

TRADING UP ON THE RULES FOR THE ASSIGNMENT OF PLAYER CONTRACTS

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I. INTRODUCTION

One of the most exciting topics in professional sports has always been ground-breaking trades. Every so often, an athlete comes along who is able to singlehandedly change the fortunes of a sports franchise and their fans; but history also tells us that even the greats have been subject to trades. Babe Ruth from the Boston Red Sox to the New York Yankees; Wayne Gretzky from the Edmonton Oilers to the Los Angeles Kings; Shaquille O'Neal from the Los Angeles Lakers to the Miami Heat – these are just a few examples of players who are widely considered to be among the best to have ever played their sport, but yet were still subject to being traded during their career. Why is this permitted in professional sports? Indeed, in almost any other employment scenario, the notion of an organization having the ability to trade an employee away to a competitor is absurd. Imagine if such a practice were permissible in the legal field – you are a senior litigator in Toronto and you have just been traded to a Saskatoon firm for two high-performing junior solicitors. Such a result would be untenable for the lawyers. However, it is permissible in the professional sports world because of a standard feature in every player contract: an assignment clause.



* © Marek Coutu, 2018. Special thanks to Professor Clayton Bangsund (University of Saskatchewan) for your insightful comments on earlier drafts of this paper, and to Professor W. Brent Cotter QC (University of Saskatchewan) for providing me the forum to pursue this research in the Sports & the Law Course you have developed. All opinions expressed in this paper are my own, and I take full responsibility for any errors.

Assignment clauses give teams the right to assign a player's contract, as long as any such assignment is done in accordance with the accompanying collective bargaining agreement (CBA). By the same token, the CBAs in the four major sports leagues¹ allow players (in some circumstances) the ability to negotiate and restrict their assignment rights through a "no-trade clause" or some form of a "no-assignment clause". This analysis will canvass both contract law and labour & employment law in order to determine whether the rules for the assignability of player contracts as stipulated in the four CBAs can be reconciled with fundamental notions of fairness as exhibited by the common law.

A related and more defined issue will also be addressed regarding the assignment of player contracts in the event of a franchise relocation. The buying and selling of sports franchises in professional sports leagues is not an uncommon occurrence, and a team that is sold may be accompanied by a relocation. In the past 20 years there have been a number of teams that have relocated:

NBA

- **2001:** Vancouver Grizzlies move to Memphis to become the Memphis Grizzlies
- **2002:** Charlotte Hornets move to New Orleans to become the New Orleans Hornets
- **2008:** Seattle Supersonics move to Oklahoma City to become the Oklahoma City Thunder

¹ This analysis will focus on the National Basketball Association (NBA), the National Hockey League (NHL), the National Football League (NFL), and Major League Baseball (MLB); reference will be made throughout the analysis to each of these leagues' collective bargaining agreements.



NHL

- **1997:** Hartford Whalers move to North Carolina to become the Carolina Hurricanes
- **2011:** Atlanta Thrashers move to Winnipeg to become the Winnipeg Jets

NFL

- **1997:** Houston Oilers move to Tennessee to become the Tennessee Titans
- **2016:** St. Louis Rams move to Los Angeles to become the Los Angeles Rams
- **2017:** San Diego Chargers move to Los Angeles to become the Los Angeles Chargers
- **2019:** Oakland Raiders approved to move to Las Vegas

MLB

- **2005:** Montreal Expos move to Washington D.C. to become the Washington Nationals

In the event of the sale of a franchise and a corresponding relocation of the team, would a player that has negotiated for a no-assignment clause be obligated to move with the team? Clearly, a player who has bargained for his assignment rights in this fashion would have contemplated that he was protected from being relocated when he signed his contract. By analyzing the four major sports leagues' CBAs, the outcome for a player in this scenario can be determined in each league, on the background provided by the analysis that follows.



II. PUBLIC POLICY & ASSIGNMENT CLAUSES

The first part of this analysis must inevitably begin with assessing assignment clauses in player contracts from a common law contract perspective. As a general observation, the question has been posited whether assignment clauses themselves are fair and reasonable, or whether they should be void as against public policy.² Indeed, these clauses carry a considerable impact on a player's performance of their contract. In most instances, a player who is traded will be required to uproot himself and his family, and move to a new city, essentially overnight. Once a player is traded, most of the major sports leagues' CBAs require the player to report to his new team within a matter of days,³ and if he fails to do so he may face discipline or suspension by the new team.⁴ This places a considerable burden on the player to the contract in the event of a trade, which is often outside of his control, and it warrants an analysis on whether our common law rules against the enforcement of contracts that are contrary to public policy could apply.

As noted by Cromwell J. in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, public policy is "fundamental to contract law, both to contractual formation and enforcement and (occasionally) to the court's relief against

² Paul C. Weiler, Gary R. Roberts, Robert I. Abrams & Stephen F. Ross, *Sports and the Law: Text, Cases and Problems*, 5th ed (St. Paul: West Academic Publishing, 2015) at 180.

³ National Basketball Association, *Collective Bargaining Agreement*, New York: NBA, 2017, Exhibit A cl 10(a) [*NBA CBA*] (requires player to report to new team within 48 hours if trade is made during a Season); National Hockey League, *Collective Bargaining Agreement*, New York: NHL, 2013, Exhibit 1 cl 11 [*NHL CBA*] (time to report may be specified); National Football League, *Collective Bargaining Agreement*, New York: NFL, 2011, Appendix A cl 17 [*NFL CBA*] (player will report to assignee Club promptly); and Major League Baseball, *Basic Agreement*, New York: MLB, 2016, Appendix A cl 6(d) [*MLB CBA*] (player shall report to assignee Club promptly).

⁴ *NBA CBA*, *ibid* at Exhibit A cl 10(d); *NHL CBA*, *ibid* at Exhibit 1 cl 11; and *MLB CBA*, *ibid* at Appendix A cl 6(d).



enforcement.”⁵ However, while the application of public policy to contract law is established as above, freedom of contract is also an important function of our legal system, and its integrity must be kept intact. Accordingly, the Court’s exercise of the public policy defence to clear contract terms has been narrow in application. Duff C.J. explained the competing notions of public policy and freedom of contract in *Re Millar Estate*:

It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which overrides the interest and what otherwise would be the rights and powers of the individual.⁶

Based on this proposition, Cromwell J. stated that freedom of contract will often, but not always, take priority over other societal values, and that “[t]he residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised.”⁷ Based on this narrow application of the doctrine, Cromwell J. noted that public policy will only clearly be applicable to conduct that approaches “serious criminality or egregious fraud.”⁸

This characterization of the application of public policy to contract law is (for good reason)⁹ narrow in scope. Accordingly, it is difficult to see how an assignment clause in a player contract, in and of itself, could be challenged on the basis of public policy. While it is true that being traded to another organization places a sizeable obligation on a professional

⁵ 2010 SCC 4 at para 116, [2010] 1 SCR 69 [*Tercon*].

⁶ (1937), [1938] SCR 1 at 4.

⁷ *Tercon*, *supra* note 5 at para 117.

⁸ *Ibid* at para 120.

⁹ See *Tercon*, *ibid* at para 123; while certain clauses in contracts may seem adverse to the interest of societal values, there is also a very strong public interest in the enforcement of contracts themselves.



athlete in his performance under his contract – one that might seem untenable in almost any other employment scenario, it has been observed by the Courts that players are generously compensated in exchange for honouring that obligation.¹⁰ As such, the bare ability of a team to trade a player to another organization could not be voided on the basis of the public policy doctrine.¹¹

III. ASSIGNABILITY OF CONTRACTS AT COMMON LAW

The greater and more applicable issue in regard to assignment clauses in player contracts and the common law, is what types of contracts are assignable and the role of consent therein. Historically, the common law refused to recognize assignments in contract, but the Courts of Equity stepped in to recognize certain assignments on the basis that contractual rights were essentially property.¹² This requires Courts to undertake an inquiry into what underlying interest is at issue, since “[t]he validity of a purported assignment, whether statutory or equitable, depends on whether the underlying interest is assignable.”¹³

In *National Trust Co. v. Mead*, Wilson J. properly recognized that, “[a]s a general rule, a party to a contract can assign the contractual benefits of the contract, but not the contractual obligations, without the consent of the other party or parties to the contract.”¹⁴ More

¹⁰ Weiler et al, *supra* note 2 at 174.

