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## INTERNATIONAL ICE HOCKEY: PLAYER POACHING AND CONTRACT DISPUTE

*Kate Zdrojeski\**

*Since the 1990's, European hockey leagues have relied on player transfer agreements to govern the movement of contracted players from their European teams to the U.S. National Hockey League (NHL). Player transfer agreements are brokered by the International Ice Hockey Federation (IIHF) and ensure that European clubs receive compensation for players electing to terminate their contracts in favor of new agreements with the NHL. As of 2007, the IIHF and the NHL had no player transfer agreement in place. This lack of an international agreement has resulted in an increase in contract breach, or player poaching. Without an enforceable player transfer agreement in place, hockey teams worldwide have no remedy for international breaches of contract. This Note first examines the role of the IIHF in governing international player transfers and suggests that a new method be implemented to regulate international player movement. A "posting" model, as used in Major League Baseball, will better address the concerns of the NHL and IIHF member bodies regarding player transfers while simultaneously reducing the incentive for international contract breach.*

### I. INTRODUCTION

Few sports enjoy the international presence, global following, and dental destruction of ice hockey. Though the U.S. National Hockey League (NHL) enjoys a reputation as the world's premier league, ice hockey is hardly America's game. Countless leagues exist around the globe, with the premier talent hailing from European nations such as Russia, Sweden, and the Czech Republic.<sup>1</sup> However, with the promise of lucrative contracts and

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<sup>1</sup> See Eugene Belashchenko, *NHL Transfer Agreement: Do Russians Have a Point?*, RUSSIAN PROSPECTS, Sept. 19, 2006, [www.russianprospects.com/public/article.php?article\\_id=480](http://www.russianprospects.com/public/article.php?article_id=480) (stating that "Russia is a significant producer of hockey talent and constituted approximately 20% of the Europeans signed by NHL clubs between 2001 and 2004."); see also Bill Meltzer, *Global Game: NHL Boasts a United Nations of Talent*, NHL.COM, Sept. 28,

high levels of competition in the NHL, Europe's most talented players frequently choose to abandon their national teams. Further, foreign players often accept opportunities to play in the NHL without regard to their existing contractual obligations.

The signing away of contracted players, or player poaching as it is commonly called, is an unfortunate occurrence in international ice hockey. Since the game lacks a powerful, supreme governing body,<sup>2</sup> hockey leagues exist as sovereign entities and often disregard the rules governing their international counterparts. Though historically prevalent, the issue of player poaching recently rose to the forefront of international ice hockey when Alexander Radulov signed a three-year deal with Russia's newly-formed Continental Hockey League (KHL)<sup>3</sup> while still under contract with the Nashville Predators.<sup>4</sup>

This Note examines the regulations governing international player transfers in ice hockey and the concept of player poaching through the lens of the Alexander Radulov saga. Part II provides substantial background on the International Ice Hockey Federation (IIHF), the NHL Collective Bargaining Agreement, the now-expired international Player Transfer Agreement, and the history of player poaching. Part III discusses and analyzes the posting system,<sup>5</sup> a method used to regulate international player transfers in Major League Baseball. Part IV proposes that the IIHF and NHL modify their current player transfer system by adopting a posting system and strengthening the IIHF.

## II. THE RISE AND FALL OF THE IIHF/NHL PLAYER TRANSFER AGREEMENT

On July 11, 2008, Russian-born Alexander Radulov, a forward with the NHL's Nashville Predators, signed a three-year contract with the KHL's

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2007, <http://www.nhl.com/ice/news.htm?id=369417> (stating that “[a]mong all European hockey countries, Sweden has been the steadiest producer of NHL talent for over 30 years . . . . [O]n a per capita basis, however, there's not a more impressive secondary producer of NHL talent than the Czech Republic.”).

<sup>2</sup> See discussion *infra* Part II.A.

<sup>3</sup> The KHL began play in 2008 and replaced the Russian Super League, which disbanded after the 2007–2008 hockey season. See *NHL, Russian League Agree Not to Poach Players*, CBC SPORTS, July 10, 2008, <http://www.cbc.ca/sports/hockey/story/2008/07/10/nhl-russia-players.html>; see also Alessandro Seren Rosso, *New Kontinental Hockey League Takes Shape, Sets Rules*, EURO HOCKEY, Mar. 13, 2008, <http://www.eurohockey.net/news/story.html?id=20080313111756newkontinentalhockeyleagueetakesshapesetsrules>.

<sup>4</sup> Joeri Loonen, *Predator Inks Debatable Deal*, INT'L ICE HOCKEY FED'N, July 11, 2008, [http://www.iihf.com/home-of-hockey/news/news-singleview/browse/1/article/predator-inks-debatable-deal.html?tx\\_ttnews%5BpS%5D=1214863200&tx\\_ttnews%5BpL%5D=2678399&tx\\_ttnews%5Barc%5D=1&tx\\_ttnews%5BbackPid%5D=187&cHash=bbe76c8329](http://www.iihf.com/home-of-hockey/news/news-singleview/browse/1/article/predator-inks-debatable-deal.html?tx_ttnews%5BpS%5D=1214863200&tx_ttnews%5BpL%5D=2678399&tx_ttnews%5Barc%5D=1&tx_ttnews%5BbackPid%5D=187&cHash=bbe76c8329).

<sup>5</sup> See discussion *infra* Part III.

Salava Yulayev Ufa.<sup>6</sup> Questions immediately arose concerning Radulov's breach of his NHL contract and the validity of his KHL agreement. When Radulov allegedly signed his KHL contract, the NHL and the KHL had no agreement in place to govern international player transfers or prevent player poaching.<sup>7</sup> Though the IIHF has successfully brokered several Player Transfer Agreements (PTAs)<sup>8</sup> between the NHL and IIHF member bodies in the past, Russia has not signed a PTA with the NHL since 2005.<sup>9</sup> Currently, no PTA exists<sup>10</sup> between the NHL and IIHF member bodies,<sup>11</sup> despite the IIHF's frequent warnings that a lack of a PTA will result in chaos throughout the hockey world.<sup>12</sup>

A. *The International Ice Hockey Federation*

The IIHF is ice hockey's world governing body. According to the IIHF Statutes and Bylaws, the IIHF formed in 1908 and its purpose is to "govern, develop and promote international ice and in-line hockey."<sup>13</sup> The IIHF Statutes and Bylaws go on to identify the IIHF's intent "to establish and maintain clear jurisdiction over ice and in-line hockey internationally."<sup>14</sup> Sixty-eight countries have some form of IIHF membership<sup>15</sup> and, therefore, are required to abide by the policies and regulations set forth in the IIHF Statutes and Bylaws. In addition to regulating the rules and member bodies of international hockey, the IIHF also regulates all international

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<sup>6</sup> Loonen, *supra* note 4.

<sup>7</sup> Though the NHL and the KHL agreed to a signing moratorium on July 10, 2008, KHL president Alexander Medvedev stated the Radulov signing occurred several days before the leagues reached an agreement. *See NHL Not Interested in Compensation from Newly Formed Russian League*, NHL.COM, Aug. 18, 2008, <http://www.nhl.com/ice/news.htm?id=380320#&navid=nhl-search>.

<sup>8</sup> *See* discussion *infra* Part II.B.

<sup>9</sup> Alex Yannis, *Russians Reject N.H.L. Player Transfer Deal*, N.Y. TIMES, Aug. 3, 2005, at D7.

<sup>10</sup> *See* Allan Hougaard, *IIHF Transfer Agreement Falls Apart After Czechs Opt Not to Extend Deal*, HOCKEY NEWS, May 1, 2008, <http://www.thehockeynews.com/articles/15728-IIHF-transfer-agreement-falls-apart-after-Czechs-opt-not-to-extend-deal.html>; *see also* discussion *infra* Part II.B.

<sup>11</sup> *See* IIHF Member National Associations, <http://www.iihf.com/iihf-home/the-iihf/members.html> (last visited Mar. 22, 2010).

<sup>12</sup> *See* Yannis, *supra* note 9.

