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COMMENT

From Russia with Love: The Legal Repercussions of the Recruitment and Contracting of Foreign Players in the National Hockey League

JEFFREY P. GLEASON†

The introduction to *New York Times* columnist Thomas L. Friedman's 1999 book, *The Lexus and the Olive Tree*, is titled "Opening Scene: The World is Ten Years Old."¹ With that name, Friedman was referring to the modern age of globalized societies and economies, which he posited began in 1989 with the fall of the Berlin Wall.² Several years after the release of Friedman's book, it is undeniable that nations now operate in an international forum, not only diplomatically but economically and socially as well. It is not only nations that operate in this globalized manner, but also individuals, a phenomenon that Friedman termed

† J.D. Candidate, 2008, University at Buffalo; B.A., 2004, University of South Carolina. First, I must thank my family and friends who always push me to do, and be, better than the day before. I would also like to thank Professor Elizabeth Mensch for sparking my interest in antitrust law and for her extremely helpful editorial comments. My thanks must also go to Tatiana Markel for her translations of Russian sources, without which I would have been lost. Finally, this Comment would never have been written had it not been for my deep love of the Buffalo Sabres, who have continually taught me the meaning of the phrase "next year."

1. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE*, at xi (1999).
2. *Id.* at 7-8.

“Super-empowered individuals.”³ While Friedman did not address it in his book, professional sports have followed the same path as nations, individuals, and economies in taking on an increasingly international character, one that no longer exists solely in Olympic competition.

This Comment will examine some of the legal consequences that American professional sports leagues and teams may incur by recruiting and signing players from foreign countries. An example of such consequences is the recent lawsuit brought by two Russian hockey teams against the National Hockey League (NHL) that alleged, *inter alia*, violations of the antitrust laws and tortious interference with contractual and business relations.⁴ That lawsuit, the circumstances surrounding its filing, and the subsequent related events will serve as the lens of this Comment, restricting its scope to the present consequences faced by the NHL with particular attention paid to Russian hockey players. This Comment will examine the claims made in that lawsuit as well as the legal bases for those claims as established through statutory and common law.⁵ That analysis will then be expanded to show that the simple maintenance of the status quo in the NHL with regard to international players will create persistent legal problems for both the league and its teams.

In Part I, I will set the stage for the conflict by providing introductory and background information about the NHL, the parties to the lawsuit, and the complaint filed by one of the Russian hockey teams. In Part II, I will develop the statutory and common law under which the Russian hockey team's claims would be analyzed, while in Part III, I will develop the corresponding law for the claims of tortious interference with contractual and business relations. Part IV will consist of a specific analysis of the

3. *Id.* at 12-13.

4. *See infra* note 62.

5. It must be noted at this time that this lawsuit against the NHL was dismissed on January 29, 2007. *See infra* notes 250-51 and accompanying text. However, an analysis will be made as if the same had not been so dismissed to show the potential validity of those claims. This is done because, as will be argued later, the legal issues presented by this lawsuit, and the analysis given those issues, remain and a similar lawsuit may arise in the future, given the current legal landscape and Russia's refusal of yet another player transfer agreement. *See infra* notes 251-58 and accompanying text.

claims made by the Russian hockey teams in light of the legal rules and precedent set forth in Parts II and III. Lastly, in Part V, I will argue that, in light of the current relations between American and Russian hockey teams, as well as the international governing body for the sport, the National Hockey League will continue to face similar legal challenges unless it changes its policy toward the recruitment of foreign players. Part V will also offer one possible solution to this conflict that could be incorporated into the current, or a future, player transfer agreement that may satisfy all parties involved.

I. THE STAGE IS SET

“I have for some time been thinking that it would be a good thing if there were a challenge cup which should be held from year to year by the champion hockey team in the Dominion.”⁶ That was the message delivered by Lord Kilcoursie⁷ at a March 18, 1892 dinner of the Ottawa Amateur Athletic Association on behalf of Lord Stanley, the Earl of Preston and Governor General of Canada.⁸ Lord Stanley proposed, and shortly thereafter purchased, one of the most sought after trophies in all of professional sports that still today bears his name: the Stanley Cup.⁹ While Lord Stanley never saw his trophy presented,¹⁰ hockey players from around the world still dream of someday playing in the NHL and having their names engraved on the Stanley Cup.

