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# **Stealing Signs: Is Professional Baseball's United States-Japanese Player Contract Agreement Enough to Avoid Another "Baseball War"?**

**Casey Duncan\***

## **INTRODUCTION**

In 1998 U.S. Major League Baseball (MLB) entered into an agreement with Japan's Nippon Professional Baseball (NPB) league governing the transaction of non-free agent players between the two leagues. This United States-Japanese Player Contract Agreement, also known as "The Posting System Agreement" (Posting System) is designed to regulate such international player transactions and to protect the interests of both leagues. While the Posting System has had some initial success, recent developments make its long-term success as a solution suspect. It is the purpose of this note to examine critically the Posting System in light of these developments, and to suggest possible changes to better effectuate its goals and protect the interests of both leagues and their players.

This note examines the current agreement between the leagues, points out its weaknesses, and finally, offers suggestions that may help to create a more effective document. Section one will raise some of the legal and financial problems facing both leagues under the current agreement, give a brief comparison of the leagues, outline the circumstances underlying the need for and development of the Posting System, and will finally explain the details of the agreement. Section two will give a survey of law relevant to the enforcement of athletic personal service contracts. Section three will explain potential

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problems in contract enforcement, explore the shortcomings of the Posting System, and propose alterations and improvements to the basic agreement and related league rules.

## I. GET YOUR SCORECARDS IN TRANSLATION: THE NEED FOR AND CREATION OF THE POSTING SYSTEM

Baseball is no longer solely the "American Pastime." Japan and Korea have established leagues comparable to the MLB, and other nations have begun to form similar leagues.<sup>1</sup> Roughly half of all professional baseball players in the MLB system are non-nationals.<sup>2</sup> While the large majority of foreign-born MLB players are from Latin America,<sup>3</sup> there is a small but significant number of Japanese players who have had an impact upon the game far greater than their relatively small numbers would suggest.<sup>4</sup> Of the fifteen Japanese players active during the 2002 season,<sup>5</sup> three received the "Rookie of the Year" award after their first MLB season,<sup>6</sup> and Seattle Mariner Ichiro Suzuki received the most All-Star fan votes in each of the 2001, 2002, and 2003 seasons.<sup>7</sup>

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1. See William B. Gould IV, *Baseball and Globalization: The Game Played and Heard and Watched 'Round the World (With Apologies to Soccer and Bobby Thomson)*, 8 IND. J. GLOBAL LEGAL STUD. 85, 113 (2000).

2. On opening day of the 2002 season, foreign-born players occupied 26.1% of all big-league rosters, while 44.75% of all U.S. professional ball players, including minor league players, were from one of thirty-one different nations. See Wayne Coffey, *As the Baseball World Turns Global Draft Needed to Level the Playing Field*, MILWAUKEE J. SENTINEL, June 2, 2002, at 1C, available at 2002 WL 3148916.

3. See *id.*

4. See Peter Schmuck, *International Pastime*, BALT. SUN, Aug. 25, 2002, at D1, available at 2002 WL 6967359; Wayne Coffey, *Saying Sayonara*, DAILY NEWS (NY), Jan. 6, 2002, at 82, available at 2002 WL 3163035.

5. See Don Ketchum, *Asian Players Make Major Inroads*, ARIZ. REPUBLIC, Mar. 17, 2002, available at LEXIS, News Library, Arizona Republic File.

6. See Jim Cour, *Suzuki's Popularity Rises*, CHI. TRIB., July 7, 2002, at 7, available at 2002 WL 2672776; Masaru Ikei, *The Ichiro Effect*, SEATTLE POST-INTELLIGENCER, July 10, 2001, at B5 (referring to Hideo Nomo and Kazuhiro Sasaki). Ichiro is only the second player to have received both the Most Valuable Player award and Rookie of the Year in the same season. See S.L. Price, *The Ichiro Paradox*, SPORTS ILLUSTRATED, July 8, 2002, at 50.

7. See Cour, *supra* note 6 (stating that Ichiro received 800,000 more votes than any other AL player and 400,000 more than the leading NL candidate in 2002); John Shea, *S.F. Trio Gets All-Star Call*, S. F. CHRON., July 3, 2001, at D1 (Ichiro received nearly 3.4 million votes in 2001, while Barry Bonds received 2.1 million votes, the most in the NL.); John Follaco, *All-Star Selection is Moment to Treasure*, USA TODAY, July 9, 2003, at 3C.

The impact they have had on the MLB is overshadowed only by their impact upon the sport in Japan.<sup>8</sup> Like the MLB,<sup>9</sup> the NPB has seen decreases in attendance<sup>10</sup> and popularity in recent decades,<sup>11</sup> but, by many accounts, the problems have noticeably worsened since the mid 1990s,<sup>12</sup> just when Hideo Nomo became the first Japanese national to play in the MLB in thirty years.<sup>13</sup> Until the MLB's rekindled interest in Japanese baseball players in the mid-1990s, it was widely believed that Japa-

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8. See Price, *supra* note 6, at 52; see also Schmuck, *supra* note 4; Coffey, *supra* note 4.

9. See, e.g., Larry Eichel, *If Baseball is Back, Fans Haven't Noticed: Attendance is Off 4.6 Percent From Last Year*, PHILA. INQUIRER, May 26, 2003, at F1, available at WL 20393867; John Delcos, *Baseball's Problem: Attendance or Profit Margins*, ASBURY PARK PRESS, May 11, 2003, at H3, available at LEXIS, News Library, Asbury Park Press File. Declining attendance and TV ratings arguments should be taken with a grain of salt. *Id.* There are more fans of baseball than ever before—they just make up a smaller portion of the overall larger population. *Id.* The same can be said of TV ratings as broader channel selection generally means more competition. *Id.* See also Mike Dodd, *[Ishii] Rising*, USA TODAY, May 2, 2002, at 2C. Additionally, in Japan, the Central League, which includes the Yomiuri Giants, always outdraws the less popular Pacific League, which includes the Orix Blue Wave, in both TV ratings and actual attendance. See *Home Teams Hurting Without Stars*, NIKKEI WKLY (Japan), July 9, 2001, available at LEXIS, News Library, The Nikkei Weekly File [hereinafter *Home Teams Hurting Without Stars*].

10. Orix Blue Wave attendance dipped thirty-seven percent in 2001 from 2000. Ikei, *supra* note 6. Television ratings for the Tokyo Yomiuri Giants were also down. Doug Struck, *Japanese Gems on U.S. Diamonds*, WASH. POST, June 5, 2001, at A01.

11. "Every day people [in Japan] are watching major league baseball games, and short term [sic], that's not so good for us,' says Steve Inow, the former general manager of the Orix Blue Wave who sold the rights to Ichiro to Seattle in 2000." Price, *supra* note 6, at 52. See also Nobuyuki Suzuki, *Nomo Has Another Dream—Pitching in the World Series*, JAPAN ECON. NEWSWIRE, Dec. 28, 1995, available at WL JWIRE Database; Ken Hijino, *How are Our Boys Doing in the U.S.?*, FIN. TIMES (London), May 5, 2001, available at LEXIS, News Library, Financial Times File; Robert Whiting, *Batting Out of Their League*, TIME (Int'l Ed., Asia), Apr. 30, 2001, available at 2001 WL 17216124.

12. See Price, *supra* note 6, at 54. When Hideo Nomo pitched a no-hit game in 2001, the Yomiuri Giants suffered their lowest TV ratings since 1993, when Japan League Soccer first began. Gordon Edes, *Baseball Notes*, BOSTON GLOBE, Apr. 8, 2001, at D11. See also *Nomo's All-Star Performance Sends TV Ratings Soaring*, JAPAN ECON. NEWSWIRE, July 13, 1995, available at WL JWIRE Database. In 1983, Yomiuri Giants' yearly TV ratings peaked at 27.1, and have remained at around twenty since the mid 1990s. Data Compilation, Video Research Topics (2003) (on file with author). Similarly, Giants attendance in 1997 was 2,117,000, while in 2000 it was 1,595,000. *Id.* Orix Blue Wave attendance in 2000 was 1,223,000 but fell to 1,079,000 in 2001. *Id.*

13. Hideo Nomo is only the second Japanese national ever to play in the MLB. See Struck, *supra* note 10. The first was relief pitcher Masanori Murakami, who pitched in 1964 and 1965 for the San Francisco Giants. *Id.* In 1914, Goro Mikami was a Japanese player in the short-lived Federal League. *Id.*

nese players could not play competitively at the MLB level.<sup>14</sup> The success of Hideo Nomo and Ichiro Suzuki, among others, has shown the fallacy of this belief and has had a profound impact on the outlook of Japanese players and fans.<sup>15</sup> While players like these have rekindled the interest of both U.S. and Japanese fans, this interest seems to be primarily in MLB baseball and those Japanese players in it.<sup>16</sup>

The MLB is currently experimenting with ways to broaden both its national and worldwide appeal,<sup>17</sup> and professional sports leagues in the United States, including the MLB, have found that signing foreign players is one way to tap into new markets across the globe.<sup>18</sup> Signing top Japanese players has greatly increased the MLB's popularity in Japan.<sup>19</sup> Japanese fans watch MLB games in the morning before, or even during work,<sup>20</sup> purchase MLB merchandise,<sup>21</sup> and read news stories

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14. Bob Nightengale, *Just How Big is Hideo Nomo?*, L.A. TIMES MAG., Sept. 17, 1995, at 20, available at 1995 WL 9826910. "[W]e had accepted the idea that outstanding Asian pitchers could fit in here, but not position players . . . [n]ow, Japanese League position players have to be evaluated in a different light." See Leonard Koppett, *Ichiro Forces Baseball to Re-Examine Itself*, SEATTLE POST-INTELLIGENCER, Nov. 23, 2001, at D6, available at 2001 WL 3571440; see also Mike Tharp, *Peanuts! Popcorn! Squid-kebabs!*, U.S. NEWS & WORLD REP., Apr. 4, 1988, at 60 ("The level of Japanese baseball is generally considered somewhere between the U.S. major and triple-A minor leagues.").

15. See Michael Zielenziger, *With Japanese Players' Success in U.S., Interest in Local Baseball Declines*, KNIGHT RIDDER WASH. BUREAU, May 5, 2001, available at LEXIS, News Library, Knight Ridder/Tribune News Service File. In 2000, by way of the Posting System, Ichiro became the first Japanese position player to play in the MLB. See Michael Farber, *Rising Son*, SPORTS ILLUSTRATED, Dec. 4, 2000, at 68; see also *Yankees Secure Bid for Talks with Hiroshima Pitcher Ramirez*, JAPAN ECON. NEWswire, Feb. 7, 2003, available at WL JWIRE Database.

16. See Suzuki, *supra* note 11; see also Thomas Dillion, *Ichiro, Ichiro, Ichinooo!*, JAPAN TIMES, Oct. 18, 2001, available at LEXIS, News Library, The Japan Times File; Schmuck, *supra* note 4.

17. See *Baseball Chiefs Plan Conquest of Europe*, Taipei Times, at <http://www.taipetimes.com/News/sport/archives/2003/03/18/198605> (Mar. 18, 2003).

18. See Tony Massarotti, *Japanese Stars Hit Big Screen; Game Has Global Impact*, BOSTON HERALD, July 16, 2003, available at 2003 WL 3031447; see also Eric Fisher, *Going Global*, WASH. TIMES, Jan. 5, 2003, at A1, available at LEXIS, News Library, The Washington Times File.

19. See Schmuck, *supra* note 4; Coffey, *supra* note 4 (stating that MLB TV ratings in Japan rose 300% in 2001, while merchandise rose 150% and sponsorship partnerships reached a record high of fourteen in 2002, up from three in 2000).