¹¹ *Washington Capitols Basketball Club, Inc. v Barry* (1969), 304 F Supp 1193, 1969 US Dist LEXIS 10245 at 8 (QL) (US Dist Ct Cal); the court stated that an assignment clause in an ABA contract was “not otherwise contrary to public policy or the law of this State”, since the “language of the contract was clear and unambiguous.”

¹² S.M. Waddams, *The Law of Contracts*, 6th ed (Aurora: Canada Law Book Inc., 2010) at para 270-71.

¹³ G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 654; as cited in *Goska J. Nowak Professional Corp. v Robinson*, 2016 ABCA 240 at para 18, 40 Alta LR (6th) 289 [*Goska*].

¹⁴ [1990] 2 SCR 410 at para 35.



specifically, this principle was previously qualified by McLachlin J.A. (as she then was) with six categories of contracts which are considered to be unassignable:¹⁵

1. Contracts which expressly by their terms exclude assignment;
2. Mere rights of action (assignments savouring of maintenance and champerty);
3. Contracts which by their assignment throw uncontemplated burdens on the debtor;
4. Personal service contracts;
5. Assignments void by public policy (public officers' wages or salary and alimony or maintenance agreements); and
6. Assignments prohibited by statutory provisions.

As an aside, McLachlin J.A.'s recognition of the ability of the Court to deem an assignment void by virtue of public policy gives further credence to the issue explored above. However, in the interest of practicality, the key exception that will be analyzed below is the fourth exception: personal service contracts.

The rationale for not allowing the assignment of personal service contracts is not inherently controversial, and a number of principles have developed through the common law. In the seminal case of *Tolhurst v. The Associated Portland Cement Manufacturers (1900) Ltd.*, Lord McNaghten established the general rule that contracts for personal services cannot be assigned without consent, except in "cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it."¹⁶ In order to

¹⁵ *Frederikson v Insurance Corp. of British Columbia* (1986), 3 BCLR (2d) 145 at para 44 (CA) [*Frederikson*]; aff'd, [1988] 1 SCR 1089.

¹⁶ [1902] 2 KB 660 (CA); as cited by McLachlin J.A. in *Frederikson*, *ibid* at para 53.



determine whether an assignment makes any difference to an obligee under the contract, Courts must decide the issue on objective grounds, keeping in mind the nature of the contract and the subject matter of the rights assigned.¹⁷ Furthermore, as a threshold issue, contracts are said to be personal when they are “based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another.”¹⁸

Based on these judicial principles, it can be safely stated that professional sports contracts are personal service contracts.¹⁹ Professional athletes in the four major sports leagues covenant that they have extraordinary and unique skill and ability,²⁰ and it is because of this unique ability that the team agrees to contract with them. The unique ability of professional athletes fits squarely within King J.’s definition of special personal characteristics.²¹ Thus, for the athlete’s side of the contract, it is clear why an athlete is required to personally perform the contract, and why he cannot assign his obligations under the contract to another person to carry out.

It is less clear how an owner’s obligations should be characterized in regard to a professional sports contract. In a standard player contract, the team is covenanting to

¹⁷ *Black Hawk Mining Inc. v Manitoba (Provincial Assessor)*, 2002 MBCA 51 at para 79, 163 Man R (2d) 215 (Man CA) [*Black Hawk*].

¹⁸ *Maloney v Campbell* (1897), 28 SCR 228 at 233 [*Maloney*]; as cited in *Black Hawk*, *ibid* at para 82.

¹⁹ *The Munchak Corporation and RDG Corporation v Cunningham* (1972), 457 F 2d 721, 1972 US App LEXIS 10272 at 6 (QL) (US Ct App 4th Cir) [*Cunningham*]; The Court stated that: “under North Carolina law the right to performance of a personal service contract requiring special skills and based upon the personal relationship between the parties cannot be assigned without the consent of the party rendering those services.”

²⁰ *NBA CBA*, *supra* note 3 at Exhibit A cl 9; *NHL CBA*, *supra* note 3 at Exhibit 1 cl 6; *NFL CBA*, *supra* note 3 at Appendix A cl 2; and *MLB CBA*, *supra* note 3 at Appendix A cl 4(a).

²¹ *Maloney*, *supra* note 18 at 233.



employ the player for a specified term,²² and to pay them a specified amount in exchange for their athletic performance.²³ On the basis of these two undertakings alone, it is questionable whether an owner's obligations are personal in nature. It could be argued (and indeed it has been argued), that any assignee owner can honour a player contract by paying the player for the specified term; this was the case in *The Munchak Corporation and RDG Corporation v. Cunningham*.²⁴ The *Cunningham* case is directly on point for a number of the issues in this analysis, and thus it deserves pause for consideration.

In *Cunningham*, Billy Cunningham's contract with the Carolina Cougars contained a clause that prohibited its assignment to another team.²⁵ Subsequently, the Carolina Cougars were sold to a new owner, and the new owner took assignment of the contracts that the original owner had entered into. Cunningham tried to argue that, since his contract was not assignable, the purported assignment of his contract to a new owner voided it. The Court declined to give effect to his argument, instead reasoning that his contract "prohibited its assignment to another "club" without his consent, but it contained no prohibition against its assignment to another owner of the same club."²⁶ The Court went on to state that Cunningham's contract was a personal services contract and that, normally, the right to

²² *NBA CBA*, *supra* note 3 at Exhibit A cl 1; *NHL CBA*, *supra* note 3 at Exhibit 1 cl 1; *NFL CBA*, *supra* note 3 at Appendix A cl 1; and *MLB CBA*, *supra* note 3 at Appendix A cl 1.

²³ *NBA CBA*, *ibid* at Exhibit A cl 3; *NHL CBA*, *ibid* at Exhibit 1 cl 1; *NFL CBA*, *ibid* at Appendix A cl 5; and *MLB CBA*, *ibid* at Appendix A cl 2.

²⁴ *Cunningham*, *supra* note 19.

²⁵ *Ibid* at 6.

²⁶ *Ibid*.



performance of a personal service contract requiring special skills cannot be assigned without consent.²⁷ However, the Court went on to state an exception to this rule:

... some of such contracts may be assigned when the character of the performance and the obligation will not be changed. To us it is inconceivable that the rendition of services by a professional basketball player to a professional basketball club could be affected by the personalities of successive corporate owners.²⁸ [footnotes omitted]

The Court concluded that the clear policy reason against the assignability of personal services contracts is to prevent assignments where an obligor undertakes to serve only the original obligee; however, in this case, Cunningham was not obligated to perform differently for the new owner than he was obligated to perform for the original owner.²⁹ On this basis, the Court found that Cunningham's contract was assignable without consent, despite the presence of his no-assignment (no-trade) clause.

Given the controversy that has surrounded some owners,³⁰ and former owners,³¹ it is at least arguable that the Court's reasoning in *Cunningham* is outdated, but assuming that their reasoning is sound and that a professional athlete's performance cannot be affected by a team being sold to a new owner in the same city – what if that new owner is in a new city?

²⁷ *Ibid*; This statement of law is consistent with Canadian authorities on the assignability of personal service contracts, as analyzed above.

²⁸ *Ibid*.

²⁹ *Ibid* at 7.

