

AN EXAMINATION OF THE KBO RESERVE CLAUSE AND ITS LEGAL IMPLICATIONS FOR AMERICAN BASEBALL PLAYERS

John Kim ^{*}

TABLE OF CONTENTS

I. INTRODUCTION

II. BACKGROUND

III. AMERICAN BASEBALL: RESERVE CLAUSE

IV. KOREAN BASEBALL: RESERVE CLAUSE

V. PARALLELS OF THE AMERICAN AND KOREAN RESERVE CLAUSES

VI. THE KORUS FTA

VII. AN EXAMINATION OF THE RESERVE CLAUSE AND THE KORUS FTA

A. Professional Services

B. Labor

VIII. CONCLUSION

I. INTRODUCTION

While the legal system in South Korea is a civil law system based on its own constitution, sports law has become an area of ambiguity and uncertainty. After the 1997 Asian Financial Crisis, South Korea underwent a major economic revival. And in recent years, sports in Korea have also accelerated to new heights. With the recent trend of American athletes taking their talents overseas, it has become imperative that athletes and their agents have a clear understanding of sports law in South Korea. This note evaluates the differences between Korean and American sports law and analyzes the impact these differences have on the available talent and player movement. Additionally,

^{*} John Kim, LL.B. in Global Law, Soongsil University College of Law.

141 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

this note provides an overview of Korean baseball's reserve clause, contract law, and labor law.

American athletes participate in the Korean sports market as baseball players in the Korea Baseball Organization (KBO). They play in the KBO under the KBO Baseball Code, Korean labor laws, and Korean contract laws. However, American athletes are also operating under the Free Trade Agreement between the United States of America and the Republic of Korea (KORUS FTA). Professional services are guarded under Chapter 12, while labor provisions are stipulated under Chapter 19. The implementation of the KBO reserve clause may cause injuries to American athletes participating in Korean baseball, especially in light of the KORUS FTA. Are the legal rights of American baseball players infringed if they are subjected to enforcement of the KBO reserve clause, vis-à-vis professional services and labor under the KORUS FTA?

II. BACKGROUND

Baseball in the United States has existed since the late 19th century. A chronological narration of baseball's litigation history provides an illustration of the development of legal issues concerning contract law and specifically the reserve clause. On the other hand, professional baseball in Korea is relatively new, and many of the rules and regulations have been modeled after those of American baseball.

The first recorded baseball game took place in 1846 in Hoboken, New Jersey.¹ Originally an amateur sport, baseball gained popularity in the 19th century and was quickly dubbed America's "national pastime."² The first

1. WARREN GOLDSTEIN, *PLAYING FOR KEEPS* 11-12 (spec. ed. 2009).

2. JULES TYGIEL, *PAST TIME* 5-6 (2000).

major league was the National Association of Professional Base Ball Players in 1871, organized by its players.³ In 1876, the National League was formed, and this formation is considered to be the creation of modern professional baseball.⁴ As its popularity grew, owners of teams began collecting gate revenue from admissions to games.⁵ Official player contracts were now offered to players. As other start-up leagues began taking shape in the late 19th century, the American League was formed in 1901 to rival the dominance of the National League.⁶ In 1903, however, the National League and the American League signed the National Commission, which was an agreement between both leagues that essentially dominated professional baseball.⁷ Until this period, the two leagues contracted with players from each league, but they eventually agreed to cease that practice. With the establishment of professional leagues, disputes in player contracts between players and owners found their way into court. And with the formation of the National Commission, it became difficult for players to move teams, due to the agreement between the two dominant leagues and the institution of the reserve clause. The reserve clause was a much-debated provision forbidding players to change teams. A number of cases would settle this dispute in the early years of baseball, but it was still a contested legal issue throughout baseball's history. In the 1920s, baseball saw a rise in popularity and fan attendance in a time period marked as the beginning of the "Golden Age of Baseball." By then, the National Commission had been replaced by an official

3. BENJAMIN G. RADER, *BASEBALL* 44 (3d ed. 2008).

4. *Id.* at 42-49.

5. *History of Baseball*, iSPORT, <http://baseball.isport.com/baseball-history/> (last visited Sept. 24, 2014).

6. RADER, *supra* note 3, at 86-89.

7. *National Commission*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/bullpen/National_Commission (last modified Mar. 31, 2008).

143 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

Commissioner of Baseball.⁸ Although still separate legal entities, the National League and the American League were now under the control of the commissioner.⁹

At the end of the Second World War, the American League and National League dominated the sport. After the war, the Mexican League would challenge this notion by attempting to raid the American players.¹⁰

A number of legal disputes arising out of the concern for baseball's increasing national dominance of the market led to various antitrust suits, such as suits by players attempting to fight the reserve clause.

The Sherman Antitrust Act, enacted by Congress in 1890,¹¹ was passed in response to a relatively small segment of the population accumulating substantial wealth and economic power.¹² The Act was passed in an attempt to encourage competition in markets and to avert the possibility of monopolization.¹³ Section 1 of the Act reads, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."¹⁴ Section 2 provides that "[e]very person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the

8. *Id.*

9. *The Commissionership: A Historical Perspective*, MLB.COM, http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com (last visited Sept. 27, 2014).

10. JOHN VIRTUE, *SOUTH OF THE COLOR BARRIER* 125-29 (2007).

11. Sherman Act of July 2, 1890, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (1890)).

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

13. *Id.* at 292-93.

14. 15 U.S.C. § 1 (2004).

several States, or with foreign nations, shall be deemed guilty of a felony.”¹⁵ Throughout baseball’s long history, antitrust regulation, especially under the Sherman Antitrust Act, would become one of the defining issues and major themes in baseball’s episodic chronicles of sports litigation.

With increased national coverage and a rise in popularity, baseball grew to include a player’s union. 1966 saw the formation of the Major League Baseball Players Association (MLBPA), a labor union consisting of all professional baseball players under contract with the league and its teams.¹⁶ By 1981, with increased media coverage and baseball’s ever-expanding global popularity, the business of baseball saw an increase in marketing and endorsements for both its players and its teams.¹⁷ Since the establishment of the MLBPA, player salaries have undergone a meteoric rise,¹⁸ and now even the lowest-paid players now boast some of the higher salaries in the nation. The formation of the players union also led to the demise of the reserve clause.¹⁹ Although it seemed like the players had the power, ongoing disputes led to multiple work stoppages and labor strikes.²⁰

It is believed that baseball was introduced in South Korea in 1905.²¹ The Treaty of Kanghwa, signed in 1876, opened Korean diplomatic relations and trade opportunities

15. *Id.* at § 2.

16. *MLBPA Info: When Was the MLBPA Created?*, MLBPLAYERS.COM, <http://mlbplayers.mlb.com/pa/info/faq.jsp#created> (last visited Sept. 26, 2014).

17. *History of Baseball*, *supra* note 5.

18. RADER, *supra* note 3, at 213.

19. Christopher W. Schmidt, *Explaining the Baseball Revolution*, 44 ARIZ. ST. L.J. 1471, 1529 (2013).

20. *History of Baseball*, *supra* note 5.

21. Bang-Chool Kim, *Professional Baseball in Korea: Origins, Causes, Consequences and Implications*, 25:3 INT’L J. HIST. SPORT 370, 373 (2008).

145 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

to the world.²² The treaty extended Korea's exchanges with Japan, the United States, and Europe. Philip L. Gillett, a Christian missionary, introduced organized baseball at a Korean YMCA, forming the first amateur baseball team in 1905.²³ By 1913, seven new Korean baseball teams had been established. By 1923, the first association of baseball clubs was founded.²⁴ It was around this period Korea began organizing national tournaments. In 1922, Korea was introduced to American baseball when MLB players played an exhibition game in Seoul.²⁵ Japan, as the colonial government of Korea, passed the "Baseball Restriction Law," forbidding all baseball tournaments in Korean territory.²⁶ Baseball was effectively outlawed as a participatory, national sport in Korea up until the liberalization of Korea in 1945.

In 1946, the Korean Baseball Association (KBA) was formed as the governing body of baseball in Korea. From the 1950s to the 1970s, baseball became increasingly popular in Korea, with some dubbing it Korea's "festive pastime."²⁷ Baseball was still regarded as an amateur sport, rising in popularity at the collegiate and international level, such as the World Baseball Games.²⁸ Today, the KBA governs Korean amateur competitions and international

22. KI-BAIK LEE, A NEW HISTORY OF KOREA 268-69 (Edward W. Wagner & Edward J. Shultz trans., 1984).

23. Barbara Demick & Jinna Park, *Baseball Is a Smash in Korea After Win over the U.S.*, L.A. TIMES, Mar. 15, 2006, at A3.

24. Kim, *supra* note 21, at 373.

25. BASEBALL WITHOUT BORDERS: THE INTERNATIONAL PASTIME 98 (George Gmelch ed., 2006).

26. Younghan Cho, *Basebaell*, Korea, in SPORTS AROUND THE WORLD: HISTORY, CULTURE, AND PRACTICE 200-01 (John Nauright & Charles Parrish eds., 2012).

27. Kwon Jungyun, *Korean Baseball, Past and Present*, KOREA.NET (Sept. 5, 2012), <http://www.korea.net/NewsFocus/Society/view?articleId=102256>.

