre-arbitration eligible player will typically make somewhere around the league minimum salary.⁶⁸ However, after those three years, the player accrues enough service time to be eligible for salary arbitration.⁶⁹ This is a benefit for the player because that player now has some leverage to earn a salary that is at least commensurate with that player's past performance.⁷⁰ For an example of how valuable this leverage can be, Chris Carter of the Houston Astros entered salary arbitration eligibility in 2015.⁷¹ In 2014 his salary was \$510,000.⁷² He signed a deal in 2015 in which the team agreed (at least in part) to avoid a salary arbitration hearing.⁷³ The new deal was worth \$4,175,000, which was an increase of 719% from his salary the year prior.⁷⁴

Still, salary arbitration is also a benefit for the owners because, although the player will receive a salary increase, the player will still likely earn a salary lower than their true value on the free agent market.⁷⁵ It should also be noted, there is evidence that MLB's salary arbitration model seems to slightly favor the owner's side once the arbitration hearing is initiated.⁷⁶ From 1974 to 2015, the owners had won 57.66% of arbitration hearings.⁷⁷

Considering the benefits that MLB's method of conferring arbitration eligibility after three years yields, MLS can viably implement a system wherein arbitration eligibility is also gained after a set number of years. Given that the careers of MLB and MLS players are relatively similar in length,⁷⁸ a

⁶⁷ Quiles, *supra* note 7, at 270.

⁶⁸ *Details of MLB, MLBPA Labor Agreement*, MLB (Dec. 2, 2016), <http://m.mlb.com/news/article/210125462/details-of-mlb-mlbpa-labor-agreement/>. In 2017, the minimum salary in MLB was \$535,000 for the year. *Id.*

⁶⁹ Sievert, *supra* note 51.

⁷⁰ *Id.*

⁷¹ Maury Brown, *Who's Winning the MLB Salary Arbitration Game? Here's Data from 1974 to 2015*, FORBES (Feb. 23, 2015, 8:10 AM), <https://www.forbes.com/sites/maurybrown/2015/02/23/whos-winning-the-mlb-salary-arbitration-game-heres-data-from-1974-to-2015/#551be4eb1558>.

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ Sievert, *supra* note 51. "This is important for the team because the team will either save money, or it can use the savings on other players." *Id.*

⁷⁶ Brown, *supra* note 71, at 2.

⁷⁷ *Id.*

⁷⁸ The average length of a MLB player career is 5.6 years. *Average Major League Baseball Career 5.6 Years, Says New Study*, SCI. DAILY (July 11, 2007) <https://www.sciencedaily.com/releases/2007/07/070709131254.htm>. It should be noted, however, that the average length of an MLS player's career is only 2.5 seasons; however, "If a MLS player makes it past the third year, chances are good for a relatively long MLS career." *A Demographic Analysis of MLS Players*, SOCCERMETRICS (Dec. 21, 2010), <http://www.soccermetrics.net/paper->

straight adoption of MLB's method of conferring arbitration after an accrual of three years seems practical.

Moreover, the procedures of MLB's arbitration system encourage a party to submit a sufficiently reasonable offer so that an arbitrator will be persuaded to select it.⁷⁹ It has been argued that negotiations thereby progress more smoothly because the difference between the two offers is not too large.⁸⁰ The tendering of reasonable offers is likely the reason why such a small percentage of the cases filed ever make it to an arbitration hearing.⁸¹

The MLB system's use of a panel is also beneficial. Panels help create improved dialogue and an opportunity to study the market together and reach a group consensus.⁸² Thus, an adoption of this mechanism by MLS would likely also be a positive step forward.

Furthermore, the criteria considered by the MLB, outlined above, should be applied to MLS because it is a reasonable and ostensibly impartial method of coming to a salary figure that is commensurate with the player's past performance. In contrast to the current method, this method of application would not be left entirely to the League's determination of the player's value.⁸³ Therefore, an adoption of MLB's method of looking at criteria is preferable to the capricious system that MLS currently uses.

