# AMERICAN BASEBALL PLAYER RESERVE CLAUSE ISSUES RESURRECTED IN KOREA

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## I. HISTORY OF THE MAJOR LEAGUE BASEBALL RESERVE CLAUSE

One of the biggest anomalies in the area of sports law for nearly 100 years was Major League Baseball (MLB)'s judicially created exemption to the Sherman Antitrust Act. The Sherman Antitrust Act, enacted by Congress in 1890 under the power of the Commerce Clause, was designed to encourage competition in the marketplace by preventing collusion between market participants and by outlawing monopolies[1]

Major League Baseball's first run-ins with the Sherman Antitrust Act were the product of the reserve clause, which was found in the standard player contracts of MLB players.[2] The reserve clause, which originated in 1879, allowed teams to bind players to one-year contract extensions at the sole discretion of the team.[3] The reserve clause found its way into federal court in the late 19th century. Under the common scenario, players who were under contract with one team would sign a contract with a new team and the former team, attempting to invoke the reserve clause, would then bring suit for breach of contract

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1. *See* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 288-98 (1989).

2. *See* JAMES B. DWORKIN, OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING 44 (Auburn House Publ'g Co. 1981).

3. *See* DAVID QUENTIN VOIGT, AMERICAN BASEBALL: FROM GENTLEMAN'S SPORT TO THE COMMISSIONER SYSTEM, 155 (Pa. State Press 2010).

against the player and seek an injunction to prevent him from playing for his new team.

In the early days of litigation on the reserve clause, courts ruled in favor of the players, holding that the reserve clause was unenforceable because of lack of mutuality, definiteness, and clarity.[4] Then in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, all predictability in this area of the law was thrown out of the window. In this case, the Supreme Court held that professional baseball was not involved in interstate commerce and was merely a local business.[5] In doing so, the Supreme Court created a professional baseball exemption to federal antitrust laws. This holding led to decades of failed antitrust claims against the MLB, in which courts had no choice but to follow their prior decisions and rule against players.

After decades of failed litigation, players discovered a more creative route that could finally bring an end to the reserve clause. In 1966, the first MLB players union was created.[6] In 1968, the union negotiated its first collective bargaining agreement (CBA) between the players and owners.[7] In 1970, a new agreement established that all disputes would be resolved through unbiased arbitration.[8] Then in 1975, two players challenged the reserve clause through arbitration. The arbitrator ruled in favor of the players and ruled that MLB clubs could no longer

4. *See, e.g.*, Metropolitan Exhibition Co. v. Ward, 24 Abb. N. Cas. 393, 417 (N.Y.S. 1890).

5. Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922).

6. *MLBPA Info*, MAJOR LEAGUE BASEBALL PLAYERS ASS'N, http://mlbplayers.mlb.com/pa/info/history.jsp (last visited Nov. 26, 2014).

7. *Id.*

8. *Id.*

unilaterally impose one-year contract extensions.[9] The reserve clause was dead and free agency was born.

## II. THE KOREAN BASEBALL ORGANIZATION RESERVE CLAUSE

The Korean Baseball Organization (KBO) has been in operation since 1981. Since its inception, KBO uniform player's contracts have included a reserve clause similar to that previously used in the MLB.[10] And considering the fact that the reserve clause troubled American courts for nearly a century, it should come as no surprise that the reserve clause found in contracts of this relatively new league would present legal issues, as well. One such legal issue revolves around the differences in the application of the reserve clause for foreign and domestic players.

Under the KBO Baseball Code, the reserve clause grants teams the rights to domestic players for nine years.[11] After playing for the team for nine years, players may enter unrestricted free agency and contract freely with any team. Additionally, domestic players may enter restricted free agency at any time, given there is a team that wishes to pay the player 300 percent of his annual salary with his former team. Foreign players playing in the KBO, however, do not have the same provisions for entering free agency. Foreign players who wish to enter free agency have to wait five years after last playing for their team in order to freely contract with a new team.[12] Foreign players also are not offered a path into restricted free agency like domestic players.

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9. Thomas J. Hopkins, *Arbitration: A Major League Effect on Players' Salaries*, 2 SETON HALL J. SPORT L. 301, 302 (1992).

10. KOREA BASEBALL ORG., 2013 KBO BASEBALL CODE art. X, *available at* https://www.koreabaseball.com/FILE/ebook/pdf/2013regulation.pdf.

11. *Id.* at art. 156.