<sup>13</sup> INT'L ICE HOCKEY FED'N, STATUTES AND BYLAWS art. 3 (2003) [hereinafter IIHF STATUTES & BYLAWS], *available at* [http://www.iihf.com/fileadmin/user\\_upload/PDF/The\\_IIHF/IIHF\\_Statutes\\_and\\_Bylaws-\\_July\\_2003.pdf](http://www.iihf.com/fileadmin/user_upload/PDF/The_IIHF/IIHF_Statutes_and_Bylaws-_July_2003.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> IIHF Member National Associations, *supra* note 11.

hockey games, the IIHF World Championship tournament, and the various national teams that form for participation in the Olympics.<sup>16</sup>

In addition to these basic functions, the IIHF also establishes ground rules for international player transfers.<sup>17</sup> Under Article 205 of the Statutes and Bylaws, the IIHF is responsible for “ensur[ing] the good order of the sport internationally and, in relation to player movement, to safeguard the player and his position with regard to player eligibility for international competitions and to uphold discipline and maintain order between clubs and within the sport.”<sup>18</sup> As such, the IIHF requires all players who wish to move to the national hockey association of a member country to obtain an IIHF international transfer card (ITC).<sup>19</sup> Additionally, a player’s transfer becomes valid only upon confirmation by the IIHF.<sup>20</sup> Further:

When a player applies for an international transfer, the member national association of the country from which he is transferring in signing the transfer application shall be deemed to have confirmed that there is no reason for them to prevent the player from transferring to the new club or national association.<sup>21</sup>

With regard to player transfers to non-member organizations, the IIHF provides that if the organization and the IIHF have a PTA in place, then the IIHF will execute international player transfers in accordance with such an agreement.<sup>22</sup> In contrast, players who leave member body organizations to play in non-member organizations without player transfer agreements with the IIHF “will at all times be regarded as belonging to [their] original member national association.”<sup>23</sup> The IIHF also reserves the right to discipline players who do not follow the international transfer procedures

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<sup>16</sup> See Eugene Belashchenko, *Why Now for a Russia-NHL Agreement*, HOCKEY’S FUTURE, July 12, 2008, [http://www.hockeysfuture.com/articles/10487/why\\_now\\_for\\_a\\_russianhl\\_agreement/](http://www.hockeysfuture.com/articles/10487/why_now_for_a_russianhl_agreement/).

<sup>17</sup> Articles 205–210 of the Statutes and Bylaws outline the IIHF’s basic international transfer regulations. IIHF STATUTES & BYLAWS, *supra* note 13, arts. 205–10. In addition, the IIHF has published International Transfer Regulations that offer significantly more detail on transfer procedures, regulations, and penalties. INT’L ICE HOCKEY FED’N, INTERNATIONAL TRANSFER REGULATIONS (2009) [hereinafter INTERNATIONAL TRANSFER REGULATIONS], available at [http://www.del.org/fileadmin/content/downloads/IIHF/IIHF\\_International\\_Transfer\\_Regulations\\_-\\_June\\_2009.pdf](http://www.del.org/fileadmin/content/downloads/IIHF/IIHF_International_Transfer_Regulations_-_June_2009.pdf).

<sup>18</sup> IIHF STATUTES & BYLAWS, *supra* note 13, art. 205.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> IIHF STATUTES & BYLAWS, *supra* 13, art. 206.

<sup>23</sup> *Id.*

outlined in the Statutes and Bylaws and the International Transfer Regulations.<sup>24</sup>

Although the IIHF lists the U.S. as a member country,<sup>25</sup> the NHL is not an IIHF member association. While IIHF International Transfer Regulations govern international player transfers between IIHF member bodies, the NHL must rely on an alternative international transfer system.<sup>26</sup> In the past, the IIHF has brokered PTAs between the NHL and IIHF member bodies.<sup>27</sup> While the IIHF does not believe that PTAs are an unsuccessful method of governing international player transfers, numerous instances of player poaching have gone unpunished over the years.<sup>28</sup> Even with the standing to regulate international contract dispute, the IIHF has struggled to put an end to this problem. While the NHL is not under IIHF jurisdiction, Russia, the Czech Republic, Sweden, and countless other hockey powerhouses are IIHF member bodies and, therefore, subject to IIHF regulations. Although the NHL's membership within the IIHF would go a long way towards alleviating the problem of player poaching,<sup>29</sup> it will not cure the illegal behavior of its international counterparts. While the IIHF could prohibit players who have engaged in illegal transfers from participating in IIHF international championship events,<sup>30</sup> such punishments would not serve as adequate deterrents.<sup>31</sup> Though the NHL reserves the right to punish players that leave their NHL teams for international clubs, the NHL has no standing to enforce such punishments overseas.<sup>32</sup> The NHL, and all hockey leagues, should be able to rely on the authority of the IIHF, hockey's self-proclaimed "world governing body," with regard to international matters. The IIHF's lack of actual authority, however, is alarming and shows the immediate need for reformation of both the IIHF-NHL PTA and the IIHF generally.

#### B. *The NHL/NHLPA Collective Bargaining Agreement*

Pursuant to the NHL Standard Player Contract, the league requires all players to "play hockey only for the Club unless his SPC [Standard Play-

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<sup>24</sup> *Id.* art. 209.

<sup>25</sup> IIHF Member National Associations, *supra* note 11.

<sup>26</sup> IIHF STATUTES & BYLAWS, *supra* note 13, art. 206; *see also* discussion *infra* Part II.C.

<sup>27</sup> E-mail from Szymon Szemberg, Communications Director, IIHF, to Katherine Zdrojeski (Nov. 21, 2008, 08:53 EST) (on file with author) [hereinafter Szemberg E-mail].

<sup>28</sup> *See* discussion *infra* Part II.C.

<sup>29</sup> *See* discussion *infra* Part IV.A.

<sup>30</sup> *See* Belashchenko, *supra* note 16.

<sup>31</sup> *See id.* (stating that because of the high, tax-free salaries paid to KHL players, it is likely that players such as Alexander Radulov and others will regard suspension from Olympic play merely as a cost of doing business).

<sup>32</sup> *See* discussion *infra* Part II.B.

er Contract] is Assigned, Loaned or terminated by the Club.”<sup>33</sup> Further, NHL clubs reserve the right to fine or suspend any player who engages in “conduct impairing the thorough and faithful discharge of the duties incumbent upon [him].”<sup>34</sup> However, the NHL’s jurisdiction does not extend beyond its member clubs. Thus, the NHL has no standing to punish or suspend from the game players who breach their contracts in search of more lucrative, international opportunities. Under the NHL and National Hockey League Players Association (NHLPA) Collective Bargaining Agreement (CBA), when an NHL player leaves his team before the term of his NHL contract has ended, the NHL deems him a “defected player.”<sup>35</sup> The Commissioner of hockey may fine or suspend a defected player<sup>36</sup> until he returns to his NHL club.<sup>37</sup> Alternatively, if the player becomes free from obligations to the unaffiliated club via dissolution or completion of his obligations but does not contact the NHL Club with which he was last under contract, the Commissioner places his name on the “Free Agent List (Defected Players).”<sup>38</sup> The meager penalties proscribed by the NHL CBA are not adequate disincentives or deterrents and will not keep players from defecting to other leagues.

Alexander Radulov and several others<sup>39</sup> have already left for the KHL, and some in the sporting world predict that more will follow.<sup>40</sup> Several of the KHL’s bankrollers have recently achieved great wealth as a result of the discovery of natural resources and the rising price of oil.<sup>41</sup> Subsequently, the KHL can ensure that its players are extremely well paid.<sup>42</sup>

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<sup>33</sup> See COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION, STANDARD PLAYER CONTRACT, Exhibit 1, art. 2(c) (2005), available at <http://www.nhl.com/cba/2005-CBA.pdf>.

<sup>34</sup> See *id.* Exhibit 1, art. 4.

<sup>35</sup> See *id.* art. 10.2(b)(i), (i)(A).

[A]ny Player not unconditionally released . . . having had an SPC [standard player contract] with a Club, the provisions of which . . . have not been completely fulfilled, contracts for a period including any part of the unfulfilled portion of the unfulfilled portion of his SPC, with a club in a league not affiliated with the NHL or with any such league . . . or with any other professional hockey club to the exclusion of the said Club or its assignee.

*Id.*

<sup>36</sup> See *id.* art. 10.2(b)(ii).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* art. 10.2(b)(ii)(A)(1-6) (stating that a defected player becomes a regular free agent upon the fulfillment of one of six conditions).

<sup>39</sup> See *KHL Calls Off Truce*, PITTSBURGH POST-GAZETTE, Sept. 5, 2008, at D8.

<sup>40</sup> See Belashchenko, *supra* note 1.

