FINAL-OFFER "BASEBALL" ARBITRATION: CONTEXTS, MECHANICS & APPLICATIONS

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INTRODUCTION

Final-offer arbitration limits an arbitrator to choosing a final offer made by one of the parties involved in an arbitration proceeding.[1] Conventional arbitration, on the other hand, allows an arbitrator to make an unrestricted settlement choice without the prior submission of offers by the disputants.[2]

The most discussed use of final-offer arbitration is its application in Major League Baseball ("MLB") salary

1. The process was first proposed by Carl Stevens in 1966. *See* Carl Stevens, *Is Compulsory Arbitration Compatible with Bargaining*?, 5 INDUS. REL. 38 (1966).

2. D.L. Dickinson, *A comparison of conventional, final-offer and "combined" arbitration for dispute resolution*, 57 INDUS.& LAB. REL. REV. 288, 289 (2004).

arbitration. Because of its long-term presence and apparent success, final-offer arbitration is sometimes referred to as "Baseball Arbitration."[3] Major League Baseball is unique in that final-offer arbitration is used solely to select a specific salary that is then inserted into a players existing contract.[4] But final-offer arbitration has also been utilized in other contexts, such as public employment, a context in which final-offer arbitration is sometimes codified to resolve bargaining impasses.[5] Although state statutes governing arbitration may share certain goals, the execution of these public employment statutes is inconsistent.

Final-offer arbitration is typically utilized in "interest" arbitration. Interest arbitration involves submitting disputes that arise from a disagreement over what terms or conditions to include in an agreement. Public employment interest arbitration involves the arbitration of disputed terms of a collective bargaining agreement, such as wages or health insurance benefits. Salary arbitration in MLB is a unique form of interest arbitration in that it deals with a player's individual contract, rather than the terms of the league's collective bargaining agreement. This paper will analyze final-offer interest arbitration in labor law in an effort to understand the statutory inconsistencies and to explore how and when final-offer arbitration may be best utilized.

Part II of this paper will discuss the theories underlying final-offer arbitration and how these theories have led to the use of such arbitration in both private and public sector labor law. In order to determine the contexts in which final-offer arbitration could be implemented, as well as the appropriate procedural variation, this section will analyze several agreements and statutes that have used or considered such

3. *See* ALAN SCOTT RAU ET AL., ARBITRATION 937 (2006).

4. *See* MLB COLLECTIVE BARGAINING AGREEMENT art. VI (2007-2011) [hereinafter MLB AGREEMENT], *available at* http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.

5. Iowa and Washington have mandatory final-offer arbitration statutes. IOWA CODE ANN. § 20.22 (Lexis 2008). WASH. REV. CODE. ANN. § 35.21.779 (Lexis 2008). Other states have mandatory final-offer arbitration statutes if requested by one of the parties. ME. REV. STAT. ANN. TIT. 13 § 1958-B(5-A) (Lexis 2008). ME. REV. STAT. ANN. TIT. 26 § 965 (Lexis 2008). CONN. GEN. STAT. ANN. 5-276a(c) (Lexis 2008). MINN. STAT. ANN. § 179A.16 (Subd. 7) (Lexis 2008). OKLA. STAT. ANN. TIT. § 51-108(4) (Lexis 2008), PA. STAT. ANN. § 11-1122-A (Lexis 2008), MICH. COMP. LAWS. ANN. 423.238 (Lexis 2008), WIS. STAT. ANN. § 111.77(4)(b) (Lexis 2008), N.J. STAT. § 34:13A-16 (2009). ILL. COMP. STAT. ANN., 5 ILCS 315/14 (2009).

arbitration. Additionally, Part II will address the interest arbitration mandate of the proposed Employee Free Choice Act and the suitability of final-offer arbitration in this context.

Part III examines which factors a final-offer arbitrator should be permitted to consider in making his or her determination. Collective bargaining agreements and final-offer arbitration statutes specifically dictate what an arbitrator may consider in making his or her decision, and some go as far as excluding specific criteria. The permitted criteria are formulated to mimic the bargaining market between the two parties in order to establish market value. With that in mind, Part III will analyze how this list of criteria should be structured in a final-offer setting.

II. IN WHAT CONTEXTS IS FINAL-OFFER ARBITRATION MOST APPROPRIATE?

A. The Theory Behind Final-Offer Arbitration

In order to understand the theory behind final-offer arbitration, it is important to first look at the criticisms of conventional arbitration. It is argued that conventional arbitrators often "split the difference" between each party's position.[6] Although the idea of a compromise itself may be fair, the existence of a compromise can be seen as an obstacle to good-faith bargaining, based on the assumption that these compromises cause a "chilling" or "freezing" effect on negotiations.[7] Because parties may believe that the arbitrator will split the difference, they may be less willing to make concessions and more likely to take extreme positions so that the arbitral "compromise" will be skewed in their favor. Whether a conventional arbitrator actually splits the difference has little impact on how the parties formulate their offers. What is most important is that parties who expect compromise tend to extend extreme offers and, as a result, fail to reach a middle ground in pre-arbitration settlement discussions. This would lead to more bargaining impasses and, consequently, more arbitration hearings.

6. *See* RAU ET AL., *supra* note 3, at 936.

7. Peter Feuille, *Final Offer Arbitration and the Chilling Effect*, 14 INDUS. REL. 302, 304 (1975).

The goal of final-offer arbitration is to counteract this chilling effect.[8] The theory is that by doing so, final-offer arbitration promotes good faith bargaining and pre-hearing settlement.[9] When an arbitrator's discretion is limited to a choice between two final offers, each party may worry that if his or her final offer is too extreme, an arbitrator will choose the final offer of the opposing party. As a result, it is to the strategic advantage of each party to present a final offer that is closer to the middle than the opposition's offer, since that position should win out in arbitration. When each party feels pressured to make a more reasonable offer, the parties are brought together toward a middle ground, which promotes settlement prior to an arbitration hearing. The idea of final-offer arbitration is to avoid arbitral hearings altogether in favor of an efficient, negotiated resolution. Although efficiency may not necessarily be the stated priority of arbitration generally, it is unequivocally the goal of *final-offer* arbitration.

Although the purpose of final-offer arbitration is to avoid an arbitration hearing, it is the *presence* of the final-offer arbitration process that promotes good-faith bargaining and drives the negotiations toward settlement, not the negotiations themselves. Although the pre-hearing settlement may be similar to the arbitrator's ultimate decision, this is not a zero-sum game. The parties not only save the time and expense of a hearing, but also seek a compromise in order to prevent the arbitrator from selecting the other party's final offer. The parties also benefit from avoiding the adversarial nature of a lengthy hearing.

Professor Roger Abrams, referring to his experience as a baseball arbitrator, notes that he looked for fair market value; whichever offer was closest to his idea of market value would win.[10] In final-offer salary arbitration, the parties know that one side might receive an award that is greater than market value while the other party might receive below market value. Thus, for risk-averse parties, there is an incentive to compromise. Final-offer arbitration may be problematic if both parties present unreasonable offers, but the incentive to

8. *Id.*

9. *Id.*

10. ROGER ABRAMS, THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION 155 (2000).

extend a more reasonable offer typically outweighs the risk associated with losing to an "unreasonable" offer. As Professor Abrams noted, "[w]inning means being more reasonable, which is the key that unlocks the door to settlement."[11]

Major League Baseball's salary arbitration is a highly successful example of the sought-after benefits associated with final-offer arbitration. In the 2009 salary arbitration season,[12] 111 players filed for arbitration, 46 players exchanged numbers with their respective teams, and only three of these players continued to a hearing.[13] The question remains whether MLB's success with final-offer arbitration is an anomaly. How is final-offer arbitration applied in public employment? Is its application appropriate? Can the process be extended to other contexts that could benefit from the advantages of final-offer arbitration? The sections that follow will analyze these questions in an effort to determine the most appropriate contexts for the use of final-offer arbitration.

B. Major League Baseball: Final-Offer Salary Arbitration

Major League Baseball's collective bargaining process utilizes final-offer arbitration for one issue only: determining a player's salary within the parameters of his existing contract.[14] A player is eligible for arbitration after completing three to six years[15] of major league service.[16] After three

11. *Id.* at 153.

12. Major League Baseball's "salary arbitration season" occurs in January and February. Players file for arbitration in early to mid-January and negotiate with their organization up until the potential hearings which take place between February 1st and February 20th. In 2009, players filed for arbitration by January 15th and all hearings were completed on February 20th as required by the league's collective bargaining agreement. MLB AGREEMENT, *supra* note 4, at art. VI, § (f)(5).

13. Maury Brown, *2009 MLB Salary Arbitration Vital Statistics*, THE BIZ OF BASEBALL, Feb. 20, 2009, http://bizofbaseball.com/index.php?option=com_content&view=article&id=2974:2009-mlb-salary-arbitration-vital-stats&catid=66:free-agnecy-and-trades&Itemid=153.

14. Sports unions are run much differently than other labor unions. In labor law, by virtue of Section 9(a) of the National Labor Relations Act, the union is entitled to eliminate all individual employee bargaining. In sports, however, individual athletes may contract within the parameters of the collective bargaining agreement. PAUL C. WEILER AND GARY R. ROBERTS, SPORTS AND THE LAW 307 (3d ed. 2004).

15. *See* MLB AGREEMENT, *supra* note 4, at (f)(1).

16. A player is also eligible for arbitration if he is what is known as a "Super Two." A Super Two is a player who has only two years of Major League experience but (a) has accumulated at least eighty-six days of service during the immediately preceding season; and (b) ranks in the top 17% in total service in the class of players who have

years, a player may invoke arbitration to determine his salary but is not permitted to look for employment elsewhere. After six years in the major leagues, a player is eligible for free agency.[17] Salary arbitration was originally instituted in MLB in 1974 to protect players from the economic effects of the controversial "reserve clause." This clause gave a team the right to retain a player at the contract of the team's choosing for the player's entire career.[18] The reserve clause was essentially eliminated, for players in the league for six years, with the implementation of free agency in 1976. Thus, the goal of modern MLB arbitration is to adjust a player's market value while allowing a team to retain a player for at least six years.

Major League Baseball uses final-offer arbitration to avoid arbitration proceedings and to promote settlement. As noted in the introduction, in this endeavor, the process is successful in its ability to achieve pre-hearing settlements.[19] In addition to the direct benefits of final-offer arbitration, there are other aspects of MLB's final-offer salary arbitration that make settlement more attractive than an arbitration proceeding. For one, if the player and the owner manage to settle on a salary figure before the hearing, they can be creative in designing a compensation package. A settlement may include bonuses, a no-trade clause, or a multi-year contract, among other perks. Traditionally, baseball arbitration results in players receiving one-year contracts. However, in 2009, fifteen players who filed for arbitration received multi-year contracts in lieu of the one-year contract (with all the terms of their existing contract) that traditionally results from entering into baseball arbitration.[20] Additionally, there is the

two years of service. *Id.*

17. *Id.* at art. XX, § (b)(1).

18. *See* ABRAMS, *supra* note 10, at 143.