20. See Daisuke Uozumi, *American Sports Rumble in Japanese Market*, NIKKEI WKLY (Japan), July 9, 2001, available at LEXIS, News Library, The Nikkei Weekly File. When Hideo Nomo first pitched against Ichiro, 20 million Japanese fans watched the live daytime broadcast. Zielenziger, *supra* note 15; see also Price, *supra* note 6; Chris Isidore, *The Latest Japanese Import*, CNNMoney, at [http://money.cnn.com/2002/01/22/news/column\\_sportsbiz/](http://money.cnn.com/2002/01/22/news/column_sportsbiz/) (Jan. 22, 2002).

written by the many Japanese foreign correspondents following Japanese players in the United States.<sup>22</sup> The popularity of the MLB in Japan has helped to make MLB International become a \$100 million a year business, over ten times its value in 1989.<sup>23</sup> Despite a recent slowdown in the MLB free agent market, which may also affect the aggressive pursuit of NPB talent, the popularity of the MLB in Japan shows little sign of abating.<sup>24</sup>

Japanese star players like Ichiro and the New York Yankees' recently acquired Hideki "Godzilla" Matsui are not the only ones experiencing success in the MLB, nor are they the only ones attracting the attention of Japanese baseball fans. The truly ominous sign for the future business stability of Japanese baseball may lie in the success of "average" players like Tsuyoshi Shinjo.<sup>25</sup> Some see Shinjo's success as opening the door for other average Japanese players to play in the MLB rather than remain in Japan.<sup>26</sup> Perhaps the worst aspect of this for the NPB is that many of these players are not necessarily motivated by the MLB's higher salaries<sup>27</sup> so much as by the de-

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21. "[M]erchandise related to the MLB has been flying off the shelves." Uozumi, *supra* note 20; see also Nightengale, *supra* note 14; Nomo is Winner in Merchandising, Too, BALTIMORE SUN, Aug. 13, 1995, available at 1995 WL 2459750.

22. The Mariners received seventy-five requests from Japanese media for press credentials to cover Mariners games in Ichiro's first season. See Jim Caple, *Get out the Rice and Sashimi Grandma! Exodus Good for U.S., Not so Good for Japan*, SEATTLE POST INTELLIGENCER, Mar. 30, 2001, at F13, available at WL 3556278; see also *Ichiro Sees Less Media, Chance for Improvement*, MIAMI HERALD, Mar. 3, 2003, available at LEXIS, News Library, The Miami Herald File (stating that 100 Japanese media members were on hand for Matsui's first workout with the Yankees); Skip Rozin, *Godzilla to the Rescue?*, BUSINESS WEEK, Mar. 3, 2003, at 95, available at LEXIS, News Library, Business Week File (stating that more than 400 journalists were at Times Square in New York when Matsui officially joined the Yankees).

23. Eric Fisher, *The MLB Getting Serious in the Far East*, WASHINGTON TIMES, July 27, 2003, at C3, available at 2003 WL 7716196. In July 2003, MLB International opened a permanent regional office in Tokyo. *Id.*

24. *Id.* The 2003 MLB All-Star game received higher TV ratings in Japan than in the United States, despite the fact that it aired in the morning. *All-Star Ratings Better in Japan Than in USA*, USA TODAY, July 21, 2003, available at [http://www.usatoday.com/sports/baseball/allstar/2003-07-21-ratings-japan\\_x.htm](http://www.usatoday.com/sports/baseball/allstar/2003-07-21-ratings-japan_x.htm).

25. See Tim Larimer, *The Shinjo Effect*, TIME (Int'l Ed., Asia), June 11, 2001, at 45. Larimer conjectures that the "trickle of Japanese talent to the U.S. may soon turn into a flood." *Id.*

26. *Id.* (stating that Shinjo's ability is "average, at best" and that "[n]obody thought he could cut it in the Major Leagues"). See also John Shea, *Japanese Superstar Draws Some Attention*, S. FRAN. CHRON., Sept. 7, 2002, at C4, available at 2002 WL 4029640; Michelle Kaufman, *Asians Entering, Playing U.S. Professional Sports at a Fast Rate*, MIAMI HERALD, July 31, 2002, available at LEXIS, News Library, Miami Herald File.

27. See Hijino, *supra* note 11. Tsuyoshi Shinjo turned down a five-year, \$12

sire to merely play in the MLB.<sup>28</sup> This desire is often enhanced by the players' growing dissatisfaction with the Japanese league in general and an emerging preference among both players and fans for the U.S. style of playing the game.<sup>29</sup>

#### A. THE GAME OF INCHES: BASEBALL IN THE UNITED STATES AND JAPAN

The approach and mindset of both Japanese players and owners towards the game historically has been drastically different from their counterparts in the MLB.<sup>30</sup> In Japan, baseball has been infused with a more spiritual meaning, and is often perceived as an embodiment of the Japanese cultural virtue of "wa."<sup>31</sup> Although there has been a Japanese players union for some time, it was not until 1985 that it gained the power to strike, which the players have never exercised.<sup>32</sup> Additionally, free agency was unknown in the NPB until 1993, and is cur-

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million deal with the Hanshin Tigers to sign a one-year, \$400,000 contract with the New York Mets. *Id.* When asked about the attitudes of young Japanese players, Kenta Aoshima, a Japanese sports broadcaster and former professional baseball player with the Yakult Swallows said, "The fundamental reason he [Tsuyohi Shinjo] went abroad is the nature of Japanese baseball." Zielenziger, *supra* note 15. See also Coffey, *supra* note 4 (saying that Shinjo was a "bargain"). Matsui turned down a seven-year, \$50 million contract with the Giants, opting for a one-year \$6 million contract so that he would still be eligible for free agency in 2003. Don Amore, *Overseas Investments*, HARTFORD COURANT, Oct. 30, 2002, at C1, available at 2002 WL 101512903.

28. See Hijino, *supra* note 11.

29. *Id.* See also Whiting, *supra* note 11 (stating that it is the freedom of the MLB that is attractive to Japanese players); Bob Klapisch, *Land of the Rising Stars*, REC. (Bergen County, N.J.), Aug. 16, 2001, available at LEXIS, News Library, The Record File (quoting the Japanese Prime Minister as saying "These days, watching MLB is more exciting than watching games in Japan" and noting that fans find the Japanese game "less thrilling than ever"); Schmuck, *supra* note 4 (quoting Hidemi Kittaka of the Kyodo News Service); *Japanese Develop Major League Taste, Sour on Local Game*, MAINICHI DAILY NEWS, Aug. 14, 2001, available at LEXIS, News Library, Mainichi Daily News File (reporting on a poll of 1,500 Japanese baseball fans).

30. *Id.* See also Tom Koppel, *Hitting Hard: Baseball Fever Sweeps Japan*, MACLEAN'S, Oct. 2, 1989, at 54 (ties are allowed because neither team loses face).

31. Japanese baseball historian Robert Whiting has noted that the Japanese approach to the sport as a martial art has imbued the sport with a philosophical and spiritual undertone which encourages harsh training practices. ROBERT WHITING, *YOU GOTTA HAVE WA* 18-20 (1990). See also Barry Hillenbrand, *Wa is Hell: The Name of the Game is Besuboru*, TIME, Sept. 25, 1989, at 87; Koppel, *supra* note 30.

32. See Andrew F. Braver, *Baseball or Besuboru: The Implications of Antitrust Law on Baseball in America and Japan*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 421, 452 (1996).

rently available only to players in an extremely limited form.<sup>33</sup> Such changes have been slow and difficult because of the owners' strength and traditional Japanese cultural views of collective harmony, company loyalty, and a tendency to promote the benefit of the group over the individual.<sup>34</sup> A serious consequence of this resistance to change is that the minimal gains in free agency and pensions are unattainable for most Japanese players as the typical career in the NPB does not exceed six years.<sup>35</sup>

While NPB owners have taken some initial steps to make the game more appealing to players and fans,<sup>36</sup> many outside

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33. Until recently, Japanese players had to play for either nine or ten years, depending upon how they were drafted, before they are eligible for free agency. See Hijino, *supra* note 11. The free agency rule was recently changed so that all players need only play for nine years regardless of how they were drafted. *Eligibility for Japan Free Agency Altered*, JAPAN TIMES, June 18, 2003, at 21. In the first year of NPB free agency, only five of sixty eligible players registered as free agents, and of these, only four switched teams. Steven Brull, *A Baseball Walkout in Japan? Unimaginable, Players Say*, INT'L HERALD TRIB., Sept. 23, 1994, at 20. Japanese free agency has, however, had the effect of boosting the average player salary by twenty-seven percent and has encouraged team owners to offer multiple year contracts which were rare before the advent of free agency. See *id.* By contrast, MLB players need only play for six years before they are eligible for free agency, and the frequency of free agents signing with new teams is much higher. See Shant H. Chalian, *Fourth and Goal: Player Restraints in Professional Sports, a Look Back and a Look Ahead*, 67 ST. JOHN'S L. REV. 593, 608-09 (1993); see also Susan H. Seabury, *The Development and Role of Free Agency in Major League Baseball*, 15 GA. ST. U. L. REV. 335, 355-59 (1998) (discussing the advent and terms of the original MLB free agency rules). The National Football League has created a complex system of free agency that is somewhere between the NPB and MLB models. The NFL model relies on four designations of free agency rights depending largely on the number of seasons a player has been in the league. Scott E. Backman, *NFL Players Fight for Their Freedom: The History of Free Agency in the NFL*, 9 SPORTS LAW. J. 1, 43-48 (2002) (discussing the 1993 NFL collective bargaining agreement's creation of the unrestricted free agent, franchise transition player, restricted free agent, and exclusive rights free agent designations).

34. See Brull, *supra* note 33, at 20. There is also a strong Japanese cultural desire to avoid appearing greedy or lazy. *Id.*

35. See *id.* (noting that most pitchers' arms are worn out by age thirty and that most players never become eligible for free agency); see also *Scouting: Lots of Diamonds but Few Riches*, N.Y. TIMES, Sept. 9, 1986, at A25 (stating that pensions qualifications are set at nine years, "about three years longer than most of them can hope to hang on").

36. See, e.g., *Home Teams Hurting Without Stars*, *supra* note 9 (The Osaka Kintestō Buffaloes hired Tommy Lasorda to provide advice both about playing technique and attracting fans.); Marty Kuehnert, *Is Popular Tigers Manager Hoshin Really a Hero or a Thug?*, JAPAN TIMES, Aug. 13, 2003, at 23 (discussing an attempt to raise officiating standards by using U.S. umpires); Dan Latham, *Combining the Best of Both Worlds*, JAPAN TIMES, Mar. 28, 2003, at B9 (stating that the Nippon Ham hired U.S. minor league manager Terry Hillman, who plans to infuse elements



the game are concerned that these steps are too little too late and that the exodus of talent and fan attention will continue.<sup>37</sup> There are some indications that owners may pressure highly skilled and valuable players to request posting so that the organization can benefit from the potentially large cash bids.<sup>38</sup> There is reason to suspect, however, that the recent stagnation of the MLB free agency market may slow MLB pursuit and acquisition of Japanese talent, as the complete absence of MLB bidding for Japanese closing pitcher Akinori Otsuka demonstrates.<sup>39</sup> While aggressive MLB pursuit of less-than-star Japanese players via the Posting System may be currently faltering, the recent contract between Japanese free agent star Hideki "Godzilla" Matsui and the New York Yankees underscores the precarious position of the NPB.<sup>40</sup> Hideki Matsui was one of the most popular and dominant star athletes in the NPB,<sup>41</sup> and, if

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of the U.S. game); see also Paul White, *Baseball in a Parallel Universe*, USA TODAY SPORTS WKLY, Aug. 13-19, 2003, at 54 (discussing Hillman); Hannah Beech, *Changing the Game*, TIME (Int'l Ed., Asia), May 3, 1999, at 46, available at 1999 WL 15941066 (noting that some practices, such as pelting players with line drives until "they were bruised and shaking" and requiring pitchers to throw 300 pitches a day, are fading in favor of more Americanized practice routines and schedules); Koppel, *supra* note 30.

37. See *supra* notes 11-16. But see Wayne Graczyk, *Big Leaguer Yoshii Rides 'Wave Home*, JAPAN TIMES, Mar. 28, 2003 (discussing a possible "U-turn phenomenon" of Japanese players returning to the NPB after playing in the MLB); Dodd, *supra* note 9, at 1C.