<sup>41</sup> *Id.*

<sup>42</sup> For instance, Alexander Radulov reportedly signed a tax-free deal with Salavat Ufa in Russia worth \$13 million. Factoring out Tennessee state taxes, the deal is worth closer to \$18

Moreover, due to the lack of a PTA, the IIHF cannot force defected players such as Radulov to return to the NHL. If the NHL and IIHF had some kind of PTA or player transfer system in place, the IIHF would have standing to suspend Radulov from play or force him into court to resolve his contractual issues. However, in the absence of such an agreement, the IIHF can do little more than deem such player actions “flagrant breach[es] of agreement.”<sup>43</sup> Further, other than the inability to play in Olympic or international competitions, players have virtually no risk of repercussion should they choose to defect.<sup>44</sup>

### C. *The Player Transfer Agreement*

Though the NHL does not currently have a PTA in place with Russia or any other IIHF member body, the IIHF has brokered PTAs between such parties since the mid-1990s.<sup>45</sup> The IIHF acts as a mediator, allowing the NHL and IIHF member bodies to negotiate PTAs amongst themselves. Ironically, the IIHF has indicated that it does not believe a transfer agreement is the best method for regulating international player movement.<sup>46</sup> However, because the NHL CBA forbids NHL clubs from negotiating with IIHF affiliated teams on an individual basis,<sup>47</sup> the IIHF agrees to broker PTAs.<sup>48</sup>

In the past, a PTA outlined the procedures followed by the NHL and IIHF member bodies when contracted and non-contracted players desire international transfers to the NHL. The PTA is a one-way agreement and governs only player transfers from leagues participating in the PTA to the NHL.<sup>49</sup> In 2005, the existing PTA expired, and Russia—home to the now extinct Russian Super League—elected not to sign the subsequent agreement, citing displeasure with the terms of the agreement and the NHL’s

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million USD. Thus, Radulov stands to make roughly \$6 million in 2008, the first of his three-year deal, as opposed to the \$984,000 he would have made under his NHL contract. See Ken Campbell, *Battle Sure to Ensue over Radulov’s Three-Year, \$13 million Russian Deal*, HOCKEY NEWS, July 11, 2008, <http://www.thehockeynews.com/articles/17153-Radulovs-Russian-deal-would-be-violation-of-new-NHLIIHF-agreement.html>.

<sup>43</sup> See *id.* (quoting IIHF spokesman Szymon Szemberg).

<sup>44</sup> See *id.*

<sup>45</sup> See *Russia Only Nation in IIHF Not to Sign New Transfer Agreement*, CBS SPORTS, May 9, 2007, <http://www.cbssports.com/nhl/story/10173472/rss>.

<sup>46</sup> Szemberg E-mail, *supra* note 27.

<sup>47</sup> See *id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Player Transfer Agreement Signed*, INT’L ICE HOCKEY FED’N, July 12, 2007, [http://www.iihf.com/home-of-hockey/news/news-singleview/article/player-transfer-agreement-signed.html?tx\\_ttnews\[pS\]=1183240800&tx\\_ttnews\[pL\]=2678399&tx\\_ttnews\[arc\]=1&tx\\_ttnews\[backPid\]=187&cHash=d93edbeb2f](http://www.iihf.com/home-of-hockey/news/news-singleview/article/player-transfer-agreement-signed.html?tx_ttnews[pS]=1183240800&tx_ttnews[pL]=2678399&tx_ttnews[arc]=1&tx_ttnews[backPid]=187&cHash=d93edbeb2f).



general lack of respect for Russian leagues and player contracts.<sup>50</sup> Russia stated that it would negotiate its own player transfers with the NHL, but not until the NHL showed respect for Russian contracts.<sup>51</sup> All involved parties agreed that brokering a transfer agreement without Russia—a hockey powerhouse—would be an extremely difficult task. The Czech Republic, another major player in the hockey world,<sup>52</sup> nearly backed out of PTA negotiations upon learning of Russia's decision but ultimately decided to participate.<sup>53</sup> The 2005 PTA was eventually signed but only for two years, in contrast to the previous PTA's three.<sup>54</sup> Russia's lack of participation signaled the beginning of the end for hockey's PTA.

In 2007, after months of tumultuous negotiating, the NHL and six other IIHF member bodies ratified a new agreement.<sup>55</sup> As in 2005, Russia refused to participate. The 2007–2011 PTA required the NHL to pay a flat fee of approximately \$9,000,000 USD to the IIHF to be used as compensation for the first forty-five foreign players brought to the U.S.<sup>56</sup> The fee earned IIHF teams approximately \$200,000 per player sent to the NHL.<sup>57</sup> Each player in excess of forty-five, however, cost the NHL an additional \$200,000.<sup>58</sup> Further, the agreement required the NHL to pay an additional \$50,000–\$150,000 to the IIHF for any players not on an NHL roster for a minimum of thirty games.<sup>59</sup> Undrafted or free agent players could sign with the NHL at any time.<sup>60</sup> The 2007 PTA did not even survive the year.<sup>61</sup> Under the terms of the 2007 PTA, either side could choose to reopen the

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<sup>50</sup> Gennady Fyodorov, *Russians Ready to Say "Nyet" to NHL Transfer Deal*, REUTERS, May 8, 2007, <http://www.reuters.com/article/idUSL088285920070508>; see also Szemberg E-mail, *supra* note 27 (confirming that money and respect are the main issues the IIHF faces in brokering PTAs).

<sup>51</sup> See Belashchenko, *supra* note 16.

<sup>52</sup> See Bill Meltzer, *Global Game: NHL Boasts a United Nations of Talent*, NHL.COM, Sept. 28, 2007, <http://www.nhl.com/ice/news.htm?id=369417#> (stating that “[o]n a per capita basis . . . there’s not a more impressive secondary producer of NHL talent than the Czech Republic.”).

<sup>53</sup> See Belashchenko, *supra* note 1.

<sup>54</sup> See Joeri Loonen, *IIHF-NHL Player Transfer Agreement*, EURO HOCKEY.NET, Aug. 17, 2005, <http://www.eurohockey.net/news/story.html?id=20050817160046iihfnhlplayertransferagreement>.

<sup>55</sup> See *Player Transfer Agreement Signed*, *supra* note 49.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See *European Countries Reopen Player Transfer Agreement with NHL*, HOCKEY NEWS, Dec. 13, 2007, <http://www.thehockeynews.com/articles/11896-European-countries-reopen-player-transfer-agreement-with-NHL.html>.

agreement prior to 2008.<sup>62</sup> Both sides exercised the option but, unfortunately, no new agreement could be reached after the Czech Republic backed out of negotiations in May 2008.<sup>63</sup>

IIHF member bodies and the NHL have indicated their willingness to work out a new PTA, however issues regarding respect and money abound.<sup>64</sup> International leagues feel they are not being adequately compensated for their players. They firmly believe that \$200,000 is insufficient compensation for the premier players they send to the NHL.<sup>65</sup> Further, they are frustrated by the fact that the NHL signs away their young talent. Undeveloped prospects often go to the NHL and simply are not ready for the major leagues. The home teams of these prospects are left incensed; instead of honing their craft in their home countries, top prospects are stuck in the U.S. playing minor league hockey. Though the payment of a fine helps to alleviate this issue for international leagues, it causes great consternation in the NHL, particularly for the NHL's commissioner who would like to see his teams be more selective in the players they choose to bring in from overseas.<sup>66</sup>

Brokering player transfer agreements has become an increasingly difficult task for the IIHF since 2005, and ultimately became impossible in 2008. Though talks are ongoing, no new agreement is in place. On July 10, 2008, Russia and the NHL agreed to a "signing moratorium" in which both sides agreed to the mutual respect of domestic contracts. However, the agreement lasted a mere twenty-four hours; on July 11, the KHL announced its deal with Predator's forward Alexander Radulov.<sup>67</sup> Prior actions by the NHL,<sup>68</sup> coupled with the KHL's refusal to suspend or return Radulov, have led to the general belief that the signing moratorium has been abandoned. The result is an increased risk of player poaching and a lack of compensa-

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<sup>62</sup> *Id.*

<sup>63</sup> Hougaard, *supra* note 10.

<sup>64</sup> See Szemberg E-mail, *supra* note 27 (confirming that money and respect are the main issues the IIHF faces in brokering PTAs).

<sup>65</sup> See Fyodorov, *supra* note 50 (quoting Russian Ice Hockey Federation President Vladislav Tretiak) ("We don't need handouts . . . . And to us a \$200,000 sum is a handout. We know that players such as Malkin or Ovechkin are worth millions and we intend to fight for our rights in the courts.").

<sup>66</sup> See *NHL, NHLPA and IIHF Talk Player Transfer Deal in Wednesday Meeting*, HOCKEY NEWS, Jan. 16, 2008, <http://www.thehockeynews.com/articles/12728-NHL-NHLPA-and-IIHF-talk-player-transfer-deal-in-Wednesday-meeting.html?sort=upload%20DESC>.

<sup>67</sup> See Loonen, *supra* note 4.

<sup>68</sup> The NHL's Los Angeles Kings drafted and signed Russian prospects Andrei Loktionov and Vyacheslav Voinov in June 2008. Russia alleged that these players were under contract with the KHL and that their transfers should be voided. See *Dispute Between KHL, NHL over Forward Radulov Could Go to Court*, NHL.COM, Sept. 6, 2008, <http://www.nhl.com/ice/news.htm?id=381419#&navid=nhl-search>.

tion for teams when players and free agents decide to leave and sign with a different league in a different country.