³⁰ See re James Dolan: Michael McCann, "The Charles Oakley vs. Jim Dolan Saga Could End in Court" (12 September 2017), Sports Illustrated, online: <<https://www.si.com/nba/2017/09/12/charles-oakley-lawsuit-knicks-jim-dolan-phil-jackson>>.

³¹ See re Donald Sterling: NBA, "Clippers owner Sterling banned for life by the NBA" (29 April 2014), NBA News, online: <<http://www.nba.com/2014/news/04/29/nba-bans-donald-sterling.ap/>>.



The assignment of a player contract to a new owner in a different city occurs in two main scenarios:³²

- 1) where the player is traded in accordance with the CBA; or
- 2) where the team is sold and moved to a new city.

Based on the Court's considerations in *Cunningham*, it seems evident that a new team, teammates, coach, and city would all be factors that would obligate a player to perform differently than he was obligated to for the original owner.³³ In turn, this would indicate that the owner's obligations are in the form of a personal services contract, and that they could not assign such obligations without consent of the other party.³⁴

At this juncture, the analysis must turn to the intersection of labour & employment law and contract law, since players' and teams' rights bargain collectively under the various CBAs. Thereafter, the analysis will examine how each of the four major sports leagues' CBAs operate, in order to determine how each league is managing the assignability of player contracts. Finally, in due course, the focus will return to the legal mechanics of assigning a player contract to a new owner in a new city, how the various CBAs facilitate such an assignment, and the role of consent therein.

³² Note that a player could also be dropped to waivers, and subsequently picked up by another team. In that case, the player's initial contract and the terms therein are assigned to the new club.

³³ *Cunningham*, *supra* note 19 at 7.

³⁴ *Goska*, *supra* note 13 at para 19: "Personal services contracts are not assignable without consent."



IV. LABOUR & EMPLOYMENT LAW PERSPECTIVE ON ASSIGNMENT CLAUSES

In the interest of stability, predictability, and fairness, professional athletes in each of the four major sports leagues collectively bargain as a player's union with the owners of teams in their respective league. Both the players' and the owners' ability to contract is confined to what is permitted by the CBA governing each league.³⁵ In this sense, labour and anti-trust law has "eroded the significance of the law in private contract in sports."³⁶ However, by the same token, it is also recognized that the significance of contractual values has not been totally displaced.³⁷ Indeed, contractual values and freedom of contract are essential ingredients to the proper functioning of labour policy.³⁸ Freedom of contract for professional athletes and their leagues is particularly important because of the uniqueness of the relationship. The Court in *Wood* recognized and grappled with the Court's role in relation to collective bargaining in professional sports:

... Such bargaining relationships raise numerous problems with little or no precedent in standard industrial relations. As a result, leagues and player unions may reach seemingly unfamiliar or strange agreements. If courts were to intrude and to outlaw such solutions, leagues and their player unions would have to arrange their affairs in a less efficient way. It would also increase the chances of strikes by reducing the number and quality of possible compromises.³⁹

³⁵ Timothy Davis, "Sports Law as a Reflection of Society's Laws and Values: Balancing Freedom of Contract and Competing Values in Sports" (1997) 38 Tex LR 1115 at 1134-35.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Wood v National Basketball Association* (1987), 809 F 2d 954, 1987 US App LEXIS 1335 at 11 (QL) (US Ct App 2nd Cir) [*Wood*]: In this case, the Court identified freedom of contract as essential in allowing employers and unions to agree upon arrangements that best suit their particular interests, and to further the goal of labour peace.

³⁹ *Ibid.*



Furthermore, it was stated in *Caldwell v. American Basketball Association, Inc.* that labour values, such as collective action, override private contract values, such as individual bargaining.⁴⁰ This general trend toward overlooking potential miscarriages of justice regarding individual contract rights, in favour of deferring to the CBA (which has been agreed upon by both parties), makes sense. The player's union in each of the four major sports leagues is a sophisticated party, which is perfectly capable of protecting the interests of their constituents. The criticism that remains is whether the CBA in each league can be reconciled with fundamental principles of contract law and labour & employment law, which underlie our society's notions of fairness.

On this background, the issue that arises is whether the assignment of player contracts can be reconciled with principles of labour & employment law. As a preliminary issue, under *The Saskatchewan Employment Act*:

“discriminatory action” is defined as any action or threat of action by an employer that does or would adversely affect an employee with respect to any terms or conditions of employment or opportunity for promotion, and includes ... transfer of an employee, ... [and] change of job location.⁴¹ [sections omitted]

Additionally, s. 2-8 prohibits an employer from taking discriminatory action against an employee without good and sufficient cause.⁴² However, in accordance with the discussion above regarding the predominance of collective agreements over individual rights, s. 6-41 codifies the proposition that employers and employees that enter a collective agreement are bound by the terms of it.⁴³ These provisions show that, while it would quite clearly be a

⁴⁰ (1995), 66 F 3d 523, 1995 US App LEXIS 27176 at 8 (QL) (US Ct App 2nd Cir) [*Caldwell*].

⁴¹ SS 2013, c S-15.1 s 2-1(d) [*Employment Act*].

⁴² *Ibid* at s. 2-8(1) and s. 2-8(2).

⁴³ *Ibid*.



contravention of the *Employment Act* for a team to assign a player's contract without consent, players are bound by their collective agreement; the terms of which they have implicitly agreed upon, if not explicitly agreed upon.⁴⁴

One final issue that will be relevant in the foregoing analysis, is the common law test for constructive dismissal. The Supreme Court of Canada addressed constructive dismissal at length in *Farber c. Royal Trust Co.*, and Gonthier J. explained the test as follows:

...it has been established in a number of Canadian common law decisions that where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment — a change that violates the contract's terms — the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed.⁴⁵ [citations omitted]

Gonthier J. also recognized however, that an employer may make changes to an employee's position that are allowed by the contract; thus, the extent of an employer's discretion will depend on what the parties have agreed to.⁴⁶

Based on the formulation of this test, the terms of a player's contract are key. Therefore, in order to determine whether the assignment of a player contract can amount to constructive dismissal, the analysis must again turn to the terms of the uniform player contract itself, and the CBA which informs it. It is prudent at this point to first identify a recurring issue: where a player contract is assigned by virtue of the team being sold to a new owner in a new city, and that player contract contains a clause precluding assignment in

⁴⁴ Current players vote on the ratification of a new proposed CBA, while players that enter the league in subsequent years that are covered by the CBA will have implicitly agreed upon it when they choose to enter the league.

⁴⁵ [1997] 1 SCR 846 at para 33 [*Farber*].

⁴⁶ *Ibid* at para 25.



some form (a no-trade clause is present), would this amount to a fundamental change to the employee's contract of employment such that it would be a fundamental breach? Would such an assignment amount to a violation of the contract's terms? Each CBA lays the foundation for what players are permitted to include in their player contract, which will provide answers to these issues.

V. COLLECTIVE BARGAINING AGREEMENTS

Each of the four major sports leagues have developed their own approach to the assignment of player contracts, and the eligibility of players to negotiate a no-trade clause – this is a key distinction that will be explored below. Consent plays a major role in the assignment of player contracts since they are personal service contracts,⁴⁷ but it is also established that a player's ability to withhold consent is limited to when and if they qualify to negotiate a no-trade clause into their contract. As seen below, in some of the major sports leagues, the governing CBA has effectively ousted a player's ability to withhold consent by narrowing the category of players that will qualify to negotiate a no-trade clause.

A. NBA CBA

Under the NBA CBA, there is a general limitation that precludes “any prohibition or limitation of an NBA Team's right to assign such Contract to another NBA Team.”⁴⁸ This blanket prohibition is qualified by one main exception for free agents, which allows a player who has 8 or more years of service in the NBA and who has also played at least 4 years for

⁴⁷ *Goska, supra* note 13.