19. As noted in the Introduction, only three players went through arbitration in 2009, as opposed to the 108 players who settled. *See supra* note 13. This is consistent with the settlement rates of the last few years. In 2008, 110 players filed for arbitration and only eight entered into arbitration proceedings. In 2007, seven players went through arbitration while 158 players filed. Maury Brown, *Salary Arbitration Filings*, THE BIZ OF BASEBALL, Nov. 30, 2006, http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=492&Itemid=65. Maury Brown, *Arbitration Scorecard*, THE BIZ OF BASEBALL, Feb. 10, 2007, http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=719&Itemid=116.

20. *Id. See also* MLB AGREEMENT, *supra* note 4, at art. VI, § (f)(6).

invaluable incentive of maintaining a congenial relationship between the player and management. In an arbitration proceeding, the player would have to witness his team's management questioning his value to the team. As the player likely will remain on the team,[21] preserving a good relationship is of great importance.

When teams and players cannot settle their differences privately, baseball's final-offer salary arbitration can provide a quick, informal, final, and binding resolution to the dispute.[22] Appeals and player holdouts are both prohibited under baseball arbitration.[23] When an arbitrator has little discretion and must choose between two offers with no arbitral explanation permitted, an appeal makes little sense, a benefit that affirms the finality of baseball's final-offer arbitration process.

C. The National Hockey League: Conventional Salary Arbitration

Like MLB, the National Hockey League ("NHL") offers salary arbitration. However, the NHL, whose salary

21. A player will remain on the team unless he is traded, which typically occurs when a small-market team cannot afford to give the player the raise he is due to receive during the arbitration process. Additionally, a team may release a player (who has received an arbitration award) during Spring Training. If the player is released more than sixteen days before the beginning of the season, the team is responsible for thirty days of the arbitration award. MLB AGREEMENT, *supra* note 4, at art. IX. If the player is released within sixteen days, the team is then responsible for forty-five days of the salary. *Id.* If the player remains with the team on Opening Day, however, the team is responsible for the full award. *Id.*

It could be argued that because players may be released, salary arbitration does not sufficiently protect players. However, if the players are released they are entitled to at least thirty days' salary. This would account for about one-sixth of an entire season's salary. For example, if a player is rewarded $6 million at arbitration and is released at the start of spring training, he is entitled to $1 million. Further, because his market value has been set by an arbitrator, the player will likely be able to collect at least $5 million on the open market (with almost a full month before the start of the season). Unless the arbitrator greatly misinterpreted the market he is supposed to approximate, the player should be able to receive a sufficient award from another team. Organizations are also deterred from releasing a player who has received an arbitration award. A team would prefer to trade a player, pay nothing, and receive at least some value rather than release the player and be responsible for one-sixth of the award. It is rare that a player is released after an arbitration award. It is more common for a team to trade such a player.

22. *See* ABRAMS, *supra* note 10, at 146.

23. *Id.* at 147. *See also* MLB AGREEMENT, *supra* note 4, at art. VI.

arbitration process was implemented in 1970,[24] uses conventional salary arbitration rather than final-offer salary arbitration. Professor Abrams notes that, in hockey, an arbitrator is almost certain to name a compensation figure falling between the two offers presented by each side.[25] In 2008, sixteen players filed for arbitration and two participated in hearings.[26] In 2007, thirty players filed for arbitration and seven players entered into hearings.[27] As of 2004, twenty-eight percent of NHL filings proceeded to arbitration.[28] As these statistics illustrate, the MLB is generally more successful than the NHL in reaching pre-hearing settlements.[29]

Further, unlike in MLB, the salary arbitration process in the NHL is not always binding. A team can refuse to implement ("walk away" from) an arbitrator's award if a player has initiated the proceeding.[30] Therefore, there is less incentive for an NHL player to forego settlement and risk going to a hearing and greater incentive for a team to risk an award from which they can simply walk away.

In 2004, NHL team owners, in an attempt to control increased wages, challenged the use of conventional salary arbitration and championed for final-offer arbitration to be included in the league's collective bargaining agreement.[31] The players' association considered including final-offer arbitration to appease the owners.[32] The owners, however,

24. *See* ABRAMS, *supra* note 10, at 146.

25. *Id.* (noting that, "[i]n fact, [a hockey arbitrator] is almost certain to name a compensation figure between the two extremes presented by each side.").

26. *2008 Salary Arbitration Filings*, CBSSPORTS.COM, June 27, 2008, http://www.cbssports.com/nhl/story/10879613.

27. *NHL Salary Arbitration, 2007 Player Arbitration List*, SPORTS CITY, http://www.sportscity.com/NHL/Salary-Arbitration.

28. Stephen M. Yoost, *The National Hockey League and Salary Arbitration: Time for a Line Change,* 21 OHIO ST. J. ON DISP. RESOL. 485, 519 (2006).

29. Based on the figures in this paragraph, when the NHL did not have a salary cap, its settlement rate was 72%. In 2008, the rate was 87.5% (in a very small sample size of only sixteen filings) and in 2007, the rate was 76.7%. In 2009, Major League Baseball's settlement rate was 97.3% (108 settlements out of 111 filings). This number is consistent with the history of Major League Baseball salary arbitration.

30. NHL COLLECTIVE BARGAINING AGREEMENT, § 12.10, *available at* http://www.nhlpa.com/CBA/index.asp (providing for walk-away rights for player-elected salary arbitration).

31. *Arbitration*, CBC SPORTS, http://www.cbc.ca/sports/indepth/cba/issues/arbitration.html.

32. Larry Brooks, *Union, NHL set to talk*, N.Y. POST, Dec. 9, 2004, *available at* http://pqasb.pqarchiver.com/nypost/access/759054421.html?dids=759054421:759054421

wanted final-offer arbitration for the wrong reasons. With little genuine interest in promoting settlement, the owners believed that final-offer arbitration would control the increase of salaries. Despite the discussion, the owners and the players' association opted to keep conventional arbitration and instead instituted a hard salary cap[33] that, for better or worse, may make salary arbitration obsolete in the NHL.[34]

D. Procedural Variations of Final-Offer Arbitration

In a field where final-offer arbitration is appropriate, an analysis should also include a discussion of which procedural variation of final-offer arbitration should be applied. MLB and the NHL limit their final-offer arbitration to disputes of one specific issue (salary), but final-offer arbitration is also used in contexts where there are a number of issues in dispute (such as public employment interest arbitration). When there are multiple issues involved, they may be approached with "package" or "issue-by-issue" final-offer arbitration.[35] Package final-offer arbitration involves each party's submitting his or her final offer in the form of a package that addresses all disputed issues.[36] Instead of deciding each issue separately, an arbitrator will select the more reasonable package. In contrast, issue-by-issue final-offer arbitration allows each party to submit an offer as to each disputed issue.[37] An arbitrator will then choose the more reasonable offer for each disputed issue. Because of the numerous issues involved in negotiating collective bargaining agreements, public

&FMT=ABS&FMTS=ABS:FT&type=current&date=Dec+9%2C+2004&author=LARRY+BROOKS&pub=New+York+Post&edition=&startpage=104&desc=UNION%2C+NHL+SET+TO+TALK.

33. A "hard salary cap" means that teams may not go above the salary cap for any reason. The NFL and NHL currently have hard salary caps. The NBA, on the other hand, utilizes a soft salary cap. A "soft salary cap" allows teams to exceed the salary cap under certain circumstances. For example, NBA teams are allowed to spend above the salary cap to retain their own players. This is known as the "Larry Bird Exception." Major League Baseball has no salary cap. Yoost, *supra* note 28, at 523-24.

34. With a hard salary cap, there is less incentive for a player to enter salary arbitration. With no salary cap, there is no limit to how high a salary can go. For example, in 2004 (prior to the introduction of a hard salary cap), 66 players filed for arbitration. Yoost, *supra* note 28, at 485. As mentioned above, under a hard salary cap, only 16 players filed in 2008 down from 30 in 2007.

35. *See* RAU ET AL., *supra* note 3, at 938.

36. *Id.*

37. *Id.*

employment interest arbitration statutes typically codify which procedural variation will be used: package or issue-by-issue.

E. Final-Offer Interest Arbitration of Collective Bargaining Impasses

Major League Baseball's collective bargaining agreement uses final-offer arbitration as a contractual tool to promote settlement and to avoid salary arbitration hearings. In the context of public employment, however, final-offer arbitration is primarily used to resolve impasses regarding the terms of new collective bargaining agreements between a state or local government and a union representing its public employees.[38] Although MLB uses final-offer arbitration within its collective bargaining agreement solely to resolve the issue of a player's salary, state governments typically use the process to resolve bargaining impasses on a number of issues. Despite this key difference in execution, the theories behind the use of final-offer arbitration are similar.

Since states are reluctant to grant public employees the right to strike, some states codify third-party procedures, such as interest arbitration, to provide for an efficient resolution. Within specific interest arbitration statutes, some states expressly indicate what type of arbitration will be employed, typically variations of final-offer or conventional arbitration, while other states opt to leave this open.[39] A state also may codify which types of disputed issues are to be resolved by each process. Interest arbitration, as a result of the pending

38. Upon reaching impasse, Iowa provides for final-offer arbitration for both economic and non-economic issues on an issue-by-issue basis. IOWA CODE ANN. § 20.22. In Maine, final-offer arbitration is used under the Maine Agriculture Marketing and Bargaining Act. ME. REV. STAT. ANN. TIT. 13 § 1958-B(5-A). Connecticut offers final-offer arbitration for all state employees upon impasse on an issue-by-issue basis. CONN. GEN. STAT. ANN. 5-276a(c).Minnesota offers final-offer arbitration on an issue-by-issue basis for "principals" and "assistant principals," and offers final-offer arbitration on an issue-by-issue or package basis otherwise. MINN. STAT. ANN. § 179A.16 (Subd. 7).Other states using final-offer arbitration for labor disputes include Oklahoma, Pennsylvania and Washington. OKLA. STAT. ANN. TIT. § 51-108(4); PA. STAT. ANN. § 11-1122-A; WASH. REV. CODE. ANN. § 35.21.779. Michigan, Wisconsin and New Jersey allow final-offer arbitration for public labor disputes involving firemen and policemen. MICH. COMP. LAWS. ANN. 423.238; WIS. STAT. ANN. § 111.77(4)(b);N.J. STAT. § 34:13A-16.

39. In New Jersey, for example, one can choose between variations of final-offer arbitration and conventional arbitration instead of requiring one form. N.J. STAT. § 34:13A-16.

Employee Free Choice Act, may also be utilized outside of the public employment field.

1.Pending Legislation: The Employee Free Choice Act's Interest Arbitration Requirement

The Employee Free Choice Act, currently before Congress, would "amend the National Labor Relations Act to establish an efficient system to enable employees to join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes."[40] The Act would also impose a system of mandatory, binding interest arbitration between management and a newly-certified union who cannot settle on the terms of their first collective bargaining agreement. Prior to such arbitration, the parties would be required to undergo mediation.[41] This legislation would apply to unions that obtain recognition under the NLRA and would not apply to state or federal government employees. However, in the unlikely event that this Act is passed,[42] a debate between final-offer and conventional interest arbitration is likely to follow. In light of this pending legislation, it is useful to analyze state statutes that utilize final-offer interest arbitration. Below are examples of states that have codified final-offer interest arbitration.