IV. AN OVERVIEW OF THE SALARY ARBITRATION MODEL OF THE NATIONAL HOCKEY LEAGUE, AND AN ARGUMENT FOR IMPLEMENTING BENEFICIAL MECHANISMS OF IT IN MAJOR LEAGUE SOCCER

A. *The NHL Salary Arbitration Model*

In the NHL's salary arbitration system, most players must accrue four years of NHL experience before they are eligible for salary arbitration.⁸⁴ In addition, the NHL's CBA specifies the number of games a player must play

discussions/demographic-analysis-of-mls-players-boyden-carey (summarizing Nathaniel Boyden and James Carey, *From One-and-Done to Seasoned Veterans: A Demographic Analysis of Individual Career Length in Major League Soccer*, JOURNAL OF QUANTITATIVE ANALYSIS IN SPORTS, 6(4): Article 5, 2010).

⁷⁹ Aubut, *supra* note 1, at 236.

⁸⁰ *See id.* (commenting further that the offers are not as large as in the NHL, where both parties tend to take extreme positions to leave room for the arbitrator to decide on a figure somewhere in the middle).

⁸¹ *Id.*

⁸² *See* Bukstein, *supra* note 7, at 37 (arguing, in the context of the NBA, that a two-member panel would be even more advantageous because it would "help avoid the phenomena of arbitrators strategically not siding with one party too often and of 'groupthink' that seems to happen occasionally in a three-person panel in baseball.").

⁸³ *See* Bukstein, *supra* note 7, at 26.

⁸⁴ Jamie Fitzpatrick, *NHL Salary Arbitration Explained*, THOUGHTCO (Mar. 19, 2017), <https://www.thoughtco.com/nhl-salary-arbitration-explained-2778981>. The term is reduced for those who signed their first NHL contract after the age of twenty. *Id.*

in a particular season in order to constitute a year of accrued professional experience.⁸⁵ According to the CBA:

A player aged 18 or 19 earns a year of professional experience by playing ten (10) or more NHL Games in a given season. A player aged 20 or older (or who turns 20 between September 16 and December 31 of the calendar year in which he signs his first standard player contract) earns a year of professional experience by playing ten (10) or more Professional Games under a standard player contract in a given season.⁸⁶

Unlike the MLB system, only restricted free agents are allowed to utilize the salary arbitration process.⁸⁷ Under the CBA, teams retain certain rights regarding restricted free agents, even after the term of their contract has expired.⁸⁸ A valuable right for the team is the right to prevent the player from signing with any other club.⁸⁹ The NHL's system is meant to allow the player to achieve their market value while also preserving the rights of the club.⁹⁰

Procedurally, the NHL system is rather complicated and detailed. The deadline for players to request salary arbitration each year is July 5, with cases heard in late July and early August.⁹¹ Oftentimes, players and teams will continue to negotiate up until the date of the hearing in order to come to an agreement on a contract and avoid the arbitration process.⁹²

Both the player (or the NHL Players' Association ("NHLPA")) and the team must submit briefs to the salary arbitrator and each other at least forty-eight hours before the hearing begins.⁹³ The hearing is conducted by one neutral arbitrator.⁹⁴ The arbitrator is randomly selected from a pool of eight arbitrators, who are all members of the National Academy of Arbitrators and are chosen jointly by the NHL and the NHLPA.⁹⁵ At the hearing, each side, the NHLPA/player and the NHL team, gets ninety minutes to state its case.⁹⁶ These ninety minutes will normally include rebuttals to the presentation of

⁸⁵ Ryan Lake, *How Salary Arbitration Works in the National Hockey League (NHL)*, LAWNSPORT (Sept. 13, 2016), <https://www.lawnsport.com/blog/ryan-lake-blog/item/how-salary-arbitration-works-in-the-national-hockey-league-nhl>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Fitzpatrick, *supra* note 84.

⁹² *Id.*

⁹³ See Dan Ryan, *Spooner vs. the Bruins: How Does NHL Arbitration Work?*, SBNATION (July 25, 2016), <https://www.stanleycupofchowder.com/2017/7/25/16023102/ryan-spooner-arbitration-hearing-how-does-nhl-arbitration-work-nhl-average-salary-arbitration-rights>; Aubut, *supra* note 1, at 204.

⁹⁴ Aubut, *supra* note 1, at 203.

⁹⁵ *Id.* at 203–04.

