Symposium on Dispute Resolution in Sports

Dispute Resolution in the NBA: The Allocation of Decision Making Among the Commissioner, Impartial Arbitrator, System Arbitrator, and the Courts

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I. INTRODUCTION

Dispute resolution in the NBA is a very fertile topic because the NBA is no stranger to controversy. The NBA has a long and rich tradition of endless litigation. Of course, all sports leagues find themselves in great need of lawyers on an almost continuous basis. This is due in part to the amount of money in professional sports: players’ salaries are extremely high; television rights are extremely important and lucrative to the sports leagues; and the Internet has already dramatically changed how leagues think about their intellectual property rights, such as the brand NBA, the brand NFL, the brand NHL, and all of the trademark rights that flow from them.

With the Internet and the ability to sell merchandise and move real time scores throughout the world, things have changed dramatically, along with the possibility of interactive television, digital television, and other technical advances. Sports leagues are concerned with this rapid expansion of technology and are all trying to protect their intellectual property in this new environment. Add to these possibilities the fact that sports leagues now think of themselves as global businesses and are not limited to either live audiences or television audiences, or even audiences in the United States. The potential audience is now five billion people in 250 countries. As a result, the entrance of sports leagues into the global business arena has a lot to do with why there is such a great need for lawyers in all the sports leagues and why the NBA has so many disputes. This speech will focus on dispute resolution in the NBA.
II. FORUMS OF NBA DISPUTES

A. Decisions of the NBA Commissioner

There are any number of different places where the NBA gets to litigate its disputes. Those forums come from the NBA Constitution, from the NBA’s collective bargaining agreement with the players, the NBA’s collective bargaining agreement with the referees, and from international arbitration agreements that the NBA has with FIBA (the International Basketball Federation). The NBA Constitution is the governing document that sets forth how the league is going to be governed, creates the Board of Governors, and establishes the powers of the Commissioner. One of the powers of the Commissioner is to decide disputes – any disputes – among NBA teams. That, surprisingly, has not been a very fertile ground of disputes. There are certainly a lot of possibilities for disputes among teams in the NBA, but there have not been very many, so the Commissioner has not had many occasions to resolve disputes between teams, but it happens.

Where the Commissioner is involved most frequently is in the area of “tampering.” Tampering is where one team approaches a player (or perhaps a coach) of another team while that player or coach is still under contract and talks to that player or coach about signing a contract. Under NBA and all sports leagues rules, it is forbidden for one team to have contact with the employees of another team while those employees are still under contract. A recent example concerns Pat Riley when he had about two years left on his contract with the New York Knicks and was approached by the Miami Heat. Miami denied approaching him but somehow contact was made and Riley decided to resign and forego the last year or so of his contract with the Knicks; a decision he claims had nothing to do with the contact with the Heat. He then signed with Miami which led to a claim of tampering by the Knicks against the Heat.

The Riley dispute came to the Commissioner of the NBA. The Commissioner, acting like an arbitrator, convened a hearing with witnesses. This hearing was much like a full-blown litigated dispute between Miami and the Knicks before the Commissioner of the NBA. Although the matter was ultimately settled, the Pat Riley dispute is an example of the kind of case that would go to the Commissioner.

As Pat Riley illustrates, coaches are now stars themselves – that is a fairly new phenomenon. Coaches are commanding contracts that would previously have been unthinkable. Coaches say they need the respect of their players, they have to tell players what to do, and when players are
making $100 million then a coach should really make at least $3 or $4 million. How else will anybody listen to them? Coaches' salaries have gone up and the notion that coaches are very important has become more prevalent. Whether in terms of attracting free agents or because people believe that coaches actually have an impact on winning games (and some clearly do), the cache that certain coaches bring has led to more competition among the teams to hold onto and attract coaches and to pay them in unusual ways. The pay is not limited to just $4 or $5 million a year (which is now not at all uncommon); in the case of Riley, he received a piece of equity in the team for agreeing to become the coach. Perhaps that is going to be an area where the Commissioner is going to have to be more active. But, again, that is hardly the day-to-day fare of disputes in the NBA.