40. Employee Free Choice Act, H.R. 800, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.800. (Last Visited Nov. 15, 2009).

41. *Id.* at § 3.

42. At this point, it is unlikely the bill will be passed in the near future. The Act is often criticized and has lost support in the past year. Arlen Specter, whose support is considered critical to the bill's passage, announced recently that he opposed the legislation. Specter noted: "The problems of the recession make this a particularly bad time to enact Employee Free Choice legislation….If efforts are unsuccessful to give labor sufficient bargaining power through amendments to the NLRA, then I would be willing to reconsider Employees' Free Choice legislation when the economy returns to normalcy." *Arlen Specter opposes Employee Free Choice Act*, WASH. BUS. J., Mar. 25, 2009, *available at* http://washington.bizjournals.com/washington/stories/2009/03/23/daily59.html.

2. State Statutes that Codify Final-Offer Interest Arbitration

a. Maine

Maine's Agricultural Marketing and Bargaining Act governs private relationships, although, due to National Labor Relations Act preemption, reaches only those private employers who do not fall within the NLRA. Maine requires binding final-offer interest arbitration (after mandatory mediation) in collective bargaining disputes between agricultural "handlers" and "qualified associations."[43] The statute defines "handlers" as agricultural employers throughout the various stages of a given agricultural process.[44] "Qualified associations" include any association certified to bargain on behalf of a group of producers.[45] This is the type of private impasse that the Employee Free Choice Act would cover if the union ("qualified association") were certified under the NLRA and the Act's proposed card check system.[46]

Prior to 1987, Maine's Act was limited to nonbinding final-offer arbitration within the potato industry.[47] In 1987, in an effort to promote good-faith bargaining and settlement (a stated goal of the section), Maine amended the Act by providing for mandatory mediation followed by binding final-offer arbitration for all disputes involving handlers and qualified associations.[48] The state likely sought to codify a

43. ME. REV.STAT. ANN. TIT. 13 § 1958.

44. *Id*. at § 1955(3). "Handler" refers to any person engaged in the business or practice of: A. Acquiring agricultural products from producers or associations of producers for processing or sale; B. Grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; C. Contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to production or marketing of any agricultural product; or D. Acting as an agent or broker for a handler in the performance of any function or act specified in paragraph A,B or C.

45. *Id*. at §§ 1955(5)-(6), 1957.

46. The Employee Free Choice Act allows for union certification if the majority of employees have signed authorization cards designating the union as the employees' bargaining representative. Employee Free Choice Act § 2(a)(6). The current system requires that the union obtain a majority through secret ballot elections to achieve certification.

47. ME. REV.STAT. ANN. TIT. 13 § 1958-A (*repealed*, 1987).

48. ME. REV.STAT. ANN. TIT. 13 § 1958. *See also* Bayside Enterprises, Inc. v. Hanson, 675 F. Supp. 1375 (D. Me. 1987).

binding alternative to strikes in these negotiations because an agricultural work stoppage would hurt the welfare of the state. When appropriate, public policy may prompt a state to take steps to protect against strikes in an important industry. In this instance, Maine chose final-offer arbitration to serve that end.

b. Public Employment State Statutes: Firemen and Policemen

Final-offer statutes can address a variety of relationships, ranging from broad labor relationships[49] to narrow labor relationships.[50] A narrow labor relationship codified in the respective statutes of New Jersey, Michigan, and Wisconsin is the bargaining relationship between public fire and police departments and their respective employee bargaining units.[51] In these states, statutory public policy prohibits policemen and firemen from striking.[52] This constraint is common for public employees involved in public safety or other essential services. Because firemen and policemen are prohibited from striking, Michigan's final-offer statute notes that public policy requires an "alternate, expeditious, effective and binding procedure for the resolution of disputes" to maintain the efficient operation of each department.[53] This policy complements the advantages of final-offer arbitration. Final-offer arbitration, in this context, can be included in a statutory system that prevents potentially harmful wildcat strikes.[54] For these reasons, in public employment, the need for procedural efficiency, good-faith bargaining, and a pre-hearing settlement have prompted some states to incorporate

49. In Connecticut, final-offer arbitration is used for all "state employees." CONN. GEN. STAT. ANN. 5-276a.

50. Maine's use of final-offer arbitration is geared toward narrow labor relationships. ME. REV. STAT. ANN. TIT. 13 § 1958-B(5-A).

51. *See supra* note 38. The respective statutes of Michigan, Wisconsin and New Jersey allow for final-offer arbitration for public labor disputes involving firemen and policemen.

52. N.J. STAT. § 34:13A-14 (Lexis 2009). MICH. COMP. LAWS. ANN. 423.231 (Lexis 2008). WIS. STAT. ANN. § 111.77 (Lexis 2008).

53. MICH. COMP. LAWS. ANN. 423.231.

54. A "wildcat strike" is a strike "that is not authorized by the labor union to which the employees belong." A wildcat strike includes strikes that are not permitted under state statute. *See* Answers.com, Wildcat Strike, http://www.answers.com/topic/wildcat-strike (last visited Nov. 20, 2009).

final-offer arbitration.

i. New Jersey

In New Jersey, Section 16 of the Employer-Employee Relations Act is unique in that it offers six variations of arbitration from which parties may choose.[55] The section allows for conventional arbitration and five forms of final-offer arbitration.[56] Among these final-offer options are package and issue-by-issue final-offer arbitration,[57] as well as variations of these methods in which the arbitrator may utilize a third offer: a fact-finder's recommendation on the respective issue or package.[58] Including a fact-finder recommendation seems counterintuitive to the underlying theory that final-offer arbitration facilitates settlement by bringing the parties' respective offers closer together. If the parties are concerned with the fact-finder's determination, they may not present reasonable offers if they know that the fact-finder will determine the most reasonable offer or compromise. This may prevent the parties from reaching a middle ground. A fifth final-offer option distinguishes between economic and non-economic issues.[59] For economic issues, the statute suggests package final-offer arbitration.[60] For non-economic issues, the statute suggests issue-by-issue final-offer arbitration.[61]

The statute provides that if the parties cannot agree on a type of arbitration, conventional arbitration will be the default option.[62] Prior to 1995, however, the default was the final-offer arbitration option that distinguished between economic and non-economic issues.[63] This change was likely the result of a 1992 legislative proposal that sought to switch the statute entirely to conventional arbitration.[64] While the legislation did not pass, the statute was amended to make

55. Employer-Employee Relations Act, N.J. STAT. § 34:13A-16 (C) (Lexis 2009).
56. *Id.*
57. *Id.* at (2), (3).
58. *Id.* at (4), (5).
59. *Id.* at (6).
60. *Id.*
61. *Id.*
62. N.J. STAT. § 34:13A-16(D)(2) (Lexis 2009).
63. Sen. Robert J. Martin, *Fixing the Fiscal Police and Firetrap: A Critique of New Jersey's Compulsory Interest Arbitration Act*, 18 SETON HALL LEGIS. J. 59, 77 (1993).
64. 80 N.J. LEGIS. INDEX NO. 2, at A-1059(1)(c)(1) (March 2, 1992).

conventional arbitration the default with each of the final-offer arbitration options remaining in the statute should the parties opt to use one of these options.

In 1999, a study in the *Journal of Collective Negotiations* analyzed the effect of New Jersey's switch to conventional arbitration. The researchers hoped to demonstrate that final-offer arbitration reduces the chilling effect of conventional arbitration.[65] The study found that in 1995, when the default option was final-offer arbitration, the average "difference" between firemen unions and municipality wage and benefit offers was 29%.[66] In 1997, the first full year with conventional arbitration as the default option, this spread increased to 44%.[67] Additionally, a 1980 survey, while far from contemporary data, concluded that final-offer arbitration in New Jersey was:

> working reasonably well toward providing finality in police and firefighter impasses and preventing strikes. Moreover, it seems to appeal to the parties, and experience to date suggests that final-offer arbitration, as compared to conventional arbitration, can increase the probability of negotiated settlements by exerting a centripetal force on the parties to move toward a middle ground.[68]

ii. Michigan and Wisconsin

Similar to one of New Jersey's options, Michigan's statute distinguishes between economic and non-economic issues in arbitration. Economic issues include wages, vacations, insurance, and other economic benefits. Non-economic issues include, for example, whether police officers should be permitted to carry guns while off-duty. Michigan mandates final-offer arbitration for exclusively economic issues in disputes involving police and fire departments.[69] This is most likely because there is a greater risk of arbitral compromise of economic issues. When there is a risk of compromise, final-offer arbitration works to counter the "chilled" negotiations

65. Greg Stokes, *Solomon's wisdom: An early analysis of the effects of the police and fire interest arbitration reform act in New Jersey*, 28 J. COLLECTIVE NEGOTIATIONS 219, 231 (1999).

66. *Id.*

67. *Id.*

68. Joan Weitzman & John M. Stochaj, *Attitudes of Arbitrators Toward Final-Offer Arbitration in New Jersey*, 35 ARB. J. 25, 33 (1980).

69. MICH. COMP. LAWS. ANN. 423.238.

associated with that risk. In Michigan, the arbitration panel identifies the economic issues and directs each party to submit their final offer for each issue.[70] Unlike New Jersey, Michigan mandates final-offer arbitration on an issue-by-issue basis.[71] New Jersey, as discussed above, recommends package final-offer arbitration of economic issues.

Unless the parties agree otherwise, Wisconsin mandates that package final-offer arbitration be used once an investigator finds the parties to be at an impasse.[72] Wisconsin does not distinguish between economic and non-economic issues. Much like the underlying purpose of final-offer arbitration in MLB, the stated purpose of Wisconsin's statute is to induce the parties to bargain in good faith in order to reach an agreement, or to at least narrow the differences between the parties to the greatest extent possible.[73]

Although New Jersey, Wisconsin, and Michigan utilize final-offer interest arbitration to accomplish similar objectives in the same narrow context, the execution of these statutes is inconsistent. Questions remain as to whether this inconsistency can be resolved, if it needs to be resolved, and if there is one ideal way to implement final-offer arbitration.

F. What do Major League Baseball salary arbitration and public employment interest arbitration have in common?

While comparing the labor situation of MLB players to that of state employees may seem problematic, the nature of their relationships with their respective employers is similar and may help to determine why final-offer arbitration is utilized in such narrow contexts. Final-offer arbitration may serve two functions. First, as previously discussed, it is a technique that promotes pre-hearing settlement. Second, it is a process for fixing market value when the parties have no other way to do so, while avoiding the repercussions of an adversarial arbitration proceeding. In MLB and public employment, final-offer arbitration serves both of these functions. In public employment, state employees must bargain exclusively with the state and some employees are

70. *Id.*
71. *Id.*
72. WIS. STAT. ANN. § 111.77(4)(b).
73. La Crosse Prof'l Police Ass'n v. City of La Crosse, 212 Wis. 2d 90, 102 (Wis. Ct. App. 1997).

prohibited from striking. These state employees do not have the benefit of their employment market and arbitration is a tool to fix market value when the market is otherwise unavailable. In MLB salary arbitration, players must bargain exclusively with their organization because players are "reserved" for six years. Both MLB players and state employees are "locked in" a bargaining relationship with one employer. The mandatory nature of these bargaining relationships makes final-offer arbitration a useful tool in mimicking an otherwise unavailable market.