28. Kim, *supra* note 21, at 374.

competitions for its national team.²⁹ By 1980, Korean baseball had become recognized on the international stage, Korea having co-hosted the 26th World Baseball Games with Japan.³⁰ In 1981, Korea's amateur national team won the World Baseball Games tournament.³¹ Amateur baseball in Korea was at its peak, and the professionalization of baseball was only the next step.

The Korean Baseball Organization (KBO) was founded in 1981 and launched its first season in 1982.³² The private sector of Korea sponsored the KBO teams and the Korean sports governing bodies. Originally, the KBO boasted six professional teams. The Doosan Business Group, Samsung Business Group, Haitai Confectionary Co., Munhwa Broadcasting Corporation, Sammi Corporation, and the Lotte Business Group each owned the original six professional baseball teams.³³ Suh Jyong-Chul was appointed the first commissioner of the KBO. Close to 30,000 spectators attended the inaugural KBO game in 1982, in Seoul Stadium.³⁴ Today, the KBO has expanded to nine professional teams.³⁵ The KBO is Korea's first professional baseball league and is the governing body of professional baseball in the nation.

III. AMERICAN BASEBALL: RESERVE CLAUSE

Since its inception in 1879, the American reserve clause has undergone a long and arduous litigious history.

29. *KBA Introduction*, KOREA BASEBALL ASS'N, <http://www.korea-baseball.com/intro/vision.asp> (last visited Nov. 2, 2014).

30. Kim, *supra* note 21, at 374.

31. *Id.*

32. *Id.*

33. *Id.* at 377.

34. *Id.* at 379.

35. *Korea Baseball Organization*, BASEBALL-REFERENCE, http://www.baseball-reference.com/bullpen/Korea_Baseball_Organization (last visited Oct. 31, 2014).

147 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

The reserve clause had been legally disputed for an extended period of time, initially through the courts via antitrust law until its conclusion by arbitrational measures in 1975. Such developments are revealed by numerous court battles and historical accounts.

At its earliest stages, the issue that defined American baseball litigation was the anointment of the reserve clause. The reserve clause allowed teams to prevent their players from joining other teams.³⁶ Disputes revolved around the question of a team's discretionary rights to terminate player contracts and to bind players to contract extensions.³⁷ From 1890 to 1922, mutuality of obligations in baseball contracts became the center of the disagreement.³⁸ Courts at the time established there was a lack of mutuality in these contracts and therefore generally denied enforcement of such agreements.³⁹

In "baseball's first instance of contract litigation,"⁴⁰ the Pittsburgh Alleghenys sued catcher Charles Bennett in connection with the reserve clause.⁴¹ Bennett signed a preliminary agreement with Pittsburgh in 1882 but ultimately signed a contract with the Detroit Wolverines; Pittsburgh sought an injunction requiring him to contract with the Alleghenys and not the Wolverines.⁴² The court found that the reserve clause in Bennett's contract with the

36. JAMES B. DWORKIN, OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING 44 (1981).

37. Richard L. Irwin, *A Historical Review of Litigation in Baseball*, 1 MARQ. SPORTS L.J. 284 (1991)..

38. *Id.*

39. *Id.*

40. Edmund P. Edmonds, *Arthur Soden's Legacy: The Origins and Early History of Baseball's Reserve System*, 5 ALB. GOV'T. L. REV. 38, 53(2012).

41. *Allegheny Base-Ball Club v. Bennett*, 14 F. 257, 257 (C.C.W.D. Pa. 1882).

42. *Id.*

Alleghenys lacked equity, and therefore it ruled in favor of the catcher.⁴³ The Bennett ruling became a landmark decision in future cases concerning the reserve clause.⁴⁴

In *Metropolitan Exhibition Co. v. Ward*, the New York Giants baseball club sought an injunction over its player John Montgomery Ward regarding the reserve clause in his contract.⁴⁵ The club argued that Ward's contractual obligations prevented him from joining another team. Ward argued that the clause was untenable and unenforceable by the National League.⁴⁶ The court held there was a lack of mutuality between the two parties of the contract; the court reasoned the club had the discretion to terminate Ward's contract at any time—with 10-days' notice—while the player was bound to his contractual duties indefinitely.⁴⁷ Furthermore, the court opined the language lacked clarity regarding certain conditions, such as fixed salaries or provisions for the 'reserved' year.⁴⁸

Also in 1890, in *Metropolitan Exhibition Co. v. Ewing*, the New York Giants sought to prevent player Buck Ewing from going not only to another club but to another league.⁴⁹ Ewing wanted to join the Players League, founded by John Montgomery Ward himself. The court used similar reasoning to that in the *Ward* case and ruled in favor of Ewing.⁵⁰

Several lawsuits followed, with courts ruling in favor of the players. However, in 1902, the case of

43. Irwin, *supra* note 37, at 284.

44. *See generally*, e.g., *Metro. Exhibition Co. v. Ward*, 9 N.Y.S. 779 (N.Y. Sup. Ct. 1890); *Metro. Exhibition Co. v. Ewing*, 42 F. 199, 199 (C.C.S.D.N.Y. 1890).

45. *See generally Ward*, 9 N.Y.S. 779.

46. *Id.*

47. *Id.* at 781-83.

48. Irwin, *supra* note 37, at 285.

49. *Ewing*, 42 F. at 199.

50. *Id.* at 201-05.

149 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

Philadelphia Ball Club v. Lajoie brought about new legal questions. Second baseman Napoleon Lajoie sought to depart the Philadelphia Phillies for the Philadelphia Athletics.⁵¹ The Phillies argued that their reserve clause restricted Lajoie from joining the Athletics, because that would be a breach of contract.⁵² The Court of Common Pleas of Pennsylvania ruled in favor of Lajoie, because the contract lacked mutuality and was vague.⁵³ The club appealed to the Pennsylvania Supreme Court, which in turn reversed.⁵⁴ The court found that Lajoie's "baseball skills" would be impossible to replace by the club, which would cause irreparable harm to the team.⁵⁵ The court also stated that if Lajoie were to defect, his status as a public draw would cause financial harm to the Phillies.⁵⁶

This decision is especially interesting because the court strayed from the lines of thinking found in the *Bennett*, *Ward*, and *Ewing* cases. While the previous cases focused on the lack of mutuality and definiteness of the player contracts, the *Lajoie* court focused on the financial, and perhaps competitive, implications of Lajoie's prospective defection. Another significant aspect of the case brought about new questions regarding the enforcement of the *Lajoie* decision in other states. After the court granted the injunction in favor of the Phillies, Lajoie signed a player contract with the Cleveland Bronchos.⁵⁷

51. *Phila. Ball Club v. Lajoie*, 51 A. 973 (Pa. 1902); PATRICK K. THORNTON, *LEGAL DECISIONS THAT SHAPED MODERN BASEBALL* 43 (2012).

52. Irwin, *supra* note 37, at 287.

53. *Lajoie*, 51 A. at 973.

54. THORNTON, *supra* note 51.

55. *Lajoie*, 51 A. at 974.

56. *Id.*

57. THORNTON, *supra* note 51, at 49-50.

The Phillies attempted to extend the injunction in Ohio.⁵⁸ A trial court in Ohio dismissed the case, allowing Lajoie to play in Cleveland for the next 12 years.⁵⁹ That court applied the reasoning in *Bennett*, *Ward*, and *Ewing*—lack of mutuality, equity, and unfair control by the league.⁶⁰

While the National League found a silver lining by winning in Pennsylvania, it nonetheless realized that its grasp on player movement had weakened significantly. The reserve clause in National League player contracts had become unenforceable when disputed. Players were slowly gaining control over their careers after winning several fundamental lawsuits. The *Lajoie* decision became binding legal precedent in contract law in sports for the next 100 years.⁶¹

American baseball saw its first antitrust-related lawsuit in *American League Baseball Club of Chicago v. Chase*.⁶² The 10-day release clause provision required teams to give 10 days' notice before terminating.⁶³ Hal Chase, first baseman of the Chicago White Sox, argued that the right to invoke the 10-day clause should be mirrored for both parties.⁶⁴ By invoking the 10-day release clause,

58. ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES: PROFESSIONAL SPORTS LEAGUES 73 n.2 (1986).

59. David Jones & Stephen Constantelos, *Nap Lajoie*, SOC'Y FOR AM. BASEBALL RESEARCH, <http://sabr.org/bioproj/person/ac9dc07e> (last visited Oct. 7, 2014).

60. Irwin, *supra* note 37, at 287.

61. THORNTON, *supra* note 51, at 41.

62. *Am. League Baseball Club of Chi. v. Chase*, 149 N.Y.S. 6 (Sup. Ct. 1914).

63. NORMAN L. MACHT, CONNIE MACK AND THE EARLY YEARS OF BASEBALL 228-29 (2007).

64. MARTIN DONELL KOHOUT, HAL CHASE: THE DEFINAT LIFE AND TURBULENT TIMES OF BASEBALL'S BIGGEST CROOK 137 (1959).

151 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

Chase signed a contract to play for the Buffalo Blues.⁶⁵ Chicago sought an injunction to prevent Chase's move to Buffalo. In response, Chase alleged his contract with Chicago constituted an illegal restraint of trade.⁶⁶ The court ruled in favor of Chase.⁶⁷ It reasoned that providing the injunction in favor of Chicago would be leading baseball toward the direction of a monopoly.⁶⁸ The court also felt that restricting Chase's movement to Baltimore was unlawful because it "[interfered] with the personal freedom of men employed."⁶⁹ The significance of this case rests on antitrust philosophies of the court. Although the court did not formally indict baseball for monopolization, it used such reasoning to allow the player to move to a different club, which essentially challenged the reserve clause again. By this time, the release clause had apparently lost its legality in court.