⁴⁸ *NBA CBA, supra* note 3 at Article XXIV.1.



the team he is contracting with, to enter into a contract with a prohibition or limitation of the team's right to trade his contract to another NBA Team.⁴⁹ With an average career length of 4.8 years, this is simply not a threshold that many players will ever reach in the NBA.⁵⁰ Effectively, by requiring a player to have played at least 8 years in the league and at least 4 with the team being contracted with, the NBA CBA limits the pool of players that are able to negotiate a no-trade clause into their contract to "franchise" players (3 player contracts in 2016/17 contained no-trade clauses).⁵¹

There are also a few other situations where a player may not be traded without consent, without the presence of a no-trade clause. These exceptions are pragmatic in function, and serve as a check on the power of the owners to enter into contracts with players and immediately assign them. These exceptions may be summarized as follows:

- A veteran free agent on a one-year contract cannot be traded without consent;⁵²
- A rookie who is drafted cannot be traded before 30 days following the contract being signed;⁵³
- Any player who signs a contract as a free agent cannot be traded before 3 months following the contract being signed;⁵⁴

⁴⁹ *Ibid*, at Article XXIV.2(b).

⁵⁰ Larry Coon, "Lockout: What will the players do next?" (3 December 2011), ESPN, online: <http://www.espn.com/nba/story/_/page/nextforplayers-111114/nba-players-do-next>.

⁵¹ Marc Stein, "The 2016-17 NBA All No-Trade Team" (28 January 2017), ESPN, online: <http://www.espn.com/blog/marc-stein/post/_/id/4937/the-2016-17-nba-all-no-trade-team>: The only 3 NBA players in the league in 2016/17 that qualified and successfully negotiated in a no-trade clause were LeBron James, Carmelo Anthony, and Dirk Nowitzki. All 3 of which are likely future hall of famers.

⁵² *NBA CBA*, *supra* note 3 at Article VII.8(b).

⁵³ *Ibid* at Article VII.8(d)(i).

⁵⁴ *Ibid* at Article VII.8(d)(ii).



The final aspect is the actual assignment clause that is found in a NBA Uniform Player Contract.⁵⁵ The operative language in the assignment clause is as follows:

The Team shall have the right to assign this Contract to any other NBA Team, and the Player agrees to accept such assignment and to faithfully perform and carry out this Contract with the same force and effect as if it had been entered into by the Player with the assignee Team instead of with the Team.⁵⁶

It is notable that the Uniform Player Contract uses “assignment” language,⁵⁷ whereas the exception enumerated for no-trade clauses is limited to the player’s ability to prohibit the team from “trading” his contract,⁵⁸ since a player’s contract may be assigned in other ways than a trade. The construction of the exception in the NBA CBA indicates that players are strictly limited in their ability to contract for a prohibition or limitation on their assignment rights, if they qualify at all.⁵⁹

B. NHL CBA

The no-assignment rules under the NHL CBA are the most player-friendly of the four major sports leagues. Under the NHL CBA, players who qualify as “Group 3 Unrestricted Free Agents” may negotiate a no-trade or no-move clause into a newly entered contract.⁶⁰ The NHL CBA defines Group 3 Players as “Any Player who either has seven (7) Accrued Seasons or is 27 years of age or older as of June 30 of the end of a League Year.”⁶¹ Furthermore, a “no-

⁵⁵ *Ibid*, Article II.1 requires that any Player Contract entered into by a player shall use the Uniform Player Contract.

⁵⁶ *Ibid* at Exhibit A cl 10(a).

⁵⁷ *Ibid* at Article XXIV.1.

⁵⁸ *Ibid* at Article XXIV.2(b).

⁵⁹ *Ibid* at Article XXIV.

⁶⁰ *NHL CBA*, *supra* note 3 at Article 11.8(a).

⁶¹ *Ibid* at Article 10.1(a)(i).



move” clause is defined as a clause that may prevent the involuntary relocation of a Player, whether by Trade, Loan or Waiver claim.⁶² Finally, the NHL Standard Player Contract (SPC) contains the following standard assignment clause:

It is mutually agreed that the Club shall have the right to Assign or to Loan this SPC, and the Player agrees to accept and be bound by such Assignment or Loan, and will faithfully perform and carry out this SPC with the same purpose and effect as if it had been entered into by the Player and such other club.⁶³

The NHL CBA affords a much greater number of players in the league the ability to negotiate a no-trade clause into their contract, since any player who is 27 or older will qualify.⁶⁴ As a result, more than 180 players had some form of no-trade or no-movement clause in their contract in 2016/17.⁶⁵

The NHL CBA is also the only CBA of the four major sports leagues that allows and distinguishes between “no-trade” and “no-movement” clauses. In practical terms, a no-movement clause prevents the team from trading the player, waiving them, or sending them down to the minor leagues, while the definition also stipulates that a no-movement clause may not restrict the team’s ability to buy-out the player or terminate them in accordance with the CBA.⁶⁶ But what about other instances where a player may be subject to an involuntary relocation via assignment, and the assignment does not take the form of a trade, waiver, loan, buy-out, or termination? Such a case arose in the summer of 2017 with the

⁶² *Ibid* at Article 11.8(c).

⁶³ *Ibid* at Exhibit 1 cl 11.

⁶⁴ *Ibid* at Article 10.1(a)(i).

⁶⁵ Jim Parsons, "2017 NHL Trade Deadline: No-Movement, No-Trade Clauses" (13 February 2017), The Hockey Writers, online: <<https://thehockeywriters.com/2017-nhl-trade-deadline-no-movement-no-trade-clauses/>>.

⁶⁶ *NHL CBA*, *supra* note 3 at Article 11.8(c).



expansion draft that occurred in order to form the Las Vegas Golden Knights. In its official rules for the expansion draft, the NHL stipulated that:

All players who have currently effective and continuing “No Movement” clauses at the time of the Expansion Draft (and who decline to waive such clauses) must be protected.⁶⁷

This ruling would seem to indicate that no-movement clauses protect players from all involuntary relocations other than buy-outs and terminations; instead of only from trades, waivers and loans – as defined by the NHL CBA.⁶⁸ The construction of the provision on no-movement clauses could be interpreted expansively or narrowly,⁶⁹ and the NHL’s approach for the expansion draft indicates that the league chose to take an expansive interpretation of the section.⁷⁰

C. NFL CBA

The NFL CBA provides a blanket prohibition on individually negotiated limitations to player movement, subject to listed exceptions.⁷¹ The section also provides that any players who are not free agents with less than three accrued seasons are prohibited from negotiating any individual limitations on their movement.⁷² While it is clear that no-trade clauses are

⁶⁷ NHL, “Rules for 2017 Expansion Draft” (16 June 2017), NHL News, online: <<https://www.nhl.com/news/nhl-expansion-draft-rules/c-281010592>>.

⁶⁸ This is an interpretation of *NHL CBA*, Article 11.8(c) that accords with how the article is drafted, since the claiming of a player in the expansion draft is clearly not an assignment in the form of a trade, waiver or loan – but the NHL still ruled that such assignments were prohibited by a no-movement clause.

⁶⁹ A narrow interpretation would construe a no-movement clause as *only* protecting relocation by trade, loan or waiver. On the other hand, an expansive interpretation would construe a no-movement clause as protecting the player against any involuntary relocation, with trade, loan or waiver listed as examples.

⁷⁰ *NHL CBA*, *supra* note 3 at Article 11.8(c).

⁷¹ *NFL CBA*, *supra* note 3 at Article 9 s. 5(a).