Arbitration is often used to establish market value in a bargaining relationship when there is no other method to determine market value. Because MLB players and state employees may lack both economic leverage and an alternative to bargaining with their employers, arbitration allows their market value to be set by a third party. Final-offer arbitration, as opposed to conventional arbitration, allows the parties to set market value themselves in pre-hearing negotiations with the looming arbitration as the motivating factor in reaching settlements. This would allow the "locked in" parties to preserve a congenial relationship despite the adversarial aspects of arbitration being a necessary aspect of the parties' bargaining relationship.

It is important to note, however, that a bargaining relationship does not need to satisfy both of these functions to benefit from final-offer arbitration. Final-offer arbitration can certainly be utilized as a settlement technique when the parties are not "locked in." However, MLB and public employment do benefit from both functions, making final-offer arbitration a particularly useful tool in those contexts.

G. How is Final-Offer Arbitration Best Utilized?

1. Procedural Variation: Package or Issue-by-Issue?

Before looking at the various contexts that could benefit from final-offer arbitration, I will first consider which procedural variation best fits within the theories of final-offer arbitration: package or issue-by-issue final offers.

One common criticism of package final-offer arbitration is that parties may be tempted to include outrageous offers on a small percentage of issues in what is an otherwise reasonable package. How should an arbitrator weigh a reasonable

package with a few unreasonable offers against a less reasonable package that is more consistent? On that note, what if *both* parties include extreme offers on a few issues? This would force an arbitrator to decide between the unreasonable offers included in each package. Additionally, these extreme offers on specific issues may not be feasible and put the arbitrator in the difficult position of not being able to select a reasonable package at all. Although the theory behind final-offer arbitration is that each party will make the most reasonable offer possible so that his or her offer will be selected, parties may also take advantage of the packaged format.

On the other hand, in an issue-by-issue hearing, the bargaining required for each disputed area forces the parties to submit reasonable offers on each issue, bringing the opposing offers closer together on at least some issues prior to hearings. Package final-offers, as compared to issue-by-issue arbitration, seem to inhibit pre-hearing settlements. In an issue-by-issue arbitration, the parties may be more likely to settle specific issues before the hearing, but in package arbitration, parties may want to take their chances at the hearing so they can assemble a reasonable package that best suits their needs. Although in an issue-by-issue arbitration all of the issues may not be settled prior to a hearing, the parties can eliminate some issues from the dispute. Negotiating a settlement with packaged offers, on the other hand, forces the parties to negotiate all of the issues at once.

Despite its advantages, issue-by-issue final-offer arbitration can also undermine the goals of final-offer arbitration. An arbitrator may split the difference by awarding half of the issues to one party and the other half of the issues to the other party. This gives an arbitrator greater discretion to fashion his own package. In a packaged offer, on the other hand, an arbitrator is restricted to one complete package, unable to split the difference.

The important thing to consider regarding this scenario is whether splitting the difference creates the chilling effect that final-offer arbitration seeks to prevent. As we have seen, the risk is that, because the arbitrator is seen as likely to compromise, the parties make offers that are far apart: for this reason, settlement is unlikely to occur before the hearing. Even though it affords an arbitrator greater discretion, when an arbitrator splits the difference on a group of multiple

issues (and is not permitted to split the difference on any one issue), the parties never actually split the difference on a singular issue and, therefore, this format neither produces the chilling effect nor undermines the goals of final-offer arbitration. It is still to the strategic advantage of the parties to make reasonable offers as to each issue, as they have no way to predict which issues will be determined in their favor.

While issue-by-issue final offers are more complex than package final offers, they are more aligned with the objectives of final-offer arbitration. Although limiting the discretion of an arbitrator is one goal of final-offer arbitration, its biggest aim is to reach settlement before the arbitration hearing. In other words, pre-hearing behavior is more relevant to the goals of final-offer arbitration than behavior during an actual hearing.

These procedural concerns do not pose a problem in MLB's salary arbitrations because there is only one issue in dispute. This may be one reason why MLB's final-offer salary arbitration works so smoothly and efficiently in promoting settlement before an arbitration hearing. Because a greater number of disputed issues presents the procedural concerns discussed above, based on the success of MLB, final-offer arbitration presumably works best when there are fewer issues at stake. But, when there are multiple issues in question, issue-by-issue final offers may be more appropriate.

2. Timing of the "Final Offers"

Another important element of final-offer arbitration is the timing of the offers. The appropriate timing of offers may help to further the goals of the process. The question is whether the offers should be submitted just prior to the hearing, early in negotiations, or sometime in the middle. In MLB, teams and players may submit final offers anytime between January 5 and January 15.[74] If an organization reduces its offer on or after January 15, then the player's window to submit to arbitration is extended for seven days.[75] The arbitral proceedings occur between February 1 and February 20.[76] Between the submission in January and the proceeding in

74. MLB AGREEMENT, *supra* note 4, at art. VI, § (f)(5).
75. *Id.*
76. *Id.*

February, the parties are free to negotiate and, as discussed earlier, often opt to settle during these negotiations.

Final offers should be permitted as early as possible prior to the arbitration hearing, but should be adjustable for a relatively short grace period. This would positively affect the dynamics of the negotiations and promote the goals of final-offer arbitration. Since MLB teams must submit their offers approximately one month before the proceedings, the parties are likely to act more reasonably in the early stages of negotiations. Allowing a grace period in which offers are adjustable would also promote the goals of final-offer arbitration. Although parties may begin bargaining with extreme final offers, they would have to adjust to more moderate offers as preliminary negotiations progress. It is important that the parties have this grace period to promote a "battle of reasonable offers" that would bring the parties toward a middle ground. In order to limit the unreasonableness of the parties' early final offers, this grace period should not be extended until the hearing. At the end of this grace period, the parties' offers must be as reasonable as possible. The combination of the reasonable final offers and the fear of losing to the opposing offer would serve to bring the parties toward a middle ground.

One argument against this may be that there is nothing to lose from allowing the final offers to be adjusted right up until the hearing. This timeline, however, may encourage parties to conceal their most reasonable offers until late in the bargaining process. If, for example, there were five days between the conclusion of the grace period and the hearing, the parties would present their most reasonable final offers and likely find a middle ground in the five days leading up to the hearing. If the parties have until the day of the arbitration, they may conceal their most reasonable offers until the proceeding itself, undermining the final-offer goal of an efficient pre-hearing settlement. Requiring both the early submission of final offers and a narrow window to adjust these final offers would best support the goals of final-offer arbitration.

3. Contexts

After determining which procedural variations may be best suited for multiple issue final-offer interest arbitration,

we turn our analysis to other contexts which may benefit from the use of final-offer arbitration.

It is important to first outline the elements that make final-offer arbitration conducive to a given context. First, it is best to have sophisticated parties use final-offer arbitration. Some literature has suggested that the parties must understand the process in order for it to work.[77] The theory is that if a party does not understand the objectives of final-offer arbitration, the process may be misused. In MLB, it is well known among the management, the agents, and even the players that the purpose of final-offer salary arbitration is to avoid the hearing and to make market adjustments. If two unsophisticated parties are involved in a contract dispute, they may see an opponent's more reasonable offer as a concession. This party may not understand that a final-offer arbitrator is likely to choose the more reasonable offer and, as a result, the party may imprudently refuse to submit their own reasonable offer.

Second, final-offer arbitration works best as part of a long-term, standardized procedure where maintaining positive relationships between the parties is a priority. In MLB, salary arbitration occurs at the same time each year and has become a standardized component of the League's off-season. Additionally, after salary arbitration, players, barring a trade, remain with the organization. Therefore, it is important to keep the proceedings as amicable as possible. Final-offer arbitration achieves this congenial tone by promoting pre-hearing settlement and by avoiding the adversarial nature of an arbitration proceeding or litigation. Similarly, in the field of public employment, final-offer arbitration is a regular procedure when collective bargaining agreements are due for renewal. Like MLB salary arbitration, it is important to make the process as friendly as possible because the public employees will continue to work for the city after the interest arbitration process has concluded.

Third, final-offer arbitration is most successful when a pre-hearing settlement might contain benefits that an arbitration award cannot offer. For example, as discussed earlier, MLB settlements may include bonuses, multi-year contracts, and other incentives that are not available through an arbitration

77. Angelo DeNisi & James B. Dworkin, *Final-Offer Arbitration and the Naïve Negotiator*, 35 INDUS. & LAB. REL. REV. 78, 79 (1981).

award. Another inherent benefit of a pre-hearing settlement is its cost effectiveness. Because of its tendency to promote settlement, final-offer arbitration is a cheaper, quicker, and generally more efficient alternative to conventional arbitration and litigation. This advantage is especially critical when a strike or expensive dispute would have a debilitating impact on the parties. States presumably use final-offer arbitration in public employment disputes to avoid the crippling effect of a wildcat strike by employees essential to the welfare and safety of the community.

There are also various private contexts that could benefit from reaching pre-hearing settlements. For example, when a private dispute involves money, the cost effectiveness of final-offer arbitration may be beneficial. While it may seem odd for private parties to contract for a form of arbitration that is intended to avoid arbitration hearings, a party may use it to protect itself when it does not know if the opposing party will contest the issue in question.

Some contexts may benefit from final-offer arbitration because the bargaining parties must negotiate exclusively with each other and have no other recourse within the relevant market. Final offer arbitration may be an effective tool when parties are "locked in" because they have no other method to assert their rights and mimic the market other than through the arbitration process. The final-offer arbitration process thus allows the parties to re-create the market while preserving the amiability of the "locked in" bargaining relationship.

Finally, as detailed in the discussion of the package and issue-by-issue procedural variations, final-offer arbitration is most effective for addressing as few disputed issues as possible. While final-offer arbitration can still be effective with multiple issues at stake, arbitrating a few select issues allows the parties to avoid the dilemma of choosing the most appropriate procedural variation.

a. The Employee Free Choice Act and Final-Offer Interest Arbitration

Before considering how final-offer arbitration could be utilized outside of public employment and MLB, I will analyze the potential role of final-offer interest arbitration under the Employee Free Choice Act. If the Employee Free Choice Act,

or another NLRA amendment mandating interest arbitration, is enacted, there may be a choice between various forms of interest arbitration, including final-offer. This paper does not take a position on the controversial Act's mandate of interest arbitration but rather analyzes which form of interest arbitration should be applied if the Act, or a similar amendment, does take effect.