In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, Baltimore alleged that the Federal League, American League, National League, and National Commission had conspired to monopolize professional baseball.⁷⁰ In a landmark decision, the Supreme Court held professional baseball was not under the jurisdiction of federal antitrust laws.⁷¹ The Court reasoned that baseball was not involved in interstate commerce and was merely a local business. The Court also

65. Martin Kohout, *Hal Chase*, SOC'Y FOR AM. BASEBALL RESEARCH, <http://sabr.org/bioproj/person/aab1d59b> (last visited Oct. 7, 2014).

66. *Chase*, 149 N.Y.S. at 15-16.

67. *Id.* at 20.

68. *Chase*, 149 N.Y.S. at 16.

69. Carl Zollmann, *Baseball Peonage*, 24 MARQ. L. REV. 139, 139 (1940).

70. *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 207 (1922).

71. *Id.* at 208-09.

cited the lack of involvement in production to mean the sport was not governed by antitrust laws.⁷²

Post-World War II contractual disputes predominantly involved the reserve clause. In this era, the reserve clause and the Court's inquiry into baseball's antitrust considerations were inherently linked. In 1946, the newly formed Mexican League had begun to offer American players contracts to play in Mexico.⁷³ In response, club owners threatened players by instituting a blacklisting policy, giving players a lifetime ban from returning to American baseball, should they defect to Mexico.⁷⁴ That year, in *American League Baseball Club of New York, Inc. v. Pasquel*, the New York Yankees requested an injunction from the court to forbid the Mexican League owners from raiding their players.⁷⁵ The court concluded that the Mexican League had acted maliciously and illegally by asking players to breach their contracts with its American counterpart;⁷⁶ thus the court enjoined the Mexican League from further contact with professional players under contract in America.⁷⁷

In *Toolson v. New York Yankees*, pitcher George Earl Toolson contended that the reserve clause in his contract had unjustly restricted him from negotiating a contract with another team.⁷⁸ He further argued that this restraint of trade should be under the governance and scrutiny of antitrust regulation.⁷⁹ Ultimately, the Court held that the ruling in *Baltimore* should be the binding legal

72. *Id.* at 209.

73. VIRTUE, *supra* note 10, at 125-29.

74. RADER, *supra* note 3, at 206-07.

75. *Am. League Baseball Club of N.Y., Inc. v. Pasquel*, 63 N.Y.S. 2d 537 (Sup. Ct. 1946).

76. *Id.* at 538-40.

77. *Id.*

78. *Toolson v. N.Y. Yankees*, 346 U.S. 356, 362 (1953).

79. *Id.* at 357.

153 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

precedent, effectively ruling that baseball was not subject to antitrust legislation.⁸⁰ The Court stated that because Congress was responsible for determining baseball's status under federal competition laws, it would follow the decision held in *Baltimore*.⁸¹

The much-maligned and notorious reserve clause again ended up in judicial proceedings in 1972. In *Flood v. Kuhn*, centerfielder Curt Flood of the St. Louis Cardinals sought injunctive relief from the reserve clause, arguing the clause harmed players and violated antitrust statutes.⁸² Flood's counsel argued that baseball's immunity was unjustified, because other professional sports leagues were subject to antitrust regulation.⁸³ The Supreme Court, however, ruled that *stare decisis* dictated that the *Baltimore* and *Toolson* decisions were legally binding.⁸⁴ According to historians, the *Flood* court was largely responsible for the introduction of free agency into baseball.⁸⁵ Arguments based on the reserve clause and antitrust had become futile, at which point players realized the efficacy and worth of a players' union.⁸⁶

In 1966, the players hired Marvin Miller, an economist for the United Steelworkers of America, to lead the newly formed MLBPA.⁸⁷ By initiating a group-licensing program and instructing players on the

80. *Id.*

81. *Id.*

82. *Flood v. Kuhn*, 407 U.S. 258, 265 (1972).

83. JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* 486 (1979).

84. BERRY & WONG, *supra* note 58, at 101-05.

85. Lawrence M. Kahn, *The Sports Business as a Labor Market Laboratory*, 14 J. Econ. Persp. 78 (2000).

86. BILL JAMES, *THE NEW BILL JAMES HISTORICAL BASEBALL ABSTRACT* 748 (2001).

87. MARVIN MILLER, *A WHOLE DIFFERENT BALL GAME: THE INSIDE STORY OF THE BASEBALL REVOLUTION* 3-4, 11 (2004).

importance of organizing, Miller formed a *bona fide* labor union.⁸⁸ In 1968, Miller and the MLBPA negotiated the first ever collective bargaining agreement (CBA), in which minimum salaries were raised from \$6,000 to \$10,000 annually.⁸⁹ By 1970, the MLBPA and the owners had signed the 1970 Basic Agreement, stipulating that disputes would be resolved through an impartial arbitration process.⁹⁰ As players had been largely unsuccessful in court for the past century, Miller claimed the establishment of arbitration would be vital for players' future gains.⁹¹ The often-disputed reserve clause could finally be challenged on an alternate platform.⁹²

In 1975, pitchers Andy Messersmith and Dave McNally, of the Los Angeles Dodgers and Montreal Expos, respectively, invoked the arbitration clause after asserting that they had fulfilled their contractual duties upon playing in their final season of the "reserve" year.⁹³ Both teams, on the other hand, argued the players' contracts should be continually renewed under the reserve clause. Under American contract law, such a provision was termed the "evergreen condition," under which contractual provisions were automatically renewed after a predetermined period. Peter Seitz of the arbitration panel ruled that both players were free to join other teams.⁹⁴

88. *MLBPA Info: History of the Major League Baseball Players Association*, MLBPLAYERS, <http://mlbplayers.mlb.com/pa/info/history.jsp> (last updated 2014).

89. Thomas J. Hopkins, *Arbitration: A Major League Effect on Players' Salaries*, 2 SETON HALL J. SPORT L. 301, 307 (1992).

90. DWORKIN, *supra* note 36, at 126.

91. *MLBPA Info: History of the Major League Baseball Players Association*, *supra* note 88.

92. See CHARLES P. KORR, *THE END OF BASEBALL AS WE KNEW IT* 73 (2002).

93. BERRY & WONG, *supra* note 58, at 407.

94. *Id.* at 414-15.

155 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

Seitz concluded that MLB clubs could not arbitrarily impose a one-year renewal of a player's contract a year after the expiration of the previous contract.⁹⁵ This ruling introduced the system of free agency in baseball.⁹⁶ More important, however, it effectively nullified the reserve clause provision. Although judicial proceedings followed the institutional decisions of *Baltimore* and *Toolson* for more than a half-century, the newly formed MLBPA found an alternative direction. Rather than intermittently focusing on antitrust-led diatribe, the players effectively organized a labor union to invalidate the much-maligned reserve clause. The next challenge was to determine the legal authority of the arbitral decisions.

In *Kansas City Royals Baseball Corporation v. Major League Baseball Player's Association*, the owners sought reversal of the arbitration panel's decision.⁹⁷ The court, however, ruled the arbitration panel held jurisdiction in player-owner disputes because the CBA effectively governed.⁹⁸ Quite significantly, the *Kansas City* case firmly established the arbitration panel's jurisdiction and authority over player-owner disputes.⁹⁹ The court followed the precedent set forth by the Supreme Court, in which arbitral rulings in labor disputes would not be overturned by courts.¹⁰⁰

In effect, labor law, rather than antitrust regulation, would be the determining factor that led to the nullification of the reserve clause. The Messersmith/McNally ruling and

95. Hopkins, *supra* note 89, at 309.

96. Ed Edmonds, *At the Brink of Free Agency: Creating the Foundation for the Messersmith-McNally Decision - 1968-1975*, 34 S.ILL. U. L.J. 565, 619 (2010).

97. *Kan. City Royals Baseball Corp. v. Major League Baseball Player's Ass'n*, 532 F.2d 615, 617 (8th Cir. 1976).

98. *Id.* at 629-30, 632.

99. Irwin, *supra* note 37, at 297.

100. *Kan. City Royals Baseball Corp.*, 532 F.2d at 621.

the *Kansas City* case finally gave the players unprecedented freedom and bargaining power.