*D. Player Poaching and Contract Circumvention*

In recent years, several significant instances of player poaching have occurred, though none have been fairly or adequately resolved. In December 2005, the NHL's Washington Capitals filed suit against Russian-born athlete Alexander Semin.<sup>69</sup> The NHL drafted Semin in 2002, and he signed a three-year contract with the Capitals.<sup>70</sup> During the second year of Semin's contract, the NHL suffered a season-long lockout, and the Capitals assigned Semin to their minor league affiliate, the Portland Pirates, for the 2004–2005 season. Semin, however, never showed up to play for the Pirates. Instead, he went back to Russia and played hockey for a private club.<sup>71</sup> When the NHL contacted Semin, he said that Russia needed him to report for duty in the Russian military.<sup>72</sup> The NHL subsequently discovered that Russia and Semin had worked out an "agreement" which allowed Semin to perform his military duty by playing hockey.<sup>73</sup> Following the end of the NHL's lockout, the Capitals demanded that Semin return to the U.S. and fulfill the remainder of his contract.<sup>74</sup> In response, Russian officials informed the Capitals that Semin's military obligations would prevent him from doing so.<sup>75</sup> The Capitals subsequently filed suit against Semin and, despite overwhelming evidence indicating that Semin's military documents could not comport with Russian law, the court ultimately denied the relief, holding that the Capitals were unlikely to succeed on the merits of the case.<sup>76</sup>

Less than two months later, the same court heard the case of Alexander Ovechkin.<sup>77</sup> The NHL's Washington Capitals drafted Russian-born Ovechkin in 2004 and, due to the season-long lockout in 2004–2005, Ovechkin played his first game for the Capitals in 2005.<sup>78</sup> Ovechkin's former team, the Russian Super League's Moscow Dynamo, filed suit against Ovechkin in January 2006 claiming that Ovechkin had a contract to play for

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<sup>69</sup> *Lincoln Hockey, LLC v. Semin*, No. A.05-02094 (HHK), 2005 U.S. Dist. LEXIS 34047, at \*1 (D.D.C. Dec. 5, 2005).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at \*3.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at \*4.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at \*7–\*8.

<sup>77</sup> *Moscow Dynamo v. Ovechkin*, 412 F. Supp. 2d 24 (D.D.C. Jan. 18, 2006).

<sup>78</sup> *Id.* at 25.

Dynamo during the 2005–2006 season.<sup>79</sup> The Russians claimed they had presented Ovechkin’s case to a Russian arbitrator who found Ovechkin in breach of his contract and banned him from play during the 2005–2006 season.<sup>80</sup> Russian Super League officials sought to have the arbitration award enforced in the U.S., but, following a hearing, the District Court concluded it did not have subject matter jurisdiction over the case and dismissed the claim.<sup>81</sup>

Shortly following the Ovechkin saga, the Russian Super League faced the departure of another marquis player—Evgeni Malkin, of Russia’s Metallurg Magnitogorsk.<sup>82</sup> Despite tremendous pressure to fulfill his one-year contract with Metallurg,<sup>83</sup> Malkin provided his Russian team with the requisite notice<sup>84</sup> of his resignation, signed a contract with the Pittsburgh Penguins, and slipped quietly away from Metallurg’s training camp to play for the NHL.<sup>85</sup> Angered but undeterred, Metallurg sought the assistance of the U.S. District Court for the Southern District of New York in obtaining an injunction to prevent Malkin from playing in the NHL.<sup>86</sup> In its suit, Metallurg alleged that the NHL and the Penguins “violated antitrust laws by conspiring in a group boycott and refusing to deal with Russian hockey clubs regarding player transfers” for the sole purpose of “punish[ing] [Russian hockey clubs] for the Russian Ice Hockey Federation’s rejection of a new general agreement governing the transfer of foreign players to the NHL.”<sup>87</sup>

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<sup>79</sup> *Id.* at 26.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 29.

<sup>82</sup> *See It’s Official: Penguins Sign Russian Star Malkin*, ESPN.COM, Sept. 7, 2006, <http://sports.espn.go.com/nhl/news/story?id=2574012>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> According to several media outlets, Malkin wanted to pursue his professional career in the NHL and only signed a one-year contract with Metallurg to alleviate the pressure placed on him and his family by Russian team officials. *See id.* Almost immediately following the signing, Malkin disappeared from Metallurg’s training camp in Finland, fearing team officials might try to prevent him from leaving. *See id.* When asked about the pressure placed on Malkin to forgo the NHL and sign a one-year deal with Metallurg, Sergei Gonchar, Malkin’s Pittsburgh Penguins teammate, Sergei Gonchar, stated, “[h]e was very upset . . . Hopefully, nobody is going to put pressure on his family or himself when he comes back [to Russia]. But at the same time, there’s got to be some pressure because otherwise a guy wouldn’t sign a deal at 3 a.m. then disappear . . . a couple days [later].” Posting of Larry Fitzgerald to <http://www.ncaastrategies.com/utopia/showthread.php?p=1044066> (Aug. 16, 2005, 22:59 EST). *See also* E.M. Swift, *The New New Kid*, SPORTS ILLUSTRATED, Oct. 2, 2006, at 70.

<sup>86</sup> *Russian Club Seeks to Stop Malkin from Playing in NHL*, CBS SPORTS, Oct. 19, 2006, <http://www.cbssports.com/nhl/story/9740727>.

<sup>87</sup> *Id.*

In deciding the case for the District Court, Judge Loretta Preska held that the Russians failed to meet the standard for a preliminary injunction as they could not show that Malkin's absence caused his former team irreparable harm.<sup>88</sup> In denying the injunction and dismissing the case, Judge Preska effectively kept Malkin and several other former Russian players in the NHL.<sup>89</sup> As a nonparty to the IIHF/NHL PTA, the Russians received nothing in return for their players, save for a hefty legal fee and the remnants of several unfulfilled contracts.<sup>90</sup> However, whether or not the Russians had existing contracts with Semin, Ovechkin, Malkin, and others is hardly the issue. Indeed, Judge Preska noted in the Malkin case that the Russian teams seemed far less concerned with retaining top talent than they were with "wresting larger player transfer fees from the NHL."<sup>91</sup>

Additionally, due to the prevalence of alleged player poaching, league officials on both sides expend a wealth of time, money, and resources on inevitably fruitless investigations. Moreover, the concerned parties rarely achieve mutually agreeable results; the vast majority of player poaching cases never see the inside of a courtroom since the facts typically prove nothing more than a blatant disrespect for both contract law and the hockey leagues of other countries. Such incidents of player poaching suggest that the IIHF only perpetuates a broken system by continuing to allow the IIHF/NHL PTA to govern international player transfers. IIHF officials do not believe PTAs are the best method of regulating player transfers,<sup>92</sup> and the acrimony between involved parties, along with the frequency of illegal player movement, makes it clear that a PTA is no longer a viable option. Moving forward, the IIHF should look for an entirely different solution and, in doing so, should model its solution based on the player transfer systems successfully implemented in other professional sports.

### III. MAJOR LEAGUE BASEBALL'S POSTING SYSTEM

Ice hockey is by no means the only sport with an international following, nor is it the only sport to face international player transfer issues. America's premier baseball league, Major League Baseball (MLB) faced numerous problems with player transfers and player poaching throughout

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<sup>88</sup> See *Russian Team's Request for Malkin Injunction Denied*, ESPN.COM, Nov. 16, 2006, <http://sports.espn.go.com/nhl/news/story?id=2663537>.

<sup>89</sup> See *id.*

<sup>90</sup> However, even if they been party to the IIHF/NHL PTA, Russia would have received a mere \$200,000 USD in exchange for Malkin—hardly a fair transfer fee for the second overall pick in the 2004 NHL draft. See *IIHF Says Predators' Radulov Wrong to Sign with Russian Club*, NHL.COM, Oct. 1, 2008, <http://www.nhl.com/ice/news.htm?id=384365>.

<sup>91</sup> See *Russian Team's Request for Malkin Injunction Denied*, *supra* note 88.

<sup>92</sup> See Szemberg E-mail, *supra* note 27.

the latter half of the twentieth century.<sup>93</sup> As baseball expanded outside of the U.S., Japanese players began to play in MLB. Though MLB scouts widely considered Japanese talent inferior to that of MLB, a few Japanese prospects sparked major league interest. Beginning the middle of the twentieth century, MLB contracted with several Japanese players without regard to their Japanese labor obligations.<sup>94</sup> The frequency with which Japanese players circumvented the rules of their respective labor agreements rose dramatically in the late 1990s,<sup>95</sup> ultimately resulting in a contentious relationship between MLB and its Japanese counterpart, Nippon Professional Baseball (NPB).