An important concern regarding the Act's interest arbitration requirement is that unions and employers may rely on an arbitrator to impose an agreement rather than participating in good-faith bargaining.[78] Another apprehension is that private parties would be bound to the terms of a contract set by an arbitrator.[79] The idea is that if an employer or union is bound to such terms, it could complicate future grievance arbitrations in which an arbitrator would apply the disputed terms of a collective bargaining agreement to the specific grievance. Although this would not complicate the proceeding in a technical sense, employers and unions would be forced to apply rules not mutually agreed upon. This is a subtle yet critical benefit of pre-hearing settlement in interest arbitration.

Final-offer issue-by-issue interest arbitration, as opposed to conventional interest arbitration, is better at addressing both of these concerns. Final-offer arbitration encourages parties to bargain in good faith and to settle at least some issues prior to arbitration so that the contract reflects more of a mutual agreement between the union and employer. If unions and employers believe that the arbitrator will select the more reasonable offer, they each will present reasonable offers, bringing the parties toward a middle ground on the particular issue. If the unions and employers settle before arbitration, they are bound to the terms mutually agreed upon rather than to terms imposed by an arbitrator.

Under the proposed Act, the arbitrator's award is binding for two years unless the terms are amended by the written consent of the parties.[80] If the parties choose to participate in a final-offer arbitration hearing, one party's offer will be deemed the "winner." This would likely prevent future

78. *Id.*

79. Andrew Lee Younkins. *Judicial Review Standards for Interest Arbitration under the Employee Free Choice Act*, 43 U.S.F. L. REV. 447, 453 (2008).

80. *See* Employee Free Choice Act § 3.

amendment. However, there is little reason to believe parties will seek amendment after conventional arbitration; thus, the pre-hearing settlement aspects of final-offer arbitration may still be preferable.

Another reason final-offer arbitration may be preferable to conventional arbitration is the "locked in" nature of these new relationships. After the streamlined certification under the proposed amendment to the NLRA, the union becomes the exclusive bargaining representative for the employees, and the employer and the union must negotiate with each other. Like salary arbitration in MLB and interest arbitration in public employment, the relationship between certified union and employer could benefit from final-offer arbitration because of the mandatory and continuing nature of their bargaining relationship.

If the Employee Free Choice Act is enacted, interest arbitration will become a requirement between unions and employers who cannot agree on the terms of their first collective bargaining agreement. In this context, final-offer interest arbitration may be appropriate to counteract the "chilled" bargaining associated with conventional arbitration. As it is in the best interests of both "locked in" parties to maintain a congenial relationship after the proceeding, the settlement promoting aspects of final-offer arbitration are preferable. Therefore, final-offer interest arbitration would be a suitable method for executing the mandatory interest arbitration under the proposed legislation.

b. Interest Arbitration and Economic Issues

Within interest arbitration, a state may choose particular issues to be covered by final-offer arbitration. Michigan's statute requiring interest arbitration for police and fire departments distinguishes between economic and non-economic issues. Economic issues, such as wages, vacations, insurance, and other economic benefits are well suited to the theories of final-offer arbitration. For example, if police officers in Michigan dispute the amount of vacation time they would receive in the new collective bargaining agreement, final-offer arbitration would promote settlement. In a conventional arbitration, the policemen's union could assume that the arbitrator would compromise and, based on this assumption, make an extreme numerical offer to secure as

many vacation days as possible. The city may similarly offer an unreasonably low number of vacation days. In final-offer arbitration, on the other hand, the union or employer would be more likely to make a reasonable offer so that their offer is selected and the officers receive an acceptable amount of vacation time. As economic issues often hinge on a numerical value, final-offer arbitration makes sense in that it would function in a fashion similar to MLB salary arbitration. Even when economic issues do not hinge on a number, a risk of arbitral compromise still exists, making final-offer arbitration a useful tool.

The reason for distinguishing between non-economic and economic issues may also be due to the nature of non-economic issues as opposed to economic issues. With respect to non-economic issues, an arbitrator may not be able to compromise certain non-economic issues thereby eliminating the risk of arbitral compromise. For example, how would an arbitrator compromise a non-economic issue such as whether police officers should be permitted to bring their police cars home with them? The officers can either bring them home, or they cannot. There is no recognizable middle ground. Final-offer arbitration is meant to address the "chilled" bargaining associated with conventional arbitration in certain contexts. Without any risk of arbitral compromise, final-offer arbitration may not be necessary to counteract this "chilled" bargaining.

A dispute over vacation time or other economic perks, on the other hand, can benefit from final-offer arbitration because of the numerical nature of these issues and the risk of arbitral compromise. For non-economic disputes it may be difficult to identify a middle ground or what constitutes a reasonable offer. Additionally, the bargaining risks associated with conventional arbitration that final-offer arbitration is meant to address do not apply to certain non-economic issues. Limiting a state statute to final-offer arbitration of economic issues would restrict final-offer arbitration to those issues that it is most effective at settling.

Distinguishing between economic and non-economic issues is one way to identify those issues that are most appropriate for final-offer arbitration. It is important to distinguish between the two issues so that final-offer arbitration can be used when it is most appropriate and necessary to counteract the chilled bargaining associated with conventional arbitrator

compromise.

c. Value Disputes

One type of private dispute that may benefit from final-offer arbitration is a dispute over the value of an item or service. Final-offer arbitration is ideal for facilitating settlement in these disputes. Like numerical economic issues, this would proceed in a similar fashion to baseball salary arbitration. When a specific value is in question, final-offer arbitration may counteract the chilling effect of conventional arbitration because there is an identifiable middle ground between any two offers.

When money is the primary issue in a dispute, parties may be more willing to settle because of the looming costs of an arbitration hearing or litigation. Therefore, final-offer arbitration offers the prospect of a cost-efficient settlement.

With regard to value disputes, various private relationships would benefit from final-offer arbitration. For example, long-term contracts could use final-offer arbitration to resolve pricing disputes. Such arbitration would allow these contracts to adjust to changes in the market in an efficient manner. Additionally, parties to a long-term contract have a continuing relationship that is best preserved through the more amicable use of final-offer arbitration.

One example would be a long-term contract in a commodities market, such as oil. Sophisticated parties could contract for final-offer arbitration as to pricing disputes based on fluctuations in the market. Final-offer arbitration can provide for an efficient resolution so that a business may adjust through a final-offer induced settlement without the financial damage of an arbitration proceeding or litigation. Another example is a contract between multiple investors for the proceeds of an invention. Private parties could stipulate in their contract that any disputes over royalties must be submitted to final-offer arbitration. With only one monetary issue at stake in a long-term contract between sophisticated parties, such disputes are ideal for such arbitration.

Another area that could benefit from final-offer arbitration is the entertainment field. In the past few years, monetary residuals of new media have been a controversial topic.[81] As

81. As of May, 2009, the Screen Actors Guild ("SAG") and the Alliance of Motion

new media outlets such as Hulu and iTunes are created, writers and actors have been excluded from the resulting economic benefits because the new media were not contemplated in their original contracts. This led to the Writers' Guild strike in 2008 and to the 2009 collective bargaining struggle between the Screen Actors Guild and the Alliance of Motion Picture and Television Producers ("AMPTP").

When new media are created, actors and writers could benefit from the inclusion of a clause for final-offer arbitration in either individual contracts or a future collective bargaining agreement. Collective bargaining agreements in the entertainment industry are similar to those in the sports world in that individuals may bargain under the general umbrella of the collective agreement. As the parties have a continuing and "locked in" relationship, final-offer arbitration as to these controversial residuals may be an effective tool. When the next "Hulu" is created, actors and producers may have final-offer arbitration in their contracts, or a bargaining agreement that promotes an efficient settlement for how the ensuing residuals are to be applied.

A final example is a monetary dispute related to real estate development. In any contract between architects, general contractors, subcontractors, or buyers, it is inevitable that the project will result in some dispute as to the value of a service. It would be beneficial for these contracts to include a final-offer arbitration clause to promote the settlement of these disputes in a cost-efficient manner. For example, a general contractor may contract with a subcontractor for $50,000 but if the subcontractor unexpectedly values his work at $75,000, a monetary dispute will arise that could be settled through the use of final-offer arbitration. In this scenario, liability is not at issue, rather, the parties are simply disputing a numerical value. Reasonable offers do exist in

Picture and Television Producers (AMPTP) are negotiating a new collective bargaining agreement. For thirteen months, the two parties have failed to reach an agreement. Recently, the AMPTP offered a contract that SAG members are voting on. The most controversial topic has been the residuals from new media such as iTunes and Hulu. Because these new media were not contemplated in the original contracts, the actors and writers are not receiving economic benefits when their work is downloaded on iTunes or viewed on Hulu. The current offer provides residuals from streaming websites such as Hulu. Bob Strauss, *SAG Members Set To Vote On New Pact*, L.A. DAILY NEWS, May 18, 2009, *available at* http://www.dailynews.com/news/ci_12399660.

such situations, and two sophisticated parties will understand that a final-offer arbitrator will choose the most reasonable offer, bringing the parties to a middle ground. These parties may have an interest in maintaining a professional relationship and a settlement may be desirable to serve that end.

The list of private value disputes that could contract for final-offer arbitration is seemingly endless. When a long-term contract and sophisticated parties are involved, final-offer arbitration of value disputes is a viable option.

Of course, final-offer arbitration need not be limited to value disputes. Value disputes do benefit from final-offer arbitration because, in these contexts, there is almost always a risk of arbitral compromise. But any situation where such a risk exists would benefit from final-offer arbitration. Value disputes are just one scenario in which the risk of arbitral compromise is clear to the parties and would undoubtedly affect bargaining behavior.

d. Professional Sports Leagues and Final-Offer Salary Arbitration: Is Major League Baseball an Anomaly?

The successful use of final-offer salary arbitration in MLB raises the question of whether other leagues' collective bargaining agreements could benefit from the use of final-offer salary arbitration. Salary arbitration is an ideal situation for final-offer arbitration because the dispute is economic in nature, utilizes a standardized procedure, and involves a continuing relationship between sophisticated parties. Additionally, in any sports contract, there are contractual benefits to settling before salary arbitration hearings, such as bonuses and multi-year contracts. If a sport uses salary arbitration, then final-offer arbitration makes sense.

In the sports world, however, MLB's use of salary arbitration appears to be an anomaly. Since players currently flourish under National Football League (NFL) and National Basketball Association (NBA) free agency, a player-driven process such as salary arbitration is not currently necessary. The NFL and NBA use restricted free agency, in lieu of salary arbitration, to adjust a player's salary. The use of restricted free agency in these two leagues allows other teams to offer a

contract to players that the original team has the option to match.[82] This process lets the market itself determine the players' value while permitting the team to retain the player if they agree to the players' value. The idea of salary arbitration is to mimic the market. With restricted free agency, the NFL and NBA use the market itself to adjust a player's salary while allowing the teams to retain a player if they choose to accept the market's valuation. In addition, the NFL and the NBA, like the NHL, have salary caps that make salary arbitration less desirable for players and owners alike.