38. Isidore, *supra* note 20 (discussing the Yakut Swallows' posting of pitcher Kazuhisa Ishii).

39. See Don Amore, *Free, But Not Easy; Stricter Budgets With New CBA*, HARTFORD COURANT, Nov. 14, 2002, at C5, available at LEXIS, News Library, Hartford Courant File; see also *Otsuka Gets Little Relief from Posting System*, DAILY YOMIURI, Dec. 20, 2002, at 24, available at 2002 WL 102532428; Matthew Tresauque, *Baseball's Free Agents Discover Soft Market*, PRESS-ENTERPRISE, Jan. 13, 2003, at C1, available at 2003 WL 5588514 (noting that All-Star catcher Ivan Rodriguez was contemplating playing in Japan because of the depressed free agent market); Steve DiMeglio, *Ivan Rodriguez Frozen out by Frigid Free-Agent Market*, SPORTS WEEKLY, Jan. 8-14, at 29.

40. Kevin Davidoff, *Stars of the East Go West; Yankees Give Matsui \$21M for Three Years*, NEWSDAY, Dec. 20, 2002, at A102, available at 2002 WL 103519561. See also George King, *Godzilla's Bronx-Bound: Matsui & Yanks on Verge of Deal*, N.Y. POST, Dec. 19, 2002, at 94, available at 2002 WL 102531071. "If the leading member of Japan's royal house of baseball [Hideki Matsui] deserts, the last taboo will have been broken . . . either meaningful change will have to be made or there may not be much of the Japanese game left to save." Whiting, *supra* note 11. "If Hideki leaves, it's a tragedy . . . It's bigger than Ichiro leaving. We depend on Hideki for so much . . . It will be the beginning of the destruction of Japanese baseball." Price, *supra* note 6 (quoting Tokyo reporter Jun Ikushima).

41. See King, *supra* note 40; see also David Lennon, *Ready for the Majors? U.S. Teams May Import Japan's Marquee Players*, NEWSDAY, Nov. 15, 2002, at A81,

his current success in the MLB continues, the NPB can almost certainly anticipate further declines in TV ratings and attendance.<sup>42</sup> Similarly, MLB teams with Japanese players can expect to reap significant financial benefits through increased tourism and attendance,<sup>43</sup> Japanese television contracts,<sup>44</sup> and merchandise sales.<sup>45</sup>

Another development that could have a negative impact on relations between the MLB and NPB, as well as on the Posting System, is the recent contract dispute between former Florida Marlin Kevin Millar and the Chunichi Dragons.<sup>46</sup> In January of 2003, Chunichi purchased the rights to negotiate with Millar from the Marlins and signed him to a two-year contract.<sup>47</sup> In an unexpected twist, the Boston Red Sox claimed Kevin Millar off of MLB waivers, a process he had to pass before he could formally join the Dragons.<sup>48</sup> The Red Sox tried to negotiate a trade for Millar with the Dragons, but the MLB interceded to enforce

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available at 2002 WL 102169665.

42. See *supra* notes 16-22 (discussing the impact of Japanese players); see also Rozin, *supra* note 22, at 95 (stating that the MLB expects to air between eighty and 100 Yankee games in Japan, up from less than twenty in 2002). The Yankee's first game had an average of 11.1% of viewers in the Tokyo area, while TV ratings for the first Yomiuri Giants game fell from 28.2% to 16.2% in 2002. *Yankees Season Opener Gets Top TV Ratings as Fans Tune in to Matsui Debut*, at <http://sports.yahoo.com/mlb/news?slug=ap-japan-matsui-tv&prov=ap&type=lgns>, Apr. 2, 2003 (on file with the author).

43. Yung Kim & Elise Young, *Made in Japan*, REC. (Bergen County, N.J.), Apr. 30, 2003, at A1, available at 2003 WL 4613877; Rozin, *supra* note 22, at 95 (stating that several Japanese tourist agencies have purchased more than 1,000 Yankee tickets for 2003 tour packages).

44. This year (2003) is the last year of MLB's five-year, \$65 million contract with Dentsu, Inc., and now the MLB "expect[s] to realize a significant increase in . . . rights fees," according to MLB Senior Vice-President Paul Archey. See Rozin, *supra* note 22, at 95; see also Ken Belson, *Baseball, Coffee, and Godzilla*, N.Y. TIMES, Apr. 2, 2003, at S3 (stating that Japan network NHK plans to air 300 plus MLB games in 2003).

45. See *supra* note 21; Coffey, *supra* note 4; Rozin, *supra* note 22.

46. See Gordon Edes, *Japan Claims Millar: Dragons Insist He is Their Man*, BOSTON GLOBE, Jan. 22, 2003, at F6 [hereinafter *Japan Claims Millar*].

47. Gordon Edes, *Millar Still Not Set: Dragons Aren't Sure He'll Show Up*, BOSTON GLOBE, Jan. 28, 2003, at D1 [hereinafter *Millar Still Not Set*]; see also Gordon Edes, *Millar Confirms He Will Not Report to Japan*, BOSTON GLOBE, Jan. 31, 2003, at E2 [hereinafter *Millar Confirms He Will Not Report to Japan*].

48. Millar rejected the claim, making him a free agent, but two sources claim his rejection was not his choice. See *supra* note 47; see also, Gordon Edes, *MLB: Sox Can't Make Deal for Millar*, BOSTON GLOBE, Jan. 20, 2003, at D3 [hereinafter *MLB: Sox Can't Make Deal for Millar*]; Gordon Edes, *MLB Will Stay Out: It Will Not Mediate Dispute Over Millar*, BOSTON GLOBE, Feb. 1, 2003, at F7, available at LEXIS, News Library, Boston Globe File [hereinafter *MLB Will Stay Out*].

Millar's contract with the Dragons.<sup>49</sup> Millar then sought to have the contract voided.<sup>50</sup> The MLB stated that Millar, since he was not yet a free agent under the rules of either league, was governed by the Posting System agreement and would have to post, like any other Japanese player, unless the contract was itself invalid or the Dragons allowed Millar to back out.<sup>51</sup> This would have meant that for Millar to return to the United States to play baseball, MLB would have had to submit sealed bids to the commissioner to buy his rights from the Dragons.<sup>52</sup> The Major League Baseball Player's Association (MLBPA) intervened on Millar's behalf,<sup>53</sup> but the MLB initially refused to mediate the situation further than its previous decision as to the validity of his contract.<sup>54</sup> The Dragons decided not to force Millar to honor his contract and play for them, but they were unwilling to release him.<sup>55</sup> The Dragons were in an awkward position because forcing Millar to honor his contract with them or sit out could have led to a complete breakdown in both the Posting System and MLB-NPB relations.<sup>56</sup> The Dragons were reportedly thinking of bringing a case against Millar in Japan, but officially had not ruled out the potential of a trade.<sup>57</sup> Meanwhile, the MLB

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49. See *MLB: Sox Can't Make Deal for Millar*, *supra* note 48.

50. *Millar Confirms He Will Not Report to Japan*, *supra* note 47. Millar has argued that his "change of heart" is no different than Noirihio Nakamura's backing out of an agreement with the New York Mets in December, 2002. *Id.* MLB spokesman Patrick Courtney points out that Nakamura had merely agreed to the terms of a contract with the Mets, and did not actually sign anything. See *MLB Will Stay Out*, *supra* note 48.

51. See *MLB: Sox Can't Make Deal for Millar*, *supra* note 48. Millar's agents' attempts to challenge the validity of his Dragons contract apparently failed, and so Millar is contractually no different than any other Japanese player. *Millar Confirms He Will Not Report to Japan*, *supra* note 47; *MLB Will Stay Out*, *supra* note 48.

52. For more discussion of the Posting System, see *infra* Part I.C.

53. *Millar Confirms He will Not Report to Japan*, *supra* note 47.

54. *MLB Will Stay Out*, *supra* note 48. Millar failed to report to the Dragons spring training on February 1, 2003, and reportedly the Dragons set a deadline requiring him to join the club by February 10, 2003, or face a potential lawsuit for damages. *Id.*

55. *Chunichi Gives up on Trying to Convince Millar*, JAPAN ECON. NEWSWIRE, Feb. 5, 2003, available at LEXIS, News Library, JEN File; Gordon Edes, *Millar Bidding Time: Sides Working on Compromise*, BOSTON GLOBE, Feb. 12, 2003, at F2. The Dragons were leaning towards releasing Millar if the Marlins refunded the \$1.2 million they received for his rights. *Id.*

56. *THE HOT CORNER: Dragons have Millar on a Barbecue*, DAILY YOMIURI, Feb. 6, 2003, at 24, available at LEXIS, News Library, Yomiuri File.

57. Gordon Edes, *Millar Resolution in the Works*, BOSTON GLOBE, Feb. 7, 2003, at D2 [hereinafter *Millar Resolution in the Works*]; see also Gordon Edes, *Can Bullpen by Committee Save the Sox?*, BOSTON GLOBE, Feb. 9, 2003, at E10 [hereinafter

approved a transaction in which Chunichi would void Millar's contract, thus sending him back to the Marlins, who would then trade him to Boston for the \$1.2 million Chunichi initially paid.<sup>58</sup> MLB Executive Vice President of Baseball Operations Sandy Alderson has been quoted as saying that the situation had the "potential for some disruption" of current protocol and relations between the MLB and the NPB, but added "[w]hich is not to say the protocol agreement is perfect . . . ."<sup>59</sup> The situation was finally resolved when the MLBPA successfully pressured the MLB to threaten canceling the Seattle Mariners-Oakland A's season-opening series in Japan if the Dragons did not let Millar go without a legal battle.<sup>60</sup> The Dragons voided the contract; the Marlins returned the \$1.2 million purchase price and then sold Millar's rights to Boston for \$1.5 million.<sup>61</sup>

Thus, the more restrictive aspects of the Japanese league have made the chance to play in the MLB all the more appealing to Japanese players.<sup>62</sup> Conversely, MLB players appear to have mixed feelings about playing in the NPB, but seem to generally view it as an acceptable alternative, particularly when they believe that they will not receive the amount of playing time or salary in the MLB that they could in Japan.<sup>63</sup> Ultimately, it is Japanese players that have expressed dissatisfaction with their own national version of baseball, and, as will be shown, attempts to act on this dissatisfaction led to the creation of the Posting System.

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*Can Bullpen by Committee Save the Sox?*] (discussing "kai-goroshi," which translates as "keep to kill"). The Red Sox had a player, outfielder Benny Agbayani, who was interested in playing in Japan. Bob Hohler, *Trying to Find a Spot: Agbayani Regrets Not Going to Japan*, BOSTON GLOBE, Feb. 24, 2003, at D2, available at LEXIS, News Library, Boston Globe File [hereinafter *Agbayani Regrets Not Going to Japan*]. Reportedly, the Red Sox tried to sell Agbayani's contract to the Dragons to both appease and compensate the Japanese team. *Id.* Agbayani later expressed regret that the deal fell through noting that he would probably have played everyday and may have also received a higher salary. *Id.*

58. Gordon Edes, *Millar Closer to Deal*, BOSTON GLOBE, Feb. 13, 2003, at D2.

59. *Millar Resolution in the Works*, *supra* note 57, at D2. Japanese officials reportedly did not see the actions of the Red Sox as adversely affecting future dealings with Japan. One is quoted as saying "for me personally, its business. They are professional, we are professional . . . . Nobody is doing this just to make people laugh," but added "[t]he whole thing is such a strain on the whole process of selling and trading players to Japan. It sets the process back considerably . . . ." *Id.*

60. Gordon Edes, *MLB's Clout Helps Break Millar Logjam*, BOSTON GLOBE, Feb. 16, 2003, at F9, available at LEXIS, News Library, Boston Globe File.