⁹⁶ Ryan, *supra* note 93.

argument and comparisons of players from the opposing party.⁹⁷ In the NHL system, the arbitrator is permitted to play an active role during the hearing.⁹⁸ The arbitrator has discretion to call witnesses and request documents necessary for a fair resolution of the dispute.⁹⁹

Per the current NHL CBA, there is a multitude of evidence the sides are able to present, including: the player's overall performance, the player's National Hockey League official statistics, the number of games that the player has played, his past injuries or illnesses, the player's length of service in the league and with the team, the player's overall contribution to the success or failure of his team in past seasons, any particular evidence of leadership or public appeal in keeping with his responsibilities as a team member, the overall performance in past seasons of any players who may be comparable to the player whose salary is in dispute, and the compensation of any players who are alleged to be comparable to the player at issue.¹⁰⁰ Additionally, the arbitrator is not bound by evidentiary rules, which allows the arbitrator to freely weigh each piece of evidence.¹⁰¹

The arbitrator's decision must be made within forty-eight hours of the hearing.¹⁰² The decision includes the duration of the contract, the yearly salary, any minor league clauses, and a brief explanation.¹⁰³

Overall, this salary arbitration system also confers benefits to both players and teams. Like the MLB system, the NHL arbitration system provides a crucial bargaining option for players facing restricted free agency.¹⁰⁴ Another benefit for the player is that there are no limitations on the number of times a player can ask for arbitration and the sum of the salary awarded.¹⁰⁵

The NHL's system also allows teams to ask for salary arbitration.¹⁰⁶ However, players may only participate in arbitration once during their career, and their salaries can never be reduced by more than 15% of the previous year.¹⁰⁷

When the arbitrator's decision is announced, the team has the right to "walk away" from the award, unless it is the party that filed the arbitration hearing.¹⁰⁸ Nevertheless, "[i]f the team exercises this right, the player can declare himself an unrestricted free agent."¹⁰⁹

⁹⁷ *Id.*

⁹⁸ Aubut, *supra* note 1, at 204.

⁹⁹ *Id.*

¹⁰⁰ Ryan, *supra* note 93. There is also a number of items of evidence that cannot be used: contracts signed by players who were not restricted free agents, any previous negotiations between the player and the team, news reports or press briefings, and the financial condition of the team. *Id.*

¹⁰¹ Aubut, *supra* note 1, at 204.

¹⁰² Fitzpatrick, *supra* note 84.

¹⁰³ Ryan, *supra* note 93.

¹⁰⁴ See Fitzpatrick, *supra* note 84.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; Ryan, *supra* note 93.

¹⁰⁹ Fitzpatrick, *supra* note 84.

B. *The Beneficial Mechanisms of the NHL Salary Arbitration Model that Should be Implemented in MLS*

There are many mechanisms of the NHL salary arbitration model that can be used effectively in the framework of MLS. For example, in the NHL, the arbitrator can award a salary consistent with either of the two offers made by the parties or for an amount ranging anywhere in between the two offers.¹¹⁰ The NHL system enables the arbitrator to hear both parties' points of view and is, thereby, able to come to a reasonable compromise: taking into account the specific circumstances surrounding a player.¹¹¹ This would allow an arbitrator flexibility when players and the League have greatly disparate salary proposals. Adoption of this mechanism would thus be a positive decision for MLS.

Moreover, the NHL system's method of exchanging salary figures between the team and player is a highly valuable mechanism. Beginning in the 1990s, NHL players' salaries began to rise dramatically.¹¹² Commentators have asserted that the exchange of salary figures between player and team representatives is a factor explaining the jump in salaries.¹¹³ Before the salary arbitration system was implemented, it was more difficult for agents to surmise if the salary they were seeking for their client was too high or too low in relation to that player's market value.¹¹⁴ Due to the increased transparency in information exchange, agents now have this valuable information to use as leverage when negotiating their client's salary.¹¹⁵ Clearly, MLS would do well to emulate the NHL's information exchange mechanism if it wants its players to become more satisfied with their salaries.

For the benefit of the owners, another mechanism MLS can borrow is NHL teams' "walk-away rights."¹¹⁶ An NHL team has the right to reject the arbitrator's award and refuse to bind itself to the decision, which allows the player to either become an unrestricted free agent or accept the last offer that was on the table by the team before the hearing.¹¹⁷ This mechanism would first alleviate any potential issues the League may have with subjecting itself to binding arbitration regarding salaries. Secondly, this aspect would allow for players, by becoming unrestricted free agents, to have even more autonomy in pursuing salaries that are commensurate with their market value.