Much more common, day-to-day litigation occurs under the NBA's collective bargaining agreement with the Players' Association. This collective bargaining agreement is a very lengthy document, about 300 pages, and it governs every aspect of the NBA's relationship with the players. It includes the very elaborate salary cap system in the NBA, the rules about free agency, how the salary cap works, how the salary cap is calculated, and a myriad of rules and regulations that are the product of very difficult negotiations and adversary draftsmanship. A document of that length and that complexity is simply so fertile with disputes that it is a cornucopia for lawyers.

The collective bargaining agreement with the Players' Association has three levels of decision-makers: level one is the Commissioner. The Commissioner is given authority under the collective bargaining agreement to decide matters that relate to on-court conduct. For example, when Dennis Rodman kicked a photographer on the court or when Mahmoud Abdul-Rauf refused to stand for the playing of the National Anthem, the Commissioner determined those matters because they involved on-court behavior. The Commissioner has the authority to impose whatever discipline he considers appropriate for those types of transgressions and the only appeal permissible under the collective bargaining agreement is back to the Commissioner himself. It is rare for the Commissioner to overrule the Commissioner. He has at times at least given it a second thought and resolutions have been worked out and the Commissioner might say to a player, "Well, I know I have fined you $100,000 but if you behave yourself I will give it back to you at the end of the season." That happens quite a bit.
Some very important matters have fallen within the Commissioner's jurisdiction under the collective bargaining agreement. Perhaps the most important in recent years was when several members of the New York Knicks left the bench during a very important playoff game against Miami in 1997. The NBA has a rule that if an altercation breaks out on the court, no one is permitted to leave the area of the bench, and if any player leaves the area of the bench, he must be suspended for the next game. This is a rigid rule. A fight broke out between Charlie Ward of New York and P.J. Brown of Miami. Miami, either better coached, or understanding the rules better, or perhaps strapped in by seatbelts, stayed on the bench. The Knicks' Patrick Ewing and Larry Johnson came right off the bench - not that they joined the fight - but they certainly were in the vicinity of the fight and had left the area of the bench. The Commissioner was faced with the issue of whether or not he should apply the NBA rule. The rule was clear - you leave the bench and you are suspended for the next game. However, it had never happened in a playoff game before, and this was at a point in the playoffs where it mattered. If the Commissioner suspended Patrick Ewing and some of the other starting players for the Knicks, it was going to have an impact on a very important playoff series. The Commissioner concluded that he had no choice, the rule was clear, the Knicks did what they did, and he suspended the Knick players. This action very likely cost the Knicks that playoff round in 1997.

As mentioned earlier, the only appeal of the Commissioner's decision is to the Commissioner himself. It was pretty clear in this case that there was no point in coming back to the Commissioner. A lot of time and deliberation had been spent on making that decision, so coming back to the Commissioner would simply be a waste of time. But the Players' Association thought they had another way of dealing with this ruling, which they thought was unfair. They went to federal court and said that the Commissioner had exceeded his authority and was violating the collective bargaining agreement. They concocted some federal claim out of that and asked for an injunction on the very day the next game was to be played. A lengthy proceeding was held in front of a federal judge. The judge denied the injunction on the ground that the collective bargaining agreement is the product of good faith negotiation and is clear in that it gives the Commissioner the authority to impose any penalty that he chooses for on-court behavior, and there is no appeal from that except to the Commissioner. As a result, the NBA now has a very clear judicial confirmation of the point that if the issue arises because of on-court conduct, the Commissioner is the sole authority for that kind of discipline.
B. The Impartial Arbitrator

The next level, level two of decision-making under our collective bargaining agreement with the players, is the impartial arbitrator. A common feature of collective bargaining agreements is that all disputes arising under the collective agreement or the uniform player contracts that were created as part of the collective agreement go to an impartial arbitrator. But every dispute under the NBA's collective bargaining agreement does not go to the impartial arbitrator. The arbitrator usually gets the more routine cases, for example, the cases of alleged non-payment of obligations under player contracts, or bonuses, clauses requiring players to maintain a certain weight, et cetera.