A. *The NHL Starts Out, Reaches Out, and Locks Out*

The NHL was founded on November 26, 1917 with only five franchises, all of which were located in Canada.¹¹

6. NHL.com, The Stanley Cup, <http://www.nhl.com/cup/cup.html> (last visited Apr. 13, 2008) (quoting Lord Kilcoursie).

7. Lord Kilcoursie was a player for the Ottawa Rebels hockey club. *Id.*

8. *Id.*

9. *See id.*

10. *Id.* (explaining that Lord Stanley returned to England before the completion of the 1893 season, the first in which the Stanley Cup was awarded).

11. *See* NHL.com, History, <http://www.nhl.com/history/112617nhl.html> (last visited Apr. 13, 2008).

Today, however, the NHL is comprised of thirty teams divided into two conferences and spread across both Canada and the United States.¹² Each year, executives from these teams assemble to draft new hockey players into the NHL, “a spectacle anticipated by hundreds of thousands of hockey fans throughout the world.”¹³ For much of its early existence, though, the NHL and the entry draft were populated nearly entirely by North American-born players.¹⁴

The NHL began to change more rapidly around 1981, when more and more international players started to enter the NHL draft¹⁵ and bring the European style of hockey to North America.¹⁶ During the 2005-2006 NHL season, 262 European-born players suited up for NHL teams,¹⁷ while 74 additional players agreed to transfer to NHL teams, from

12. See NHL.com, Teams, <http://www.nhl.com/teams/index.html> (last visited Apr. 13, 2008).

13. NHL.com, Futures: NHL Entry Draft, <http://www.nhl.com/futures/drafthistory.html> (last visited Apr. 13, 2008). While the first NHL Amateur Draft was held in Montreal on June 5, 1963, the draft has undergone subsequent eligibility changes in 1969, 1979, 1980, 1987, and 1992, and is now named the NHL Entry Draft. See *id.* All eighteen-, nineteen-, and twenty-year-old players born both inside and outside of North America are eligible to be drafted. *Id.* Also, non-North American-born players aged twenty-one and older are eligible for the NHL draft. *Id.* Since 2000, approximately 290 players are drafted in the NHL Entry Draft each year. NHL.com, Futures: Entry Draft Summary, <http://www.nhl.com/futures/draftsummary.html> (last visited Apr. 13, 2008).

14. In 1965, Ulf Sterner became the first European player to join the NHL when he appeared on the New York Rangers' roster on January 27. A to Z Encyclopedia of Ice Hockey, <http://www.azhockey.com/index.html> (follow “Firsts Gallery” hyperlink located in the text box on the left side of the screen) (last visited Apr. 13, 2008). The first time a European player was drafted by an NHL team did not occur until four years later in 1969. *Id.*; see also Larry Wigge, *New World Order*, SPORTING NEWS, Feb. 25, 2002, at 24, 25 (“A quarter-century ago, 90 percent of the players in the NHL were born in North America.”).

15. NHL.com, Futures: Entry Draft Summary, <http://www.nhl.com/futures/draftsummary.html> (last visited Apr. 13, 2008) (showing that between the 1980 and 1981 drafts, the number of players drafted from abroad increased from 6.2% to 15.2% of all players drafted).

16. See Wigge, *supra* note 14 (opining that Finnish-born Jari Kurri's playing partnership with hockey great Wayne Gretzky “was the first step toward hockey globalization: Kurri Europeanized Gretzky; Gretzky did not North Americanize Kurri”).

17. Bill Meltzer, *Austrians Stride Forward in North American, International Play*, NHL.COM, June 8, 2006, Across the Pond, <http://www.nhl.com/features/pond/austria060806.html>.

their International Ice Hockey Federation (IIHF) teams, during the 2006 off-season.¹⁸ Additionally, the reverse of this pattern was seen during the 2004 NHL Lockout,¹⁹ when 388 NHL players temporarily left North America to play in nineteen different European leagues.²⁰ Evidently, when the Cold War ended and economies began to operate without borders, so did the NHL.

In both 2006 and 2007, however, the entry draft retreated a bit from its highly diversified international character. In 2006, a record ten out of the thirty total draft picks in the first round were players from the United States.²¹ That trend continued in the 2007 entry draft when another ten U.S.-born players were selected in the first round, including both the first and second draft picks—the first time that has happened in the history of the draft.²² Including those first round picks, 63 U.S.-born players were selected in the 2007 draft, accounting for a record thirty percent of the 211 total draft picks.²³ While Canadian-born

18. IIHF News, List of Signed European Players by NHL Clubs for 2006-2007 Season, <http://www.iihf.com/news/iihfpr5106.htm> (last visited Oct. 20, 2006). The high point of the influx of European players was in the 2001-2002 NHL season, when 30.0%, or 293 out of 968 NHL players, were European. INTERNATIONAL ICE HOCKEY FEDERATION, STUDY ON EUROPEANS GOING TO NORTH AMERICA 5 (2006) [hereinafter IIHF STUDY]. During the draft that preceded that year, 49.1% of the players drafted were European. *Id.* at 6.