By this time, the MLBPA was growing in stature, especially at the negotiating table.¹⁰¹ With the institution of free agency, players began to negotiate relatively exorbitant salaries. In 1967, the average annual player's salary was \$19,000.¹⁰² By 1977, after the holdings of *Kansas City* and *Messersmith/McNally*, the average salary had increased to approximately \$76,000 annually—nearly quadrupling the amount in 1967.¹⁰³

Initially, judicial proceedings upheld *Toolson* and *Baltimore*, under which baseball's antitrust exception meant players were still bound by the reserve clause. By the 1960s, players began unionizing and, under the leadership of Marvin Miller, formed the MLBPA.¹⁰⁴ The MLBPA was monumentally successful in not only invalidating the reserve clause but also augmenting the negotiating power of the players.¹⁰⁵ By 1990, the average annual player salary was \$597,000¹⁰⁶—a colossal increase from the average in 1967. This era marked the quasi-resolution of baseball's antitrust exemption. While baseball had not been formally declared a monopoly, arbitral proceedings nonetheless gave the players a safe haven in the MLBPA. Players were no longer perpetually restricted

101. JESSE W. MARKHAM & PAUL V. TEPLITZ, *BASEBALL ECONOMICS AND PUBLIC POLICY* 54 (1981).

102. *Average Salaries in Major League Baseball: 1967-2009*, MAJOR LEAGUE BASEBALL PLAYERS ASS'N (2009), http://hosted.ap.org/specials/interactives/_sports/baseball08/documents/bbo_average_salary2009.pdf.

103. *Id.*

104. Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 269 (2008).

105. Irwin, *supra* note 37, at 297-98.

106. *Average Salaries in Major League Baseball: 1967-2009*, *supra* note 102.

157 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

from joining other teams. Rather, players had the right to a free agency period in which they were allowed to negotiate contracts with any of the Major League Baseball teams.

In the post-reserve clause days, the MLBPA and the MLB owners have negotiated new standardized contracts. Players now only have a duty to serve the duration of their contracts, rather than perpetually renew on an annual basis. Teams have a player's contractual rights until a player can enter the free agency pool. A player will obtain free agency status upon fulfilling his contract, completing at least six seasons in the MLB, and not having a baseball contract for the upcoming season.¹⁰⁷ Afterward, the free agent in question will notify the MLBPA of his intent to pursue the free agent market.¹⁰⁸ Upon notification, the player is free to negotiate with any team for a new contract.¹⁰⁹

Salary arbitration is initiated by either the player or the club, upon submission to the arbitration panel between January 1 and January 15. From February 1 to February 20, arbitration hearings commence before a three-person arbitration panel. Both player and club submit a salary figure, each party submitting presentations on behalf of its own figure. The arbitration panel considers the player's quality of contribution to the club, overall career, past salary, and physical/mental defects; comparative salaries; and the recent performance of the club in the league.¹¹⁰ After deliberation, the panel decides between figures submitted by the player and the team.¹¹¹ The chosen figure is the player's salary figure for the upcoming season.

107. 2003-2006 BASIC AGREEMENT art. XX § B (2002).

108. *Id.* § B(2)(a).

109. *Id.*

110. *Id.* at art. VI § F(12)(a).

111. *Id.* at art. VI § F(5).

Owners still maintain a window in reserving the rights to a player upon the completion of his contract.¹¹² If the free agent in question has not signed a new contract by December 1, the team has the right to execute salary arbitration and retain the player's services for the following season.¹¹³ Although teams still have an opportunity to maintain player contracts, this new system is vastly liberating to players. Rather than giving the owners complete power by annually reserving a player, this new system allows players the option to enter into a free agency pool. Should the player be unsuccessful in procuring a new contract with another team, then the former club has the opportunity to retain that player's services for another year.

Player salaries grew exponentially in the 1990s, and owners wanted to impose a salary cap on teams.¹¹⁴ Since the establishment of the professional model of baseball, the average player salaries have been as follows:

112. *Id.* at art. XX § B(3).

113. *Id.*

114. Daniel C. Glazer, *Can't Anybody Here Run This Game? The Past, Present, and Future of Major League Baseball*, 9 SETON HALL J. SPORT L. 339, 363 (1999).

159 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

Average MLB Player Salary by Decade: 1880s-1950s¹¹⁵

Year	Average Salary
1880s-1890s	\$3,054
1900s	\$6,523
1910s	\$2,307
1920s	\$6,992
1930s	\$7,748
1940s	\$11,197
1950s	\$12,340

115. Michael J. Haupert, *The Economic History of Major League Baseball*, EH.NET, <http://eh.net/encyclopedia/the-economic-history-of-major-league-baseball/> (last visited Oct. 7, 2014).

Since the establishment of the MLBPA in 1966, the average salary has risen as follows:

Average MLB Player Salary by Year: 1960s-1990s¹¹⁶

Year	Average Salary
1960s	\$18,568
1970s	\$55,802
1980s	\$333,686
1990s	\$1,160,548

In 1985, the average MLB player salary was \$371,157.¹¹⁷

116. *Id.*

117. *Average Salaries in Major League Baseball: 1967-2009*, *supra* note 102.

161 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

The average salary over a 17-year period rose as follows:

Average MLB Player Salary by Year: 1985-2002¹¹⁸

Year	Average Salary
1985	\$371,157
1986	\$412,520
1987	\$412,454
1988	\$438,729
1989	\$497,254
1990	\$597,537
1991	\$851,492
1992	\$1,028,667
1993	\$1,076,089
1994	\$1,168,263
1995	\$1,110,766
1996	\$1,119,981
1997	\$1,336,609
1998	\$1,398,831
1999	\$1,611,166

118. *Id.*

2000	\$1,895,630
2001	\$2,138,896
2002	\$2,295,649

According to public accounts provided by the MLBPA, the average player contract has been steadily increasing year by year. Although the change has not been as exponential as in the early days, the data shows that the power of the MLBPA is still intact. Negotiating leverage and the bargaining power of the labor union proved fruitful for the players. The intent of the 1997 CBA was to significantly reduce labor costs. On its face, however, the agreed-upon CBA signifies that the owners were unsuccessful in curbing player salaries.

The MLBPA and the teams use arbitration to settle any “grievances” or complaints regarding provisions of any agreements between the union and the teams, or between a player and a team.¹¹⁹ The player first submits a grievance to the club’s designated representative, who makes a decision regarding the matter.¹²⁰ The player may then appeal that decision to an arbitration panel.¹²¹ The panel then makes a final decision regarding any submitted “grievances.”¹²² Arbitration proceedings are conducted in accordance with the CBA Rules of Procedure.¹²³ 1

119. 2003-2006 BASIC AGREEMENT, *supra* note 107, at art. XI § A(l)(a).

120. *Id.* at art. XI § B.

121. *Id.*

122. *Id.*

123. *Id.* at app. A.

163 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

IV. KOREAN BASEBALL: RESERVE CLAUSE

The Korean Baseball Organization (KBO) institutes a standard “uniform player’s contract.”¹²⁴ All player contracts are made between the club and the player.¹²⁵ Quite similar to the old reserve clause provision of American baseball, however, is the KBO-implemented reserve clause. Since the formation of the KBO in 1981, the reserve clause has been partially modified through due to judicial proceedings and adjudications by the Korea Fair Trade Commission. The reserve clause is still in effect today and is implemented separately for Korean and American players.

Under the KBO Baseball Code, the standard KBO player contract for foreign players states that clubs have the “the right to renew [contracts], and that Player[s] shall be prohibited from playing for any other baseball club [worldwide.]”¹²⁶ Another provision states teams have the discretion to either enforce the reserve clause or terminate such a right. During the tenure of his contract, a player may not leave Korea to play for another club unless he receives express written permission from his team. Any instance in which a contracted player leaves Korea constitutes a breach of contract, thereby restricting the player from playing for any other baseball team worldwide.¹²⁷

KBO clubs have the right to an “exclusive negotiation period.”¹²⁸ According to Article X of the KBO Baseball Code, titled “Uniform Player’s Contract,” a club reserve the right to notify a player of its desire to retain the

124. 2013 KOREA BASEBALL ORG., UNIF. PLAYER’S CONTRACT art. I, *available at* <https://www.koreabaseball.com/FILE/ebook/pdf/2013regulation.pdf>.

125. *Id.* at art. I.

126. *Id.* at art. III § 2.

127. *Id.*

128. *Id.* at art. X.

player's services for an additional year.¹²⁹ The club will submit a written offer of no less than 75 percent of the previous salary.¹³⁰ Teams may offer more than the 75 percent minimum. Should the parties fail to reach an agreement by the deadline, the player may declare for free agency.¹³¹ However, said player may not sign with another KBO club, only with teams outside of Korea. The club may also submit a qualifying offer, under which it can retain its KBO rights over the player for five years.¹³² Should the club not submit a qualifying offer, then the player may enter free agency with the right to sign with any other KBO club or internationally. All disputes between player and club, including contractual issues, are resolved by KBO rules, Korean law, and Korean judicial proceedings.¹³³ The club has the sole discretion, however, to submit the dispute to a United States court in accordance with U.S. law.¹³⁴

For Korean players, a team may cancel the contract of a player if the player does not live up to the conditions of the contract.¹³⁵ According to the "Free Agency" section of the Baseball Code, a domestic player must apply to qualify as a free agent to his former team, in a process in which the team decides the player's future.¹³⁶ If a team decides its player qualifies, then the player officially becomes a free agent for the upcoming season. If the player fails to apply for free agency, that player will not qualify for free agent status. According to Article 156, a player in the KBO may acquire free agent status after nine years of service as a

129. *Id.*

130. *Id.*

131. *Id.* at art. X § A.

132. *Id.* at art. X § B.

133. *Id.* at art. IX § 2.

134. *Id.*

135. *Id.* at art. 26.

136. KOREA BASEBALL ORG., 2013 KBO BASEBALL CODE art. 159, available at <https://www.koreabaseball.com/FILE/ebook/pdf/2013regulation.pdf>.