Nevertheless, there can be fairly important issues for the impartial arbitrator such as whether a player has been properly terminated under a contract. Recently, Rony Seikaly, a former player for the New Jersey Nets and others brought a proceeding before the impartial arbitrator claiming that his contract had been improperly terminated by the Nets because he was injured at the time they terminated him. The Nets contention was that they had a right under the contract to terminate him for lack of skill. Rony Seikaly argued that it was not his skill, it was his injury that made it appear that he had a lack of skill, and the Nets cannot terminate him because of injury. That dispute was also resolved, but after about eight to ten days of testimony before the impartial arbitrator.

The impartial arbitrator might hear cases even more important than Seikaly's. For example, when Latrell Sprewell (before he became the toast of New York) had choked his coach at Golden State, that was not on-the-court behavior. That happened in a practice, so it was in a gym but it was not in the midst of a NBA game, and as a result it did not go to the Commissioner. At least that was the advice the Commissioner got from his lawyers, advice he was not entirely happy about. The Commissioner could, of course, suspend a player for the kind of behavior Sprewell engaged in and he did — he suspended Sprewell for a year and in addition to that, the team, the Golden State Warriors, terminated his contract. But because the incident that gave rise to this suspension and termination of the contract had not occurred in an NBA game, the matter could and did go to the impartial arbitrator. The arbitrator was John Feerick, Dean of the Fordham Law School. This was a hotly litigated and intensely watched case. There were about nine days of testimony and newspapers around the country and around the world followed this case. Overpaid players choking their coaches apparently hit some chord with the public who asked, "My God, what have we
come to?" In any event, that matter was decided by Dean Feerick, in an exceptionally important decision. Normally, there is little basis to appeal from an arbitrator's ruling and there probably was not any basis to appeal from this one.

Dean Feerick reduced the Commissioner's suspension and reinstated Sprewell's contract, but Sprewell was still not happy with that result and hired a whole battery of new lawyers who brought an action in federal court - initially claiming an anti-trust violation in the suspension that had been imposed. When someone pointed out the deficiencies in that allegation, it became a race claim that the suspension that Sprewell had received was larger than would have been imposed on a white player. The complaint was thrown out twice by the federal district court in San Francisco, and sanctions were ordered against Sprewell's new lawyers. The matter was appealed to the Ninth Circuit.¹

The most significant example of the importance of cases that can come before the impartial arbitrator was in 1998. At that time the NBA's old collective bargaining agreement expired and the NBA had the right to terminate it early and did. Beginning in July 1998, the NBA locked out the players in support of the NBA's bargaining demands for a new contract. At the time the NBA locked out the players (July 1998), several hundred players still had individual contracts in effect. The terms of those individual contracts extended beyond 1998, so there was a collective bargaining agreement that was over but there were individual contracts signed under that collective bargaining agreement that were not over. Normally, in a lockout there is no issue—the employer does not pay. That is why you have a lockout—you do not let the employees come to work, you impose economic hardship on them as well as yourself. In the caldron of that economic hardship you hope that you will make a deal.

The players claimed (and this matter went before the impartial arbitrator because it was a contract dispute) that they were entitled to be paid under their contracts. If the NBA was voluntarily locking its doors, that was up to the NBA; but, the players had existing contracts calling for salaries in total of about $850 million for one year. Dean Feerick got the question of whether the NBA (there was no issue of the propriety of locking out, he was not deciding that), despite the lockout, would have to pay these individual contracts.