19. On September 16, 2004, the day after the collective bargaining agreement between the NHL and the NHL Players' Association—the players' union—expired, the league experienced a work stoppage termed a "lockout." Joe Lapointe, *Lockout is First Shot in Hockey's Labor War*, N.Y. TIMES, Sept. 16, 2004, at D1. On February 16, 2005, NHL Commissioner Gary Bettman cancelled the entire 2004-2005 hockey season, the only season since 1919 in which the Stanley Cup was not awarded. Joe Lapointe, *League Cancels Hockey Season in Labor Battle*, N.Y. TIMES, Feb. 17, 2005, at A1.

20. IIHF News, Lockout List Ends at 388 NHL Players in Europe as of February 25, <http://www.iihf.com/news/iihfpr8704.htm> (last visited Aug. 8, 2007).

21. Kevin Allen, *American First-Rounders Could Break 2006 Record*, USA TODAY, June 22, 2007, at 15C.

22. Donna Spencer, *Stars and Stripes Flies High, U.S. Passes Europe, Becomes Canada's Big Rival at NHL Draft*, WINNIPEG FREE PRESS, June 24, 2007, at C5. Patrick Kane, from Buffalo, N.Y.—namely, my own hometown of South Buffalo—was selected first overall while James vanRiemsdyk, from Middletown, N.J., was selected second. *Kane Becomes Second Straight U.S.-Born Player Selected First*, ESPN.COM, June 22, 2007, <http://sports.espn.go.com/nhl/draft2007/news/story?id=2913585>.

23. Spencer, *supra* note 22.

players continue to dominate the draft,²⁴ the increase in American hockey players in recent years is staggering. “Where there were once Russians, Czechs, Slovaks and Swedes crowding Canadians in the prospect pool, there are now kids from New Jersey, Minnesota, Michigan, Illinois and even California.”²⁵ While this “home-grown” character of the NHL draft may be due to the growth of the U.S. National Team Development Program,²⁶ it likely also has much to do with the expense and difficulty teams encounter when attempting to pull their draft picks away from their international teams and into the NHL.

In 2001, in order to facilitate the global movement of hockey players, the NHL, together with the National Hockey League Players Association (NHLPA),²⁷ reached an agreement with the IIHF and its member hockey associations to regulate the transfer of players from IIHF affiliated leagues to the NHL—and, occasionally, vice versa.²⁸ The Player Transfer Agreement stipulated that, upon the signing of a player from a European team, the NHL team would compensate the player’s former team with a developmental fee.²⁹ During the term of that agreement, from 2001 to 2004, 185 players transferred to the NHL from IIHF associated leagues, and US\$28.8 million in compensation was paid by NHL teams.³⁰

24. *See id.* (explaining that 102, or roughly forty-eight percent, of the 211 draft picks in 2007 were Canadian-born players).

25. *Id.* Spencer noted that three players from California and one from Texas—not traditional hockey havens due to their warm climates—were drafted in 2007. *Id.*

26. *See* Allen, *supra* note 21.

27. The NHLPA, or players’ union, is “recognized as the sole and exclusive bargaining representative of present and future [p]layers in the NHL.” COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION pmbl. (2005). [hereinafter NHL-NHLPA COLLECTIVE BARGAINING AGREEMENT].

28. *See* IIHF News, Zherdev Last Player to Sign Under Expiring IIHF-NHL-NHLPA Deal, <http://www.iihf.com/news/iihfpr4003.htm> (last visited Oct. 21, 2006).

29. *See id.*

30. *Id.* A subsequent report from the IIHF counted 194 player transfers under the 2001-2004 agreement. IIHF News, IIHF-NHL Player Transfer Agreement Involving Six Euro Countries, <http://www.iihf.com/news/iihfpr8405.htm> (last visited Oct. 21, 2006).