61. *Id.*

62. Beech, *supra* note 36.

63. See *supra* notes 39 and 57 and accompanying text (discussing Ivan Rodriguez and Benny Agbayani, respectively).

## B. THE REASONS FOR CREATING THE POSTING SYSTEM

In 1995, Japanese pitcher Hideo Nomo was able to sign with the MLB by cleverly exploiting a loophole his agents discovered in the standard NPB player contract.<sup>64</sup> Essentially, this loophole allowed Nomo to circumvent completely the NPB's player mobility restrictions and sign as a free agent with any MLB team simply by voluntarily retiring from his NPB club.<sup>65</sup> While Nomo's "defection" to the MLB initially sparked a hostile reaction from Japanese fans and media,<sup>66</sup> his success turned heads on both sides of the Pacific and inspired MLB teams to sign several other Japanese pitchers in the following seasons.<sup>67</sup>

In the wake of Nomo's discovery and exploitation of this loophole, Japanese teams scrambled to protect their interests in their current players. One method, adopted by the Chiba Lotte Marines, was the resurrection of "working agreements" that had existed between some Japanese and MLB clubs in the 1960s.<sup>68</sup> Having secured such a working agreement with the San Diego Padres, Chiba Lotte sold the Padres the exclusive right to negotiate with their star pitcher Hideki Irabu, who had expressed a desire to play in the MLB.<sup>69</sup> Irabu, however, had made it clear that he only wanted to play for the New York Yankees, and reportedly, Chiba Lotte gave him indications that his wish would be honored before assigning his rights to the Padres.<sup>70</sup> With this exclusive right, the Padres were the only team that could negotiate with and sign Irabu.<sup>71</sup> Irabu protested the arrangement, and went before a MLB panel to argue his position, which was also supported by Gene Orza of the MLBPA General Counsel's Office.<sup>72</sup> MLB Commissioner Bud Selig did not agree, and

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64. See *Agents of Change Always Unwelcome*, DAILY YOMIURI, Dec. 28, 2000, at 26, available at LEXIS, News Library, Yomiuri File; Whiting, *supra* note 11, at 24.

65. The loophole had actually existed since 1963, but the NPB had neglected to fix it and American teams had not considered it worth exploiting. See *Agents of Change Always Unwelcome*, *supra* note 64.

66. *Id.*

67. See Ketchum, *supra* note 5.

68. Robert Nishihara, *Turning Japanese: The Next Step in the Internationalization at Major League Baseball*, The Diamond Angle, at <http://www.thediamondangle.com/archive/mar02/japanball.html> (Mar. 2002).

69. *Id.* See also Hal McCoy, *Realignment Toned Down*, DAYTON DAILY NEWS, Sept. 7, 1997, available at LEXIS, News Library, Dayton Daily News File.

70. E-mail from Robert Whiting to Casey Duncan, author (May 14, 2003) (on file with author).

71. *Japan Says 'No' to Exclusive Trade Talks with MLB Teams*, JAPAN ECON. NEWSWIRE, July 16, 1997, LEXIS, News Library, JEN File.

72. Both Orza and the Yankees challenged the validity of working agreements

Irabu, calling the Chiba Lotte-San Diego agreement "slave trade," publicly stated that he would only sign with the New York Yankees and threatened to sit out the 1997 season until he was eligible for free agency under NPB rules.<sup>73</sup> After several months of tense negotiating with San Diego, the Yankees finally reached a trade deal with the Padres in which they acquired the rights to sign Irabu.<sup>74</sup> The NPB commissioner, however, in a letter to the MLB, accused the Yankees of tampering and conducting secret negotiations, and at least one MLB official agreed.<sup>75</sup>

In 1998, Hiroshima Tokyo Carp player Alfonso Soriano unsuccessfully attempted to negotiate a higher salary through salary arbitration.<sup>76</sup> The Carp had signed Soriano at the age of sixteen in a Dominican baseball academy, and at the time of his attempt to renegotiate his salary, he was only making \$45,000; the average salary for foreign players was closer to \$220,000.<sup>77</sup> He and his agent, Don Nomura, decided to ask for \$180,000, but Nomura was not allowed to attend the arbitration and Soriano failed to convince the panel, made up of the commissioner and the two league presidents, that he was entitled to an increase.<sup>78</sup> Under the NPB standard player's contract, Soriano could voluntarily retire if the arbitration panel refused his request.<sup>79</sup>

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that granted MLB teams exclusive bargaining rights to Japanese players. See Jon Heyman, *Baseball Report: Yankees Strike out in Irabu Case, but Trade with Padres Possible*, NEWSDAY, Feb. 28, 1997, LEXIS, News Library, Newsday File; *Japan Says 'No' to Exclusive Trade Talks with MLB Teams*, *supra* note 71.

73. *Japan Says 'No' to Exclusive Trade Talks with MLB Teams*, *supra* note 71; *Baseball Report: Yankees Strike out in Irabu Case, but Trade with Padres Possible*, *supra* note 72. Irabu returned to Japan, but Chiba Lotte informed him they would only renew his contract if he publicly apologized for the "slave trade" remark and sign an agreement never to try to play for a MLB team again. See *Team Tells Irabu to Forget About Majors*, COLUMBIAN (Vancouver, Wa.), Apr. 1, 1997, at D2, available at LEXIS, News Library, The Columbian File.

74. John Gianmore, *Inside Irabu*, DAILY NEWS, July 9, 1997, at Sports 60, available at LEXIS, News Library, Daily News File. Irabu signed with the Yankees on April 22, 1997 for the sum of \$12.8 million and a signing bonus of \$8.5 million. *Id.*

75. *Id.*

76. Jeff Pearlman, *He's Arrived*, SPORTS ILLUSTRATED, Aug. 26, 2002, at 40, 42. A week before his salary arbitration hearing, Soriano and his agent, Don Nomura, were notified that Nomura would not be allowed to attend and that Soriano would have to present his claim without Nomura's aid. *Id.*

77. *Id.* at 41. See also Anthony McCarron, *Star Wars: Alfonso Soriano is Second to None, but it Took a Fight Against an Entire Country*, DAILY NEWS, July 11, 2002, LEXIS, News Library, Daily News File.

78. See Pearlman, *supra* note 76, at 42; McCarron, *supra* note 77.

79. See Pearlman, *supra* note 76, at 42.

After this failure, Soriano voluntarily retired and attempted to utilize the Nomo loophole and sign as a free agent in the MLB.<sup>80</sup> The NPB, however, had already closed the loophole,<sup>81</sup> and the Carp retained their exclusive rights to Soriano even after he had voluntarily retired.<sup>82</sup> Although the Carp threatened Soriano and any MLB team that signed him with legal action, the MLB Commissioner's Office declared that it considered Soriano an unrestricted free agent on July 13, 1998.<sup>83</sup> The Yankees then offered Soriano \$3.1 million regardless of any legal action taken by the Carp.<sup>84</sup> With the MLB, MLBPA, and deep-pocketed Yankees backing Soriano, the Carp balked at fully pressing their legal claim, and the dispute ended quietly when Soriano settled with the Carp<sup>85</sup> and signed with the New York Yankees on September 29, 1998.<sup>86</sup>

### C. THE POSTING SYSTEM AGREEMENT

The Irabu incident caused severe embarrassment for both leagues,<sup>87</sup> but it was Soriano's defection that underscored the need to create a new agreement not only governing respect for the other league's player contracts, but more importantly, regulating player transfers between the leagues. In 1998 the MLB and NPB began to finalize the "United States-Japanese Player

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80. *Id.* See also Jim Allen, *THE HOT CORNER: Breaking the Law*, DAILY YOMIURI, Jan. 6, 2000, at 24, available at LEXIS, News Library, Yomiuri File. Soriano's refusal of the salary arbitration determination was essentially the equivalent of Nomo's "voluntary retirement." McCarron, *supra* note 77. See also Joel Sherman, *Soriano's Best Japanese Import*, N.Y. POST, Apr. 30, 2003, at C9, available at LEXIS, News Library, New York Post File.

81. Allen, *supra* note 80, at 24.

82. *Id.*

83. McCarron, *supra* note 77; see also, Pearlman, *supra* note 76, at 43. The MLB declared Soriano a free agent because it refused to honor what it considered the NPB's "unilateral attempt to alter the working agreement between Japan and the majors." Allen, *supra* note 80, at 24.

84. According to Jean Afterman, then Nomura's legal assistant and now Yankees Assistant General Manager, this commitment to legally back Soriano is what clinched the deal more than the actual dollar amount. John Delos, *Afterman Earned Pinstripes by Playing Hardball*, J. NEWS (Westchester, N.Y.) Mar. 31, 2003, at K2, available at LEXIS, News Library, The Journal News File; see also McCarron, *supra* note 77.

85. *Soriano Proves High Price Tags are Overrated*, BUFFALO NEWS, July 7, 2003 at C1, available at LEXIS, News Library, Buffalo News File.

86. See McCarron, *supra* note 77. Soriano has since become one of the MLB's most dominant players and an All-Star second basemen. See Pearlman, *supra* note 76, at 44.

87. See Ketchum, *supra* note 5.

Contract Agreement,” which they entered into on July 10, 2000.<sup>88</sup>

The Posting System has several main purposes. First, it eliminates inter-league legal controversies such as those that arose during the defections of Nomo and Soriano.<sup>89</sup> Second, by requiring ownership consent to both the initial posting and the acceptability of the bid amounts, NPB teams still retain significant control over the release of their players.<sup>90</sup> Finally, it provides for a system of team compensation for waiving the rights to the duration of a player’s contract in much the same way that the various professional free agency plans in the United States provide.<sup>91</sup>

The agreement regulates the inter-league transaction of any non-free agent player, defined as those players on the “Reserve, Military, Voluntarily Retired, Restricted, Disqualified, Suspended, or Ineligible List of any Japanese Club.”<sup>92</sup> If a Japanese player covered in this paragraph wishes to play in the MLB, his team must first agree to his request, and then must notify the NPB commissioner of the player’s availability.<sup>93</sup> The NPB commissioner then notifies the MLB commissioner’s office, which then “posts” the player’s availability to the MLB teams.<sup>94</sup> The agreement requires that all such postings occur between November first and May first of the following year.<sup>95</sup> Once a player has been posted, MLB teams then have a total of four business days to submit a single cash bid to the MLB commis-

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88. UNITED STATES-JAPANESE PLAYER CONTRACT AGREEMENT ¶ 7 (2000) (on file with author) [*hereinafter* POSTING SYSTEM]. Under the terms of this agreement, it expired on December 15, 2002. *Id.* ¶ 17. The agreement further provides, however, that so long as neither commissioner gives notice of his intent to modify or terminate the agreement and neither league “materially alters” its player reserve rules or any special rule identified in the agreement, it will continue to be in force from year to year. Thus, while the initial binding period of the agreement has expired, the agreement is still in force as to all of its provisions and requirements. *Id.* See also Kuehnert, *supra* note 36.

89. See Ketchum, *supra* note 5.

90. POSTING SYSTEM, *supra* note 88, ¶¶ 9-12; *infra* notes 99-101 and accompanying text (discussing ¶¶ 9-12).

91. See Chalian, *supra* note 33, at 612-16.

92. POSTING SYSTEM, *supra* note 88, ¶ 5. This paragraph refers to the Japanese Professional Baseball Rules of February 1, 2000 for the definition of these various terms. *Id.* The agreement similarly applies to MLB players and player restraints. *Id.* ¶ 2.

93. *Id.* ¶ 5.

94. *Id.* ¶ 8.

95. *Id.* ¶ 9.



sioner's office.<sup>96</sup> The MLB commissioner determines the highest bid and notifies the NPB commissioner of the amount.<sup>97</sup> The NPB commissioner then has four business days to contact the posted player's team to determine if the bid amount is acceptable and notify the MLB commissioner.<sup>98</sup> If the Japanese team accepts the bid, the U.S. team then has the exclusive and non-assignable right to negotiate a contract with the player for a period of thirty days.<sup>99</sup> If an agreement results, the Japanese club is entitled to the bid amount as consideration "for relinquishing its rights to the player."<sup>100</sup> If the Japanese player and the U.S. team fail to reach an agreement within the thirty day period, the MLB team retains its bid amount and the Japanese player is ineligible for further posting or negotiations until the following November first.<sup>101</sup>

The Posting System Agreement has two final important provisions. First, it allows for "working agreements"<sup>102</sup> between teams of either league so long as they do not "provide a U.S. Club with exclusive or preferential rights" to negotiate and contract with players covered by the agreement.<sup>103</sup> Teams must file the details of all such working agreements with both league commissioners, either of whom may require the modification of the agreement if he determines that the terms are either inconsistent with the Posting System or "not in the best interests of professional baseball in that country."<sup>104</sup> Teams proposing to enter negotiations or player transactions under a working agreement must immediately inform the MLB commissioner.<sup>105</sup> The MLB commissioner has full authority to enforce the agreement against U.S. teams and, in the event of a violation, such as direct contact between a Japanese player and a U.S. team, may revoke the team's exclusive bargaining right and award it to the next highest bidder.<sup>106</sup> Second, the MLB commissioner may declare null and void any contract between a Japanese player and

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96. *Id.*

97. POSTING SYSTEM, *supra* note 88, ¶ 10.

98. *Id.*

99. *Id.* ¶ 11.