⁷² *Ibid* at Article 9 s. 5(a)(iii).



permitted under NFL CBA,⁷³ it is unclear how they are specifically sanctioned by the CBA itself. The standard NFL Player Contract provides the following Assignment Clause:

Unless this contract specifically provides otherwise, Club may assign this contract and Player's services under this contract to any successor to Club's franchise or to any other Club in the League.⁷⁴

The qualifier on this clause, which allows the party to contract otherwise, could be construed as the basis in itself for allowing parties to negotiate no-trade clauses, coupled with the freedom to negotiate that Unrestricted Free Agents enjoy under Article 9.⁷⁵ This freedom to contract however, is subject to the prohibition on individual limitations for players who are not free agents with less than three accrued seasons.⁷⁶

In any event, trade rules and no-trade clauses are less of a live issue in the NFL. There are generally less trades in the NFL compared to other major sports leagues, given the hard salary cap and prevalence of front-ended bonus-structured contracts.⁷⁷

D. MLB BASIC AGREEMENT

The MLB Basic Agreement⁷⁸ provides a different structure for assignment clauses in comparison to the other three major sports leagues. Under the MLB CBA, a player who has 10 or more years of Major League service, the last 5 of which have been with one club, shall

⁷³ There are numerous references to no-trade clauses in other related provisions of the CBA.

⁷⁴ *NFL CBA*, *supra* note 3 at Appendix A cl 17.

⁷⁵ *Ibid* at Article 9 s. 1(a).

⁷⁶ *Ibid* at Article 9 s. 5(a)(iii).

⁷⁷ *Ibid* at Article 13 s. 6(b)(i); provides that the total amount of any signing bonus may be prorated over the term of the contract, but Article 13 s. 6(b)(ii)(1) provides that when any contract is assigned, the remaining portion of the player's signing bonus will be accelerated and assigned to the assignor's salary cap for that year.

⁷⁸ "MLB Basic Agreement" and "MLB CBA" will be used interchangeably below.



not be assignable to another team without the player's consent.⁷⁹ There are two important distinctions with how this rule is formulated. Firstly, where a player meets the "10 and 5" criteria, their contract *shall* not be assignable, meaning that once they meet this threshold, they are awarded a no-trade clause by default – no negotiation necessary. Secondly, the rule refers to "assignment" as opposed to a prohibition on being traded. Presumably, this clause would prevent any form of assignment to another team, not just a trade. However, this default no-assignment clause is narrow in its application, since the "10 and 5" criteria for tenure in the league will apply to only a small number of players in the league, given the average career length of 5.6 years in the MLB.⁸⁰

The MLB CBA also provides an avenue for free agents to negotiate a no-trade clause into their contract. The MLB CBA provides that any player with 6 or more years of Major League service, and who does not have a contract for the next year, will be deemed a "free agent".⁸¹ Further, free agents are eligible to negotiate and contract with any Club without any restrictions or qualifications, and no-trade or limited no-trade provisions will be a properly discussed subject between any Club and a free agent.⁸² This allows any free agent the eligibility to negotiate a no-trade clause into his contract before he qualifies for the "10 and 5" criteria, but it should be noted that it takes a player 6 years upon entering the league before he will qualify as a free agent.

⁷⁹ *MLB CBA*, *supra* note 3 at Article XIX(A)(1).

⁸⁰ Sam Roberts, "Just How Long Does the Average Baseball Career Last?" (15 July 2007), *New York Times*, online: <<http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html>>.

⁸¹ *MLB CBA*, *supra* note 3 at Article XX(B)(1).

⁸² *Ibid* at Article XX(B)(2)(b)(vi).



Finally, the standard assignment clause in a Major League Uniform Player’s Contract is formulated as follows:

The Player agrees that his contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules. The Club and the Player may, without obtaining special approval, agree by special covenant to limit or eliminate the right of the Club to assign this contract.⁸³

To summarize, the commonality between all four major sports leagues is that in any event, a rookie who is entering the league is not entitled to negotiate a no-trade clause into his contract. Accordingly, in each of the leagues, a player must be an unrestricted free agent in order to be eligible to negotiate a no-trade clause into their contract, and further restrictions that are specific to each league are the “8 and 4” rule which applies to the NBA,⁸⁴ and the “7 or 27” rule which applies to the NHL.⁸⁵ Furthermore, under the MLB CBA, players automatically qualify for a no-assignment clause if they meet the “10 and 5” criteria,⁸⁶ and one additional note is that the NHL CBA specifically provides players with the ability to negotiate “no-movement” clauses in addition to standard “no-trade” clauses.⁸⁷

Now that assignment clauses have been analyzed from a contract law perspective, a labour & employment law perspective, and from the perspective of each of the four major sports leagues’ CBAs, the questions posed earlier can be examined.

⁸³ *Ibid* at Appendix A cl 6(a).

⁸⁴ *NBA CBA, supra* note 3 at Article XXIV.2(b): player must have played at least 8 years in the league, and at least 4 years with the team he is contracting with.

⁸⁵ *NHL CBA, supra* note 3 at Article 10.1(a)(i): player must have played at least 7 years in the league or be 27 years old.

⁸⁶ *MLB CBA, supra* note 3 at Article XIX(A)(1): Player must have played at least 10 years in the league, and the last 5 years with the same team.

⁸⁷ *NHL CBA, supra* note 3 at Article 11.8(a); also see Article 11.8(c): no-movement clauses prevent involuntary relocation of a player.



VI. NO-ASSIGNMENT CLAUSES & TEAM RELOCATIONS

If a player contract is assigned by virtue of a team being sold to a new owner and moved to a new city, and that player's contract contains a no-trade clause, is he obligated to report to the new team?

The default common law contractual principle is that personal service contracts may not be assigned without the consent of the parties.⁸⁸ The rule in *Tolhurst* however, provides that personal service contracts may be assignable without consent where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it.⁸⁹ Applying a similar rule, the Court in *Cunningham* reasoned that a professional basketball player's contract may be assignable without consent, since the personality of successive corporate owners could not affect the obligation of a player and how he performs.⁹⁰ The decision in *Cunningham* is distinguishable from the issue stated above however, since *Cunningham* dealt with the assignment of a player contract to an owner in the same city, not in a new city.⁹¹ Where a team is sold to a new owner and that owner moves the team to a new city, the performance of a player's obligations are certainly affected by the personality of the new owner. The player's obligations regarding practices, media obligations and home games are all in a new city, which will require him to move to the new

⁸⁸ *Frederikson*, *supra* note 15 at para 44.

⁸⁹ *Supra* note 16 at 668.

⁹⁰ *Supra* note 19 at 6.

⁹¹ *Ibid.*



city. It follows that, since player contracts are personal service contracts, they cannot be assigned without consent, according to common law contract principles.

This is not the end of the inquiry, however, because of the nature of professional sports and collective bargaining. As stated in *Caldwell*, private contractual bargaining will be overridden by collective bargaining where there is a binding collective bargaining agreement in place.⁹² As such, what do each of the four major sports leagues' CBAs indicate would be the outcome if a team in any of those given leagues were sold and moved to a new market?

A. OUTCOME UNDER THE NBA CBA

Under the NBA CBA, in limited circumstances, a player will be permitted to negotiate a prohibition of his "Team's right to trade such Contract to another NBA Team."⁹³ Based on how this section is constructed, it is unlikely that an NBA player with a no-trade clause would be permitted to refuse to report to the team in the new city. There is a certain amount of speculation involved in this assertion, since a standard no-trade clause is not present in the Uniform Player Contract;⁹⁴ however, any such no-trade clause would be required to comply with the governing provisions in the NBA CBA. The NBA CBA puts a prohibition on a player's ability to contract to limit a team's right to "assign" a player contract, with the listed exception only allowing for a limitation on the team's ability to "trade" the player.⁹⁵ A prohibition on the team's ability to trade the player to another team likely could not be

⁹² *Supra* note 40 at 8.

⁹³ *NBA CBA*, *supra* note 30 at Article XXIV.2(b).

⁹⁴ *Ibid* at Exhibit A: cl 10 provides the standard assignment clause, but it is not stipulated which language would be used for a no-trade clause.