Following the 2004-2005 lockout, the NHL, NHLPA, and IIHF once again began negotiating the terms of a new Player Transfer Agreement. A two-year agreement was reached on August 16, 2005 that included the NHL and the national hockey associations of the Czech Republic, Finland, Germany, Sweden, Slovakia, and Switzerland.³¹ However, Russia did not agree with the financial compensation, transfer limit, and transfer deadline provisions in the agreement and refused to be a part of it.³² This was especially significant for the NHL since fifty-one native Russians played on NHL teams during the 2005-2006 season,³³ and the rights to forty-one Russian players were transferred to the NHL under the old Player Transfer Agreement.³⁴ The result was a very tumultuous relationship between the NHL and the Russian Ice Hockey Federation during the term of the Player Transfer Agreement—one that resulted in a bitter exchange of words in the press and a good deal of litigation.

In May 2007, “[r]epresentatives of the NHL, NHL Player’s Association, the IIHF, and the seven top European player-producing nations [met] at a downtown Moscow hotel” hoping to reach a new, mutually agreeable Player Transfer Agreement, to which Russia would be a part, as the previous agreement was about to expire.³⁵ The parties seemed optimistic that Russia would sign this Player Transfer Agreement, even if reluctantly, “ending a two-year boycott that threatened to throw the sport into chaos.”³⁶ A new agreement was drafted providing that the NHL teams would contribute ten to twelve million U.S. dollars to an IIHF transfer pool that would go to pay a \$200,000 developmental fee for each European player signed by an NHL team.³⁷ However, that deal could not be finalized as

31. IIHF News, IIHF-NHL Player Transfer Agreement Involving Six Euro Countries, <http://www.iihf.com/news/iihfpr8405.htm> (last visited Oct. 21, 2006).

32. *Id.*

33. See IIHF STUDY, *supra* note 18, at 5.

34. See IIHF News, *IIHF-NHL Player Transfer Agreement Involving Six Euro Countries*, *supra* note 30.

35. *New Deal Ends Possible Hockey Boycott from Russians*, ESPN.COM, May 4, 2007, <http://sports.espn.go.com/nhl/news/story?id=2860115>.

36. *Id.*

37. See *id.*

Russian Ice Hockey Federation president, and Hall of Fame NHL goaltender, Vladislav Tretiak mysteriously did not show up to the meeting.³⁸ IIHF president Rene Fasel announced that Russia would have until midnight on May 8 to ratify the agreement.³⁹ In what appeared to be exasperation, Fasel stated that “[the Russians] know exactly what is going on, we have been discussing for many months the proposal and they know exactly the numbers and figures and conditions and just have to say yes or no.”⁴⁰

As the May 8 midnight deadline approached, Tretiak reported that “80 percent of his nation’s clubs were dissatisfied with the terms” of the agreement, but that he hoped further negotiations would yield agreeable terms.⁴¹ However, as the deadline passed it became apparent that Russia would not be a part of this new Player Transfer Agreement. Tretiak expressed his distaste with the agreement—the NHL itself posted an article on its website stating, “Russian teams would rather lose players to the NHL for nothing than sign a contract that pays them what they consider a disrespectful amount of money, according to [Tretiak].”⁴² As will be shown, Russia’s rejection of this new Player Transfer Agreement will continue to cause legal and financial headaches for NHL teams that recruit and sign Russian players.

B. *The Cast of Characters*

In the 2004 NHL draft, Evgeni Malkin, an eighteen-year-old hockey player from Magnitogorsk, Russia, was selected by the Pittsburgh Penguins as the second overall pick, behind fellow Russian Alexander Ovechkin.⁴³ Malkin,

38. See *Transfer Deal Still Might Get Ratified on Tuesday*, ESPN.COM, May 5, 2007, <http://sports.espn.go.com/nhl/news/story?id=2861222#>.

39. *Id.*

40. *Id.* (quoting IIHF president Rene Fasel).

41. *Russian Hockey Prez Says Clubs Not Happy with Deal*, ESPN.COM, May 8, 2007, <http://sports.espn.go.com/nhl/news/story?id=2863744>.