12. *Id.*

## III. THE RESERVE CLAUSE THROUGHT THE LENS OF THE KORUS FTA

In his article *An Examination of the KBO Reserve Clause and its Legal Implications on American Baseball Players*, John Kim suggests that this disparate treatment of domestic and foreign players playing in the KBO could be a violation of American players' rights under the United States – Korean Republic Fair Trade Agreement (KORUS FTA), the International Labor Organization Declaration of 1998 (ILO), and the Korean Labor Standards Act of 1997. Upon analyzing the KBO reserve clause, it is clear that the KBO reserve clause violates at least one of these codes and is an infringement on American players' rights. This case note analyzes the three statutory sections that Kim believes may be problematic with respect to the application of the reserve clause to Americans playing in the KBO.

### A. Baseball Players as Service Professionals

Article 12 of the KORUS FTA deals with cross-border trade in services by service suppliers of either party. Section B of Article 12.4 provides that neither party may "restrict or require specific types of legal entity or joint venture which a service supplier may supply a service."[13] The question then becomes: Are professional baseball players providing a "service" under Chapter 12 of the KORUS FTA? This question must be answered in the negative.

Article 12.13 defines professional services as "services, the supply of which requires specialized post-secondary education, or equivalent training or experience or examination."[14] In his article, Kim explains the MLB draft process, in which players are selected after graduating

13. United States - Korea Free Trade Agreement, U.S.-S. Kor., art. 12.4, June 30, 2007, 125 Stat. 428.

14. *Id.* at art. 12.13.

high school, after their junior year of college, or after one year of junior college. Kim then suggests that, because some players receive a college education while playing, they may qualify as professional service providers. Additionally, he suggests that, because professional baseball players train in their sport for many years, beginning in youth, they might qualify as professional service providers because of "equivalent training or experience."

However, it is unlikely that a court would classify professional baseball players as professional service providers covered under the scope of Article 12 of the KORUS FTA. First, while some professional baseball players may receive a post-secondary education while playing collegiate baseball, many players do not receive this education. Players who are drafted to the MLB directly from high school clearly do not receive a post-secondary education. Additionally, many MLB players enter the league from foreign nations at a young age and do not receive any sort of post-secondary education. Therefore, all MLB players cannot be classified as professional service providers solely through the requirement of attaining a post-secondary education.

Second, it is unlikely that a court would classify professional baseball players as professional service providers based on their "equivalent training or experience." It cannot be said that the training required to become a professional baseball player is equivalent to the education and training required to become a service professional such as a surgeon, lawyer, or accountant. First, there is no clearly defined path for how to train to become a professional baseball player. Conversely, to become a traditional service professional, there are strict requirements. In almost all cases, one must obtain a four-year college degree, earn a post-graduate degree, and pass a

standardized proficiency exam. Further, someone who is training to become a professional baseball player might receive training from baseball coaches or family members or even train on their own, whereas traditional service professionals are educated by trained and certified instructors in the subject. Therefore, professional baseball players cannot be classified as professional service providers based on "equivalent training or experience."

Finally, the existence of the KBO Baseball Code United State-Korean Player Contract Agreement, which provides stipulations on player movement between the two countries,[15] suggests that professional baseball players are not covered as service professionals under Article 12 of the KORUS FTA. If the United States and Korea had intended for professional baseball players to be covered under Article 12 of the KORUS FTA, the United State-Korean Player Contract Agreement would be a redundant piece of legislation. Therefore, it is likely that professional baseball players are not covered under Article 12.

### B. Forced Labor Under the Reserve Clause

In his article, Kim also suggests that American baseball players' rights may be infringed based on Article 19.1 of the KORUS FTA, in which both parties reaffirm their obligation to abide by the International Labor Organization Declaration of 1998.[16] Article 19.2.1 Subsection C states that the parties must maintain in its statutes, regulations, and practices the "elimination of all forms of compulsory or forced labor."[17] The ILO Forced Labour Convention of 1930 defines forced labor as, "all work or service which is exacted from any person under the

15. 2013 KBO BASEBALL CODE, *supra* note 10, at "United States-Korean Player Contract Agreement."

16. United States - Korea Free Trade Agreement, *supra* note 13, at art. 19.1.

17. *Id.* at art. 19.2.1.

menace of penalty and for which the said person has not offered himself voluntarily."[18] Additionally, the Labor Standards Act of Korea prohibits forced labor and provides, "no employer shall force a worker to work against his own free will through the use of violence, intimidation, confinement or any other means which unlawfully restrict mental or physical freedom."[19] By requiring a player to agree to a one-year contract extension or be forbidden from joining another KBO team for five years, are KBO teams compelling or forcing players into labor? This question must also be answered in the negative.