Further, NFL teams typically do not grant guaranteed contracts to their second-tier players, which can make binding salary arbitration less attractive. The reason is that such players may be released at any time after a potential award, unless the salary arbitration process protects against such a release. This may change, however, when a new collective bargaining agreement is negotiated during or before 2011.[83] This new agreement likely will result in a salary structure that will allow teams to grant more guaranteed contracts and will undoubtedly include a rookie pay scale as it functions in the NBA.[84] Because of this pay scale, salary arbitration may be an option to protect rookies a couple years into their initial contract. For example, NFL rookies currently receive substantial contracts.[85] With a potential pay scale, however,

82. *See* Ryan T. Dryer, Comment, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 277.

83. In May 2008, NFL owners voted unanimously to opt out of the league's current labor deal. If a deal is not reached before 2011, then the owners may lockout the players. John Clayton, *NFL owners vote unanimously to opt out of labor deal*, ESPN.COM, May 20, 2008, http://sports.espn.go.com/nfl/news/story?id=3404596.

84. On April 2, 2009, NFL Commissioner Roger Goodell stated that rookie salaries are excessive and that the new collective bargaining agreement should address this: "The money should go to the people that have produced on the NFL level or on the professional level....And I just think, though we've had a number of great rookies coming in, not everyone makes that transition as successfully, and you want to make sure that the system rewards the people who perform and I think that's what we have to figure out in the next collective bargaining agreement. How do we pay the players fairly? How do we compensate them properly after they've proven themselves on the NFL level?" John Clayton, *Time to fix rookie salary structure*, ESPN.COM, Apr. 2, 2009, http://sports.espn.go.com/nfl/columns/story?columnist=clayton_john&id=4036126. As the union does not yet represent rookies, it seems inevitable that rookie salaries will be capped in the upcoming collective bargaining agreement.

85. Jake Long, the first pick in the 2008 NFL Draft, received a $57.75 million contract with a $30 million signing bonus, making him the highest paid lineman in the NFL before even stepping out onto the field. *Dolphins sign Long, will select OT No. 1*

NFL rookies would be relegated to a certain salary depending on where they are drafted. Salary arbitration could be a useful tool for reevaluating a player's performance during the player's rookie contract, prior to free agent eligibility. This would function similarly to MLB salary arbitration. If the rookie performs well, then his salary may adjust with the market. Because NFL teams historically have been willing to give inflated sums to rookies, the restrictive salary cap is less of a hindrance to salary arbitration than it is in the financially unstable NHL. In the unlikely event that salary arbitration is used in the NFL in the context of the inevitable rookie pay scale, final-offer arbitration would be a tool to facilitate efficient settlements much like those of MLB.

If the NHL had not instituted a hard salary cap,[86] it could have benefitted from a switch to final-offer arbitration. While it remains a viable option, the diminishing importance of salary arbitration in the NHL makes it a concern less worthy of comment, especially considering the League's troubled financial issues.[87] While final-offer arbitration would not solve the NHL's escalating salaries, it would be a more efficient way for player salaries to adjust to market value. For a league that struggles financially,[88] avoiding costly arbitration proceedings and promoting settlement could only be of help. However, particular aspects of the NHL's bargaining agreement might undermine the theories of final-offer arbitration. For example, the fact that NHL owners can walk away from an arbitration award may inhibit settlement because management may want to risk arbitration since it is not necessarily saddled with the arbitrator's decision.

With respect to professional sports leagues, it is unlikely that final-offer arbitration will be used outside of MLB simply because salary arbitration does not fit within the structure of the other leagues. If salary arbitration were appropriate in a given league, however, final-offer arbitration would be a better option than conventional arbitration.

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overall, ESPN.COM, Apr. 22, 2008, http://sports.espn.go.com/nfl/draft08/news/story?id=3358424. As a result of the pay scale, the first pick in the NBA Draft receives less than $4 million a year.

86. Yoost, *supra* note 28, at 523.

87. *See* NHL Business, http://www.andrewsstarspage.com/NHL-Business/ (last visited Nov. 20, 2009).

88. *Id.*

H. Conclusion

Final-offer arbitration works well as a salary adjuster in MLB and has proven to be a workable option in public employment interest arbitration. Final-offer arbitration, however, need not and should not be limited to MLB and public employment. There are numerous private relationships that could benefit from using such arbitration as a contractual tool to resolve disputes in an efficient manner.

III. WHAT FACTORS SHOULD A FINAL-OFFER ARBITRATOR BE PERMITTED TO CONSIDER?

A. The Criteria an Arbitrator May Consider

In interest arbitration, selecting the controlling criteria for a proceeding is a complicated and important task. For grievance arbitration, one need only look at what the parties intended in a contract, whereas in salary arbitration and public employment interest arbitration, no single factor is controlling. For example, in a MLB wage determination, comparing one player's performance to that of another player will provide an arbitrator with guidance, but there are other relevant factors to consider, such as the length and consistency of the player's career contribution. The determination does not hinge on one single factor and the weight and use of each factor is debatable.[89]

This section will examine the criteria that a final-offer arbitrator is typically allowed to consider and how such factors mesh with the theories and goals of final-offer arbitration. This section will place particular emphasis on the appropriate number of criteria, the thoroughness of each criterion, the weight each criterion receives, and whether a private- or public-sector arbitrator should consider an employer's financial position.

A collective bargaining agreement, statute, or private agreement typically dictates the criteria an arbitrator may or must consider and, in some cases, which criteria must be excluded. Common criteria include: comparability, ability to

89. For example, when considering an employer's financial position: what information is relevant? Is speculative information appropriate? Additionally, what weight is given to this factor as compared to the other relevant factors?

pay, productivity, variations in job content or hazards, historical trends, equity, forces within the marketplace, and criteria that are specifically geared toward a respective context.[90] The purpose of setting criteria is to mimic the market. An arbitrator is establishing market value so the factors serve to re-create the parties' bargaining market in the absence of the arbitrator. In some instances, however, agreed-upon policy may require that the market not be perfectly re-created due to the nature of the given context.

Comparability and an employer's financial position have proven to be the most controversial factors.[91] Arbitrators are likely to decide in such a way as to increase their professional demand. Because it follows that they would adhere strictly to the factors outlined in a given agreement or statute, establishing the most appropriate list of criteria can enhance the efficacy of final-offer arbitration.

B. Major League Baseball's Salary Arbitration Criteria

In MLB salary arbitration, the criteria an arbitrator may consider include the quality of the player's contribution to his team during the past season; the length and consistency of his career contribution; the record of the player's past compensation; comparative baseball salaries; the existence of any physical or mental defects on the part of the player; and the recent performance record of the team including, but not limited to, its league standing and attendance as an indication of public acceptance.[92] The agreement allows the arbitrator, in his discretion, to assign a weight to each of the criteria that appears appropriate under the circumstances.[93]

1. Weight Issues

One potential issue is the lack of pre-assigned weight given to the criteria, which may impede settlement. MLB's

90. Tim Bornstein, *Interest Arbitration in Public Employment: An Arbitrator View of the Process*, 83 LAB. J. 77, 83 (1978).

91. Comparability is criticized because it creates an unending spiral of wage increases and because it often relies on evidence that is unclear, ambiguous and easily manipulated. Ability to pay is controversial, especially in the public sector, because it has been criticized as speculative and unfair to employees. These criteria often conflict with each other. *See* Martin, *supra* note 63, at 69.

92. *See* MLB AGREEMENT, *supra* note 4, at art. VI, § (f)(12).

93. *Id.*

collective bargaining agreement instructs the arbitrators to consider both the player's prior-year performance as well as his entire career performance, but does not instruct an arbitrator on how to weigh these factors with respect to comparability.[94] Inconsistencies between a player's performance throughout his career and the most recent season may keep offers apart, which runs contrary to the theory of final-offer arbitration. Because the agreement does not prioritize among these conflicting factors, a team and a player may disagree as to which factor is more important. Consider the following hypothetical: Player A performs at a $10 million level for the first two seasons of his career but plays at a $1 million level in his third year. Player A's agent will want to consider the player's whole career while management will emphasize the player's performance during the most recent season. This keeps the parties in disagreement and inhibits settlement. In final-offer arbitration, the criteria should be geared toward promoting pre-hearing settlement. When any two criteria have the potential to conflict, each party may interpret the conflict in its favor. If an agreement were to outline how such a conflict should be interpreted in arbitration, the parties would be better able to predict an arbitrator's behavior and more likely to settle on a middle ground prior to arbitration.

2. Inadmissible Evidence

The agreement also stipulates six types of inadmissible evidence in an arbitration proceeding. The financial position of a player or club is one such factor.[95] The agreement also prohibits parties from discussing, and arbitrators from considering, the League's Competitive Balance Tax (also known as the League's "luxury tax").[96] This tax, created in 2000, requires teams whose payroll exceeds a certain figure, calculated each year, be taxed on this excess amount.[97] This tax is deposited into a League "industry growth fund."[98] These exclusions are examples of how an agreement's criteria

94. *See* ABRAMS, *supra* note 10, at 150. Abrams listed this weight issue as one reason why parties in baseball arbitration may not settle.

95. *See* MLB AGREEMENT, *supra* note 4, at § (f)(12)(b)(i).

96. *Id.* § (f)(14).

97. *Id.* art. XXIII.

98. *Id.*

may purposefully skew the market. Although the market for players would undoubtedly be affected by the financial position of a given team, it may be in the "best interests of baseball" to exclude a team's financial position in the context of salary arbitration so that a player is not punished for being drafted by a financially inferior organization. This exclusion is one of the few complaints among owners regarding final-offer arbitration. Baseball management has criticized salary arbitration since 1974 for inflating player salaries by overemphasizing the comparability factor while excluding a team's financial position.[99]

Studies have noted that even players who "lose" arbitration still make, on average, a 150% increase from their previous year's salary.[100] The reason for this increase is that salary arbitration is a tool designed to adjust a player's salary to the current market and to the player's performance. Typically, salary arbitration occurs while a player is still bound by an inexpensive rookie contract so it is expected that salaries will increase to adjust a player's salary to match their performance. A player is unlikely to deserve less than what he earned before playing in the major leagues, so it comes as little surprise that salaries increase in baseball salary arbitration. There is validity, however, to the argument that salary arbitration essentially forces small-market teams to account for the extravagant free-agent spending of big-market teams. This has forced many small-market teams to trade away arbitration-eligible players.[101]

If an arbitrator were to consider a team's financial position, however, a small-market team would be more likely to risk an arbitration hearing than to settle for a salary it cannot, or would prefer not to, pay. On the other hand, the

99. *See* ABRAMS, *supra* note 10, at 164.