¹ The district court's decision was eventually affirmed. See Sprewell v. Golden State Warriors, 231 F.3d 520 (9th Cir. 2000).
That issue was monumental. It asked the question whether the NBA was going to have any labor law remedies. So there were a lot of chips on the table. Dean Feerick held that the NBA did not have to pay the individual contracts and that they were all subsidiary to the collective agreement. Once the collective agreement was over, these contracts were at least suspended – if not terminated. Dean Feerick did not make a precise determination of the status of the contracts other than to say that the NBA was permitted to lockout and these individual contracts did not constitute any waiver by the NBA of its right to lockout and withhold payment from the players. So the lockout continued and the players were not paid. An agreement was reached several months later after a lot of damage to the game, to the players, and to the league. But some very important changes were made in the salary cap system. Again, that all came from the impartial arbitrator who normally only gets the routine cases. But there are some mornings that the impartial arbitrator wakes up and he is deciding the entire fate of the league. So, it is quite a varied docket that the impartial arbitrator has.

C. The System Arbitrator

Level three of dispute resolution under our collective bargaining agreement is what is called the system arbitrator. This is the arbitrator who is supposed to get the important cases. He is called the system arbitrator because the questions he gets are those that relate to the overall economic system that was put in place in the collective bargaining agreement, including anything about how the salary cap operates and is calculated. There have been some hotly contested issues about the way the salary cap is calculated. Calculation of the salary cap begins with a concept called “basketball related income.” Basketball related income is all the income that comes into the league and its teams. A percentage of basketball related income then forms the basis of the salary cap. But what is included and not included in basketball related income can have a huge impact on how high the cap is in any particular year. Disputes arise, for example, over naming rights, which were not dealt with specifically in the collective agreement. Were they in basketball related income or not? Hundreds of millions of dollars turned on that question. That is the kind of issue that the system arbitrator would get.

The system arbitrator also gets the issues of whether or not the salary cap is being circumvented and whether teams, players, and agents are cheating under the cap rules. As of November 3, 2000, the NBA was trying the Joe Smith case before the system arbitrator and the issue there
was (for the first time ever) that the NBA discovered a written agreement. This secret written agreement between player and team, Joe Smith and the Minnesota Timberwolves, was a complete and unbelievable violation of the salary cap. It provided for a series of five contracts that would be signed into the future. It made Joe Smith a "Larry Bird" player, which allows a player to sign for any amount up to the individual maximums with your own team. A player has to be with the team for three years to do that. Joe Smith was signing with Minnesota in 1999 as a free agent—he was not entitled to Bird rights, he would have to play for three years for Minnesota to achieve that status. But this secret deal provided for a series of three one-year contracts and then two other contracts going out to 2008 promising him $84 million. All of that violated so many salary cap rules I cannot list them. The NBA uncovered that agreement. It does not appear that there is much to litigate once you have that agreement in hand.

In the past, the NBA has alleged that there were undisclosed agreements between players and teams that violated the salary cap—that players were accepting one year contracts with teams for a lot less money than other teams were offering and no one could understand why that was happening. But it was understandable if you believe that the team offering the lesser amount of money, legal under the salary cap, for the one year contract had promised the player, "don't worry—when you become a 'Bird' player, we'll take care of you and this is what you are going to get. Whatever you gave up with the other teams, we'll make that up and more." How prevalent that is cannot be determined. The NBA believes that it has happened in a number of cases and is asked for by agents routinely. How many teams succumb cannot be known, but some do. Prior to Joe Smith, the NBA had never seen a written contract of this scope and this brazenness.

But even when the NBA had the smoking gun in hand, there were still issues to litigate before the system arbitrator because one of the provisions of the collective bargaining agreement is that upon a finding of an undisclosed agreement—a finding by a system arbitrator that there was an undisclosed agreement—the Commissioner then has the authority to void any player contract between the team and the player found to have violated the salary cap. The first issue that came up several weeks ago was "well, this is very bad, this secret agreement. We are putting that aside. But Joe Smith would like to sign with Minnesota again." The Commissioner said, "I am going to void any contract that you sign with him again, certainly for this coming year. That would just be effectuating the secret agreement and we are not going to do that."
So the players brought a claim to the system arbitrator saying that the Commissioner’s power to void any contract could not extend to future contracts, contracts that had not yet been entered into. Litigation over this issue took place before the system arbitrator. He came to a reasonably sensible conclusion that if the new contract is the product of circumvention and is a product of the secret agreement, it can be voided by the Commissioner. Put another way, unless the new contract is so starkly different from what the secret agreement contemplated, then the Commissioner can void even a future contract. But there would have to be a factual hearing over whether it was really the product of circumvention or whether it was starkly different, which is why so much litigation took place. (Smith eventually signed with Detroit).