165 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

professional baseball player in the league.¹³⁷ To qualify as a full season, a player must have played at least two-thirds of the total number of games played in a KBO season. A player may pursue a contract overseas, with the consent of the team, after playing for a KBO team for seven years.¹³⁸

In 2000, the Korean Professional Baseball Players Association (KPBPA) enacted its first legal action against the KBO, in a report submitted to the Korea Fair Trade Commission (KFTC).¹³⁹ The report alleged that the KBO's Baseball Regulation instituted unfair provisions, including the reserve system, unilateral trade system, free agency rules, and the prevention of players from entering free agency. The report also noted certain provisions of the Uniform Player's Contract of the KBO—Articles 8, 16, 21, 25, 29, 30, 31, and 34—provided inequitable treatment between players and owners.¹⁴⁰ The KFTC observed such practices were “unduly restraining business-related activities of member enterprises.”¹⁴¹ The Commission reasoned such provisions, while limiting the business activities of Korean baseball, also placed unfair conditions on players, due to the KBO's excessive authority. The Commission held that the KBO's Baseball Regulation and Uniform Player's Contract violated Korean antitrust law

137. *Id.* at art. 156.

138. Jye-Shyan Wang, Chih-Fu Cheng & Wen-Jhan Jane, *The Causality Between Salary Structures and Team Performance in Korean Professional Baseball League*, in HANDBOOK ON THE ECONOMIC, FINANCE AND MANAGEMENT OUTLOOKS 573, 575 (2013).

139. Jongmi Joo, *The Identification of Collective Bargaining Issues for the Korea Baseball Organization* 33-34 (Aug. 25, 2003) (unpublished Ph.D dissertation, Florida State University) (on file with DigiNole Commons, Florida State University).

140. *Id.* at 33 (citing Rectifying Order by Committee of Fair-Trade (Mar. 22, 2001)).

141. KOREAN DELEGATION, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN KOREA 24 (2002).

and fair trade laws.¹⁴² The KFTC ordered the KBO to suspend, modify, or delete the related provisions and clauses. A \$100,000 fine would be instituted on the league if it failed to obey the Commission's directives.¹⁴³

The KFTC decision is significant because it applied antitrust laws to Korean baseball contracts. By establishing fair and free competition among players, the KFTC contributed to the development of Korean baseball and to the welfare of its players.

Six years after the formation of the KBO, a group of players attempted to form the first labor/players union in 1988.¹⁴⁴ However, due to a lack of governmental backing,¹⁴⁵ the efforts of the players proved futile and a union would not form for another 12 years. The Constitution of the Republic of Korea allows workers the right to collective bargaining. Chapter 2, Article 33 states that workers have the right to "independent association" and "collective action."¹⁴⁶ At the time, a players' union was not established for a number of reasons. First, the sentiment among the majority of the players was that they did not want to be involved in a union, nor were they interested in supporting one.¹⁴⁷ Most players remained on their respective teams for less than five years and the threat of a legal battle with the owners meant the possibility of not

142. Joo, *supra* note 139, at 134.

143. *Id.* at 35 (citing Rectifying Order by Committee of Fair-Trade (Mar. 22, 2001)).

144. *Id.* at 30 (citing S-J SHON, SPORTS BUBHOK [SPORTS LAW], Seoul, Korea: Tae-geun-mun-hwa-sa (2000)).

145. *Id.* at 31 (citing S-J SHON, SPORTS BUBHOK [SPORTS LAW], Seoul, Korea: Tae-geun-mun-hwa-sa (2000)).

146. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 33 (S. Kor.).

147. *See generally* GEORGE H. SAGE, POWER AND IDEOLOGY IN AMERICAN SPORT (1990); *see also* Joo, *supra* note 139, at 35 (citing S-J SHON, SPORTS BUBHOK [SPORTS LAW], Seoul, Korea: Tae-geun-mun-hwa-sa (2000)).

167 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

playing competitively during those years. Second, the players were perceived as socially isolated from the general establishments of labor unions in the country, so it was difficult to get the support from those unions. Third, under cultural and social notions of sport at the time, players were thought to be socially conservative and were to be strained from disobeying management. Players were inclined to believe that professional athletes in Korea were to focus on individual glory, rather than a collective action. Around this period, there was an anti-union sentiment among the players, the owners, and the league.¹⁴⁸

In 2000, the KPBPA was formed,¹⁴⁹ despite facing resistance from the KBO owners. Although not a bona fide “labor union” like the MLBPA, the organization was formed in order to allow players to partake in collective bargaining with the owners. However, the owners argued the economic and financial conditions of Korean baseball would make it impossible to follow collective bargaining with KPBPA.¹⁵⁰ In retaliation for forming the union, the owners designated the 72 players who had joined the KPBPA as having “free contract” status.¹⁵¹ Nevertheless, the players contended an association of players was imperative for players to actively participate in the development of the KBO and Korean baseball.

148. Joo, *supra* note 139, at 32-33.

149. *Korea Professional Baseball Players Association*, BASEBALL-REFERENCE, http://www.baseball-reference.com/bullpen/Korea_Professional_Baseball_Players_Associati on (last updated Dec. 6, 2009).

150. Joo, *supra* note 139, at 33-34.

151. Kim Dong-seok, *Baseball conflict intensifies*, THE CHOSUN ILBO (Jan. 23, 2000, 6:42 PM), http://english.chosun.com/site/data/html_dir/2000/01/23/2000012361275.html.

Fan attendance had decreased and general popularity of the sport had waned. Thus, the players needed an opportunity to contribute to the development of baseball. Additionally, the players felt the contractual standards of KBO players, established by the Baseball Regulation and Uniform Player's Contract, were unreasonable.¹⁵² Under the current system of the KBO, it was unnecessarily difficult for players to negotiate contracts, because owners had all the leverage over player contract negotiations. It was also difficult for the players to file a lawsuit against the KBO, in part due to unfair practices by management. Since 1984, all 82 cases stemming from annual salary disputes have been denied. The players felt because the president of the KBO was also a team owner, it was inherently unfair for the players. A governing body was needed to represent the players at any bargaining table.

V. PARALLELS OF THE AMERICAN AND KOREAN RESERVE CLAUSES

The reserve clause in American baseball was immensely disputed between owners and players. The dispute lasted nearly 100 years,¹⁵³ finally coming to an end in 1975 with the Messersmith/McNally ruling,¹⁵⁴ which effectively nullified the clause. In Korean baseball, the KBO equivalent to the old MLB reserve clause has been in effect since the founding of the KBO.¹⁵⁵ The stringent effects of the reserve clause have been tempered by the introduction of the free agency system.

152. Joo, *supra* note 139, at 32-33.

153. NEIL F. FLYNN, *BASEBALL'S RESERVE SYSTEM* 159-63 (2006).

154. Thomas J. Hopkins, *Arbitration: A Major League Effect on Players' Salaries*, 2 SETON HALL J. SPORT L. 301, 308 (1992).

155. Yong Bae Jeon, *A Legal Consideration Related to KBO Regulations, Labor Relation and KPBPA*, 40 KOREAN J. PHYSICAL EDUC. 515, 520 (2001).

169 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

Concerning Korean players in the KBO, the clause essentially grants KBO teams rights to its players for nine years. Upon nine years of service for the KBO club, a player may then enter free agency to pursue a new contract with another team.¹⁵⁶ From the late 19th century to the late 20th century, the reserve clause in America effectively granted a team's right to renew a player's contract perpetually.¹⁵⁷ Standard player contracts lasted for one year. When the reserve clause was in place, MLB clubs had the rights to their players for essentially their whole careers. In the KBO, clubs have the rights to their players for essentially nine years. Today, MLB players may enter free agency after completion of six years of service.¹⁵⁸ Due to the KFTC decision, standard KBO contracts were partially modified. Thus, the KB, regarding player contracts, may be heading in the direction of the MLB, wherein reserve rights over a player are finite.

Korean baseball contracts for American athletes may be paralleled by the American baseball contracts cited in the earlier *Bennett*, *Ewing*, and *Ward* cases. Those courts concluded player contracts lacked mutuality and definiteness—teams had the discretion to terminate players' contracts, while players were bound to their contractual duties indefinitely.¹⁵⁹ In Korea, teams have the right to terminate a foreign player's contract¹⁶⁰—by their own convenience or due to injury or illness—and, according to Article X of the Baseball Code, teams have the right to

156. 2013 KBO BASEBALL CODE, *supra* note 136, at art. 156.

157. *Kuhn*, 407 U.S. at 275.

158. Dryer, *supra* note 104, at 270-72.

159. *Allegheny Base-Ball Club v. Bennett*, 14 F. 257 (C.C.W.D. Pa. 1882); *Metro. Exhibition Co. v. Ewing*, 42 F. 199 (C.C.S.D.N.Y. 1890); *Metro. Exhibition Co. v. Ward*, 9 N.Y.S. 779, 781-83 (N.Y. Sup. Ct. 1890).

160. 2013 KBO BASEBALL CODE, *supra* note 136, at art. VIII(2) ("Uniform Player's Contract").

renew a foreign player's contract for an additional year.¹⁶¹ In line with the reasoning cited in the *Ward* case, the reserve clause, and Korean baseball contracts in of themselves, may lack mutuality and definiteness. Although the Baseball Code notes that the one-year qualifying offer grants the team reserve rights for five years over its player,¹⁶² it is unclear whether those five years are renewed perpetually or are fixed.