100. James B. Dworkin. *Collective Bargaining in Baseball: Key Current-Issues*, 39 LAB. L.J. 480 (1988).

101. For example, this past off-season, the Florida Marlins, notorious for cutting costs and maintaining a low payroll, traded arbitration-eligible first-baseman Mike Jacobs to the Kansas City Royals. Jacobs, who had earned $395,000 with the Marlins in 2008, was signed by the Royals to a one-year, $3.275 million contract. The Marlins traded Jacobs because they did not want to pay for Jacobs' expected salary increase. This is a common occurrence when players on small-market teams become eligible for arbitration. It should be noted that the Royals are also a small-market team, but typically have a much higher payroll than the Marlins. *Slugger Jacobs agrees to one-year deal with Royals*, CBSSPORTS.COM, Feb. 18, 2009, http://www.cbssports.com/mlb/story/11390437.

policy likely behind this exclusion is that players should not be punished for being drafted by financially inferior teams. A delicate balance could be achieved that would allow a player to adjust his salary within the confines of a team's financial capabilities, but the fact remains that allowing an arbitrator to consider a team's financial position would run contrary to theories of final-offer arbitration. One idea is that arbitrators, in implementing the comparability factor, take into account the financial position of a comparable player's organization. A player for a big-market team who makes $10 million may be very different from a player for a small-market team who makes $10 million. The collective bargaining agreement apparently attempts to address this by noting that "the arbitration panel shall consider the salaries of all comparable players and not merely the salary of a single player or group of players."[102] Expanding upon this language could appease the owners' concerns while continuing to promote settlement and allowing the arbitration process to account for a player's increased value. Additionally, greater specificity would give the parties a better understanding of how an arbitrator will view a player's market value, even if that market value is not a perfect reflection of the actual market.

The policy behind excluding information regarding which teams may be subject to the luxury tax is that an arbitrator should not base a player's salary on the fact that a wealthy team, such as the New York Yankees, may have to pay double for its arbitration-eligible players.[103] Unlike the excluded financial position criterion, excluding information regarding the luxury tax has not faced much criticism. It is relevant, however, as an example of an excluded factor that is disadvantageous to big-market teams.

C. Criteria Permitted in State Statutes

Generally, final-offer state statutes require an arbitrator to consider factors similar to those listed for salary arbitration in MLB's collective bargaining agreement. For example, comparability is a central aspect of both state statutes and

102. MLB AGREEMENT, *supra* note 4, at art. VI, § (f)(13).

103. For example, if an arbitrator awards a New York Yankee $5 million, the Yankees must pay $5 million to the player and an additional $5 million to the "industry growth fund" if the team has surpassed the payroll cap for a given year. MLB Agreement, *supra* note 4, at art. XXIII.

the MLB agreement.[104] One notable difference, however, is that the state statutes typically require an arbitrator to consider the employer's financial position and do not explicitly exclude any criteria.[105] The final-offer statutes of Wisconsin, Maine, Michigan, and New Jersey, each discussed in Part II, have a "financial position" requirement.[106] Although financial position considerations differ between team owners, other private employers, and state municipalities, the policy underlying the consideration of any employer's financial situation may enlighten our understanding of MLB's explicit exclusion of a team's financial position. Additionally, comparing a state statute's list of criteria and the weight given to each criterion will be helpful in determining how criteria should be laid out in any final-offer agreement.

1. Maine

The Maine Agriculture Marketing and Bargaining Act lists eleven factors that an arbitrator is required to consider, such as "the producer's costs of production including the cost that would be involved in paying farm labor a fair wage rate" and "the impact of the award on the competitive position of the handler in the market area or competing market areas."[107] The Act does not outline what weight should be given to each factor nor does it explicitly exclude any factors.[108] A list of eleven factors does not seem to help achieve the goals of final-

104. For example, Wisconsin requires a "comparison of wages, hours and conditions of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services. WISC. STAT. ANN. § 111.77(6)(D) (Lexis 2008). Michigan, New Jersey and Connecticut, among others, also have comparability factors. MICH. COMP. LAWS. ANN. § 423.239(9)(d) (Lexis 2008); N.J. STAT. § 34:13A-16(g)(2); CONN. GEN. STAT. ANN. § 5-276a(e)(5) (2008).

105. Iowa requires a final-offer arbitrator to consider "the interests of the welfare of the public, the ability of the employer to finance the economic adjustments and the effect of such adjustments on the normal standard of services." IOWA CODE ANN. § 20.22(9)(c). Maine, New Jersey, Connecticut, Minnesota, Oklahoma, Pennsylvania, Washington, Wisconsin and Michigan have similar requirements. ME. REV. STAT. ANN. TIT. 13 § 1958-B(5-A);.J. STAT. § 34:13A-16(g)(6) (2009). CONN. GEN. STAT. ANN. 5-276a(e)(3) (Lexis 2008). MINN. STAT. ANN. § 179A.16 (Subd. 7) (Lexis 2008). OKLA. STAT. ANN. TIT. § 51-108(4) (Lexis 2008), PA. STAT. ANN. § 11-1122-A (Lexis 2008), WASH. REV. CODE. ANN. § 35.21.779(2)(6) (Lexis 2009). WIS. STAT. ANN. § 111.77(6)(C) (Lexis 2008). MICH. COMP. LAWS. ANN. § 423.239(9)(C).

106. N.J. STAT. § 34:13A-16 (g)(6); WIS. STAT. ANN. § 111.77 (6)(C); MICH. COMP. LAWS. ANN. § 423.239(9)(c).

107. ME. REV. STAT. ANN. TIT. 13 § 1958-B(5-A) (D), (F).

108. *Id.*

offer arbitration. Perhaps Maine should reduce the number of factors or require an arbitrator to explain the weight given to each factor. Because the ultimate goal of final-offer arbitration is settlement, it may follow that the arbitrators should consider as few factors as possible because the parties will be negotiating only as to those factors. If the parties are required to consider a long list of factors, settlement may be less likely. While it is possible that each of these eleven factors is essential to Maine agricultural law, the theories underlying final-offer arbitration suggest that only the essential criteria be considered.

In discussing Maine's criteria, it is important to remember that the Act is unique in that it deals with the financial position of "handlers" rather than municipalities. The clause that requires arbitrators to consider the impact of an award on the competitive position of the handler in the market is interesting in light of MLB's exclusion of a team's financial position. Like major league teams, handlers are in a competitive market. Although MLB considers the individual player market and a team's competitiveness in terms of "on the field" success for establishing a player's market value, it does not consider the competitive market as it relates to the award or any future award's potential impact on a team's financial competitiveness.

2. New Jersey

New Jersey's Employer-Employee Relations Act lists nine factors that an arbitrator may consider.[109] The Act requires that in a final-offer or conventional arbitration, the arbitrator give "due weight to those factors. . .that are relevant for the resolution of the specific dispute."[110] The statute also requires that, in the award, an arbitrator indicate which factors are relevant, satisfactorily explain why the others are irrelevant, and provide an analysis of the evidence for each relevant factor."[111]

The financial position criterion in New Jersey's statute has been the subject of literature, case law, and legislative

109. N.J. STAT. § 34:13A-16 (g).
110. *Id.*
111. *Id.*

proposals.[112] Some critics have argued that the financial position factor should be given more weight, and that arbitrator discretion as to weight has led to incessant wage increases New Jersey's municipalities cannot afford.[113] These same critics attribute these wage increases to the comparability factor. Thus, the argument is that the criteria do not provide an accurate reflection of the market for less-affluent municipalities. In 1992, various proposals in the New Jersey Legislature unsuccessfully sought to control the wage increases associated with the comparability factor by putting greater emphasis on the state's financial capacity.[114]

A separate question is the weight to be accorded to each criterion. The Supreme Court of New Jersey, on multiple occasions prior to 1995, found that arbitrators did not give each criterion the correct weight and the legislature has made attempts to address the issue. The court repeatedly emphasized that each of the eight factors must be more carefully evaluated.[115] Increased judicial review is a risk associated with requiring an arbitrator to outline the weight given to each factor. However, especially in a final-offer arbitration setting, such review may prevent excessive arbitrator discretion and thereby help the parties predict an arbitrator's actions. The court also noted that merely determining that a municipality has the financial capability to meet the employees' demands should not satisfy the "financial impact" factor.[116] An arbitrator is not limited to simply determining whether the municipality *can* pay, but may also focus on whether the municipality *should* pay given the financial impact. Since most state statutes provide little guidance as to the extent that a city's financial position should be a factor, the court's interpretation is worth noting.

In 1995, New Jersey's statute was amended to expand upon the language of the "financial position" factor.[117] The

112. *See* Martin, *supra* note 63. *See also* P.L. 1996, Chapter 425, 206th Leg., 2nd Annual Sess. (N.J. 1995); Fox v. Morris County Policemen's Ass'n, P.B.A. 151, 266 N.J. Super. 501 (N.J. Super. Ct. App. Div. 1993); Twp. of Washington v. N.J. State Policemen's Benevolent Ass'n, Local 206, 137 N.J. 88 (1994). New Jersey requires that an arbitrator take into account "the financial impact on the governing unit, its residents and its taxpayers." N.J. STAT. § 34:13A-16 (g).

113. *See* Martin, *supra* note 63, at 62.

114. 80 N.J. LEGIS. INDEX NO. 2, at A-836 (Feb. 9, 1993)

115. *See Fox*, *supra* note 112. *See also Twp. of Washington*, *supra* note 112.

116. *See Twp. of Washington*, *supra* note 112.

117. P.L. 1996, *supra* note 112.

Legislature added language to clarify how the "financial impact" should be analyzed.[118] Although this language undoubtedly gives the arbitrator clarification as to how to apply the factor, it does not address concerns as to the weight an arbitrator should apply to a municipality's ability to pay. Critics note that arbitrator awards are still too high and that the legislature has not appropriately considered the limited ability of municipalities to fund increases in pay.[119]

Overall, however, New Jersey's willingness to clarify the financial position factor is encouraging and may promote settlement. The statute now allows less room for an arbitrator's interpretation. Before the amendment, parties may have been less likely to agree on how a municipality's ability to pay should be applied in an arbitration proceeding. As the factor is now more detailed, the arbitrator's discretion is limited, which may make the parties more likely to agree on how the factor will be applied in arbitration. This increased predictability should promote pre-hearing settlement.

3. Michigan, Wisconsin, and Catch-All Factors

Michigan's final-offer statute for firemen and policemen requires that an arbitrator consider eight relatively vague factors including "the interests of the public and the financial

118. N.J. STAT. § 34:13A-16 (g). Prior to 1995, section (g)(6) read, "[t]he financial impact on the governing unit, its residents and taxpayers." The 1995 amendment added the following language:

> When considering this factor in a dispute in which the public employer is a county or a municipality, the arbitrator or panel of arbitrators shall take into account, to the extent that evidence is introduced, how the award will affect the municipal or county purposes element, as the case may be, of the local property tax; a comparison of the percentage of the municipal purposes element or, in the case of a county, the county purposes element, required to fund the employees' contract in the proceeding local budget year with that required under the award for the current local budget year; the impact of the award for each income sector of the property taxpayers of the local unit; the impact of the award on the ability of the governing body to (a) maintain existing local programs and services, (b) expand existing local programs and services for which public moneys have been designated by the governing body in a proposed local budget, or (c) initiate any new programs and services for which public moneys have been designated by the governing body in a proposed local budget.