42. *Russians Turn Down Transfer Agreement, Club Teams Want More Respect*, NHL.COM, May 9, 2007, <http://www.nhl.com/nhl/app?articleid=305462&page=NewsPage&service=page>. Russian teams lost thirteen players without compensation as a result of not being a part of the previous transfer agreement. See *id.*

43. NHL.com, *Futures: NHL Entry Draft*, <http://www.nhl.com/nhl/>

however, was under contract with the Metallurg Magnitogorsk (Metallurg) through the 2007-2008 hockey season,⁴⁴ and he continued to play for Metallurg during the 2004-2005 season that was cancelled due to the lockout.⁴⁵ When Russia declined the NHL-IIHF Player Transfer Agreement in 2005, Malkin continued to play for Metallurg through the 2005-2006 season.⁴⁶ During that season, Malkin was third in scoring in the Russian Super League and, with Ovechkin already playing for the Capitals,⁴⁷ was considered to be the best player not playing in the NHL.⁴⁸

Despite Malkin's existing contract with Metallurg and the lack of a Player Transfer Agreement with the Russian Ice Hockey Federation, the Penguins began contract negotiations with Malkin's agent in August 2006.⁴⁹ While the Russian Ice Hockey Federation attempted to negotiate a transfer fee for Malkin, the NHL refused to negotiate beyond those fees set by the IIHF in the Player Transfer Agreement.⁵⁰ Instead, the NHL instituted the policy that:

app?service=page&page=DraftStats&year=2004&round=1 (last visited Apr. 13, 2008). Alexander Ovechkin was drafted by the Washington Capitals, *id.*, and won the Calder Trophy as the NHL's Rookie of the Year for the 2005-2006 season. John McGourty, *Ovechkin Wins Calder Trophy in a Runaway*, NHL.COM, June 22, 2006, <http://www.nhl.com/nhl/app?service=page&page=NewsPage&articleid=279601>. Ovechkin was also the first rookie since 1991 to be selected to the NHL First All-Star Team. *Id.* However, Ovechkin's entrance into the NHL was not without legal troubles, as will be discussed later. See *infra* notes 269-71 and accompanying text.

44. Karen Price, *Pens, Malkin's to Open Talks*, PITT. TRIB.-REV., Aug. 3, 2006, at C24.

45. See NHL.com Players, Evgeni Malkin, <http://www.nhl.com/nhl/app?service=page&page=PlayerDetail&playerId=8471215&tab=crst> (last visited Apr. 15, 2008).

46. See Alan Robinson, *Malkin Thought to be Safe, but Whereabouts Unknown*, Aug. 14, 2006, <http://www.nhl.com/news/2006/08/278748.html>.

47. Ovechkin's entrance into the NHL was also marred by litigation, though. See *infra* notes 269-71 and accompanying text.

48. See Price, *supra* note 44.

49. See *id.*

50. See *id.* (noting the Russian Ice Hockey Federation's position that, given Malkin's hockey stardom in Russia, the US\$200,000 flat fee was unacceptable); see also Shelly Anderson, *Malkin: Russian Team Takes Case To Court*, PITT. POST-GAZETTE, Nov. 14, 2006, at D1 (citing Metallurg's position that the NHL should negotiate a transfer fee for each individual Russian player, as is done with player transfers in European soccer leagues). Reportedly, Sergey Arutyunyan, general director of the Russian Ice Hockey Federation, sent an e-

If the player can secure his own release, either pursuant to the terms of his existing Russian contract or pursuant to applicable Russian law, NHL clubs will be free to sign such player, and the resulting NHL contract will be registered and approved as valid for play in the NHL.⁵¹

Additionally, to further complicate the situation, Malkin and Metallurg reached a new one-year contract on August 7, 2006 for the 2006-2007 hockey season, modifying his previously existing contract, described above.⁵²

Despite what appeared to be a resolution of the dispute, Malkin quietly slipped away from the Metallurg team when it arrived in Helsinki, Finland for training camp on August 12, 2006.⁵³ Malkin stayed in Helsinki with one of his agents until he could gain clearance to enter the United States.⁵⁴ Malkin then spent two weeks in Los Angeles, California before traveling to Pittsburgh and signing an entry-level NHL contract with the Penguins on September 5, 2006.⁵⁵ Shortly thereafter, an arbitration committee of the Russian Ice Hockey Federation ruled on September 15, 2006 that Malkin violated his contract with Metallurg and that Malkin could not play for any other hockey team in the Russian Federation or abroad.⁵⁶ Malkin was neither present nor represented at the arbitration hearing.⁵⁷ Notably, while space precludes substantial analysis, similar situations exist regarding Russian players Andrei

mail to NHL Deputy Commissioner Bill Daly demanding US\$1 million "as compensation for Malkin playing for the Penguins." Kevin Allen, *Notes: Russians Lose Injunction Claim Over Malkin*, USATODAY.COM, Nov. 16, 2006, http://www.usatoday.com/sports/hockey/nhl/2006-11-16-notes-malkin-court-ruling_x.htm?loc=interstitialskip.