100. *Id.* ¶ 9.

101. *Id.* ¶ 12.

102. See generally *supra* notes 68-75 and accompanying text (discussing "working agreements" and Irabu); see also Davidoff, *supra* note 40 (referring to the working agreement between the New York Yankees and the Yomiuri Giants).

103. POSTING SYSTEM, *supra* note 88, ¶ 14.

104. *Id.*

105. *Id.*

106. See *id.* ¶ 13.

an MLB team if it resulted from conduct not in the best interest of professional baseball or inconsistent with the agreement.<sup>107</sup>

## II. DOUBLE PLAY: ENFORCING PERSONAL SERVICE CONTRACTS IN A WORLD OF CONTRACT JUMPING AND PLAYER RAIDING

Although the defections of Nomo and Soriano were the catalyst for scrapping the old MLB-NPB treaty and creating the Posting System, also providing significant impetus was the existing legal framework of enforcing personal service contracts of professional athletes. Basic contract law plays a very important role in the continued existence of sports leagues.<sup>108</sup>

### A. CONTRACT JUMPING AND INTER-LEAGUE PLAYER COMPETITION IN THE MLB

Historically, inter-league competition generally occurred when a new league formed and began to compete with an existing league for both players and fans.<sup>109</sup> In each situation, a period of contract jumping and player raiding followed the emergence of the new league.<sup>110</sup> Rival league-inspired contract jumping has occurred no less than six times in U.S. professional baseball, three times in the twentieth century.<sup>111</sup> The three most notable periods involved the National League-American League "Great Baseball War" and eventual merger in the early 1900s, the struggle between the AL-NL combined league and the Federal Baseball League in 1914 and 1915, and the Mexican League inspired defections in 1946.<sup>112</sup> Finally, the racial integration of professional baseball and the resulting collapse of the Negro Leagues in the late 1940s and early 1950s is probably the most comparable to the present situation.<sup>113</sup>

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107. *Id.*

108. See James T. Brennan, *Injunction Against Professional Athletes Breaching Their Contracts*, 34 BROOK. L. REV. 61, 61 (1968).

109. See 1 ROBERT C. BERRY & GLENN M. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES*, 65-66 (1986).

110. See *id.*; Sharon F. Carton, *Damning with Fulsome Praise: Assessing the Uniqueness of an Artist or Performer as a Condition to Enjoin Performance of Personal Service Contracts in Entertainment Law*, 5 VILL. SPORTS & ENT. L. J. 197, 203 (1998).

111. BERRY & WONG, *supra* note 109, at 67.

112. See *id.*

113. See *infra* notes 137-39 and accompanying text. These situations differ from other rival league situations because rather than a league being formed specifically

Certainly the most powerful tool in the team's legal arsenal against contract jumping players is the unique services doctrine. Under this doctrine, first developed in the nineteenth century English case *Lumley v. Wagner*,<sup>114</sup> courts are more likely to find the application of a negative injunction appropriate against an athlete's contract than against normal personal service contracts in other industries.<sup>115</sup> *Philadelphia Ball Club v. Lajoie*<sup>116</sup> is the seminal case applying the unique services doctrine to sports contracts and inter-league "contract jumping."<sup>117</sup> Napoleon "Nap" Lajoie was a star player for the National League's Philadelphia team, and when his salary request in 1901 was refused, he angrily left to play for the rival American Association team across town.<sup>118</sup> His former club brought a suit seeking a negative injunction to prevent him from playing for the American Association team.<sup>119</sup> Perhaps the most important aspect of the case is the analysis the Pennsylvania Supreme Court utilized in determining that damages were inadequate.<sup>120</sup> The court held that for injunctive relief to be appropriate, the team must establish that the player had unique skills that "could not easily be obtained from others."<sup>121</sup> In concluding that Lajoie was indeed highly skilled and that a negative injunction was appropriate, the court looked not only to his above-average baseball skill, but also to his familiarity with his team and teammates and to his overall reputation and corresponding ability to draw fans.<sup>122</sup>

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for competition with an existing league, they resulted from a shift in an aspect of cultural perspective that brought the two leagues into a rivalry over fans and players. See *infra* notes 137-39 and accompanying text.

114. *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852). *Lumley* is a somewhat famous case involving an opera singer who broke her contract with one theater to perform for another. Carton, *supra* note 110, at 198. The court refused to force her to sing for the theater, but reasoned that if she were barred from singing anywhere else she would choose to sing there rather than forgo being an opera singer. *Id.*

115. See BERRY & WONG, *supra* note 109, at 68.

116. *Phila. Ball Club v. Lajoie*, 51 A. 973 (Pa. 1902).

117. Carton, *supra* note 110, at 206.

118. See BILL JAMES, THE BILL JAMES HISTORICAL BASEBALL ABSTRACT 79 (1985); LEONARD KOPPETT, KOPPETT'S CONCISE HISTORY OF MAJOR LEAGUE BASEBALL 94-95 (1998).

119. KOPPETT, *supra* note 118, at 94.

120. See Carton, *supra* note 110, at 206.

121. *Phila. Ball Club*, 51 A. 973, 973.

122. See *id.* at 974. See generally C. Paul Rogers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L. REV. 325, 325-26 (2002) (referring to the skill of Lajoie).

Less than a month after the *Lajoie* opinion, another court refused to grant an injunction against another contract jumping player in *Brooklyn Baseball Club v. McGuire*.<sup>123</sup> At the conclusion of a very brief opinion, the court stated that it was not satisfied that McGuire was so talented or unique that his services "could not be performed, and substantially as well, by others engaged in professional baseball playing, who might easily be obtained to take his place."<sup>124</sup> While the legal outcomes were vastly different the practical effect was not, as Lajoie's contract was sold to a Cleveland team and the Ohio courts refused to enforce the Philadelphia Supreme Court's injunction.<sup>125</sup>

The creation of the Federal League in 1913 again sparked a period of player raiding and contract jumping. In *Weegham v. Killefer*,<sup>126</sup> the court refused to grant a negative injunction to Weegham, owner of the Chicago Federal Club, against Killefer because Weegham did not come before the court with "clean hands" in the matter.<sup>127</sup> The same year, the court in *American League Baseball Club of Chicago v. Chase*<sup>128</sup> vacated a preliminary injunction issued against the ballplayer Chase because it found that the existing player contracts were lacking in mutuality of remedy.<sup>129</sup> The *Chase* court refused to follow the *Lajoie* decision because it was against "other cases constituting the weight of authority."<sup>130</sup> Instead, the underlying policy of *Chase* was that of personal freedom, and so it was not the place of the court to "assist in enforcing an agreement which is a part of a general plan having for its object the maintenance of a monopoly, interference with the personal liberty of a citizen, and the control of his free right to labor wherever and for whom he pleases . . . ." <sup>131</sup>

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123. *Brooklyn Baseball Club v. McGuire*, 116 F. 782, 783 (E.D. Pa. 1902).

124. *Id.*

125. KOPPETT, *supra* note 118, at 95. The only real limit on Lajoie's ability to play was that he did not travel through or play any games in Pennsylvania to avoid arrest for contempt of court. See JAMES, *supra* note 118, at 79. Several other players in Pennsylvania likewise moved to teams out of state to avoid having injunctions imposed on them. *Id.*

126. *Weegham v. Killefer*, 215 F. 168 (W.D. Mich. 1914).

127. *Id.* at 172-73. Granting injunctions is a discretionary function of the courts, and here Weegham had induced Killefer to breach his MLB contract, and so Weegham did not come before the court with clean hands when he attempted to prevent Killefer from again breaching and resigning. *Id.*

128. *Am. League Baseball Club of Chicago v. Chase*, 149 N.Y.S. 6, 14 (N.Y. Sup. Ct. 1914).

129. *Id.*

130. *Id.* at 15.

131. *Id.* at 20.

Thus, two separate applications of the rule were formed during the "Great Baseball War" of the early 1900s, and in the Federal League period, courts generally chose not to follow the *Lajoie* opinion.<sup>132</sup> In the 1946 rivalry with the Mexican League, instead of seeking injunctions against contract jumping players, the MLB issued a policy that any player under a MLB contract that signed with a Mexican League team would be barred from the MLB for five years.<sup>133</sup> There were still several players who jumped to the Mexican League,<sup>134</sup> and when the league collapsed in 1948,<sup>135</sup> these players brought antitrust actions against the MLB's policy.<sup>136</sup> Then, during the racial integration of the MLB, the Negro League owners first found that their contracts did not bar players from signing with MLB teams.<sup>137</sup> Not only could they not prevent players from leaving via a negative injunction, the MLB teams felt no obligation to compensate the Negro League teams.<sup>138</sup> The Negro Leagues changed their contracts and some MLB teams infrequently gave monetary compensation, but Negro League team owners were unwilling to seek negative injunctions because they did not want to be perceived as standing in the way of racial integration.<sup>139</sup>

## B. NEGATIVE INJUNCTIONS AND THE UNIQUE SERVICES DOCTRINE

Baseball, however, is not unique in experiencing such inter-league struggles for player contracts. Each major professional sport has faced significant rival league competition at least once.<sup>140</sup> Despite the early reluctance of courts to follow the *La-*

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132. *Id.* at 15. *But see* Cincinnati Exhibition Co. v. Marsans, 216 F. 269 (E.D. Mo. 1914) (following *Lajoie*).

133. WILLIAM MARSHALL, *BASEBALL'S PIVOTAL ERA, 1945-51*, at 49 (1999).

134. Eight MLB players signed with the Mexican League. KOPPET, *supra* note 118, at 227.

135. MARSHALL, *supra* note 133, at 63.

136. *See, e.g.,* Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949); Martin v. Nat'l League Baseball Club, 174 F.2d 917 (2d Cir. 1949); *see also* BERRY & WONG, *supra* note 109, at 95-97 (discussing Gardella, 172 F.2d 402).

137. Alfred Dennis Mathewson, *Major League Baseball's Monopoly Power and the Negro Leagues*, 35 AM. BUS. L.J. 291, 299-300 (1998).

138. *See id.*; Dr. Harry Edwards, *The End of the "Golden Age" of Black Sports Participation?*, 38 S. TEX. L. REV. 1007, 1049 (1997); John B. Holway, *Baseball Blackout*, WASH. POST, Apr. 4, 1993, at C1, available at LEXIS, News Library, Washington Post File.

139. *See* Kenneth L. Shropshire, *Jackie Robinson's Legacy*, EMERGE, Apr. 30, 1997, at 60, available at 1997 WL 11609302.

140. *See* Nassau Sports v. Peters, 352 F. Supp. 870, 872 n.2 (E.D.N.Y. 1972).

*joie* opinion in baseball cases,<sup>141</sup> *Lajoie* has become the "leading case for the availability of specific performance against an athlete."<sup>142</sup> The general trend has been to further relax the standards for issuing a negative injunction against professional athletes.<sup>143</sup> This is especially true as to the analysis of an athlete's uniqueness and skill.<sup>144</sup> Although the *Lajoie* court relied on the fact that *Lajoie* was a "bright particular star" in the "baseball firmament," the injunction it imposed actually covered two less stellar teammates who had jumped their National League contracts along with *Lajoie*.<sup>145</sup> Perhaps the most important aspect of the case is that the court required the team only to establish that the player had unique skills that "could not *easily* be obtained from others."<sup>146</sup> Later courts have followed the practical outcome of *Lajoie* to such an extent that professional athletes are often treated as *prima facie* unique.<sup>147</sup> Many commentators seem to be uncomfortable, if not critical, of this expansion of the uniqueness standard.<sup>148</sup>

Another twist added to the unique services analysis is best evidenced in *Winnipeg Rugby Football Club v. Freeman*.<sup>149</sup> In *Winnipeg*, a team in the Canadian League sought an injunction preventing two of its former players from playing for the Cleve-

One notable instance is *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972), involving basketball legend Julius "Dr. J" Erving.