The "evergreen condition" of the old MLB reserve clause was such that contracts were perpetually renewed on a yearly basis. In the Messersmith/McNally decision, the MLB noted teams have the right to continually renew contracts upon expiration.¹⁶³ In the KBO, a team has the right to renew a foreign player's contract for an additional year.¹⁶⁴ By virtue of a team's right over that player, the player is contractually obligated to his team for five years, provided he desires to play in the KBO during that period. In the situation where an American player wishes to play in the KBO for at least five years, a KBO team has the right to perpetually renew that player's contract.

VI. THE KORUS FTA

The KORUS FTA was signed in 2007¹⁶⁵ and renegotiated in 2010.¹⁶⁶ Upon submission of the newly

161. *Id.* at art. X.

162. *Id.* at art. X § a.

163. BERRY & WONG, *supra* note 58, at 412.

164. 2013 KBO BASEBALL CODE, *supra* note 136, at art. X.

165. *United States and the Republic of Korea Sign Landmark Free Trade Agreement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (June 3, 2007),

http://web.archive.org/web/20080527150515/http://www.ustr.gov/Document_Library/Press_Releases/2007/June/United_States_the_Republic_of_Korea_Sign_Lmark_Free_Trade_Agreement.html.

166. *New Opportunities for U.S. Exporters Under the U.S.-Korea Trade Agreement*, OFFICE OF THE UNITED STATES TRADE

171 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

renegotiated terms, the U.S. president signed the legislation, previously approved by the Senate and House of Representatives, on October 21, 2011.¹⁶⁷ In South Korea, the Korean National Assembly signed the legislation on November 22, 2011. As of this writing, the most recent agreement between the U.S. and Korea—the KORUS FTA—came into effect on March 15, 2012. The newly signed FTA effectively made Korea the seventh-largest trading partner of the U.S.¹⁶⁸ The U.S. is Korea’s third-largest trading partner.

According to the agreement, cross-border trades in services or cross-border supply of services are covered under the FTA.¹⁶⁹ Chapter 12 of the agreement defines cross-border trade in services or cross-border supply of services as the “supply of a service . . . from the territory of one Party into the territory of the other Party.”¹⁷⁰ The scope of the definition may also include supply of services “in the territory of one Party by a person of that Party to a person of the other Party; or by a national of a Party in the territory of the other Party.”¹⁷¹

Chapter 12 outlines that delivery, purchase, use, or payment for services are covered under the scope of the KORUS FTA.¹⁷² This Chapter covers measures affecting “the presence in its territory of a service supplier of the

REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited Sept. 24, 2014).

167. William H. Cooper et al., CONG. RESEARCH SERV., RL34330, THE U.S.-SOUTH KOREA FREE TRADE AGREEMENT (KORUS FTA): PROVISIONS AND IMPLICATIONS 1 (2013).

168. *Id.* at 7.

169. United States - Korea Free Trade Agreement, U.S.-S. Kor., art. 12.1, June 30, 2007, 125 Stat. 428.

170. *Id.* at art. 12.13.

171. *Id.*

172. *Id.* at art. 12.1(a)-(b).

other Party.”¹⁷³ Section 13 of Article 12 defines professional services as “services, the supply of which requires specialized post-secondary education, or equivalent training or experience or examination, and for which the right to practice is granted or restricted by a Party”¹⁷⁴ According to Section 4, titled “Market Access,” neither the U.S. nor Korea may impose limitations on the number of service suppliers or the total number of employed persons in a particular service sector.¹⁷⁵ It also stipulates neither party may “restrict or require specific types of legal entity of joint venture through which a service supplier may supply a service.”¹⁷⁶

Chapter 19 of the KORUS FTA—titled “Labor”—provides that both the U.S. and Korea shall affirm their obligations as members of the International Labor Organization (ILO).¹⁷⁷ Fundamental labor rights are guarded, as provided by the FTA, under the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up (ILO Declaration).¹⁷⁸ These fundamental rights include freedom of association, the right to collective bargaining, the exclusion of forced or compulsory labor, and the removal of discrimination regarding employment and occupation.¹⁷⁹ The Chapter states both parties must adopt and maintain these fundamental labor rights in their statutes, regulations, and practices. Statutes and regulations are defined in the FTA for both the U.S. and South Korea. For the U.S., statutes and regulations are defined as acts of Congress and the Constitution of the United States.¹⁸⁰ For

173. *Id.* at art. 12.1(d).

174. *Id.* at art. 12.13.

175. *Id.* at art. 12.4.

176. *Id.* at art 12.14(b).

177. *Id.* at art. 19.1.

178. *Id.* at art. 19.2.1.

179. *Id.* at art. 19.2.1(a)-(c), (e).

180. *Id.* at art. 19.8.

173 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

Korea, statutes and regulations are defined as acts of the National Assembly.¹⁸¹

**VII. AN EXAMINATION OF THE RESERVE
CLAUSE AND THE KORUS FTA**

With the institution of the reserve clause for American players in the KBO, potential violations under the KORUS FTA may ensue. Professional services and labor are protected under the provisions outlined in the FTA. It is entirely possible that, as professional service providers and laborers, American baseball players may be legally protected under the scope of the agreed upon FTA.

A. Professional Services

Under Article X of the KBO, failure to agree on the terms of a one-year renewal during the exclusive negotiation period bars the player from joining any other KBO team.¹⁸² Subsection A of the Article provides teams in such circumstances have rights over the player for five years,¹⁸³ meaning said player may not join another KBO club for five years.

Chapter 12 of the KORUS FTA—titled “Cross-Border Trade in Services”—covers cross-border trade in services by service suppliers of either party. As mentioned before, cross-border trade or supply of services is defined under Article 12.13 as “supply of a service from the territory of one Party into the territory of the other Party.”¹⁸⁴ The MLB and the KBO have an agreement regarding cross-border player movement, titled “United

181. *Id.*

182. 2013 KBO BASEBALL CODE, *supra* note 136, at art. X.

183. *Id.* at art. X § B.

184. United States - Korea Free Trade Agreement, *supra* note 136, at art. 12.13(a).

States-Korean Player Contract Agreement.”¹⁸⁵ Paragraph 1 provides that KBO clubs must coordinate with the Office of the Commissioner of Korean Professional Baseball in communicating with the MLB Office of the Commissioner, should a KBO club wish to contact or engage a baseball player “playing or has played” in the U.S. or Canada or who is a player of the MLB.¹⁸⁶ Vice versa, Paragraph 4 reads that MLB clubs must notify the KBO Commissioner when wishing to contact and engage with Korean amateur or professional players.¹⁸⁷ Ultimately, the MLB-KBO agreement entails a level of cooperation between the two organizations regarding the trading of services of baseball players, with standard procedures of cross-border player movement set in place. The agreement signifies that there is a supply of services “from the territory of one Party into the territory of the other Party.” Article 12.13 alternatively defines cross-border trade or supply of services as “supply of a service by a national of a Party in the territory of the other Party.”¹⁸⁸ Simply put, when an American athlete, a national of the American party of the FTA, participates in Korean baseball—the territory of the other party—said athlete may supply his service as part of the cross-border trade in services description of Article 12.13. Thus, measures concerning the reserve clause, which may potentially affect foreign player movement within and outside of Korea, may apply to the scope and coverage of Chapter 12 of the KORUS FTA. This includes cross-border trading and supplying of services affecting distribution, delivery, and payment for a service.

185. 2013 KBO BASEBALL CODE, *supra* note 136, at “United States-Korean Player Contract Agreement.”

186. *Id.* at para. 1.

187. *Id.* at para. 4.

188. United States - Korea Free Trade Agreement, *supra* note 136, at art. 12.13(c).

175 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

Under the terms of the KORUS FTA, Article 12.4 restricts parties from imposing limitations on the quantity of service suppliers or the “total number of natural persons that may be employed in a particular service sector.”¹⁸⁹ It further states restrictions or a requirement of specific types of legal entities or joint ventures, by either party, through which a service supplier may supply a service, are forbidden.

Considering the facts, one could make the supposition that restricting foreign players from joining other KBO teams, for essentially a period of five years, is in violation of Article 12.4 by “imposing limitations on the number of service suppliers”¹⁹⁰ or “the total number of natural persons that may be employed in a particular service sector.”¹⁹¹ The “service sector” in question would be the sports industry sector, or specifically Korean baseball. Forbidding a foreign player from joining other professional baseball clubs in Korea on the basis of him rejecting the one-year qualifying offer could potentially be tantamount to limiting the number of employees (i.e., players) “who are necessary for, and directly related to, the supply of a specific service.” Article VI of the KBO Baseball Code explicitly states baseball players have “exceptional and unique skill” and such “services” are “special, unusual and extraordinary.”¹⁹² By this notion, baseball players, according to the KBO Baseball Code, are performing “services.” When a baseball player desires to join or at least have the opportunity to provide his “services” to other baseball clubs in Korean territory, the “other baseball clubs in Korean territory” would be “directly related” to supply of a specific service.

189. *Id.* at art. 12.4.

190. *Id.* at art. 12.4(a)(i).