51. Price, *supra* note 44 (quoting NHL Deputy Commissioner Bill Daly).

52. See Larry Neumeister, *Russian Club Seeks to Stop Penguins Rookie Sensation Malkin from Playing*, USATODAY.COM, Oct. 19, 2006, http://www.usatoday.com/sports/hockey/nhl/penguins/2006-10-19-malkin-lawsuit_x.htm.

53. See Robinson, *supra* note 46. After leaving the team in Helsinki, Malkin allegedly faxed the team a two-week notice that he was terminating his labor contract. Whether such notice is sufficient will be discussed later in this Comment. See *infra* notes 199-205 and accompanying text.

54. See Anderson, *supra* note 50.

55. See *id.*

56. Jason Cato & Karen Price, *Arbitration Committee Rules Against Malkin*, PITT. TRIB.-REV., Sept. 16, 2006, at C4.

57. *Id.*

Taratukhin of the Calgary Flames and Alexei Mikhonov of the Edmonton Oilers. On September 9, 2006, a Russian arbitration committee ruled that Taratukhin and Mikhonov violated their respective contracts with the Russian team Lokomotiv Yaroslavl by going to the NHL.⁵⁸

On October 19, 2006, Metallurg filed a lawsuit in the United States District Court for the District of Manhattan against the NHL and the Penguins.⁵⁹ However, on November 16, 2006, Metallurg's request for a preliminary injunction was denied by Judge Loretta A. Preska for failure to show irreparable harm.⁶⁰

C. *The Stakes Rise: Metallurg's Complaint*

As is the case in many areas of law, a discussion of the merits of Metallurg's lawsuit requires an analysis of the actual allegations laid out in the complaint filed by Metallurg.⁶¹ Additionally, while Metallurg alleges seven causes of action in its complaint, most are outside the scope of this Comment and will not be addressed or considered.⁶²

58. *Id.*

59. See Neumeister, *supra* note 52. Malkin is not personally named in the suit. *Id.* Notably, if Malkin were named, Metallurg could not have brought the suit based on diversity of citizenship under 28 U.S.C. § 1332 (2000).

60. See Denis Gorman, *Ruling Clears Way for Malkin, Penguins*, PITT. TRIB.-REV., Nov. 16, 2006, at C3. Judge Preska believed that the timing of the suit's filing was merely to inconvenience the NHL and its teams and was an effort directed to extracting a larger sum of money. *Id.* Judge Preska also ruled accordingly against Lokomotiv Yaroslavl in connection with Taratukhin and Mikhonov, whose suit had been joined to the Metallurg suit. *Id.*

61. Metallurg claims violations of the Sherman Antitrust Act and "[t]herefore, to state a claim upon which relief can be granted under [§ 1 of the Sherman Act], allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires." *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961).

62. Metallurg alleges the following causes of action: (1) Tortious Interference with Contract; (2) Aiding and Abetting a Breach of Fiduciary Duty; (3) Tortious Interference with Business; (4) Misappropriation; (5) Unjust Enrichment; (6) Conversion; and (7) Violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and § 2 of the Clayton Act, 15 U.S.C. § 15. Complaint paras. 65-117, at 24-34, *ANO Hockey Club Metallurg Magnitogorsk v. Nat'l Hockey League & Lemieux Group L.P. d/b/a Pittsburgh Penguins*, No. 06 Civ. 9936 (S.D.N.Y. Oct. 19, 2006) [hereinafter *Metallurg Complaint*]. As noted, this Comment will address the antitrust claims made in the seventh cause of action as well as the

In its complaint, Metallurg alleged facts regarding Malkin, his contract, and his departure from Helsinki substantially similar to those discussed above.⁶³ Metallurg then alleged that the NHL and the Penguins “knew and should have known that Malkin was under contractual obligations to . . . Metallurg when defendants acted in regard to Malkin.”⁶⁴ Metallurg stated that it notified both the NHL and the Penguins several times, beginning on September 1, 2006, that Malkin was under contract,⁶⁵ that his resignation was not proper under Russian law,⁶⁶ that the Penguins’ negotiations and subsequent contracting with Malkin constituted “blatant and deliberate tampering and interference,”⁶⁷ and also that the arbitration committee of the Russian Hockey Federation had ruled against Malkin.⁶⁸ Despite these notices, Metallurg alleged, the NHL and the Penguins continued to induce Malkin to breach his contract with Metallurg, culminating in his contract with the Penguins, which was then registered by the NHL.⁶⁹ Metallurg alleged that these actions constituted an actionable claim for tortious interference with contract and business relations.⁷⁰

Metallurg also addressed the expiration of the old

tortious interference claims, though I will consider interference with contractual and business relations concurrently.