141. See *supra* notes 123-32 and accompanying text.

142. Brennan, *supra* note 108, at 63; see also Peter J. Bosch, *Enforcement Problems of Personal Service Contracts in Professional Athletics*, 6 TULSA L.J. 40, 47 (1969); Carton, *supra* note 110, at 206.

143. See Mark D. Scheffler, *Injunctions in Professional Athletes' Contracts—An Overused Remedy*, 43 Conn. B.J. 538, 544-46 (1969); Brennan, *supra* note 108, at 71.

144. See Scheffler, *supra* note 143, at 544-45.

145. Rogers, *supra* note 122, at 333-35.

146. Phila. Ball Club v. *Lajoie*, 51 A. 973, 973 (Pa. 1902) (emphasis added); see also Carton, *supra* note 110, at 206.

147. See Carton, *supra* note 110, at 207; JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 618 (2003); see, e.g., *Nassau Sports v. Peters*, 352 F. Supp. 870, 876 (E.D.N.Y. 1972); *Central N.Y. Basketball, Inc. v. Barnett*, 181 N.E.2d 506, 517 (Ohio C.P. 1961) ("Professional players in the major baseball, football, and basketball leagues have unusual talents and skills or they would not be so employed."). But see Carton, *supra* note 110, at 207 (stating that "[the uniqueness] issue has not reached the point of being removed from dispute at the trial level").

148. See, e.g., Scheffler, *supra* note 143, at 544; Michael D. Gallagher, *Contractual Rights and Duties of the Professional Athlete—Playing the Game in a Bidding War*, 77 DICK. L. REV. 352, 360 (1973) (stating that recent cases have made "uniqueness" meaningless).

149. *Winnipeg Rugby Football Club v. Freeman*, 140 F. Supp. 365 (N.D. Ohio 1955).

land Browns.<sup>150</sup> One of Cleveland's coaches testified that the players in question were merely "good" football players, but not especially skilled or talented.<sup>151</sup> The judge, noting that he would normally give great weight to such testimony, instead found that "[t]he standard of special skill and exceptional ability to some extent must have a relation to the class and character of play."<sup>152</sup> That is, an athlete's uniqueness is to be determined in reference to the overall perceived quality of the team or league that he is attempting to either leave or join.

The most notable feature of the contract jumping cases is the conflict between underlying policies and the resulting inconsistency in outcomes.<sup>153</sup> Thus, one commentator can state that "most courts have been fairly tolerant of the athlete's actions,"<sup>154</sup> while another that "club owners . . . do not have much difficulty in obtaining injunctions to restrain their ball players from providing services to others."<sup>155</sup> Even when faced with nearly identical facts, courts have come to opposite conclusions as to the appropriateness of a negative injunction.<sup>156</sup> The most important issue suffering from uncertainty is the permissible length of the negative injunction. This is largely because when determining the reasonableness of the contract, courts will look to the length of the original contract,<sup>157</sup> but there is a countervailing policy

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150. *Id.* at 365; see also BERRY & WONG, *supra* note 109, at 74.

151. Winnipeg, 140 F. Supp. at 366.

152. *Id.* The court further stated that "it seems reasonable to observe that appraisal of skill and unique ability of a player, as they relate to contracts of this type, must depend somewhat upon his prospects and potential." *Id.* Clearly, this holding takes on special importance when the caliber of one team or league is considered superior to the other because, no matter the athlete's talent level, he is likely to be more valuable to a less established or "inferior" league. See Gould, *supra* note 1, at 106 n.79; Gallagher, *supra* note 148, at 361.

153. Gallagher, *supra* note 148, at 368 (stating that "the reasons why courts reject lack of mutuality as a defense have varied greatly"); see also Rogers, *supra* note 122, at 344.

154. Carton, *supra* note 110, at 212.

155. Scheffler, *supra* note 143; see also Bosch, *supra* note 142, at 58.

156. See Robert C. Berry & William B. Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CASE W. RES. L. REV. 685, 723 (1981). Compare Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37, 46 (Tex. Civ. App. 1961) (tolling option clause for player who sat out a season), with Lemat Corp. v. Barry, 80 Cal. Rptr. 240, 243-45 (Cal. Ct. App. 1969) (refusing to toll an option clause).

157. See BERRY & WONG, *supra* note 109, § 2.14, at 87. But a contract that requires that the contract be tolled during the player's absence from the sport may allow an injunction to issue even after the contract would have expired. *Id.* See, e.g., Dallas Cowboys Football Club, 348 S.W.2d at 46 (tolling the year remaining in the contract when player attempted to sign with another team after having sat out a

that courts will not issue injunctions that impose great hardship.<sup>158</sup> This policy is most frequently invoked when a team seeks an injunction lasting several seasons because this would essentially force the player to play for a team against his will or entirely forsake his profession.<sup>159</sup> Because of the operation of the various reserve systems and frequent use of single year contracts containing an option clause to extend the contract prior to the advent of free agency and multiyear contracts, the issue has not been widely litigated, although there have been some cases.<sup>160</sup> Courts will also presume that players have a limited number of prime years and will be reluctant to enforce contracts or injunctions which will bar the player from his primary means of employment for a significant time.<sup>161</sup>

### III. FOUL BALL: THE INADEQUACIES OF THE POSTING SYSTEM AGREEMENT

Since its inception, the Posting System's only significant legal hurdle has been the recent Kevin Millar dispute. Although this situation was "unprecedented," other similar controversies may well be looming.<sup>162</sup> The situation should serve as a wake-up call to the potential and real weaknesses of the Posting System. Neither league should view the current Posting System as anything more than a temporary solution which, for various reasons stated below, both leagues should consider restructuring to better protect the interests of both leagues and their players.

#### A. THE INFIELD FLY RULE: ENFORCING CONTRACTS IN THE CONTEXT OF THE POSTING SYSTEM

Although the unique services doctrine is simply stated and has become fairly standardized, the underlying policies are very confused and often conflict. This is partly due to the fact that the doctrine is only periodically applied against athletes and sports leagues because of the temporal infrequency of rival

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year).

158. See, e.g., Scheffler, *supra* note 143, at 543.

159. See *id.*; RESTATEMENT (SECOND) OF CONTRACTS § 367(2) (1981).

160. See, e.g., Machen v. Johansson, 174 F. Supp. 522, 522 (S.D.N.Y. 1959); Le-mat Corp. v. Barry, 275 Cal. App. 2d 671, 680 (Cal. Ct. App. 1969); Arena Athletic Club v. McPartland, 58 N.Y.S. 477, 478 (N.Y. App. Div. 1899).

161. See Carton, *supra* note 110, at 213.

162. See *MLB Will Stay Out*, *supra* note 48, at F7.



leagues. Additionally, policies requiring an injunction in one case would seem to require refusing one in another. Also, with the doctrine now being imposed against all professional athletes, instead of only true star athletes, as arguably the doctrine ought to be enforced,<sup>163</sup> there is further potential for some odd results. For instance, a star athlete or top prospect, such as Ichiro or Soriano, is more likely to receive the support of the league and team he is attempting to join. Because of the expense of litigation and the uncertainty of the outcome that the various policy justifications may cause, it is entirely foreseeable that a star player may be able to escape his contract and the imposition of an injunction through a settlement, as did Soriano, while a mediocre player, unsupported by a strong team or league, is more likely to have an injunction imposed upon him.

It is often said that courts are loath to force an athlete to choose between their profession and playing for a team against their will, but this is exactly what the doctrine often does, even if the length of the injunction is limited to a year or two.<sup>164</sup> This tendency is of less concern for occasional instances of contract jumping, but makes the doctrine as a whole somewhat unsuitable and inefficient for regulating all player movement between leagues. Thus, some sort of agreement that both enables and regulates inter-league player movement is preferable so long as it is designed to act like player transaction rules within a single league. Clearly, resolving all intra-league player transaction disputes by litigation and negative injunction would be highly undesirable, and it should be no different in the case of two well-established leagues that have begun to overlap in player and fan base largely due to the proliferation of the global economy and broadcasting.

There remain several legal questions as to the Posting System's enforceability in the event of a controversy.<sup>165</sup> A pressing issue is the overall enforceability of Japanese player contracts in the United States.<sup>166</sup> In the sports and entertainment context, the "unique services" doctrine is the best way to prevent contract jumping in the absence of an agreement such as the Post-

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163. See, e.g., Scheffler, *supra* note 143, at 544-45 (discussing courts' tendencies to consider "mere engagement as a baseball player in the professional league" evidence of excellence and extraordinary abilities).

164. *Id.* at 553 (noting that injunctions are really specific performance of negative contracts).

165. See Gould, *supra* note 1, at 117-18 (discussing possible antitrust issues).

166. See *supra* notes 76-86 and accompanying text.

ing Agreement.<sup>167</sup> U.S. courts will presume the uniqueness of athletes, and if the contract is otherwise valid, will impose a negative injunction against the player and any rival league or team that attempts to sign him.<sup>168</sup> Courts will not, however, always impose a negative injunction and the more restrictive nature of the NPB leaves some doubts as to how U.S. courts will treat their player contracts. Courts, however, have recognized that even moderately skilled players have more value to less accomplished leagues.<sup>169</sup> Thus, if a Japanese player were to attempt to jump his contract and sign with the MLB, this argument could have substantial persuasive value with a court, even in spite of the NPB's more restrictive player contracts and practices.<sup>170</sup> Despite the expansion of the unique services doctrine and some case rulings that arguably should make it easier for NPB teams to get negative injunctions against players trying to sign with MLB teams,<sup>171</sup> the implication of Soriano's settlement with the Carp is that the team either suspected that Soriano's contract was not enforceable in the United States or realized that the costs of successful litigation outweighed any potential remedy.

Legal disputes and contract wrangling need not originate because of contract jumping, and contract enforcement and negotiation issues such as those recently involving Kevin Millar, and to a lesser extent, Japanese player Norihiro Nakamura,<sup>172</sup> certainly will occur again. If the Dragons had utilized a "keep to kill" tactic on Millar's contract,<sup>173</sup> the MLBPA certainly would have pressured the MLB to allow Millar to re-enter the league. This would have placed the MLB in a difficult position and probably would have led to its utilization of the escape clause now active in the Posting Agreement.<sup>174</sup> If the Posting System collapses, the NPB in particular will be in a difficult position and will almost certainly have to contend with some expensive and largely fruitless contract jumping litigation in the United

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167. See *supra* notes 114-17 and accompanying text.

168. This presumption is rebuttable. See Carton, *supra* note 110, at 216 (discussing *Winnipeg*).

169. See *supra* notes 149-52 and accompanying text.

170. *Supra* notes 30-35, 149-52 and accompanying text.

171. See *supra* notes 149-52 and accompanying text.

172. See *Millar Confirms He Will Not Report to Japan*, *supra* note 47.

173. See *Can Bullpen by Committee Save Sox?*, *supra* note 57 and accompanying text (discussing Kai Goroshi).

174. See *POSTING SYSTEM*, *supra* note 88, ¶ 16 (allowing renegotiations or possible voidance of the agreement if either party has a "material change in its reserve rules").

States.<sup>175</sup> Ironically, Kevin Millar had placed the leagues in a situation where the best way to maintain positive inter-league relations also directly conflicted with the terms of the Posting System. If the leagues had instead choose to act according to the Posting System and forced Millar to sit out two years or post, inter-league relations would have been severely strained.<sup>176</sup> While the U.S. commissioner can void any agreement between a Japanese player and U.S. team that is not in the best interests of professional baseball, neither he nor the NPB commissioner currently have the same power to void contracts between Japanese teams and U.S. players.<sup>177</sup> If such a power existed, there would have been a way for the NPB to save face and resolve the issue without seriously jeopardizing inter-league relations or the Posting System.