Contractual problems between NPB and MLB began in the 1960s when Japan's Nankei Hawks sent several prospects to the San Francisco Giants farm system to "hone their craft."<sup>96</sup> The Hawks and the Giants agreed to a baseball exchange program; the players remained under contract with their Japanese teams but fulfilled their contractual obligations with MLB.<sup>97</sup> The agreement collapsed when the Giants realized the talent of Japanese pitching prospect Masanori Murakami and added him to their major league roster in 1964.<sup>98</sup> After Murakami turned in several impressive months of work during the 1965 season, the Nankei Hawks asserted their right to reclaim him.<sup>99</sup> Disregarding the terms of the exchange program, the Giants refused to send Murakami back, despite the Hawks' insistence.<sup>100</sup> The Murakami incident eventually led to a 1967 Working Agreement between MLB and Japan.<sup>101</sup> Pursuant to the terms of the agreement, no team could attempt to sign a player from another league unless that player was a free agent.<sup>102</sup>

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<sup>93</sup> See Tom Singer, *Matsuzaka Posting System's Latest Gem: Relationship Between MLB, Japan League Long and Storied*, MLB.COM, Nov. 14, 2006, [http://mlb.mlb.com/news/article.jsp?ymd=20061114&content\\_id=1740635&vkey=hotstove2006&fext=.jsp](http://mlb.mlb.com/news/article.jsp?ymd=20061114&content_id=1740635&vkey=hotstove2006&fext=.jsp) (discussing the history of how Japanese players came to play in MLB).

<sup>94</sup> *Id.*

<sup>95</sup> See Posting System, <http://dic.academic.ru/dic.nsf/enwiki/2491784> (last visited Mar. 22, 2010).

<sup>96</sup> Singer, *supra* note 93.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* As a relief pitcher for the Giants in 1965, Murakami went 4-1 with eight saves during forty-five appearances. *Id.*

<sup>100</sup> *Id.* ("After he went 4-1 with eight saves in 45 relief appearances in 1965, Nankei asserted its rights to Murakami in what unraveled into a messy international affair.")

<sup>101</sup> *Id.*

<sup>102</sup> See Michael Street, *A Brief History of Japanese-American Baseball Relations, Part 2: The Tornado*, EXAMINER.COM, Dec. 3, 2008, <http://www.examiner.com/examiner/x-739-AsianAmerican-Sports-Examiner~y2008m12d3-A-brief-history-of-Japanese-American-baseball-relations-Part-2-The-Tornado>.

The agreement remained in place until the 1990s, when Japanese agent Don Nomura discovered a loophole in the NPB regulations that allowed his client, pitcher Hideo Nomo, to circumvent the agreement.<sup>103</sup> According to the NPB rules, Japanese players obtained free agent status upon retiring from the league. In 1994, Nomo announced his retirement from Japanese baseball and, in doing so, effectively freed himself from all contractual obligations to the Kintetsu Buffaloes.<sup>104</sup> As the 1967 agreement did not restrain the movement of free agents, Nomo went on to sign a hefty contract with MLB's Los Angeles Dodgers.<sup>105</sup> In 1997, Nomura used the same method to free twenty-one year old Alfonso Soriano from his contract with the Hiroshima Carp.<sup>106</sup> The pilfering of Japanese talent became an issue for MLB as well when, in 1997, the San Diego Padres paid the Chiba Lotte Marines for the exclusive negotiating rights to pitcher Hideki Irabu.<sup>107</sup> The Padre's actions left MLB's twenty-nine other teams infuriated; many wanted the chance to vie for Irabu's services and felt they had been unfairly shut out of the wooing process.<sup>108</sup>

The exodus of top Japanese talent to the U.S. led NPB to close the loophole in their regulations and seek an agreement with MLB and the MLB Player's Association (MLBPA) governing international player transfers.<sup>109</sup> In 1998, the parties established the posting system, a one-way agreement regulating the transfer of players from NPB to MLB.<sup>110</sup> Under the system, Japanese players with fewer than nine years of service<sup>111</sup> allow their Japanese teams to "post" their availability to each of MLB's thirty teams.<sup>112</sup> If the Japanese team agrees, the player is posted between November 1 and March 1, and interested teams have four days to submit a blind

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<sup>103</sup> Singer, *supra* note 93.

<sup>104</sup> *Id.*

<sup>105</sup> See Street, *supra* note 102.

<sup>106</sup> See *id.* Though the Carp insisted Soriano remain in Japan, MLB commissioner Bud Selig declared Soriano a free agent and allowed him to sign with the New York Yankees. *Id.* The Soriano incident proved to be the last straw for NPB. Following Soriano's departure, NPB closed the loophole in their regulations and began working with MLB to establish a new player transfer system. *Id.*

<sup>107</sup> Tim Kurkjian, *Posting Process Needs to Be Altered*, ESPN.COM, Dec. 15, 2006, [http://sports.espn.go.com/mlb/columns/story?columnist=kurkjian\\_tim&id=2697354](http://sports.espn.go.com/mlb/columns/story?columnist=kurkjian_tim&id=2697354).

<sup>108</sup> See *id.*

<sup>109</sup> See Street, *supra* note 102.

<sup>110</sup> See Paul White, *Japan Frets over Talent Exodus to USA*, USA TODAY, Mar. 29, 2007, at 1C.

<sup>111</sup> Once a player achieves nine years of service, he is eligible for free agency and may sign with any team he wishes, regardless of the league. See Barry M. Bloom, *Tazawa Unlikely to Alter Asian Market*, MLB.COM, Nov. 8, 2008, [http://kansascity.royals.mlb.com/news/article.jsp?ymd=20081105&content\\_id=3665291&vkey=hotstove2008&fext=.jsp](http://kansascity.royals.mlb.com/news/article.jsp?ymd=20081105&content_id=3665291&vkey=hotstove2008&fext=.jsp).

<sup>112</sup> Singer, *supra* note 93.

bid to the MLB Commissioner's Office.<sup>113</sup> The bid represents the dollar amount the team would pay for the exclusive right to negotiate with the posted player.<sup>114</sup> By bidding, each team vies merely for the right to *negotiate* with the Japanese player and not the right to sign the player. The Commissioner's Office then presents the Japanese team with the highest bid, and that team has four days to accept or reject it.<sup>115</sup> If accepted, the player and MLB team may negotiate for thirty days.<sup>116</sup> If the parties agree on a contract, the Japanese team receives the bid money and releases the player from his obligations to his Japanese team.<sup>117</sup> If no deal is reached, no money exchanges hands; the player returns to his Japanese team and cannot be posted again for another year.<sup>118</sup>

The posting system serves a twofold purpose. First, it allows MLB to protect smaller-market teams by giving every team an equal chance to bid for the negotiating rights to posted Japanese players. Additionally, the posting system allows NPB to protect the integrity of its league and ensures that its team will receive adequate compensation for departing players.<sup>119</sup>

The posting system is not without flaws, and critics are quick to point out its shortcomings.<sup>120</sup> First and foremost, the posting system has shown that it may not achieve one of its main goals; small market teams are often left without a real opportunity to bid for top Japanese talent.<sup>121</sup> For example, in 2006 the Boston Red Sox paid an astounding \$51.1 million USD—\$11 million more than the closest bidder—to the Seibu Lions for the right to negotiate with pitcher Daisuke Matsuzaka.<sup>122</sup> The Red Sox ultimately agreed to terms with Matsuzaka on a six-year, \$52 million contract, bringing the grand total to a whopping \$103.1 million for Matsuzaka's services.<sup>123</sup> In 2006, being the team with the second-highest payroll in MLB,<sup>124</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *See* Posting System, *supra* note 95.

<sup>119</sup> *See* Dan Sloan, *Japan Player Posting System Needs Review, Say Yankees*, REUTERS, Feb. 1, 2007, <http://www.reuters.com/article/idUSSP15866320070201> (stating that when the Boston Red Sox paid the Seibu Lions \$51.1 million USD to negotiate with Daisuke Matsuzaka, the amount was reportedly equal to three times the Lions' 2006 payroll).

<sup>120</sup> *See* Kurkjian, *supra* note 107.

<sup>121</sup> *See* Anthony Castrovine, *Notes: Early Posting Results Unhelpful*, MLB.COM, Nov. 17, 2006, [http://mlb.com/news/article.jsp?ymd=20061115&content\\_id=1741274&vkey=news\\_mlb&fext=.jsp&c\\_id=](http://mlb.com/news/article.jsp?ymd=20061115&content_id=1741274&vkey=news_mlb&fext=.jsp&c_id=) (stating that the Cleveland Indians—a small-market team—lost out on the negotiating rights to two players they felt they bid for aggressively).