⁹⁵ *Ibid* at Article XXIV.



extended to a team’s right to assign the player’s contract to the same team, in the hands of a successive owner. Thus, an NBA player with a no-trade clause would still be required to report to the team if their contract was assigned to a new owner and the franchise was moved to a new city, despite their attempt to control their location by negotiating the team’s right to assignment.

B. OUTCOME UNDER THE NHL CBA

Under the NHL CBA, a player who meets the “7 or 27” rule will be permitted to negotiate a no-trade or no-movement clause,⁹⁶ and a no-movement clause may prevent the involuntary relocation of a player.⁹⁷ Based on the construction of this section and how it has impliedly been interpreted by the NHL,⁹⁸ a no-movement clause has the potential to allow a player grounds to refuse to report to a new owner in a new city where their contract is assigned by virtue of the team being sold, since such a move would be an “involuntary relocation” of the player.

C. OUTCOME UNDER THE NFL CBA

Under the NFL CBA, once a player has played 4 seasons in the NFL he will qualify for unrestricted free agency,⁹⁹ and an unrestricted free agent will be permitted to negotiate a no-trade clause into his new contract.¹⁰⁰ The language in the NFL CBA on this point is not

⁹⁶ *NHL CBA*, *supra* note 3 at Article 11.8(a).

⁹⁷ *Ibid* at Article 11.8(c).

⁹⁸ See Rules for NHL Expansion Draft, *supra* note 67.

⁹⁹ *NFL CBA*, *supra* note 3 at Article 9 s. 1(a); subject to the Franchise or Transition tags that can be put on a player via Article 10.

¹⁰⁰ *Ibid* at Article 9 s 5.



entirely clear, and the outcome for this scenario would, again, depend on how the specific limitation on assignment clause was worded. One interesting aspect of the standard form Assignment Clause in the NFL Player Contract is that it specifically stipulates that the team may assign the player's contract to "any successor to Club's franchise or to any other Club in the League," unless the contract provides otherwise.¹⁰¹ Given the number of NFL teams that have recently been sold and relocated,¹⁰² this clause gives greater clarity to players and teams on what assignments are and are not covered by the player contract, and it clearly contemplates this specific issue. An unrestricted free agent is given the freedom to contract for limitations on a team's right to assign his contract by virtue of a successive owner purchasing the team, and thus it is seemingly possible for an NFL player to contract to prevent his assignment in the event of a relocation.

An interesting contract negotiation on this point played out in 2015 with Philip Rivers' contract extension with the now Los Angeles Chargers. At the time, the Chargers were playing out of San Diego, but there was speculation that the team would be moving to Los Angeles. Given this impending relocation, there was a report that Philip Rivers was negotiating a clause into his new contract that would void a number of years of his contract if the team was relocated, allowing him to re-enter free agency.¹⁰³ While the validity of the speculation in this report is subject to question, this does show the ability of players in the NFL to contract for protection against the potential relocation of a franchise where they are

¹⁰¹ *Ibid* at Appendix A cl 17.

¹⁰² I.e. Los Angeles Rams and Los Angeles Chargers; see page 3 above.

¹⁰³ Kevin Patra, "Philip Rivers' extension includes no-trade clause" (17 August 2015), Around the NFL, online: <<http://www.nfl.com/news/story/0ap300000511006/article/philip-rivers-extension-includes-notrade-clause>>.



opposed to such a move. In the end, Philip Rivers chose to commit to the Chargers organization, regardless of the city, and he did not put this clause in his contract. Rather, he signed a massive extension, which included a no-trade clause, allowing him to remain with the Chargers for the remainder of his tenure.¹⁰⁴

D. OUTCOME UNDER THE MLB CBA

Under the *MLB CBA*, once a player has free agent status,¹⁰⁵ he is free to negotiate and contract with any team without any restrictions or qualifications.¹⁰⁶ Furthermore, the Major League Uniform Player's Contract provides that a team and a player may "agree by special covenant to limit or eliminate the right of the Club to assign th[e] contract."¹⁰⁷ On this basis, how an assignment by virtue of a team being sold and moved would be affected by a free agent's contract depends on what the player has contracted for. If the player only negotiated a no-trade clause, for much of the same reasons as listed above for the NBA scenario, the player would likely still be required to report to the new owner in the new city. However, since the Uniform Player's Contract in the *MLB CBA* specifically states that the parties may contract for a right of the player to eliminate the right of the team to "assign" the contract, if a player had such a clause in his contract he would likely have grounds to challenge the assignment of the contract to a new owner in a new city.

¹⁰⁴ *Ibid*; The terms of his reported contract were \$83.25 million over 4 years, with \$37.5 million fully guaranteed in 2015, given his \$15 million salary for the year coupled with a \$22.5 million signing bonus.

¹⁰⁵ *MLB CBA*, *supra* note 3 at Article XX B(1): After 6 or more years of Major League service a player who does not have a contract for the upcoming seasons will be deemed a free agent.

¹⁰⁶ *Ibid* at Article XX(B)(2).

¹⁰⁷ *Ibid* at Appendix A cl 6(a).



Another issue that arises is whether a player who qualifies under the “10 and 5” rule for an automatic no-assignment clause would be required to report to the owner in the same scenario. Based on the construction of the provision in the MLB CBA, a player would likely still be required to report to the new owner – despite the use of “assignment” language as opposed to “trade” language.¹⁰⁸ The reason for this inconsistency is the specific language used in the section. The section of interest expressly provides that a player who qualifies will “not be assignable to *another* Major League Club without the Player’s written consent.”¹⁰⁹ Where a player’s contract is assigned by virtue of the team being sold to a new owner, it is being assigned to the *same* club. As an aside, this provision would protect a player from being moved in an expansion draft, but it would seemingly not protect a player from being moved in the event of an assignment via the team being sold.

E. CONCLUSION

In order to determine whether a player with some form of no-assignment clause will be permitted to challenge the validity of a purported assignment of his player contract by virtue of the team being sold and relocated, it will depend on the specific language and form of the no-assignment clause, and which of the four major sports leagues the issue arises in. Based on the preceding analysis, a standard “no-trade” clause will likely not protect a player against this type of assignment. Furthermore, the NBA CBA limits the ability of players to contract for limitations on the assignment of their contract to bare no-trade clauses, so players in the NBA are precluded from contracting for protection from assignments via

¹⁰⁸ *Ibid* at Article XIX(A)(1).

¹⁰⁹ *Ibid*.



relocation.¹¹⁰ The NHL allows players to contract for “no-movement” clauses, which would likely permit a player to challenge this type of assignment.¹¹¹ Finally, in both the NFL and MLB, players likely have the ability to contract for protection against this type of assignment, but they would need to construct the clause in their player contract to preclude any assignments of the player contract without permission, or to preclude involuntary relocations – not just assignments to other teams.¹¹²

VII. CALL FOR REFORM

After a full examination of the rules surrounding assignments in the CBAs of the four major sports leagues, the general take-away is that players will need to play anywhere from 4-8 years in their respective league before they even qualify to negotiate a no-trade clause, and even if they do qualify to negotiate such a clause into their contract, they may not be able to contract for protection against assignment of their contract in the event that the franchise is sold and moved to a new city. On this background, should the various CBAs be amended to loosen the restrictions on players’ ability to contract?

The criticism on the current rules under the various CBAs (but especially the NBA’s), is that, by putting restrictive criteria on when players are eligible to negotiate clauses preventing the assignment of their contract, the leagues are essentially taking consent out of the equation. Fundamentally, contract law principles provide that personal service contracts

¹¹⁰ *NBA CBA*, *supra* note 3 at Article XXIV.2(b).

¹¹¹ *NHL CBA*, *supra* note 3 at Article 11.8(c).