The NPB has borne the brunt of recent manifestations of the inherent difficulty of preventing contract jumping; however, the season-ending players strike in 1994 prompted some free agents to sign with Japanese teams, which had Gordon Ash, then general manager for the Toronto Blue Jays, expressing concern about MLB players leaving for the NPB.<sup>178</sup> There is speculation and some evidence that the depressed free agent market may be a cause of the new MLB collective bargaining agreement's luxury tax.<sup>179</sup> If so, then the NPB may become an attractive alternative for some mid and top-level MLB talent who have recently found themselves unable to command the salary levels that comparable players have under existing contracts.<sup>180</sup> Thus, it is ultimately in the interests of both leagues to retain a system of regulation for inter-league player transfers.

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175. See BERRY & WONG, *supra* note 109, at 68 (explaining unlikely success of lawsuits seeking damages, specific performance, and negative injunction when personal services contracts are involved).

176. See *supra* notes 58-59 and accompanying text.

177. See POSTING SYSTEM, *supra* note 88, ¶ 13.

178. See Richard Griffin, *Land of Rising Sun Beckons Ballplayers*, TORONTO STAR, Sept. 20, 1995, at E1 [hereinafter *Land of Rising Sun*] ("[F]uture signings would endanger the mutual hands-off agreement and . . . the offending Japanese could expect repercussions.").

179. See, e.g., Amore, *supra* note 39, at C5; Peter Schmuck, *Economy Causing Depression in Signings: With Teams Cutting Payroll, Free Agents Attracting Little Interest at Meetings*, BALT. SUN, Dec. 15, 2002, at 5D, available at LEXIS, News Library, Baltimore Sun File.

180. See *Land of Rising Sun*, *supra* note 178, at E1.

## B. DOWN ON STRIKES: THE POSTING SYSTEM DOES NOT ADEQUATELY PROTECT THE NPB'S INTERESTS

Many have argued that the Posting System may actually expedite the decline of the NPB rather than preserve it as intended.<sup>181</sup> This fear is valid. If Japanese baseball fans continue to divert their attention and money towards U.S. baseball, NPB owners may have no viable alternative other than to post players in an effort to offset revenue lost to MLB baseball.<sup>182</sup> Ironically, it is the loss of star players that has the most adverse effects on league revenue,<sup>183</sup> but it is these same star players who can earn their NPB team a substantial Posting System bid.<sup>184</sup> With each successive posting, the NPB may dig itself into a deeper financial hole, receiving relatively minimal benefits at the greater cost of escalating future losses.<sup>185</sup> The temptation for a franchise to seek this sort of compensation for a player it may soon lose to free agency is obvious.<sup>186</sup> Thus, rather than being the solution the NPB sought, many argue that the system will reduce the NPB to the status of a farm system for the MLB.<sup>187</sup>

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181. See, e.g., Price, *supra* note 6, at 52 (noting a decline in attendance and TV ratings for Japanese baseball); Caple, *supra* note 22, at F13 (discussing Japanese fears of losing their star players to U.S. major leagues and a possible decrease in Japanese baseball popularity); Larimer, *supra* note 25, at 45 (alluding to possible adverse impacts on Japanese baseball caused by the disparity between soaring American baseball salaries and decent Japanese players' cut-rate salaries); Isidore, *supra* note 20 (noting that the new Posting System has the "potential to feed the U.S. teams with a supply of reasonably-priced stars" and it will "dampen fans' appetite for Japanese baseball").

182. See Isidore, *supra* note 20.

183. See Gallagher, *supra* note 148, at 353 (discussing the "impact that a superstar can have on the fortunes of a team" and the typical method of inducement of offering substantially more money than the player is receiving from their present team).

184. *Id.* at 354.

185. Compare Mason Nakadomari, *The Future Relationship of the Baseball Superpowers*, National Pastimes (Oct. 6, 2002) (on file with author) (arguing that the NPB will not collapse as have other baseball leagues competing with the MLB because the MLB cannot steal its audience), with Uozumi, *supra* note 20 (discussing the MLB's attempts to expand into the Japanese market with merchandise and TV broadcasts by tapping the growing popularity of Japanese players in the major league).

186. The Mariners paid Ichiro's former Japanese team, the Orix Blue Wave, over \$13 million just to sit down at the bargaining table with him. See Price, *supra* note 6, at 54. The Yakult Swallows similarly received \$11.25 million from the Los Angeles Dodgers for pitcher Kazuhisa Ishii. See Isidore, *supra* note 25.

187. See Farber, *supra* note 15, at 12 (quoting MLBPA's Japanese representative Peter Miller as saying, "the posting system will only accelerate the trend [of the Japanese leagues becoming a U.S. farm system] . . . this is a bonanza for Japanese

Unfortunately for the NPB, its troubles arise not from the Posting System itself, but rather from its interaction with the league's rules and practices.<sup>188</sup> Players are leaving because they are dissatisfied with the NPB, not because of the Posting System,<sup>189</sup> which merely establishes a regulated procedure by which dissatisfied players may leave. Its real force as a protective instrument comes from the MLB's agreement to respect Japanese player contracts outside of the Posting System and from the limited control it gives NPB team owners over the timing of player transfers.<sup>190</sup> Despite this element of control, the Posting System may actually create incentives for Japanese players to leave the NPB sooner rather than later. The Posting System provides the quickest opportunity for any player who would be happier playing for a different team or for higher wages to get out of his current contract. A player who would prefer to play for another NPB team, but who is unwilling to complete his contract with his current team, may decide to seek posting instead. Currently, only four players have utilized the Posting System.<sup>191</sup> But this may soon change. Reportedly, Ichiro threatened to jump his contract, and when the Orix owners realized they were going to lose Ichiro either immediately to a contract breach or the following year to free agency, they posted him.<sup>192</sup> Thus, both players and owners have incentives to post before free agency; players avoid the full time restraints of their contracts and owners are able to convert a certain loss to a potentially substantial gain.<sup>193</sup>

As has been mentioned, the Posting System also skews the interests of NPB management and ownership.<sup>194</sup> This is particularly true since NPB ownership can refuse inadequate bids,

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clubs. Financially strapped teams will start doing it more often. Instead of opposing a posting . . . they're going to be pushing it"). See also Whiting, *supra* note 11.

188. See *supra* notes 27-29 and accompanying text.

189. See *supra* notes 27-29 and accompanying text.

190. See *supra* text accompanying notes 43-45, 100.

191. See *Yankees Secure Bid for Talks with Hiroshima Pitcher Ramirez*, *supra* note 15 (noting that as of February 7, 2003, Ramon Ramirez is the fourth player to draw a bid under the Posting System, after Ichiro Suzuki, Kazuhisa Ishii and Alejandro Quezada).

192. See Beech, *supra* note 36.

193. See *supra* notes 111-21 and accompanying text; see also Beech, *supra* note 36 (noting the nine-year time constraint for Japanese players to be eligible for free agency and suggesting that under the Posting System a "ball club can place a player on the international market and sell him to the highest bidder").

194. See Gould, *supra* note 1, at 115; see also *supra* notes 36-38 and accompanying text.

and so risk nothing by the mere act of posting a player.<sup>195</sup> However, every time a star or popular NPB player posts successfully, his absence not only weakens the commercial appeal of the league and competitiveness of the team, but also adds to the strength of its commercial rival.<sup>196</sup> Additionally, since the Posting System only allows monetary compensation for posted players, the MLB does not sacrifice any of its future commercial competitiveness.<sup>197</sup> Thus, the end result may be a vicious snowballing effect in which each successive posting makes necessary a subsequent one as the MLB increases its overall attractiveness to Japanese fans and competitive strength over the NPB.

If such a trend continues long enough, the NPB could essentially become a "farm" or "feeder" league for the MLB, and the NPB could be reduced to developing talent only to sell it in an attempt to keep the team from financial ruin or popular obscurity. While the great distance separating the leagues may slow the process, the history of multi-league competition for fans and players has thus far only resulted in the collapse or incorporation of the weaker league.<sup>198</sup>

#### C. FULL COUNT: POTENTIAL MLB PROBLEMS WITH THE POSTING SYSTEM

The Posting System poses problems for the MLB as well.<sup>199</sup> First, because the Posting System allows only monetary compensation, wealthier teams are in a better position to obtain the best Japanese players.<sup>200</sup> To sign a top Japanese player, a MLB team must be able to out-bid its rivals, and as each team may make only one blind bid, there is a strong temptation to bid high. This raises special problems for less financially stable teams who either need or want the player or know that their team is especially attractive to the posted player. Obviously,

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195. See *supra* text accompanying notes 98-101.

196. See *supra* notes 17-24, 36-38, 185 and accompanying text.

197. See Chalian, *supra* note 33, at 612-16. U.S. league rules often require that compensation for inter-team player transactions be in the form of current players or future draft picks. *Id.* at 613. Under a system of purely monetary compensation, this result is more indirect and only occurs if the team receiving the compensation directs the money to the recruitment or development of additional talent. *Id.*

198. See BERRY & WONG, *supra* note 109, at 65-66. It should be noted that geographic distance did not protect Russian professional hockey from losing its talent to the NHL. See Whiting, *supra* note 11.

199. See Edes, *Millar Resolution in the Works*, *supra* note 57; see also notes 46-59 and accompanying text (discussing the Kevin Millar NPB contract controversy).

200. See POSTING SYSTEM, *supra* note 88, ¶ 9.

the system greatly favors teams that have financial resources not invested in current talent, as opposed to traditional player for player trades in which teams are more competitively balanced. Additionally, the nature of the bidding process may yield a situation in which the team making the highest bid is not in the position to make an attractive offer to the player, potentially opening the way for an antitrust suit brought by the acquired player.<sup>201</sup> The real effect of this is that teams with larger budgets are in a better position to acquire Japanese players, whereas in other trade situations teams are on more equal footing as players and draft picks are more evenly distributed among the teams.<sup>202</sup> Although wealthy teams have a similar competitive advantage in the domestic free agent market, they do not have similar exclusive bargaining rights and small market teams may attract players for reasons which are not exclusively financial.<sup>203</sup>

Also, the fact that a player may only be posted once a year may create both an incentive and a corresponding ability for a MLB team to attempt to prevent a rival from signing a needed or desired player.<sup>204</sup> This could be accomplished by simply entering an unusually high bid and then engaging the player in hard bargaining.<sup>205</sup> Since the Japanese team only receives the bid amount if the player signs a contract, such a strategy might very well work. This strategy may have an added benefit to the blocking team in that it might be able to sign a quality player for much less than his actual market value. Considering that current trends show U.S. teams with successful Japanese play-

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201. See Gould, *supra* note 1, at 115-16 (explaining that "some teams may want to keep the player off the market and to provide the highest bid, knowing that their bargaining stance makes a contract with the player impossible since no dispute resolution mechanism such as arbitration is contained in the agreement").

202. See Chalian, *supra* note 33, at 612-13 nn.131, 133, 136 & 139; see also *supra* note 197.

203. See Chalian, *supra* note 33, at 613 nn.136 & 139.

204. While this may seem a bit unrealistic, teams frequently enter player transactions with a view not only to strengthen their team but as a means of preventing a close rival from gaining a competitive edge. See, e.g., Bob Hohler, *Yankees Cut Red Sox Out of Colon Deal*, BOSTON GLOBE, Jan. 16, 2003, at E3, available at 2003 WL 3375150. Although Brian Cashman, the Yankees General Manager, denies that they entered a three-way trade with the Montreal Expos and Chicago White Sox to "try to prevent Boston from getting better," he does admit that the result was a "fringe benefit." *Id.*

205. See Gould, *supra* note 1, at 115; see also George King, *Torre to The Boss: Place Blame on Me*, N.Y. POST, Feb. 7, 2003, at 110, available at 2003 WL 5134189 (noting that "With Steinbrenner's dislike of the Red Sox at an all-time high, The [sic] Boss could . . . make a ridiculously high bid for [Millar] . . .").

ers become immensely popular in Japan, revenue from merchandise, tourism, and other such sources may alleviate any financial setback incurred by this strategy.<sup>206</sup>

#### D. CALL TO THE BULLPEN: A PROPOSED MODIFICATION OF THE POSTING SYSTEM

The inadequacies of the Posting System are really functions of problems already existing in each league.<sup>207</sup> The agreement itself can and ought to be altered to better effectuate the interests of all parties, but the leagues should also alter their practices and rules to better protect their mutual interests.