63. See *id.* paras. 6-15, at 3-5.

64. *Id.* para. 16, at 5.

65. *Id.* para. 17, at 5.

66. *Id.* There is a dispute in this case as to which provision of Russian law applies, a dispute that will be addressed with the analysis of the tortious interference claims. See *infra* notes 199-204 and accompanying text.

67. See Metallurg Complaint, *supra* note 62, para. 17, at 5.

68. *Id.* para. 54, at 20.

69. *Id.* para. 18, at 6. Metallurg also alleged that the NHL and the Penguins knew well before entering the contract that Malkin was under contract with Metallurg, independent of the above described notices. *Id.* para. 19, at 6.

70. *Id.* paras. 65-72, at 24-25; paras. 84-92, at 27-29. Through these causes of action, Metallurg claimed damages “in the amount to be proven at trial.” *Id.* para. 70, at 25; para. 90, at 28. At the same time, Metallurg alleged that “[t]he services provided by Malkin as [a] professional hockey player are of a unique character, the loss of which cannot be adequately compensated to . . . Metallurg, and . . . Metallurg is entitled to an injunction enjoining defendants from using Malkin’s services in [the] 2006/2007 season.” *Id.* para. 71, at 25; see also *id.* para. 82, at 27 (stating substantially the same claim). However, as noted above, Metallurg lost its claim for a preliminary injunction.

Player Transfer Agreement as well as the failure of the NHL and the Russian Hockey Federation to agree on the terms of a new Player Transfer Agreement.⁷¹ Metallurg went on to allege that:

[D]efendant NHL and its member clubs decided to play hardball with the Russian hockey clubs to punish them for the Russian Ice Hockey Federation's rejecting the New [Player Transfer Agreement] and to force them to give in to the term [sic] of the New [Player Transfer Agreement] and, with improper motive and intent and without legitimate justification and using improper means, decided to disregard contracts entered into between Russian hockey clubs and Russian hockey players, including the Contract here.⁷²

Metallurg then described the policy of the NHL, which instructed clubs that they were free to sign players under contract, so long as those players secured releases from their Russian teams.⁷³ Further, Metallurg alleged that, pursuant to this policy of the NHL, teams would be subjected to penalties if they negotiated with, or paid release fees to, Russian teams in exchange for the release of a player.⁷⁴ These allegations, according to Metallurg, amount to "a contract, combination and conspiracy in restraint of trade in that the defendants and the NHLPA are engaged in [a] group boycott and concerted refusal to deal with Russian

71. *Id.* paras. 20-22, at 7.

72. *Id.* para. 23, at 7-8.

73. *Id.* para. 24, at 8; see also Price, *supra* note 44 (quoting NHL Deputy Commissioner Bill Daly's articulation of this policy). Metallurg also cited the reference to "releases" in the NHL Memorandum as "a scheme, pretense, subterfuge and a sham concocted to disregard Russian professional hockey player's [sic] contracts." Metallurg Complaint, *supra* note 62, para. 28, at 10. Metallurg claims the Russian Labor Law does not apply to professional athletes and thus such releases are inapplicable. *Id.*; see also *infra* notes 199-204 and accompanying text.

74. Metallurg Complaint, *supra* note 62, para. 26, at 9. Metallurg alleged that these penalties are "the same penalties as provided for in Article 26 of the Collective Bargaining Agreement between the NHL and NHL Players' Association." *Id.* Article 26 of the Collective Bargaining Agreement provides that an NHL team may be, among other things, (1) fined no less than \$1 million and no more than \$5 million, (2) forced to forfeit draft picks, or (3) forced to forfeit games in the event that a "Circumvention" occurs. NHL-NHLPA COLLECTIVE BARGAINING AGREEMENT, *supra* note 27, art. 26.13(c). Under Article 26.3(a), the payment to a Russian club of a release fee for a player may be considered a "Circumvention." *Id.*

hockey clubs regarding player transfers in violation of § 1 of the Sherman Act.”⁷⁵ This restraint of trade, Metallurg alleged, “has [a] predictable and pernicious anticompetitive effect, and limited potential for procompetitive benefit,” and therefore is per se unlawful.⁷⁶