¹¹² *NFL CBA*, *supra* note 3 at Article 9 s. 5; *MLB CBA*, *supra* note 3 at Article XX(B)(2).



are not assignable without consent.¹¹³ Professional athletes in the four major sports leagues give up these contractual rights, to a degree, by virtue of collective bargaining;¹¹⁴ provided however, that these rights are being sacrificed to promote the interests or values of the group.¹¹⁵ Moreover, the common law test for constructive dismissal provides that a fundamental change to an employee's contract of employment, which is not permitted by the contract itself, will result in termination of the contract.¹¹⁶ Accordingly, this summary of the law demonstrates that consent is still required for a valid assignment in the four major sports leagues, and it is accomplished by requiring each player to agree to an assignment clause in their uniform player contract.¹¹⁷

But does a player really have any other option than giving his consent to an assignment clause? The average career span is 3.5–5.6 years depending on which sport the professional athlete plays,¹¹⁸ yet depending on the governing CBA, a player will not qualify to even negotiate his assignment rights until he has played between 4–8 years, and even then, he may not meet the necessary criteria. The reality in most sports leagues is that the CBAs are designed so that most players are never in a position to even bargain with their team and give actual consent to the presence of an assignment clause when they are signing their contract. Rather, they are faced with an ultimatum – sign the contract and agree to the

¹¹³ *Tolhurst, supra* note 16.

¹¹⁴ *Caldwell, supra* note 40.

¹¹⁵ *Davis, supra* note 35 at 1134.

¹¹⁶ *Farber, supra* note 45 at paras 25-26.

¹¹⁷ *NBA CBA, supra* note 3 at Exhibit A cl 10; *NHL CBA, supra* note 3 at Exhibit 1 cl 11; *NFL CBA, supra* note 3 at Appendix A cl 17; *MLB CBA, supra* note 3 at Appendix A cl 6(a).

¹¹⁸ RAM Financial Group, "Athletes Services" (2012), online: <<http://www.ramfg.com/RAM-Financial-Group-Solutions-Professional-Athletes-Athletes-Services>>: states that the average career length for the four major sports leagues are as follows: NFL – 3.5 years, NBA – 4.8 years, NHL – 5.5 years, and MLB – 5.6 years.



assignment clause, or simply do not play professional sports. This fundamentally conflicts with the notion of what consent is designed to accomplish.

In order to balance these considerations, the CBAs in the four major sports leagues should be amended to allow greater eligibility for players to negotiate some form of no-assignment clause into their player contract. To be clear, greater eligibility would not necessarily mean that players would automatically be given the leverage to successfully place a no-assignment clause in their next contract, but such clauses could at least be brought to the bargaining table. By offering players the eligibility to discuss these matters with teams before signing their contract, the irrefutability of consent will be bolstered. Any assignment clause that is present in a player contract will be paramount in its application, since there will be more than one possible outcome when the parties contract.

There are further economic considerations that favour removing restrictions on the negotiation of no-assignment clauses. While it has been observed that players are paid generously in exchange for giving their team the right to trade them,¹¹⁹ the opposite is also true where players negotiate a no-trade clause into their contract. Based on a study of MLB free agent contracts, there is evidence that there is a trade-off between monetary compensation and the risk reduction provided by a no-trade clause.¹²⁰ From the team's perspective, greater eligibility for players to receive no-trade clauses could give the team another tool to utilize when trying to retain high-performing players, given the constraints

¹¹⁹ Weiler et al, *supra* note 2 at 174.

¹²⁰ Robert Pedace & Curtis M. Hall, "Home Safe: No-Trade Clauses and Player Salaries in Major League Baseball" (2012) 51:3 *Industrial Relations* (Wiley Periodicals) at 641.



placed upon teams by salary caps.¹²¹ By the same token, teams could also utilize this form of non-monetary compensation to give a player his market value overall, while actually minimizing the player's salary on the books, which correspondingly will lower the player's effect on the team's salary cap. This trade-off has been recognized as being valuable for both parties in certain situations:

In situations where players have location preferences or other aversions to migrating (e.g., married, children enrolled in school, etc.), a no-trade clause provides players with insurance against involuntary movement and provides a vehicle for financially constrained teams to offer valuable nonmonetary compensation.¹²²

Especially in leagues where teams operate under a "hard" salary cap (i.e. the NHL and NFL), financial flexibility may be realized by teams where they are able to award a player a contract that is below the player's market value, because they have also agreed to award the player a no-trade clause, and the certainty and stability that comes with it.

VIII. CRAFTING A MODEL CBA RULE ON THE ASSIGNABILITY OF PLAYER CONTRACTS

Assuming that a CBA was to be amended to remove restrictions on players' ability to negotiate no-assignment clauses into their contract, what would the model rule look like? Based on the foregoing analysis and the outcomes of the scenarios analyzed, the following rule is proposed:

¹²¹ *Ibid* at 642; for superstar players that are clearly eligible for a max contract under their governing CBA, further rewarding such a player a no-trade clause may allow a team to retain a player who may otherwise entertain offers with other teams.

¹²² *Ibid* at 642-43.



Any player may negotiate a limitation or prohibition on the team's right to assign the player's contract. Such a limitation or prohibition shall be in the form of either of the following, and the parties are free to agree upon any specific terms of such limitation or prohibition thereof:

- a) No-trade clause: a clause limiting or prohibiting the team's right to assign the player's contract to another team.*
- b) No-movement clause: a clause limiting or prohibiting the involuntary relocation of the player. For further clarity, a no-movement clause may be used to preclude any form of assignment of a player's contract that involves the player moving to another city or team.*

However, none of the above clauses may restrict the team's ability to buy-out the contract or terminate it in accordance with the CBA.

There are certain features of this model rule that merit consideration:

A. "ANY PLAYER"

While most other aspects of this model rule are pieced together using the non-restrictive elements of the four major sports leagues' existing CBA rules on assignment of player contracts, opening up the eligibility for any player to contract for a no-assignment clause would be a novel step. The argument in favour of allowing rookies, as well as free agents, the ability to negotiate these clauses into their contracts is principally based on the role and nature of consent. In order to ensure that the role of consent in the assignability of personal service contracts is not undermined, players should at least be given the



opportunity to negotiate for their rights to assignment from the outset; even though such negotiations would likely be inconsequential.

Under the leagues that have salary caps in place, the CBA provides rookies with a fixed wage for their rookie contract.¹²³ Since a rookie's compensation is essentially determined from the outset in these cases,¹²⁴ teams would have little to gain by offering rookies no-assignment clauses, and accordingly, rookies would have little to offer in return for their rights to assignment. Additionally, rookies will generally be less concerned with the risk of relocation when they are young and it is early in their career, instead prioritizing maximization of earnings.¹²⁵ On this basis, even if rookies were permitted to negotiate these clauses, it likely would not become commonplace to do so. However, values of consistency, uniformity, and fairness should still prevail to allow players the ability to negotiate the rights to their assignment, regardless of tenure in their respective league.

B. "NO-MOVEMENT CLAUSE"

With a nod to the NHL CBA, the Model Rule contains the same "involuntary relocation" language for the more restrictive form of no-assignment clause.¹²⁶ The definition in the Model Rule however, has removed the reference to "Trade, Loan, or Waiver claim" in the interest of clarity, and to bolster freedom of contract between the parties.¹²⁷ It should also

¹²³ *NBA CBA*, *supra* note 3 at Article VIII s. 1; *NHL CBA* Article 9; *NFL CBA*, *supra* note 3 at Article 7.

¹²⁴ *NBA CBA*, *ibid* at Article VIII s. 1(c)(i): this section, for example, provides that a rookie scale contract shall provide for at least 80% compensation based on the scale in place, and the player may negotiate performance bonuses on top of that guaranteed 80% for up to 120% total compensation.

¹²⁵ Pedace & Hall, *supra* note 120 at 642-43.

¹²⁶ *NHL CBA*, *supra* note 3 at Article 11.8(c).