191. *Id.* at art. 12.4(a)(iv).

192. 2013 KBO BASEBALL CODE, *supra* note 160, at art. VI.

Subsection B of Article 12.4 states that neither party may implement measures that “restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.”¹⁹³ The KFTC mentioned in its adjudication of KBO’s operational activities the league should not be regarded as a single entity.¹⁹⁴ Professor Ki-Sung Song of Konyang University mentions courts in Korea have generally viewed the KBO and all professional sports leagues as joint ventures.¹⁹⁵ Nevertheless, the KBO, is governed by the provision in Article 12.4. When American athletes wish to contract with other Korean baseball teams, those athletes are longing to “supply a service.” By restricting the supply of services American athletes provide, the KBO may potentially be in discord with the KORUS FTA.

Are American athletes in the KBO providing “services” in the context of Chapter 12 Cross-Border Trade in Services? Article 12.13 defines “professional services” as “services, the supply of which requires specialized post-secondary education, or equivalent training or experience or examination, and for which the right to practice is granted or restricted by a Party, but does not include service supplied by trades-persons or vessel and aircraft crew members.”¹⁹⁶

In the U.S., the annual First-Year Player Draft assigns amateur baseball players to professional clubs in MLB.¹⁹⁷ MLB is composed of 30 professional teams,¹⁹⁸

193. United States - Korea Free Trade Agreement, *supra* note 169, at art. 12.4(b).

194. KOREAN DELEGATION, *supra* note 141, at 24.

195. Ki-sung Song, *The Impact of Antitrust Law on Professional Sports Market*, 5 KOREAN J. OF SPORT MGMT. 17, 27 (2000).

196. United States - Korea Free Trade Agreement, *supra* note 169, at art. 12.13.

197. *Major League Baseball Amateur Draft*, BASEBALL-REFERENCE, <http://www.baseball->

177 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

each owning a right to select one amateur player per round. There are a total of 40 rounds in the draft, meaning at least 1,200 new players are assigned to professional teams every year.¹⁹⁹ This does not include undrafted players. Eligible players for the draft are high school graduates not attending college,²⁰⁰ college players who have completed at least their junior year (or are at least 21 years old), or junior college players.²⁰¹ Generally, players who are ineligible for the draft are those still attending school. The MLB Draft system suggests that, in order for athletes to provide services to the league, they must have a “specialized post-secondary education” or “equivalent training or experience.”

Typically, players selected from the college ranks are NCAA athletes. Playing as an amateur college athlete may constitute “specialized post-secondary education” as defined under the KORUS FTA. Highly touted prospects are typically offered athletic scholarships by their universities. Such scholarships are regulated by the National Association of Intercollegiate Athletics or the National Collegiate Athletic Association.²⁰² It could be argued that prospective professionals undertake “specialized post-secondary education,” in which student

reference.com/bullpen/MLB_Amateur_Draft (last modified Mar. 16, 2014).

198. See *Complete Baseball Team and Baseball Team Encyclopedias*, BASEBALL-REFERENCE, <http://www.baseball-reference.com/teams/> (last visited Oct. 7, 2014).

199. *First-Year Player Draft*, MLB, <http://mlb.mlb.com/mlb/draftday/faq.jsp> (last visited Oct. 7, 2014).

200. Michael A. McCann, *Justice Sonia Sotomayor and the Relationship Between Leagues and Players: Insights and Implications*, 42 CONN. L. REV. 901, 910-11 (2010).

201. *First-Year Player Draft Rules*, MLB, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Oct. 7, 2014).

202. James V. Koch, *A Troubled Cartel: The NCAA*, 38 LAW AND CONTEMP. PROBLEMS 135, 136-45 (1973).

athletes perform the roles of being both a full-time student and a full-time athlete.

In fact, MLB clubs will institute standard player development contracts with minor league affiliates, according to Rule 56 of the Major League Rules.²⁰³ Players selected by professional teams in the draft may be assigned to minor league teams. Players drafted from the high school ranks are assigned to minor league teams in order to develop into professional baseball players. Although these players are not participating in a formal post-secondary education, one could say the participation in a player-development system constitutes “equivalent training or experience.”

Every MLB team is comprised of a number of coaches with a multitude of responsibilities.²⁰⁴ For example, clubs typically assign a number of bench coaches, pitching coaches, hitting coaches, base coaches, and coaches with other responsibilities. All coaches, in some way, are assigned to develop and “train” players.²⁰⁵

According to the most recent MLB CBA, under Schedule A, “Uniform Player’s Contract,” teams employ players to render their “skilled services” as baseball players.²⁰⁶ A contracted player will be compensated his annual salary for performance of said player’s “services and performances.”²⁰⁷ Such services “for which the right to

203. See MAJOR LEAGUE RULES, Rule 56, at 153-65 available at <http://www.bizofbaseball.com/docs/MajorLeagueRules-2008.pdf>.

204. PETER MORRIS, A GAME OF INCHES: THE GAME ON THE FIELD 360-65 (2006).

205. *Id.* at 300-03.

206. Major League Baseball [MLB] Basic Agreement 2012-2016, 277 (“Employment”), available at http://mlb.mlb.com/pa/pdf/cba_english.pdf.

207. *Id.* at 277-78 (“Payment”).

179 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

practice is granted or restricted by a party”²⁰⁸—as mentioned by the FTA—are further stipulated in the CBA, in which a player “perform his services . . . diligently and faithfully” under “first-class physical condition” and in conformity with high standards of personal conduct.²⁰⁹ Furthermore, players are required to participate in promotional activities in cooperation with their respective teams or the MLB. Under “Player Representations,” the CBA dictates that players are providing services in regards to their “exceptional and unique skill and ability” as baseball players.²¹⁰ Such services are of “special, unusual and extraordinary character,” according to the Uniform Player’s Contract.²¹¹

In its Korean counterpart, the KBO Baseball Code, the Uniform Player’s Contract section provides similar language regarding “services” of a player. The Baseball Code also states players have “exceptional and unique” skills, and services to be rendered are of “special, unusual, and extraordinary” character.²¹² Both the MLB and KBO explicitly state baseball players provide and perform services that are unique and exceptional. Players are, according to both the Baseball Code and the CBA, paid according to and upon the performance of these services. This suggests baseball players in both parties subject to the KORUS FTA, in an employment context, are “professionals,” because they are paid and compensated for the unique “services” they provide. As the term “services” is repeatedly mentioned regarding baseball players in both contexts, it may be that baseball players are indeed

208. United States - Korea Free Trade Agreement, *supra* note 169, at art. 12.13.

209. MLB Basic Agreement 2012-2016, *supra* note 206, at 279 (“Loyalty”).

210. *Id.* at 280 (“Player Representations”).

211. *Id.*

212. 2013 KBO BASEBALL CODE, *supra* note 136, at art. VI § 1.

providing and performing “professional services,” especially in light of the KORUS FTA.

Furthermore, until the 2013 season of the KBO, only three foreign-based players were allowed to be employed per team.²¹³ Compared to a typical roster size of nearly 100 players per team, a cap on foreign players may also be “imposing limitations” on the number of employment. This provision may also be in violation of the FTA.

B. Labor

Article 19.1 specifies both parties have an obligation as members of the ILO.²¹⁴ In reaffirming this obligation, both parties must recognize the rights outlined in the ILO Declaration of 1998.²¹⁵ Article 19.2.1, subsection C, asserts that in recognizing the rights outlined in the ILO Declaration, parties must maintain in their statutes, regulations, and practices the “elimination of all forms of compulsory or forced labor.”²¹⁶ It is possible the reserve clause may be tantamount to compulsory labor or forced labor.

The ILO Forced Labour Convention of 1930 defines forced or compulsory labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered

213. *Top Baseball League Abolishes Salary Cap on Foreign Players*, YONHAP NEWS AGENCY (Jan. 14, 2014), <http://english.yonhapnews.co.kr/full/2014/01/14/93/1200000000AEN20140114006100315F.html>; see also *Top League in S. Korea, KBO, Prepares for Expansion, Adds More Spots for Foreign Players, Cuts Salary Caps*, INT’L BASEBALL FED’N (Jan. 15, 2014), <http://www.ibaf.org/en/news/2014/01/15/top-league-in-skorea-kbo-prepares-for-expansion-ad/f7763137-5c55-41e2-bd10-6c5f7ebf1e33>.

214. United States - Korea Free Trade Agreement, *supra* note 169, at art. 19.1.

215. *Id.* at art. 19.2.1.

216. *Id.* at art. 19.2.1(c).

181 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

himself voluntarily.”²¹⁷ Upon the expiration of his contract with a KBO team, an American athlete may be “exacted” his work or services under the threat of a penalty of the reserve clause. A KBO team has the sole discretion as to whether said athlete will remain with the club. It is only upon the club’s decision not to offer the one-year qualifying offer that the player may sign with any team in the KBO.²¹⁸ If the club offers the one-year qualifying offer, the player may either agree to terms with his employers for an additional year or reject the offer, thereby restricting the player from joining another KBO team for essentially five years.²¹⁹ Ultimately, once a foreign player is employed by his KBO club, that player does not have the option to enter free agency and unreservedly contract with another KBO team without the cooperation of his employers. The reserve right provision of the Uniform Player’s Contract restricts a player’s choice to enter the KBO free agency market for an additional five years by virtue of the club’s qualifying offer. Under the scope of the ILO definition of forced or compulsory labor, the circumstances resulting from the reserve clause may possibly be exacting an American player to perpetually work or provide his services to his employers annually. It is entirely possible an American player may be under the “menace” of a penalty from the KBO—in this case, being restricted from freely contracting with another Korean baseball club. The definition of forced or compulsory labor by the Forced Labour Convention may or may not apply to these circumstances; however, the Convention does provide a further definition of the one mentioned in the ILO Declaration, which it does not explain.