<sup>122</sup> *See* Kurkjian, *supra* note 107.

<sup>123</sup> This total does not include incentives, which, if realized, would make Matsuzaka's contract worth as high as \$110 million. *Id.*



the Red Sox could afford to aggressively pursue a player such as Matsuzaka. Other teams, however, did not enjoy the same luxury. At \$51.1 million, the Red Sox's bid money equaled more than half the total payroll for twenty-five of the thirty MLB teams.<sup>125</sup> Further aggravating this problem is the fact that bid money is not counted as part of a team's yearly payroll.<sup>126</sup> Big-market teams, therefore, have no incentive to exercise cautious spending. Teams with the resources to do so can place outrageous bids on top talent, knowing that the money will go untaxed.

Some teams with average payrolls may find ways to restructure their finances in order to liquidate the funds needed to place winning bids. However, the Red Sox set an unfortunate precedent when they bid for the negotiating rights to Daisuke Matsuzaka. Before the Matsuzaka bid, winning bids under the posting system averaged between \$300,000 and \$1 million USD per player.<sup>127</sup> Moving forward, however, high-caliber players and their Japanese teams may come to expect comparable compensation.<sup>128</sup> Teams with the fewest financial resources stand little chance of successfully bidding on top talent. Moreover, exorbitant bidding acts as a deterrent in future posting situations. Small-market teams may refrain entirely from bidding, instead expecting that their richer counterparts will out-bid them if a prospect is worth pursuing.<sup>129</sup>

Another issue within the posting system issue is the concept of "foreclosure," an anti-competitive tactic in which a team with no intention of signing a player places an outrageous bid for the sole purpose of freezing out the competition.<sup>130</sup> Though the posting system comes with an implicit "good faith" clause, MLB has never established the penalty for bad faith.

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<sup>124</sup> USA Today, 2006 MLB Team Payrolls, <http://content.usatoday.com/sports/baseball/salaries/totalpayroll.aspx?year=2006> (last visited Mar. 22, 2010).

<sup>125</sup> The Florida Marlins had the lowest payroll in 2006 at \$14,998,500—less than one third of the Red Sox bid price. *See id.*

<sup>126</sup> MLB does not have a salary cap, but it does impose a luxury tax upon its teams; teams whose payrolls exceed a certain amount are taxed on the excess. *See* Christine Snyder, Note, *Perfect Pitch: How U.S. Sports Financing and Recruiting Models Can Restore Harmony Between FIFA and the EU*, 42 CASE W. RES. J. INT'L L. 499, 524 (2009).

<sup>127</sup> Duane W. Rockerbie, *Peculiarities of the Major League Baseball Posting System 2* (July 2007) (Univ. of Lethbridge, Working Paper), available at <http://web.uvic.ca/econ/research/seminars/rockerbie.pdf>.

<sup>128</sup> In 2006, for example, the New York Yankees paid \$26 million for the negotiating rights to Kei Igawa of the Hanshin Tigers. Kurkjian, *supra* note 107.

<sup>129</sup> *See* Castrovine, *supra* note 121 (stating that conservative bidding comes with risks, that "small-market clubs can get left out" when bidding reaches the Matsuzaka level).

<sup>130</sup> Rockerbie, *supra* note 127, at 8. Rumors initially circulated around the Matsuzaka trade suggesting that the Red Sox intended to bid excessively to keep Matuzaka out of the hands of their division rivals, the New York Yankees. *See* Jimmy Graham, *The Matsuzaka Master Plan?*, THESPORTSTRUTH.COM, Dec. 12, 2006, <http://www.thesportstruth.com/categories/daisuke-matsuzaka/>.

Additionally, “bad faith” could come in varying degrees. Certainly, MLB would penalize a team for complete failure to negotiate with a player. However, what if a team negotiates but offers significantly less than a player’s projected worth—does this qualify as “bad faith?” During the Daisuke Matsuzaka bidding war, one critic of the posting system suggested that the Baltimore Orioles could use such a method to keep Matsuzaka out of the hands of its American League East Division rivals.<sup>131</sup> He argued that the Orioles could make an outrageous bid and then make Matsuzaka a “take it or leave it” offer—a substantial amount of money<sup>132</sup> but still less than his widely-sSpeculated market value.<sup>133</sup> Matsuzaka, without the benefit of generating competing bids from other teams, would have to choose between the Orioles’ low offer and continuing his tenure in Japan.<sup>134</sup> If Matsuzaka accepted the deal, the Orioles would get a top pitcher at a bargain price.<sup>135</sup> If Matsuzaka rejected the deal, the Orioles would, at the very least, keep him from signing with a rival team.<sup>136</sup> Without a clear definition or penalties for bad faith, scenarios such as this one would go unchecked. Further, allowing teams to make anticompetitive bids for players they have no intention of signing would significantly compromise the integrity of the game and could jeopardize MLB’s relationship with NPB.

Foreclosure could have serious repercussions not only in MLB, but also in NPB and for the individual players. For example, anticompetitive bids would deprive NPB of significant amounts of bid money. NPB does not enjoy the wealth of MLB and, despite their desire to keep their most talented players in Japan,<sup>137</sup> the teams often rely on the winning bid money to support their franchises.<sup>138</sup> Though the league does not derive its revenue solely from the posting system, NPB should not be deprived of an opportunity to move a player in order to generate additional funding. From the individual player’s perspective, foreclosure significantly restricts free move-

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<sup>131</sup> See Buster Olney, *In Pursuit of Matsuzaka*, ESPN.COM, Nov. 1, 2006, [http://insider.espn.go.com/espn/blog/index?entryID=2645543&name=olney\\_buster&action=login&appRedirect=http%3a%2f%2finsider.espn.go.com%2fespn%2fblog%2findex%3fentry=ID%3d2645543%26name%2dolney\\_buster](http://insider.espn.go.com/espn/blog/index?entryID=2645543&name=olney_buster&action=login&appRedirect=http%3a%2f%2finsider.espn.go.com%2fespn%2fblog%2findex%3fentry=ID%3d2645543%26name%2dolney_buster).

<sup>132</sup> Ironically, Olney suggested the Orioles make an “outrageous” offer of \$50 million. See *id.*

<sup>133</sup> Olney suggested a ten year contract at \$5 million per year. *Id.*

<sup>134</sup> See *id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See White, *supra* note 110 (“The majority (of Japanese officials) believe we lose too many of the best players.”) (alteration in original) (quoting Nobusha Ito, Executive Director of baseball operations for the NPB).

<sup>138</sup> 2006 news reports indicated that the Seibu Lions were in the midst of financial difficulty and would likely accept the Daisuke Matsuzaka bid amount. See Kurkjian, *supra* note 107.

ment. In the Orioles scenario, for example, Daisuke Matsuzaka would have been left to choose between an inadequate amount of money and another year with his Japanese team—both unsuitable alternatives. Foreclosure cuts off a player's options and hurts both the player's career and rival MLB teams with the resources and genuine desire to negotiate.

While no method is foolproof, the posting system's advantages outweigh its flaws. Though the Japanese, much like their Russian counterparts, have mixed feelings about the departure of their "national treasures"<sup>139</sup> for American leagues, NPB officials agree that the generous compensation for departed players certainly softens the blow.<sup>140</sup> Additionally, the bidding itself serves a dual purpose: it gives every team an equal opportunity to vie for the services of talented players and it forces teams to bid aggressively for players they want to pursue. Further, the bidding process offers the potential for greater benefit to Japanese teams, particularly when contrasted with the NHL's flat-fee system.<sup>141</sup> Instead of paying a fixed price for all players brought over from Japan, MLB teams are pitted against one another in the form of a silent auction.<sup>142</sup> It naturally follows that the better the player, the higher the bids, thus the more likely that the former team will be compensated for the true value of a departing player. Additionally, since the posting system's 1998 inception, MLB and NPB have had limited incidents of player poaching and circumvention of contract law.

#### IV. IMPLEMENTING A NEW INTERNATIONAL PLAYER TRANSFER SYSTEM

Necessity mandates that an international sport has a working and effective system in place to govern international player transfers. Within the world of ice hockey, the historically prevalent tension between Russia and the NHL, coupled with the KHL's potential for success, makes the need for international regulation all the more pressing. Such change can be accomplished in a series of steps that will significantly alter the way international hockey operates.

##### A. *Relinquishing International Control to the IIHF*

First and foremost, hockey's supreme governing body, the IIHF, needs to assert its power. The IIHF Statutes and Bylaws explicitly state that

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<sup>139</sup> White, *supra* note 110.