The secret agreement was signed in 1999, and Smith had already played under two contracts under that secret agreement before the NBA discovered it, the one year agreement that covered '98-'99, and the second one year agreement covering '99-2000. As part of the Commissioner's penalties that he imposed here (which involved a fine of $3.5 million and the forfeiture of five draft picks), he also voided every player contract that was referred to in the secret agreement, including the two that had already been performed. The significance of those two contracts is (as previously mentioned) that in order to become a ‘Bird’ player (to be able to get a really big contract unrestrained by the salary cap, except for the individual maximum) you need to be with a team for three years. Joe Smith wanted credit for those two years played under those two contracts that had been the product of the secret agreement. Essentially, the NBA said, “You’ve got to be kidding! The Commissioner has voided those contacts. Those contracts were illegal. They never should have come into being. And so no, you don’t get your ‘Bird’ rights.” And the player said, “Oh, that is wrong. The player is entitled to his ‘Bird’ rights just because he actually played. He physically played for those two years so it doesn’t matter. The Commissioner cannot void contracts that have already been fully performed.” This presented an interesting question. The NBA spent the entire day November 3, 2000 with witnesses and with legal argument debating whether or not the Commissioner’s power to void any contract extended to voiding past contracts that had now been fully performed but were being invoked as the basis for the player getting his ‘Bird’ rights. So that is the second Smith proceeding that the NBA has had in these otherwise clear circumstances and it probably is not the last.

And the NBA had yet a fourth issue that has been tendered by Minnesota, which is that the penalty was too high. Five draft picks was
too high because the Commissioner really had made a settlement agreement to take away fewer draft picks than that and the Commissioner has reneged on the settlement. But, once again, the complexity of this agreement will lead to litigation after litigation after litigation and that is the type of litigation that the system arbitrator gets to hear.

III. INTERNATIONAL ARBITRATION

In conclusion, I would like to discuss the NBA's participation in international markets. Apart from the NBA's collective agreement with the players, the NBA has an international component to its business. The NBA, to some extent, is in competition with basketball leagues and teams around the world for the services of players. A number of countries have very well developed professional basketball leagues, for example Italy, Spain, Greece, Yugoslavia, Germany, and a number of other countries. These countries are producing some very good basketball players. Every once in a while players (maybe a couple a year) will be attractive enough to NBA teams that they would like to have that player. Most of those players (in order to have gotten good enough to reach the NBA's radar screen) have played for some professional team, usually in Europe, and already have a contract. So the NBA (as much as they might want to sign a foreign player) is often confronted with a contract (or an alleged contract) that player has with a team in one of these countries. Often when one of these countries hears that the NBA might be interested in its player their reaction is: "Well, of course, we have a contract. It's been in the draw for six years but yes, there it is and we will be happy to get rid of this contract but you will have to pay us a lot of money." Those sorts of disputes existed and the NBA did not quite know how to handle them because there are 200 or more countries in which basketball is played and in which there are basketball federations and legal systems that greatly differ from our own.

When a dispute like that arose where was it going to get heard? It is going to be a race to the courthouse. Was the NBA going to be dealing with the police court in Seville over whether or not a player could have a contract that prevented him from playing in the NBA? Or would the NBA team win the race and find a friendly judge in its home town? This process seemed to be unseemly and not a very good way to deal with the problem that was becoming more and more of an issue. In response to this problem, ten years ago the NBA entered into a contract with FIBA (the International Basketball Federation) and set up an international
arbitration system so that now if an NBA team wishes to sign a player who last played for a FIBA team somewhere outside of the United States, the NBA must ask FIBA for clearance. Is that player free of any contractual obligations? Can he play for an NBA team? And if FIBA says, “No he is not,” then the NBA has the right to dispute that determination and bring it to the international arbitrator. That has happened with increasing frequency over the last number of years.