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

218. 2013 KBO BASEBALL CODE, *supra* note 136, at art. X § b.

219. *Id.* at art. X § a.

Furthermore, the Labor Standards Act of Korea²²⁰ under Article 7 prohibits forced labor. It reads, “[N]o 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.”²²¹ While it would be mere conjecture to posit that American athletes in the KBO are working against their free will “through the use of violence, intimidation [or] confinement,” the implementation of the reserve clause may be “unlawfully” restricting physical freedom of these players. As mentioned in Chapter 12 of the KORUS FTA, the professional services²²² provided by American athletes may fall under the scope of the KORUS FTA, making it “unlawful” to impose limitations on employment or services in a specific sector.²²³ Thus, the foreign player’s reserve clause in light of the KORUS FTA may also be in violation of Article 7 of the Labor Standards Act. To reiterate, South Korea as a party to the FTA must adopt and maintain its statutes and regulations as stated in the ILO Declaration of 1998, according to Article 19.2.1.²²⁴ Statutes and regulations are defined as “acts of the National Assembly or regulations promulgated pursuant to acts of the National Assembly that are enforceable by action of the central level of government.”²²⁵

The Labor Standards Act was passed by the National Assembly in 1997, which would qualify the Act as Korea’s “statutes and regulations” under Article 19.2. Moreover, the scope of application in Article 11 of the Labor Standards Act includes “all businesses or workplaces

220. Labor Standards Act (Act No. 5309), Mar. 13, 1997 (S. Kor.).

221. *Id.* at art. 7.

222. United States - Korea Free Trade Agreement, *supra* note 169, at art. 12.13.

223. *Id.* at art. 12.4(a)(iv).

224. *Id.* at art. 19.2.1.

225. *Id.* at art. 19.8.

183 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

in which five or more workers are ordinarily employed.”²²⁶ All KBO teams certainly employ five or more workers who are “ordinarily employed.” In sum, the KBO is under the scope of application of the Labor Standards Act, and the Labor Standards Act is under the scope of the “statutes and regulations” of Korea that must maintain and adopt the initiatives stated in the ILO Declaration of 1998, including the elimination of all forms of compulsory or forced labor. Furthermore, Article 19.3 of the KORUS FTA reads “neither party shall fail to effectively enforce its labor laws, including those it adopts or maintains in accordance with Article 19.2.1.”²²⁷ Thus, the KORUS FTA may potentially implicate Korea’s failure to enforce the elimination of all forms of compulsory or forced labor—via the application of the Labor Standards Act—through which American baseball players are implicated from the reserve clause.

Subsection E of Article 19.2.1 states both parties must implement “the elimination of discrimination in respect of employment and occupation.”²²⁸ Similarly, Article 6 of the Labor Standards Act states “no employer shall discriminate against workers on the basis of gender, or give discriminatory treatment in relation to the working conditions on the basis of nationality, religion or social status.”²²⁹ Thus, according to its own statutes and regulations, Korea has implemented the “elimination of discrimination in respect of employment and occupation.” However, the practices of the KBO when instituting employment policies in regard to its foreign players may in fact be in discord and in violation of not only its own statutes and regulations, but subsection E of Article 19.2.1 of the KORUS FTA, as well.

226. Labor Standards Act, *supra* note 220, at art. 11.

227. United States - Korea Free Trade Agreement, *supra* note 169, at art. 19.3.

228. *Id.* at art. 19.2.1(e).

229. Labor Standards Act, *supra* note 220, at art. 6.

The KBO Baseball Code applies the reserve clause differently for Korean players and foreign players. For domestic players, KBO clubs reserve the right to its players for essentially nine years.²³⁰ Upon the completion of nine years of service, the player may enter unrestricted free agency and freely contract with another team. Unrestricted free agency for domestic players also occurs when teams release the player or decide against renewing the player during the “reserve years.”²³¹ A domestic player may enter restricted free agency and sign with another club. The other club, however, must compensate the player’s former club 300 percent of the player’s annual salary.²³²

Foreign players, on the other hand, are restricted from contracting with other KBO teams except in the event the club does not offer the one-year qualifying offer.²³³ The KBO Baseball Code does not provide an avenue for foreign players to enter restricted free agency. Under its waiver procedures, a foreign player’s contract may be terminated by his employers, upon which constituent KBO clubs may negotiate with the former club for assignment of the player.²³⁴ The foreign player will be assigned to a new club based on the amount of compensation paid and order of priority to the former club.²³⁵

Under the provisions set out in the KBO Baseball Code, it seems that domestic players have a wider array of options. Although domestic players are technically

230. 2013 KBO BASEBALL CODE, *supra* note 136, at art. 156 (“Free Agency”).

231. Min Chang,, *Legal Issues of Sports Player Transfer upon Player Contract’s Expiration - Focused on Compensation for Free Agent’s Transfer*, 18법학논총 제18권 제3호[LAW & SOC’Y] 113, 140-141 (2011) (S. Kor.).

232. *Id.*

233. 2013 KBO BASEBALL CODE, *supra* note 136, at art. X § b.

234. *Id.* at art. VIII,

235. *Id.* at art. VIII § b.

185 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

restricted from entering unrestricted free agency for nine years,²³⁶ they have an avenue in the form of restricted free agency.²³⁷ Restricted free agency for foreign players, however, is not provided under the Uniform Player's Contract. Because foreign players are essentially obligated to play for their teams for five years,²³⁸ a foreign player's discretion to contract with another KBO team is limited as compared to the domestic player. Only upon circumstances where the team does not offer a qualifying offer to the foreign player may he freely contract with another KBO team. Thus, a KBO club has the sole discretion over a foreign player's career, whether in the form of the waiver system or the reserve right system.

One might deduce that domestic players are under "harsher" conditions due to the nine-year rule; however, Article 6 of the Labor Standards Act provides that employment discrimination based on "nationality" or "social status" is illegal.²³⁹ Whether domestic players face harsher contractual conditions than foreign players may, under the jurisprudence of Korea's statutes and regulations, be a moot point. Ultimately, the terms and provisions offered by the KBO Baseball Code are certainly distinguishable for both foreign players and domestic players. The KBO institutes separate, standardized contracts based on nationality, as shown by the Uniform Player's Contract section of the Baseball Code. Thus, the KBO may be in violation of the Labor Standards Act with respect to discrimination based on nationality or social status. It is entirely possible that the KBO's practices—in regard to American talents participating in the league—may be in violation of subsection E of Article 19.2.1 of the

236. *Id.* at art. 156 ("Free Agency").

237. Chang, *supra* note 231, at 140-41.

238. 2013 KBO BASEBALL CODE, *supra* note 160, at art. X § a.

239. Labor Standards Act, *supra* note 220, at art. 6.

KORUS FTA, via the Labor Standards Act. Although Korea as a party to the FTA institutes the initiatives of the ILO Declaration, it must eliminate discrimination in respect to employment and occupation,²⁴⁰ through the Labor Standards Act. The institution of the reserve clause and the differing terms and conditions of American and Korean players may be in direct discord with both Act and the ILO Declaration—which Korea is obligated to follow as a party to the FTA.²⁴¹

VIII. CONCLUSION

With the number of American athletes playing Korean baseball, the reserve clause set forth in standard player contracts for foreigners may be in violation of the KORUS FTA. The reserve clause in American baseball was an often-disputed provision and was ultimately dismantled by the Messersmith/McNally decision in 1975. Today, an American baseball player may enter free agency after six seasons of service.

The KBO reserve clause has been generally replaced by free agency, as well—similar to the MLB reserve clause—as players may enter free agency after nine years. Such a clause, however, is instituted differently for Korean and American players. The reserve clause for American players may conflict with the cross-border supply of services chapter of the KORUS FTA, in which neither the U.S. nor Korea may impose limitations on employment or supply of professional services.

It can be argued that American baseball players are professional service providers in the KBO. As professional service providers, the reserve clause forbidding American athletes from freely contracting with other KBO teams may

240. United States - Korea Free Trade Agreement, *supra* note 169, at art. 19.2.1.

241. *Id.* at art. 19.1.

187 **AN EXAMINATION OF THE KBO RESERVE
CLAUSE AND ITS LEGAL IMPLICATIONS
FOR AMERICAN BASEBALL PLAYERS**

be in direct violation of Chapter 12 of the KORUS FTA. Furthermore, such a clause may also contravene the labor chapter of the KORUS FTA, under which both forced or compulsory labor and employment discrimination are prohibited. By restricting American players from freely joining other KBO teams, the reserve clause may potentially create circumstances in which players are under compulsory or forced labor. By instituting separate player contracts for Korean and American players, the KBO may also be unduly discriminating against American athletes, especially under the scope of Chapter 19 of the KORUS FTA