<sup>140</sup> See Sloan, *supra* note 119.

<sup>141</sup> Under the most recent NHL/IIHF PTA, the NHL paid IIHF member bodies a flat fee of \$200,000 per player. See discussion *supra* Part II.C.

<sup>142</sup> In 2000, the Seattle Mariners bid \$13.1 million for the negotiating rights to Ichiro Suzuki and later stated that while they were concerned with overpaying, they knew they needed to post at least \$10 million to have a chance of winning the bidding war. See Kurkjian, *supra* note 107.

all IIHF member bodies are required to include, in their associations' constitution or equivalent document, a statute declaring that they and their teams will submit to and accept the binding decisions of the IIHF on all international matters.<sup>143</sup> However, this article of the Statutes and Bylaws is preceded by a provision stating that the IIHF will recognize its member bodies as the supreme authorities on hockey in their individual countries.<sup>144</sup> Article 10 of the Statutes and Bylaws completely contradicts Article 11 and cuts the IIHF's power off at the knees. The IIHF should begin its internal modification by amending Article 10 so that IIHF member bodies retain supreme authority in their own countries, *so long as their actions and governing documents comport with the standards set forth by the IIHF*. Adding this single phrase would restrict little of IIHF member bodies' individual power. In practice, the amendment would do little more than establish the IIHF as the ultimate authority on all issues relating to ice hockey. In reality, the IIHF already possesses this authority. Throughout the Statutes and Bylaws, the IIHF makes reference to its complete jurisdiction and its binding authority. However, the IIHF continually states that its jurisdiction does not cover non-member bodies such as the NHL.<sup>145</sup> Even when IIHF member countries become involved in legally questionable transactions with the NHL, the IIHF cannot interfere.<sup>146</sup> For instance, although Russia is an IIHF member body, and the KHL's signing of Alexander Radulov was a blatant example of player poaching, the IIHF closed the investigation after announcing that it had no standing to take Radulov to the International Court of Arbitration for Sport.<sup>147</sup>

If the NHL became an IIHF member-body, a vast majority of international contractual issues would disappear. Pursuant to Articles 4 and 11 of the IIHF Statutes and Bylaws, IIHF member associations are bound by all regulations created by the IIHF.<sup>148</sup> To that end, the IIHF has created International Transfer Regulations, a series of guidelines governing international

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<sup>143</sup> IIHF STATUTES & BYLAWS, *supra* note 13, art. 11.

<sup>144</sup> *Id.* art. 10.

<sup>145</sup> Szemberg E-mail, *supra* note 27 ("We are asked to broker as NHL clubs do not allow their clubs to do direct business with IIHF affiliated clubs.").

<sup>146</sup> *See id.*

<sup>147</sup> *See* Graham Dunbar, *IIHF: Radulov Was Wrong to Sign with Russian Club*, USA TODAY, Oct. 1, 2008, [http://www.usatoday.com/sports/hockey/2008-10-01-3074851221\\_x.htm](http://www.usatoday.com/sports/hockey/2008-10-01-3074851221_x.htm).

<sup>148</sup> Articles 4 and 11 state, respectively, that the IIHF will establish Statutes, Bylaws, Regulations and official playing rules to govern ice hockey and that, as a condition of membership in the IIHF, member countries must agree to abide by such documents. IIHF STATUTES & BYLAWS, *supra* note 13, arts. 4, 11.

player transfers between IIHF member bodies.<sup>149</sup> Under Article 4.1 of the IIHF's International Transfer Regulations:

During the period of an existing contract a player shall not be approached by an official of any other club, or by a person in connection with any other club, in membership with another member national association or league with the goal of inducing the player to breach his current contract and to join a new club.<sup>150</sup>

Two drastic changes would occur if the NHL became a part of the IIHF: first, all international player movement involving the NHL would be subject to the International Transfer Regulations.<sup>151</sup> Second, the NHL would have the resources and international standing necessary to resolve issues of player poaching as they arose.<sup>152</sup>

Although joining the IIHF would alleviate the vast majority of the NHL's international contractual issues, it is unlikely that the NHL will surrender its autonomy in such an extreme manner. However, even if the NHL refused to join the IIHF, a simple addition to the NHL/NHLPA CBA and the NHL's Standard Player Contract could remove some of the incentives for player poaching and contract breach. The NHL need only put a clause in both the CBA and SPC requiring all players to submit to the final, binding authority of the IIHF on international matters. Then, should an international contract dispute arise, the IIHF would have the authority to resolve the matter, regardless of the existence of an international player transfer system.

The NHL might try to oppose relinquishing international control to the IIHF, but in reality the NHL does not have any international standing. In fact, the proposed amendment actually increases the NHL's power. By adding to the CBA and SPCs, the NHL would create an avenue through which it could resolve international disputes. The benefit to the NHL of amending the CBA and SPCs is highlighted when contrasted with maintaining the status quo. At present, in the absence of a PTA, the NHL has no way of quickly or successfully resolving incidents such as the Alexander Radulov case. For the NHL, the projected success of the KHL means an increased risk that contracted and non-contracted players will depart for Russia.

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<sup>149</sup> INTERNATIONAL TRANSFER REGULATIONS, *supra* note 17, pmb1.

<sup>150</sup> *Id.* art 4.1.

<sup>151</sup> The success, or lack thereof, of the International Transfer Regulations is beyond the scope of this Note, as the NHL is not likely to become a member of IIHF. Because the NHL intends to remain a sovereign entity, it is more appropriate to consider an alternative international player transfer system. *See* discussion *infra* Part IV.B.

<sup>152</sup> However, subjecting the NHL to the International Transfer Regulations would likely eliminate most incidents of player poaching since such incidents occur most frequently between the NHL and IIHF member bodies.

Amending the IIHF's Statutes and Bylaws as well as the NHL's CBA and SPC would go a long way in alleviating the problem of player poaching and in empowering the IIHF to stop it. However, the proposed amendments are only the first step in correcting the problem. Since the NHL is not an IIHF member body, both parties need to establish a working international player transfer system. In doing so, the IIHF and the NHL should consider implementing a posting system, which is a method of player transfer with a proven success rate in MLB.

*B. A Posting Model*

Numerous incidents of player poaching and countless months of contentious negotiations make clear that the NHL and IIHF should move away from the traditional player transfer agreement. After ensuring that the IIHF will assert the power it proscribes to itself in its Statutes and Bylaws, and that the NHL will submit to the IIHF's final authority, the parties should institute an entirely new international player transfer system. MLB has had success in transferring players from Japan since it adopted the posting system in 1998. Given the abundant benefits of that system,<sup>153</sup> the IIHF and the NHL should strongly consider instituting a similar method in ice hockey.<sup>154</sup> In hockey, the posting system would apply to drafted, international players not yet eligible for free agency and to veteran players under contract with foreign teams. Players would indicate their desire to be posted to their current team, and both posting and bidding would occur during a fixed time period. The IIHF should consider whether or not a player's current team should have the right to refuse a player's request.<sup>155</sup> Every interested NHL team would have the opportunity to submit a blind bid, with the winning bid presented to the player's current team. The NHL's winning bidder and the player would then have the opportunity to negotiate a contract that, if successful, would result in payment of the bid money and termination of the player's contract with the international team. If unsuccessful, no money would change hands and the player would be ineligible for posting until the following year. Such a system could have an extremely

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<sup>153</sup> See discussion *supra* Part III.

<sup>154</sup> The proposed system would only apply to international player transfers between the NHL and IIHF member bodies. Player transfers between IIHF member associations would continue to be governed by the IIHF International Transfer Regulations. However, if the posting system yielded positive results, the IIHF might consider implementing it on a larger scale. See discussion *infra* Part IV.C.

<sup>155</sup> In MLB, a player's current team has the right to refuse to post that player's availability. In hockey, however, tensions between the NHL and foreign hockey leagues, particularly the KHL, could lead to unwarranted refusal of a player's request. Even resistant teams, however, might be swayed by a substantial bid price. Forcing teams to post their players' availability could lead to more just results. See Posting System, *supra* note 95.

positive effect on both hockey's international player transfers as well as the relationships between the NHL and IIHF member associations.

A large part of Russia's discontent with the PTA stems from the fact that it does not feel it is adequately compensated for the talented players it loses to the NHL. Other European leagues recently indicated their support for Russia's position when they opted to reopen the 2007 PTA mere months after it was signed. Foreign hockey leagues feel that \$200,000 USD per player is simply inadequate.<sup>156</sup> In some cases, the amount drastically undervalues the talent of the player. NHL club owners, however, believe that they often pay hefty prices for players whose talent remains undetermined. Implementing a method such as the posting system would undoubtedly help to derive the true value of a player. An arrangement of this kind would be agreeable to all sides; the NHL would alleviate the financial burden of overpaying for raw, undeveloped talent, and IIHF teams would receive appropriate compensation for their most prized prospects.