The reserve clause does not amount to forced or compulsory labor under the language of either the ILO or the Labor Standards Act of Korea. First, under the language of the ILO, the reserve clause does not "exact" labor "under the menace of penalty" as intended by the act. If an American player rejects an offer made by a KBO club for a one-year extension, that player cannot sign with another KBO club for five years. This certainly cannot amount to a "penalty" as defined by the ILO. First, there is no legal penalty imposed, such as a fine, imprisonment, or physical punishment, imposed on the player. The player is free to continue to play baseball for pay in any other professional baseball league in the world. Additionally, the player signed the original contract under his own free will, presumably with knowledge of the reserve clause and the implications it may have. Therefore, the reserve clause does not fit the ILO's definition of forced labor.

Further, the reserve clause does not amount to forced labor under the Labor Standards Act of Korea. As Kim states, "it would be mere conjecture to posit that

18. International Labor Organization [ILO], Forced Labour Convention, June 28, 1930, No. C029, art. 2(1).

19. Labor Standards Act (Act No. 5309), Mar. 13, 1997, art. 6 (S. Kor.). Labor Standards Act (Act No. 5309).

American athletes in the KBO are working against their free will 'through the use of violence, intimidation [or] confinement.'" However, he suggests that the implementation of the reserve clause might amount to "other means which unlawfully restrict mental or physical freedom"—the "unlawful" means being the restriction of professional services as provided under Article 12 of the KORUS FTA. However, as discussed above, professional baseball players are not professional service providers under the KORUS FTA. Therefore, this cannot be classified as "other means which unlawfully restrict mental or physical freedom."

### C. Discrimination in Application of the Reserve Clause

The final theory that Kim suggests could create an infringement on American baseball players' rights comes under Article 19.2.1(e) of the KORUS FTA and Article 6 of the Labor Standards Act of Korea. Article 19.2.1(e) of the KORUS FTA states that both parties must maintain in their statutes and regulations "the elimination of discrimination in respect of employment and occupation."[20] Article 6 of the Labor Standards Act of Korea states, "no employer shall . . . give discriminatory treatment in relation to the working conditions on the basis of nationality, religion or social status."[21] Does the disparate application of the reserve clause for domestic and foreign players amount to discrimination in respect of employment? The answer must be yes.

As discussed above, the reserve clause is applied differently for domestic Korean players in the KBO and foreign American players in the KBO. Domestic players

20. United States - Korea Free Trade Agreement, *supra* note 13, at art. 19.2.1(e).

21. Labor Standards Act, *supra* note 19, at art. 6.

may enter unrestricted free agency after nine years of service for a KBO team. Additionally, domestic players may enter restricted free agency at any time through their career. Conversely, foreign players are only able to enter unrestricted free agency if their current team decides not to offer compensation for the player's services or they sit out of KBO play for five years. Further, foreign players have no option to enter restricted free agency.

The two code sections discussed above establish that there can be no discrimination in respect to employment and such discrimination certainly may not be based on nationality. Clearly, the application of the KBO reserve clause violates these code sections, because implementation of the reserve clause is directly dependent on nationality. It is of no concern whether the conditions for domestic players are more or less harsh than those of American players. The code sections do not state that there may be no discrimination unless domestic players receive harsher conditions. They simply state that there may be no discrimination based on nationality.

## IV. POTENTIAL IMMUNITY DUE TO COLLECTIVE BARGAINING

As discussed above, the difference in application of the reserve clause is a violation of the KORUS FTA and the Labor Standards Act of Korea. However, it does not automatically follow that American players will be successful in bringing claims against KBO teams. For example, in American sports leagues, courts have recognized nonstatutory exemptions with respect to certain league implemented rules, which were negotiated as part of a collective bargaining agreement. These rules, while in violation of federal antitrust laws, are valid if they meet the three nonstatutory exemption requirements. These requirements are: (1) the rule restricts only parties to the CBA, (2) the rule deals with a mandatory subject of the

CBA, and (3) the rule is a product of a bona fide arm's length agreement.[22] Courts have recognized that in certain cases, restrictive rules are necessary for the good of the league, the owners, and the players.

Whether Korean courts have recognized similar nonstatutory exemptions is beyond the scope of this note. However, it should be noted that because the KBO Baseball Code was negotiated by the player union as part of a collective bargaining agreement, the reserve clause may not present an actionable wrong to American athletes.

22. Powell v. Nat'l Football League, 930 F.2d 1293, 1299 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).