In many respects, the current situation between the NPB and the MLB is similar to the early league rivalries in U.S. baseball history.<sup>208</sup> One key difference, however, is that the weaker league is the one with the more restrictive player restraints, while typically in inter-league competition, it is the start-up league which would offer better incentives to players to challenge the more established league.<sup>209</sup> The NPB should note this and do what it can to make its terms more attractive to those in the MLB. While the geographic separation of the leagues and the popularity of the sport in Japan make a complete collapse very unlikely,<sup>210</sup> the NPB can and will decline unless it takes steps to create better incentives to retain, develop and attract highly talented players.<sup>211</sup> But with Japanese dissatisfaction with the NPB rising and the stiff restraints on player mobility even within the NPB, the Posting System ap-

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206. See, e.g., Price, *supra* note 6, at 52; Uozumi, *supra* note 20, at 1 (reporting that more exposure of the MLB brand name in Japan would raise more revenues from consumer product sales, television rights fees, sponsorship fees, and event ticket fees).

207. For example, the current disparities between each league's appeal to baseball players. See *supra* notes 33-38.

208. See *supra* notes 111-13; see also Nakadomari, *supra* note 185 (analogizing the current tension between NPB and MLB to that between the Negro National League and MLB, in that MLB drained away talent from the League once it realized the availability of talented players at a cheaper price).

209. This actually makes the situation very comparable to the collapse of the Negro Leagues with the racial integration of the MLB. See Mathewson, *supra* note 137, at 298-301 (pointing out the Negro League's inability to "afford team synergy and an extremely weak employment contract system"); Kenneth L. Shropshire, *Where Have You Gone, Jackie Robinson?: Integration In America in the 21<sup>st</sup> Century*, 38 S. TEX. L. REV. 1043, 1049 (1997) (explaining that the absence of signed contracts and lack of financial incentives for black players were the causes of the Negro League collapse).

210. See *supra* note 185.

211. See *supra* note 185.



plies pressure on the league that is the exact opposite of what it should be if the intent was to slow or control the drain of talent from the NPB to the MLB.

Although the prestige of the MLB is probably the main reason Japanese players leave the NPB,<sup>212</sup> the length of the service required to qualify for NPB free agency, along with other aspects of the league, such as the disparity in bargaining power, grueling practices, short careers and low wages, are also highly determinative factors.<sup>213</sup> The NPB should therefore seriously consider restructuring its free agency system to create incentives for talented players to stay in the league. The NPB could retain its nine year requirement for unrestricted free agency and alter the practice of posting a player only in his last season or two into a hard rule that only players with seven years in the league are eligible for posting, but implement a NPB-only "demand to trade right" sometime toward the middle of a player's contract.<sup>214</sup> This would give NPB players rights comparable to their MLB counterparts and also provide incentives to remain in the league.<sup>215</sup> That is, players in the NPB system would have more power and flexibility in shaping their careers within the league before they were eligible to post, thus giving them an opportunity to switch teams or to negotiate better deals without having the Posting System as the sole resort. Also, these changes would give owners more incentive to treat players fairly, thus removing the opportunity to treat some players unfairly. At this point, it should be remembered that Alfonso Soriano's failed attempts to improve his NPB contract is what led to his decision to retire and sign with the Yankees.<sup>216</sup> Additionally, it would also seem that the Japanese cultural virtues already discussed would prevent these limited but more expansive rights and options from having the same arguably ill effects in Japan that some have argued they have had in the MLB.<sup>217</sup>

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212. See *supra* notes 27-28 and accompanying text.

213. See *supra* notes 33-36 and accompanying text.

214. See Seabury, *supra* note 33, at 358 (explaining similar rule in the MLB).

215. *Id.*

216. See *supra* notes 76-82 and accompanying text.

217. See *supra* notes 31-34 and accompanying text (discussing Japanese idea of "wa" and communal harmony). See also Tracy Ringolsby, *Player Salaries a Casualty of Labor War*, ROCKY MOUNTAIN NEWS (Denver), Dec. 3, 1995, at 15B, available at LEXIS, News File, Rocky Mountain News File (discussing the growing disparity between super star salaries and those of other players); Richard Griffin, *If Jay's Offer is Competitive, Leiter Should Stay*, TORONTO STAR, Nov. 24, 1995, at C6, available at LEXIS, News File, Toronto Star File, (noting the high turnover of players in the MLB but also arguing that it is an improvement over the reserve system).

The system could be further tailored to create corresponding rights and obligations on NPB players and teams, depending on whether the player exercised his "demand to trade right." For instance, the initial "demand" right could be merely a right to request, which, if refused, would make the player an unrestricted free agent after seven years instead of nine. Additionally, a player whose request was refused should receive some sort of accelerated compensation for the seasons between the refusal and his seventh season.<sup>218</sup> Players who do not exercise this right, could gain a true right to demand to be traded or posted after seven years, which if not granted by some point within the Posting System window, would render the player an unrestricted free agent.<sup>219</sup> Players who exercised the earlier right should also have some sort of right to refuse a limited number of trades or retract their request if none of the proposed trades are to their liking.<sup>220</sup> Further, players who refuse a trade or retract their request should be treated as not having made the request and thus retaining the second right to demand a trade or posting. Players who exercise the initial right and successfully enter a second contract must play out their remaining contract for their new team, and would still be eligible, but could not demand to be posted after their seventh season.<sup>221</sup> Players who do not exercise any of these rights would play under what would amount to the current NPB free agency rules.<sup>222</sup> While this structure is complex, it is no more so, nor more rigid than, many U.S. sports league free agency rules. At the same time it would encourage players to remain in the NPB and encourage NPB teams to act more competitively amongst each other and with the MLB, but would still allow them to post players as necessary. It should be noted, however, that any substantial change to either leagues' rules allows the other league to renegotiate or rescind the agreement within ten days of notification.<sup>223</sup>

As has been mentioned, the exclusive bargaining rights granted under the Posting System favor wealthier teams and

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218. See Backman, *supra* note 33, at 45 (describing franchise and transition player status in the NFL).

219. See Seabury, *supra* note 33, at 358 (explaining similar rule in the MLB).

220. *Id.*

221. *Id.*

222. See Backman, *supra* note 33, at 43-45 (describing four types of free agent players: unrestricted free agents, franchise and transition players, restricted free agents, and exclusive rights free agents); Seabury, *supra* note 33, at 358-59.

223. See POSTING SYSTEM, *supra* note 88, ¶ 16.

also could lead to potential abuses.<sup>224</sup> It should also be noted, however, that the very exclusivity of the rights granted is a large part of the incentive for teams to bid. Thus, altering the exclusive nature of the bargaining could adversely affect a team's willingness to place high bids, in part because a plural right is worth less and also because a more competitive bargaining process would likely result in teams allocating funds from the bid compensating the NPB team, to the contract amount offered to the player. This would certainly alleviate any skewed incentives NPB ownership has in posting players for short-term profit, but it would also increase long-term loss, as the team would have fewer funds to use in acquiring or developing fresh talent. A plural bargaining right would only be effective, and suitably compensate the NPB team, if every team wishing to participate paid a set and irrevocable entry fee. This would spread the cost among MLB teams, make access to Japanese talent through the Posting System more equitable between strong and weak MLB franchises, and would ensure at least some profit for the NPB team even in the event no MLB contract was reached. Depending on how high the entry fee was set and the number of interested MLB teams, it could also encourage more postings of mediocre players, who usually receive a much smaller bid amount than talented players for whom NPB teams can expect to receive greater compensation in the current closed bidding system.

Although this alteration would alleviate some potential problems within the framework of the Posting System, it does not alleviate the problems manifested during Irabu's contract negotiation.<sup>225</sup> The problem is complicated by the fact that the current Posting System allows working agreements between MLB and NPB teams as long as exclusive negotiating rights are not one of the terms.<sup>226</sup> In a plural bargaining situation it will be more difficult for the commissioners to police the process to ensure that a working agreement has not unfairly tainted the negotiation process.<sup>227</sup> This is not to say, however, that the leagues cannot amend the process to address both problems. As mentioned, one potential solution would be to require that the Japanese team receive set and irrevocable negotiation fees from all interested MLB teams.

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224. See *supra* notes 199-206.

225. See *supra* notes 68-74.

226. See POSTING SYSTEM, *supra* note 88, ¶ 14.

227. See *supra* notes 102-05 and accompanying text.

Alternatively, prior to the bidding process the player could submit a sealed list of teams that he would prefer to play for. The commissioner would then send both the top actual bid and the top bid, if any, from the player's list. The NPB would then determine if the high bid amount was acceptable, just as it does now, but in the event that it was, the player would then negotiate with both teams, the NPB team retaining a certain percentage of both winning bids regardless of whether an agreement with the player results, or the entire bid of the team the player reached an agreement with. This would at least partially ensure that teams are sincere in their efforts to sign the player and would also give the player a better chance to strike a good deal with a team he sincerely wanted to play for.<sup>228</sup> Additionally, it would also mean that less financially endowed teams, that nonetheless had other factors attractive to the player, could effectively compete for his services. Although it could have the effect of slightly lowering bid amounts, the fact that the NPB team is guaranteed to receive at least some compensation would offset this effect. Another added benefit is that it more accurately reflects the nature of the transaction. That is, the bid amount is expressly "consideration for the Japanese Club relinquishing its rights to the player,"<sup>229</sup> but there is no consideration for allowing a team the near exclusive right to negotiate, a right which certainly has some value.

Finally, it is worth considering whether players could be used as bids, much like inter-league player-for-player trades. Certainly there are players in the MLB, like Benny Agbayani, who would like to play in Japan, and allowing teams to bid in the alternative, that is, the current cash bid, or alternatively a player or player plus some cash, would further allow smaller teams to compete for players.<sup>230</sup> It should also be remembered that the Posting System is designed to govern player transactions going both ways across the Pacific, and while the current traffic has largely been one way, it is a possibility that MLB players will be posted in the future. The NPB is certainly capable of attracting MLB talent, and should consider importing more foreign talent to offset the loss of their top stars and to po-

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228. See *supra* notes 199-206 and accompanying text.

229. See POSTING SYSTEM, *supra* note 88, ¶ 16.

230. See *Agbayani Regrets Not Going to Japan*, *supra* note 57 and accompanying text. See also DiMeglio, *supra* note 39, at 29 (discussing the possibility of Ivan Rodriguez playing in Japan); *Land of Rising Sun*, *supra* note 178, at E1 (discussing MLB players leaving to play in Japan because of the strike-shortened season).

tentially attract more fans. Allowing player-for-player alternate bids may be the strongest incentive that Japanese teams could offer, although that is not to say that many MLB teams would not also be interested in selling player contracts for cash.

## CONCLUSION

The Posting System was meant to address the historically and legally significant issues surrounding inter-league competition for players, fans, market, and revenue. The NPB-MLB conflict, while related to earlier domestic league competitions, is unique in that the two leagues are well established and that their conflict arises from the increasing globalization of entertainment media. The agreement was designed to protect the interests of the NPB while still allowing Japanese players to sign with MLB teams, but it is becoming increasingly clear that the agreement as currently written is inadequate to completely resolve every issue. By modifying the agreement, the leagues and players will be better protecting their own interests while hopefully reducing the still-present potential for conflict. The NPB is not going anywhere so long as the sport remains popular in Japan, but it could face a serious crisis if Japanese fans grow to prefer the MLB game to such an extent that they also begin to view the NPB as an inferior league. There is a lot of young talent in Japan, proven by the fact that a Japanese team has won three of the last five Little League World Series,<sup>231</sup> and having a strong Japanese league is really in the best interests of fans, players, and teams in both nations.

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231. *Japan Bags Little League World Series*, JAPAN TIMES, Aug. 26, 2003, at 20, available at LEXIS, News Library, The Japan Times File.