The NBA still had to find a neutral location. FIBA would not agree to come to the United States and the NBA would not agree to go to Switzerland (although that would probably have been okay but the NBA would not agree to go to Spain or Italy). The international arbitrator sits in London and the process was formed with the intent of making the international arbitration expensive and cumbersome so that people would settle and not use the system. But the NBA agreed on London because Great Britain has very little professional basketball and counsel for the NBA would understand the language.

A year ago, the NBA had a case that went the entire route through a litigated conclusion before the international arbitrator in London involving a player named Aleksandar Radojevic. He played for a team called Beduchnost in Montenegro. The NBA had Croatian law experts and it was an interesting and hotly contested matter before the international arbitrator.

A more recent case involved a player named Iakovos Tsakalidis, the starting center on the Greek national team who had led the Greek team to some prominence over the last year or two. He was drafted this past year by the Phoenix Suns, but his team in Greece (known as “AEK”) claimed he could not sign a contract with Phoenix because he had a contract with them. The agent for Tsakalidis told the NBA that contract was not valid, so the NBA began to look into it. Low and behold, the NBA discovered that Iakovos Tsakalidis was really not the player’s name at all, his name was Alexi Ledkov, and he was from Russia. He was not Greek, he was Russian. He had been discovered in Stavropol, Russia, by a Greek agent and he had been brought to Athens, where he was miraculously converted into Iakovos Tsakalidis. This was all contrary to FIBA’s rules about how many foreign nationals you could have on a team. The NBA also discovered that the contract that they were relying on (signed when he was eighteen) had been presented to him only in Greek. As a Russian he was having some difficulty deciphering his contract. But the agent who had found him in Russia said, “Oh it’s fine. The contract is just fine, sign here Iakovos and everything will be okay.”
And Jake (as we call him) signed and he thought he was signing a four year deal. That was four years ago and the NBA thought he was free to be drafted and signed with Phoenix. But when this Greek contract was translated, it was not a four year contract. It had a four year initial term but then it had an option in the team to renew it for five more years and after the five years were over, if Tsakalidis did not sign yet another contract with this team, he would have to repay his last two years of salary. This was a contract that was never going to end. This provided a lot of good ground for cross-examination and many interesting proceedings in London.

These players always seem much more attractive to the team when the foreign team is claiming they cannot have him. As soon as they get the player he suddenly becomes less indispensable; he is a "project," and teams wonder why they bothered with all this. Aleksandar Radojevic is somewhere on Toronto’s injured list and Tsakalidis (they traded Luc Longley right in the middle of this hearing, putting even more pressure on their lawyers because they would have had no center if the NBA lost this case) is actually playing for Phoenix, but we will see how long that lasts.

IV. CONCLUSION

As you can see, the NBA’s increasing interest in international markets and players will present challenges as well as opportunities in the future. Certainly, the number of international players coming to the NBA and WNBA will continue and even accelerate. To address these new challenges, the NBA made great progress with the FIBA agreement. What the European countries are realizing through these proceedings is that if you want to have a contract that sticks, it better not be one-sided or unfair. Hopefully, the FIBA agreement will serve as a model for future NBA dealings with foreign players.

On the domestic front, with increasing salaries for both players and coaches, the NBA will continue to be no stranger to controversy. The NBA’s long and rich tradition of litigation is in no jeopardy of ending. Luckily, the system of arbitration in the NBA – between the Commissioner, impartial arbitrators, and system arbitrators – is a sturdy system that will work to resolve these conflicts. I hope this speech was helpful in understanding how we deal with disputes in the NBA – both here at home and abroad.