¹¹⁰ Bukstein, *supra* note 7, at 50.

¹¹¹ Aubit, *supra* note 1, at 236.

¹¹² *Id.* at 223.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ NHL Collective Bargaining Agreement, art. 12.

¹¹⁷ NHL Collective Bargaining Agreement, art. 12.

IV. POTENTIAL PROBLEMS WITH INCORPORATING MLB AND NHL SALARY MODELS

A. *The Potential Reticence of the Owners*

Owners may see expanded free agency and salary arbitration as a threat to the League's structure because it would set the members within the single entity of MLS in opposition to each other.¹¹⁸ This would be especially bad for the League because such negotiations would make the League look less like a synchronized organization in the eyes of the law, which could make it susceptible to antitrust lawsuits.¹¹⁹

In fact, the League has been attacked on antitrust grounds before.¹²⁰ A change that could bring the League in front of a court again could be argued by the owners to be against MLS's overall interest. Furthermore, any change that could once again create an adversarial relationship between the League and the players will undoubtedly be unwelcome in the owners' eyes.

Nevertheless, the reality is that a high number of players are already dissatisfied with the current state of MLS's compensation structure, and there is already some hostility from the players toward the owners.¹²¹ Thus, a salary arbitration system structured with the reasonable mechanisms detailed above represents a palatable method by which salary disputes can be effectively and congenially settled.¹²²

B. *The Difficulties of Instituting Salary Arbitration under a Salary Cap*

MLS imposes a salary cap every year that all teams' total payroll cannot exceed.¹²³ Every year the salary cap rises by a specified amount.¹²⁴ The

¹¹⁸ Haisley, *supra* note 36.

¹¹⁹ *Id.*

¹²⁰ See *Fraser*, 284 F.3d 47 (1st Cir. 2002). In this instance, the League prevailed when the First Circuit held that there was no liability under 15 U.S.C.S. §§ 1, 2, 18 because the formation of the soccer association did not involve the acquisition or merger of existing business enterprises, but rather the formation of an entirely new entity which itself represented the creation of an entirely new market. *Id.*

¹²¹ See Borriello, *supra* note 31; see also Taylor Anderson, *MLS Players "Willing To Strike" Over Free Agency?*, SOUNDERS NATION (2015), <https://soundersnation.com/2015/01/22/mls-players-willing-strike-free-agency/> (noting that "[t]he players are arguing that the league has never been more popular, and that after a new broadcast deal with Fox Sports and ESPN, the league should be able to not only institute free agency but increase the minimum salaries for its players, who are currently some of the lowest paid professional soccer players in the world's major leagues."); Ty Duffy, *MLS Owners Offer Laughable "Free Agency" Proposal To Players, Almost Inviting a Strike*, THE BIG LEAD (March 3, 2015), <http://thebiglead.com/2015/03/03/mls-owners-offer-laughable-free-agency-proposal-to-players-almost-inviting-a-strike/>.

¹²² See 1 JAMES T. GRAY, SPORTS LAW PRACTICE § 1.09 (Matthew Bender, 3d ed. 2017) ("[A]rbitration has played a significant role in the resolution of a variety of disputes in the sports industry. As a result, many of the major legal issues in the professional sports industry have been resolved, not in the courtroom, but in the arbitrator's office.").

¹²³ Collective Bargaining Agreement Between Major League Soccer and Major League Soccer Players Union: February 1, 2015 – January 31, 2020.

¹²⁴ *Id.*

amounts are documented in the CBA for each year the CBA is in effect.¹²⁵ Instituting a salary arbitration system in a league with a salary cap can pose a number of challenges.¹²⁶

First, the evidentiary rules of the NHL and MLB systems would need to slightly be altered. In the NHL's¹²⁷ and MLB's¹²⁸ models of salary arbitration, the information regarding the teams' and leagues' finances is not admissible.¹²⁹ For those salary arbitration models to work in MLS, such evidence would be necessary for arbitrators to ensure the team in arbitration observes the League's salary cap.¹³⁰ While this would potentially limit the sums that players can be awarded, it will cause players to be more selective when submitting claims in arbitration.¹³¹ As a beneficial consequence, a potential drawback in the League's eyes may be cured. That is, the salary cap would limit a player to pursue salary arbitration only when the club has enough money to spend under the cap.¹³²

Second, the salary cap would present the problem of how a team's remaining cap room gets divided if more than one player on a team chooses to pursue salary arbitration.¹³³ Under the MLB and NHL salary arbitration models, teammates are heard independently, which prevents arbitrators from inappropriately comparing teammates with each other; this allows each player an opportunity to be judged on his own merits.¹³⁴ For the same reasons, and in the same mold as those salary arbitration models, MLS players should likewise have their claims heard independently.