Additionally, the NHL's commissioner has indicated that he would like his teams to be more selective in the athletes they choose to bring in from overseas.<sup>157</sup> He is concerned with the amount of money the NHL is paying in fines to the IIHF for players not on NHL rosters for a minimum of thirty games.<sup>158</sup> Foreign leagues, on the other hand, remain frustrated by the fact that the NHL scoops up homegrown talent with little intention of actually using it. The negotiation portion of the posting system, however, would substantially alleviate both of these concerns. First, "fines" for players that do not see enough playing time would become unnecessary and a non-issue. After a player's current team accepts the bid for that player, the player and the prospective team would have a fixed period of time—thirty days in MLB—to work out a contract. By signing a contract, the player's services become the property of an NHL team for a fixed number of years, and the NHL would avoid fines owed to the player's former team. A player would likely refuse to sign a one-year deal, but even if he did, at its expiration, he would be free of contractual obligations and could become an international free agent. Leagues concerned with retaining their homegrown talent could also find relief in the posting system, since the NHL would now have an incentive not to overpay for underdeveloped talent.<sup>159</sup> Alternatively, the IIHF could mandate that players not yet eligible for free agency, but

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<sup>156</sup> See discussion *supra* Part II.

<sup>157</sup> See *NHL, NHLPA and IIHF Talk Player Transfer Deal in Wednesday Meeting*, *supra* note 66.

<sup>158</sup> *Id.*

<sup>159</sup> See discussion *supra* Part IV.B.

desirous of international transfer, must obtain approval from their current teams before their availability can be posted.<sup>160</sup>

Arguably more important than the posting system is the IIHF's role in international player transfers and the NHL's submission to IIHF authority. If the IIHF exercises the power it has reserved for itself, if the NHL submits to the IIHF on international matters, and if contracts are respected and breaches penalized, the problem of player poaching should diminish drastically.

### C. Potential Problems

Although MLB has enjoyed modest success since the inception of its posting system, the success has been just that: modest. In the history of the league, only thirty Japanese players have ever donned an MLB uniform, and only twelve Japanese players have come to America via the posting system since its inaugural transfer in 1998.<sup>161</sup> While the posting system has proven effective for MLB, it has only been applied on a very small scale, and the NHL is home to significantly more international players. In the 2002–2003 season, the NHL housed 299 foreign players—nearly double the amount that played in the league during 1994–1995 season (156) and more than five times the amount that played during the 1986–1987 season (54).<sup>162</sup> The dramatic increase in the NHL's foreign athletes over the past two decades indicates that it will be critical to consider the effect of implementing a posting system on such a large scale.

The IIHF could consider altering the posting system by adding a provision that would make the system more conducive to operation on a large scale. Under a different international player transfer system,<sup>163</sup> teams are free to negotiate internationally amongst themselves. Players can request an international transfer, and individual teams can also transfer players in-

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<sup>160</sup> *But see* IIHF STATUTES & BYLAWS, *supra* note 13, art. 10.

The member national associations of the IIHF shall recognize each other as being solely empowered to control ice and/or in-line hockey in their respective countries; therefore, they undertake that neither they nor any of their members will in any way have relations with nonassociated bodies or one of their members, except as may be permitted by Statutes and Bylaws or with special permission of the IIHF President for limited time periods.

*Id.*

<sup>161</sup> *See* Rockerbie, *supra* note 127, at 2 (citing Baseball-Reference.com, Posting System, [http://www.baseball-reference.com/bullpen/Posting\\_System](http://www.baseball-reference.com/bullpen/Posting_System) (last visited Mar. 22, 2010)).

<sup>162</sup> *See* ANDREW ZIMBALIST, *THE BOTTOM LINE: OBSERVATIONS AND ARGUMENTS ON THE SPORTS BUSINESS* 52 (2006).

<sup>163</sup> *See* Rockerbie, *supra* note 127, at 3 (describing the English Premier League's international player transfer system, in which clubs can negotiate internationally and players can be transferred internationally without their consent).



ternationally without their consent. Allowing individual NHL and international teams to negotiate would likely lessen the strain on the posting system and make it possible for it to be conducted on a smaller scale. However, such a provision might cause unrest amongst the players, as it is likely that they will not want to be transferred to another country without their consent. To that end, the IIHF could implement a regulation requiring all leagues to place an international transfer clause in every player contract. At signing, players would be given the option of either retaining the possibility of international transfer for the length of their contract or forgoing it entirely. Should they choose to accept, players would retain the option of requesting an international transfer at some point during the life of their contracts, but their teams could also subject them to a nonconsensual international transfer. Should they decline, they could not be internationally transferred—willingly or otherwise—until the expiration of their contracts. They would, however, remain eligible for national trading. Such a provision would provide players with a voice while also reducing the strain on the posting system.

A second problem with MLB's player transfer method is that it is a one-way system. With the development of the KHL and the strong likelihood of success, it is already apparent that the IIHF needs a better system to govern player transfers not only to and from the NHL, but also to and from hockey leagues around the globe. A universal posting system shared by all hockey leagues would be extremely intricate and could become quite messy. However, if the IIHF were able to find a successful method—such as the posting system—and test it first on a smaller scale, it might be able to make appropriate adjustments and apply the system universally.

Another potential issue with the posting system is the likelihood that small market teams will get shut out of the bidding process. One of the benefits of paying a flat fee for all international players is that it is arguably fair to all teams interested in those players. Under a bidding system, teams with the deepest pockets will simply go after the players they want very aggressively and, as has happened in MLB, small market teams will not be able to compete. The same likelihood exists, however, under the current flat-fee system. If big market teams can afford to bid exorbitantly for players and still have money left over to sign those players to contracts, then it is equally as likely that those same teams can afford to spend \$200,000 on player transfer fees. In fact, it is likely that a posting system will act as an equalizer. Hockey does not enjoy the wealth of MLB, and since the price of player contracts might soon be on the rise,<sup>164</sup> NHL teams are likely to be more selective in the players they bring overseas. Alternatively, the NHL could take MLB's posting system one step further by factoring the bid price

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<sup>164</sup> See discussion *supra* Part II.B.

into the winning team's salary cap. Individual teams, however, will likely take issue with this policy and will not want to be taxed on money they are not spending on player salaries. An alternative and more mutually agreeable solution might be for the NHL to tax only a percentage of the bid price.

*D. Effects on Players*

It is important to consider the effect a new transfer system will have not only on the managers, owners, and league officials, but also on the players themselves. One of the drawbacks to MLB's posting system is the risk of foreclosure—teams submitting outrageous bids for the sole purpose of winning the bidding war and keeping their rivals from negotiating with talented players.<sup>165</sup> Foreclosure threatens not only competition, but also the free movement of individual players. It has yet to officially become an issue in MLB, largely because of the limited number of worthwhile Japanese prospects. However, given the sheer volume of international players that come to the NHL, teams will undoubtedly have a wealth of talent to choose from. Such endless options could potentially entice teams to bid on and negotiate with the players they want while simultaneously bidding excessively on other players in an effort to keep rival teams from obtaining foreign talent. Additionally, should the IIHF choose to implement a mandatory international transfer clause into player contracts, player movement could be restricted even further.<sup>166</sup>

Players, however, will likely be the biggest beneficiaries of the posting system. The nature of the bidding component coupled with the KHL's potential for success<sup>167</sup> will likely drive up the value of player contracts in the coming years. Russia has long been one of the strongest hockey nations on the globe, and, given its projected ability to bankroll a new hockey league,<sup>168</sup> it has the ability to provide homegrown talent with numerous reasons to stay in Russia. To that end, if the NHL wants to remain the world's premier league, it must continue to house the world's premier talent. Under the posting system, it will only be able to do this if the price is right. Top players will also expect competitive salaries and, in that sense, they will follow the money.

## V. CONCLUSION

The tumultuous history of ice hockey's PTA indicates that the system is no longer a workable solution to the problem of player poaching. The

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<sup>165</sup> See discussion *supra* Part III.

<sup>166</sup> See discussion *supra* Part IV.B.

<sup>167</sup> See discussion *supra* Part II.

<sup>168</sup> See Belashchenko, *supra* note 1.

two-step solution of granting the IIHF regulatory power over the NHL in international matters and implementing a posting system such as that in MLB will likely resolve a significant number of the contractual issues plaguing international ice hockey.

No solution will be without flaws. Worse, however, would be the lack of any legal regulation of international player transfers. The nonexistence of a binding system breeds disrespect for the law and contracts of all hockey leagues and their respective countries and creates a chaos from which no one benefits, and only the game suffers.