¹²⁷ *Ibid*.



be noted that there is one possible assignment that would not be addressed by the Model Rule: assignment of a player contract where an owner sells the team, but the team is *not* relocated. This was purposefully excluded from the ambit of the Model Rule, based on the reasoning in *Cunningham* that this type of assignment does not affect the player's obligations under the contract and, thus, the assignment may be carried out as an exception to the rule that personal service contracts require consent to be assigned.¹²⁸ Otherwise, the construction of the Model Rule is sufficiently flexible to allow contracting parties the freedom to give effect to any no-assignment provision that is agreeable between them.

IX. COUNTERARGUMENTS TO GREATER ACCESS TO NO-ASSIGNMENT CLAUSES

There are conceivable counterarguments to allowing players greater access to no-assignment clauses. The purpose of this analysis is not to canvass them all, but it is prudent to address some of the key contentions. A preliminary point that should be addressed is the difference between allowing greater eligibility for players to negotiate no-trade clauses, and actually giving a greater number of players no-trade clauses. The recommendation that emerges from this analysis is not that more players should be given no-trade clauses in their player contracts. Rather, the recommendation is that the various CBAs be amended to remove restrictions on players' and teams' abilities to negotiate these clauses at the time of contracting.

¹²⁸ *Supra* note 19 at 7; *Tolhurst, supra* note 16.



While it is recognized that allowing a greater number of players the ability to negotiate no-assignment clauses may logically result in a greater number of no-assignment clauses in player contracts, such a shift may be mutually beneficial to players and teams. As discussed above, given the economic trade-off that some players are willing to engage in with no-assignment clauses, teams may be in a position to benefit by granting a player a no-assignment clause.¹²⁹ In any event, it is conceivable that even with looser restrictions, players may still be unsuccessful in negotiating no-trade clauses into their contract.¹³⁰ There is nothing inherently wrong with this result. Ultimately, players and teams will calculate the marginal benefit/loss which would accompany any given player's potential no-assignment clause, and they should be entitled to give effect to such a benefit if it is present.

The other counterargument on the economics side is that, while utilizing no-assignment clauses may provide teams with financial flexibility in a cap-constrained league,¹³¹ it also inherently restricts their ability to make roster moves. Even with the proposed Model Rule however, teams will retain the ability to refuse to award no-assignment clauses, if the team determines that such a course of action is in its interest.¹³² For example, Stan Kasten – who has held high profile roles with teams in the MLB, NHL, and NBA – has, in the past, steadfastly refused to negotiate no-trade clauses with players.¹³³

¹²⁹ Pedace & Hall, *supra* note 120 at 642.

¹³⁰ Marcus Thompson II, "Thompson: Five Years ago, Steph Curry signed the contract that set up a dynasty" (31 October 2017), *The Athletic*, online: <<https://theathletic.com/142451/2017/10/31/thompson-five-years-ago-steph-curry-signed-the-contract-that-set-up-a-dynasty/>>: In the summer of 2017, Stephen Curry signed an unprecedented \$201 million contract, however, despite Curry's star power (two-time league MVP; two-time NBA champion; four-time all-star), he was unsuccessful in negotiating a no-trade clause into his contract.

¹³¹ Pedace & Hall, *supra* note 120 at 642.

¹³² Jerry Cranswick, "Phillies hamstrung by Burrell's no-trade clause" (8 November 2006), *ESPN*, online: <http://www.espn.com/mlb/columns/story?columnist=crasnick_jerry&id=2653713>.

¹³³ *Ibid.*



Kasten's reasoning was that teams should hold on to their assignment rights because, while negotiating away money is one thing, negotiating away the team's ability to improve the team is another.¹³⁴ This is a valid justification from a team's perspective, and again – teams should be given the freedom to make this call for themselves, instead of being restricted by the provisions in the CBA.

Another potential counterargument arises in regard to the scenario explored above: should we allow players to contract out of the team's ability to assign them by virtue of a sale of the team? In the event that a player's contract is assigned to a new owner and relocated, contrary to a no-movement clause under the player's contract, the contract would likely be deemed void, the player would be relieved from his obligations under the contract moving forward, and thus free to enter free agency (if he chose not to consent to the purported assignment).¹³⁵ In this scenario, allowing players out of their contracts in the event of a sale of the team in the face of a player's no-movement clause will hurt the owner who purports to sell the team. This is true, but it is not inherently unfair. Player contracts are, in a sense, property.¹³⁶ The exclusion of a player's contract from the roster of the team can simply be taken into account when valuing the organization as a whole prior to sale; the same as any other asset.

A final counterargument that is worth addressing is the best interest of sport and the league. Phrased differently, should we protect players and teams from themselves, and purposely limit the ability of these parties to contract for the limitation of assignment rights?

¹³⁴ *Ibid.*

¹³⁵ *Cunningham, supra* note 19 at 6.

¹³⁶ *Waddams, supra* note 12.



For certain players, the presence of their no-trade clause has certainly made for an untenable environment for the team and the player.¹³⁷ However, other than anti-climactic trade deadlines, past experience does not show that the widespread prevalence of players with no-trade clauses is a burning issue that leagues should be hesitant to loosen restriction on. The majority of NHL stars have some form of no-assignment clause as part of their contract,¹³⁸ and it does not pose an issue in that league, despite the fact that player contracts are often for terms exceeding 5 years, which is the maximum term under an NBA contract, for example. Longer term contracts magnify the risk of a no-trade clause for the team,¹³⁹ yet there is widespread utilization of no-trade clauses by players in the NHL. This analysis shows that eliminating restrictions and allowing parties the eligibility to negotiate on a player's assignment rights will yield greater opportunities to arrive at efficient outcomes,¹⁴⁰ which is in the best interest of the league and the sport. Furthermore, our society's basic notions of fairness are reflected by developments in the common law in both contract law and labour & employment law, and by limiting a player's ability to negotiate his consent to assignment, the current CBAs are too restrictive and should be reformed.

X. CONCLUSION

The foregoing analysis demonstrates that the restrictions on the eligibility for professional athletes to negotiate their assignment rights should be loosened. The ability to

¹³⁷ See for example, Carmelo Anthony: Jeremy Woo, "Melo-Drama: A Brief Timeline of Carmelo Anthony's Final Year as a Knick" (23 September 2017), Sports Illustrated, online: <<https://www.si.com/nba/2017/09/23/carmelo-anthony-knicks-thunder-trade-timeline>>.

¹³⁸ Parsons, *supra* note 65.

¹³⁹ Pedace & Hall, *supra* note 120 at 643.

¹⁴⁰ *Ibid* at 642.



assign a player contract carries significant consequences, particularly for the player. To combat this disparity, the common law of contract has established that personal service contracts are not assignable without consent, and labour & employment law principles tell us that such a fundamental change to an employee's employment contract requires the employer to first attain consent. While it is clear that professional athletes collectively bargain their rights under their CBA, and that they may give up some of these individual rights in the interest of the collective group, it is also clear that the role of consent in the assignment of player contracts has not been diminished by collective bargaining, since every standard player contract is required to include an assignment clause. However, the current rules regarding the eligibility of players to negotiate the team's right to assign their contract are too narrow, resulting in most players being faced with an ultimatum at the time of contracting – agree to give the team the right to assign the contract, or do not play professional sports. This conflicts with the purpose of consent and what it is supposed to accomplish. Furthermore, there is little downside to removing these restrictions to negotiate. Teams are sophisticated and are entirely capable of deciding for themselves whether or not they want to relinquish their rights to assign a player. In some cases, the ability of teams to bargain with their assignment rights may actually be beneficial. Ultimately, each CBA is a mutually agreed upon constitution for the league that it governs, and this may be an issue that the owners' side of the table would be wary to broach. However, as the analysis has established, eliminating the restrictions on these rules will simply widen the freedom of contract for both parties, giving both sides of the table the opportunity to benefit from the negotiation of assignment rights.