VI. CONCLUSION

Major League Soccer's adoption of MLB's and NHL's salary arbitration system can benefit the players, the teams, and the League as a whole. MLS Commissioner Don Garber has repeatedly stated publicly that he intends for MLS to be a "top league" by 2022.¹³⁵ However, the League's publicly stated goal is hampered by its business and development structure.¹³⁶ MLS is hampered because, as has been detailed above, the League keeps salaries

¹²⁵ *Id.*

¹²⁶ *See* Quiles, *supra* note 7, at 275.

¹²⁷ NHL Collective Bargaining Agreement art. 12.

¹²⁸ MLB Collective Bargaining Agreement art. VI.

¹²⁹ *See* Quiles, *supra* note 7, at 275.

¹³⁰ *Id.* (coming to a similar solution on a similar problem).

¹³¹ *See id.*

¹³² *See id.*

¹³³ *See id.*

¹³⁴ MLB Collective Bargaining Agreement art. VI; NHL Collective Bargaining Agreement art. 12.

¹³⁵ Noah Davis, *MLS Has a 2022 Problem*, VICE SPORTS (June 16, 2016, 7:44 AM), https://sports.vice.com/en_us/article/wnmdw9/mls-has-a-2022-problem (writing that Garber has made statements to the fact in 2011, 2013, and 2015).

¹³⁶ Davis, *supra* note 135.

artificially depressed in an effort to curb spending and limit losses.¹³⁷ If MLS wants to meet its goal of becoming a top league, like the English Premier League for example, then MLS needs to compensate its players in a manner similar to the top leagues.¹³⁸

Instituting a non-biased forum to deal with salary disputes prior to the season, MLS could more effectively compensate its players with salaries that are commensurate with their skills and performance. This, in turn, should place MLS on the path of elevating itself to the level of the world's top leagues. Higher salaries mean that MLS would attract better talent from around the world.

Furthermore, salary arbitration not only represents a pathway for the League to attract better talent, it also represents a way for teams to keep the talent they already have. Take, for example, the salary dispute between Hungarian attacker Krisztian Nemeth and Sporting Kansas City.¹³⁹ Nemeth scored 10 goals in 28 appearances, and was one of Sporting's most effective players.¹⁴⁰ "[Nemeth's] original contract was for four seasons, meaning he still had three years left on a deal that [would pay] him \$250,000."¹⁴¹ However, Nemeth saw that he had out-performed the value of his contract and he accordingly asked the club for a raise in salary.¹⁴² Unfortunately, the two sides could not come to an agreement.¹⁴³ According to Sporting, "Nemeth's asking price was just too high," and the team could not afford to meet his salary demands.¹⁴⁴ Unwilling to give Nemeth a raise, and without an arbitration mechanism, Sporting saw itself left only with the unpalatable option of selling the valuable twenty-seven year-old to Al-Gharafa of the Qatari league.¹⁴⁵ This example is just one of many where a salary arbitration system could have possibly represented an avenue for a team to retain valuable talent. Further, the League would have correspondingly benefited by keeping a player of Nemeth's caliber.

MLS's current structure of player compensation harms the individual players, clubs, owners, fans, and even the League in the long run. A salary arbitration system incorporating the most beneficial mechanisms of MLB and the NHL represents a definite way to rectify the challenging problem of inequitable player compensation.

¹³⁷ *Id.*

¹³⁸ *See id.* ("The average salary for a player at Chelsea – the club with the seventh-highest average salary – is \$7.46 million," which is "nearly half a million more than Kaká, MLS's highest paid player.").

¹³⁹ Jason Davis, *The Problem with MLS on a Budget*, UNITED STATES NATIONAL SOCCER TEAM PLAYERS ASSOCIATION (Feb. 13, 2016), <https://ussoccerplayers.com/2016/02/the-problem-with-mls-on-a-budget-transfers-soccer-business.html>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*