119. E-mail from Robert Martin, Professor, Seton Hall University School of Law, to Benjamin A. Tulis (March 2009) (on file with author). *See also* Martin, *supra* note 63.

ability of the unit of government to meet these costs."[120] The statute does not assign any particular weight to its eight factors and notes that the panel should base its findings and opinions on these factors only "if applicable."[121] The factors in Michigan are guidelines rather than strict criteria, giving an arbitrator greater discretion to decide the economic issues in dispute. For the purposes of final-offer arbitration, it is better to apply strict criteria so that the parties can agree on what an arbitrator will consider and ultimately decide. Unlike New Jersey's final-offer statute, Michigan's "financial position" factor remains vague.[122] The Court of Appeals of Michigan has noted that while an arbitrator must consider a city's financial ability, a financial inability to pay does not automatically mean that the city's final offer will be selected.[123] Greater specificity in the factor could address this issue and would allow the parties to agree on how an arbitrator would apply the criterion. Instead, Michigan's vague factor has led to arbitration proceedings and judicial review.

Wisconsin's final-offer statute lists eight factors, similar to those listed in Michigan's statute, including a requirement that an arbitrator consider "the interests and the welfare of the public and the financial ability of the unit of government to meet these costs," but it does not require that any specific weight be given to any of the factors.[124] The statute merely states that the arbitrator shall "give weight" to the listed factors.[125]

Both Michigan and Wisconsin's final-offer statutes also contain a residual, or catch-all factor, with identical language, for the arbitrator to consider "such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in determining wages, hours and employment through voluntary collective bargaining,

120. MICH. COMP. LAWS. ANN. § 423.239 (9)(c).

121. MICH. COMP. LAWS. ANN. § 423.239.

122. MICH. COMP. LAWS. ANN. § 423.239 (c). Michigan's statute requires that an arbitrator consider "the interests and welfare of the public and the financial ability of the unit of government to meet these costs." New Jersey, on the other hand, clarified the vague nature of its statutory language, likely in response to litigation. Maine and Wisconsin's financial position factors are similar to Michigan's. ME. REV. STAT. ANN. TIT. 13 § 1958-B(5-A)(D); WIS. STAT. ANN. § 111.77(6)(C),

123. Hamtramck v. Hamtramck Firefighters Ass'n, 128 Mich. App. 457 (Mich. Ct. App. 1983).

124. WISC. STAT. ANN. § 111.77(6)(C).

125. *Id.*

mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment."[126] Maine's final-offer statute includes a similar catch-all factor.[127] New Jersey's statute, on the other hand, lacks a catch-all factor.[128]

These residual factors give an arbitrator greater flexibility to determine which final offer is most appropriate. For example, the Third District Court of Appeals in Wisconsin found that an arbitrator, who used the catch-all factor, did not err in evaluating the final-offer proposals by speculating as to the economic effect a new jail would have on the city's financial position in evaluating the final-offer proposals.[129] The Wisconsin Professional Police Association argued that the prospective economic impacts could not be characterized as definite because they were unpredictable and could vary, but the court allowed the arbitrator's use of speculative information under Wisconsin's catch-all factor.[130]

How does the presence of these catch-all factors relate to the theories of final-offer arbitration? Catch-all factors may complicate negotiations. For example, if one party to a negotiation makes an offer based on what it believes to be a relevant factor under the catch-all, but the other party does not agree with the relevance of this factor, the parties are less likely to find a middle ground. If the parties must adhere to a strict, finite list of criteria, however, they are more likely to be in agreement during pre-hearing negotiations.

D. Conclusion

Each context utilizing final-offer arbitration may require different criteria depending on the nature of the parties and the respective market. There is no universal set of criteria that can be applied to every final-offer setting. However, the list of criteria in any agreement or state statute

126. *Id*. § (h).

127. Maine's final-offer statute requires an arbitrator to consider "other factors which are normally or traditionally taken into consideration in determining prices, quality, quantity and the costs of other services involved." ME. REV. STAT. ANN. TIT. 13 § 1958-B(5-A) (K).

128. N.J. STAT. § 34:13A-16(g).

129. Wisconsin Prof'l Police Ass'n v. Oneida County, 2001 WI App 58 (Wis. Ct. App. 2001). *See also* WIS. STAT. ANN. § 111.77(6)(H) (Lexis 2008).

130. *Id.* at *10.

should be formulated to promote the underlying theories and goals of final-offer arbitration.

1. When Should Factors Be Excluded?

Similar to the list of admissible criteria, the list of inadmissible criteria in any agreement or statute will vary in different contexts. For example, in their respective proceedings, it is more important to consider a municipality's ability to pay than the financial position of a sports organization. MLB has its own reasons for prohibiting an arbitrator from considering a team's ability to pay.[131] Excluded factors, however, may also be utilized to promote settlement. This may not be the reason behind the exclusion in baseball. If a small-market baseball team were aware that its financial position would be considered, it would be more likely to try to win arbitration rather than settle. The team could then trade a player if it lost the arbitration, in order to save money. A municipality, on the other hand, does not have the option to trade its firemen if the municipality loses arbitration. An agreement could exclude factors in an effort to promote pre-hearing settlement as long as the excluded factor is not an essential criterion.

2. Weight Issues

Because every dispute varies, it is difficult to restrict an arbitrator to a specific weight for each factor. Regardless, clarification would further the theories of final-offer arbitration. Clarification can come in the form of prioritizing the most important factors or highlighting those factors that typically receive more weight. The more information the parties possess as to how an arbitrator will decide, the more likely they are to find a middle ground.

Clarifying the weight of each factor would be especially beneficial for conflicting factors. For example, MLB could note that a player's performance over the course of his career is more important than his performance in the most recent season. However, the specific order in which the factors are

131. This exclusion is likely a result of a collective bargaining agreement being constructed between the Players' Association, big-market owners, and small-market owners. The big-market owners and small-market owners split the owners' vote, while the Players' Association prefers that a team's financial position be excluded.

prioritized is irrelevant. All that matters is that the parties are aware of how an arbitrator will view the factor and, as a result, have one less factor to interpret allowing the parties to avoid pre-hearing disagreement. Another weight issue surrounding conflicting factors is a municipality's ability to pay weighed against the wages of comparable workers in other municipalities. A statute could indicate how to weigh these factors. For example, a statute could require an arbitrator to prioritize a municipality's ability to pay the wages of comparable employees in comparable municipalities if the cited municipalities have greater financial resources than the negotiating municipality.

Another option is New Jersey's requirement that an arbitrator discuss, in his decision, how much weight was given to each relevant factor. This would allow the parties in subsequent arbitrations to predict how that arbitrator will weigh a given factor by analyzing past analogous arbitrations. Since the parties would be able to better predict how the arbitrator might decide, they would be more likely to find a middle ground – at least if the arbitrator were identified in advance. Two risks are associated with written decisions in final-offer arbitration. First, these decisions are not always consistent. The arbitrator often attempts to be fair and not offend either party, resulting in decisions that may simply pay lip service to the criteria. Having parties rely on such decisions may be dangerous and there is no guarantee that parties will gain a greater understanding of how the arbitrator will adjudicate. The other risk of allowing arbitrator discussion, however, is that it increases the potential for judicial review, thus reducing the efficiency and finality of the process. New Jersey public employment arbitrations, presumably because of this discussion requirement, have been the subject of greater judicial review than those of Wisconsin and Michigan.

3. How Extensive and Detailed Should Criteria Be?

The ideal list of criteria in final-offer arbitration is short and very detailed. Although a state may find twenty factors to be absolutely essential for mimicking the market, final-offer arbitration typically works best when parties negotiate based on a short list of factors. Additionally, regardless of how many factors are included in the statute or agreement, each factor

should be as detailed as possible to limit arbitrator discretion so that the parties can more easily predict the outcome of an arbitration proceeding. Many factors in both state statutes and MLB's collective bargaining agreement are relatively vague. Ambiguous factors are left open to interpretation by the arbitrator and, more importantly, by the negotiating parties. Each negotiating party will interpret a vague factor in their favor, which could "chill" negotiations.

For example, in MLB, there is little guidance as to how to apply the comparability factor. While MLB salary arbitration is effective in reaching pre-hearing settlement, the resulting salaries may be skewed by the criteria in the collective bargaining agreement. I propose a formula based on MLB's salary comparability factor that would provide greater specificity and understanding among the parties prior to arbitration.[132] The formula determines a player's market value based on the player's position, performance, and other factors. If the parties knew that an arbitrator would take this "market value" into account, this knowledge could further negotiations. The formula is an example of the benefits of greater specificity, which, in any form, would lead to a better understanding between the parties and, in turn, direct the parties toward the final-offer goal of pre-hearing settlement. Greater specificity would function in a fashion similar to New Jersey's 1995 clarification of the "financial" position factor.

132. The formula standardizes each factor by providing constants based on the "superstar" statistics of a player in a given six hundred at bats. "Superstar" statistics were the league leaders in any given category spread out over 600 at bats. For hitters, the factors included are hits, home runs, total bases, RBI's, stolen bases, runs, walks, time on the disabled list, team wins, errors (at the player's position), Stolen Bases allowed (for catchers), caught stealing (for catchers, the formula also included other position specific categories such as outfield assists), experience, and other factors. (There are obviously different factors for starting pitchers and relief pitchers).

One side of the formula included the constants and the statistics of "comparable" players spread out to six hundred at bats while the other side of the formula included the constants and the statistics of the arbitration eligible player spread out to six hundred at bats (Note: six hundred at bats is the standard for hitters. There are different (innings-related) standards for starting pitchers and relief pitchers). Both of these are put in the denominator while the comparable player's salary is put in the numerator and the arbitration eligible player's market value, X, is placed in the other numerator. This allows you to compare the value of the player going through arbitration with any "comparable" player a party chooses to utilize. Of course, MLB salary arbitration is a successful example of final-offer arbitration but there is always room for improvement. I may discuss the formula more thoroughly in an upcoming article.

Michigan, Maine, and Wisconsin, on the other hand, have left their financial position language vague, much like New Jersey's pre-1995 language. Greater specificity for this criterion, and all criteria for that matter, would better facilitate good faith bargaining.

Along the same lines, catch-all factors such as those included in Michigan, Maine, and Wisconsin's statutes most likely do not suit the goals of final-offer arbitration. In negotiations, parties may attempt to stretch the reach of a catch-all definition to a point where the parties disagree as to what is relevant. To avoid this scenario, an arbitrator should be restricted to a set number of criteria.

Criteria should be as clear as possible to facilitate pre-hearing negotiations while reflecting the sought-after market. It is most important that criteria be detailed in such a manner that the parties have a mutual understanding as to how a given criterion will be applied prior to the hearing. If possible, a list of criteria should be limited, detailed, and include some mechanism for apportioning the weight of conflicting factors.

CONCLUSION

When applied appropriately, final-offer arbitration can be a useful tool for facilitating pre-hearing settlement. In addition to MLB and public employment, there are various contexts that could benefit from the process, including private value disputes and interest arbitrations under the proposed Employee Free Choice Act. Within these contexts, any agreement to arbitrate can be implemented in such a way as to promote the theories behind final-offer arbitration, most importantly by counteracting the "chilled" bargaining effect associated with conventional arbitration. Outlining a suitable set of criteria and choosing the appropriate procedural variation may ensure proper implementation. Although final-offer arbitration appears to be underutilized and, at times, misused, if applied properly in an appropriate context, it can be a valuable alternative to conventional arbitration and provide a more efficient, congenial and cost-effective arbitration process.