II. YOUR MOVE, MR. SHERMAN: THE ANTITRUST CLAIMS

With players’ salaries regularly in the millions,⁷⁷ and sports franchises valued at up to \$1.5 billion,⁷⁸ it seems undeniable today that professional sports are a national business, and a thriving one at that. However, when the worlds of professional sports and antitrust law first collided, a completely different conclusion was reached. In 1922, the United States Supreme Court addressed the first of many antitrust challenges to professional sports.⁷⁹ While the D.C. Circuit had held that professional baseball involved no transfer of goods in commerce, and thus antitrust laws were not implicated,⁸⁰ Justice Oliver Wendell Holmes, writing for the Supreme Court, stated:

The business is giving exhibitions of [baseball], which are purely state affairs. . . . [T]he fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the

75. Metallurg Complaint, *supra* note 62, para. 27, at 9-10. Metallurg also claims that the policy of the NHL “is not immune from antitrust scrutiny.” *Id.* para. 34, at 12. Those subjects that are immune from such scrutiny will be addressed in Part II.

76. *Id.* para. 111, at 33. As a result of these alleged antitrust violations, Metallurg requested relief in the form of damages, treble damages, attorney’s fees, interest, and costs. *Id.* para. 119, at 34. Metallurg also requested an injunction, as described previously, which was subsequently denied. *Id.* paras. 120-21, at 34-35; *supra* note 60 and accompanying text.

77. The average player salary in the NHL, as of 2006, is \$1.5 million while those salaries of players in the NBA, NFL, and MLB average \$5 million, \$1.7 million, and \$2.9 million respectively. Richard Hoffer, *It’s Great to be Average*, SPORTS ILLUSTRATED, July 31, 2006, at 56.

78. See Michael K. Ozanian, *How ‘Bout Them Cowboys?*, FORBES.COM, Sept. 13, 2007, http://www.forbes.com/business/2007/09/13/dallas-cowboys-stadium-biz-07nfl_cx_mo_0913nflintro.html.

79. Fed. Baseball Club of Balt. v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200 (1922).

80. Nat’l League of Prof’l Baseball Clubs v. Fed. Baseball Club of Balt., 269 F. 681, 684-85 (D.C. Cir. 1921).

character of the business. . . . [T]he transport is a mere incident, not the essential thing.⁸¹

In his opinion, Justice Holmes created an exemption to antitrust enforcement for our “national game,” an exemption that would withstand two subsequent Supreme Court challenges⁸² and would remain unaltered for seventy-six years.⁸³ While baseball enjoyed an antitrust exemption, other sports have not been so fortunate,⁸⁴ and “arguably no other sector has faced a more haphazard application” of antitrust laws as has professional sports.⁸⁵ This haphazard application has resulted from substantially different application of the antitrust laws to each of the professional sports leagues and the often odd context in which these antitrust challenges arise. Recently, the professional sports leagues have faced challenges to restrictions on television broadcasts of games⁸⁶ as well as league labor policies.⁸⁷ Each challenge brings with it a new set of circumstances in

81. *Fed. Baseball Club of Balt.*, 259 U.S. at 208-09.

82. See *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. N.Y. Yankees*, 346 U.S. 356 (1953). The Court in *Flood*, while recognizing that baseball was indeed interstate commerce, and that baseball’s antitrust exemption was an anomaly, nevertheless reaffirmed the exemption on the grounds of *stare decisis*. *Flood*, 407 U.S. at 282-84.

83. In 1998, Congress passed the Curt Flood Act which guaranteed baseball players the same rights as athletes in other professional sports, 15 U.S.C. § 26(b) (2004), effectively negating the impact of the exemption created in *Federal Baseball Club of Baltimore*. *Fed. Baseball Club of Balt.*, 259 U.S. at 208-09.

84. See, e.g., *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204 (1971); *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957); *United States v. Int’l Boxing Club of N.Y.*, 348 U.S. 236 (1954). While professional hockey has not yet received antitrust scrutiny from the Supreme Court, at least one court has observed that it appeared to be “highly probable and well-nigh a certainty, that all professional sports operating interstate eventually will be ruled by the Supreme Court to be subject to federal antitrust statutes.” *Boston Prof’l Hockey Ass’n v. Cheevers*, 348 F. Supp. 261, 265 (D. Mass. 1972). The court in *Cheevers* also noted that, because of its distinct international character, “professional hockey would seem to be the leading candidate for a ruling that it is subject to the federal antitrust laws.” *Id.* Recall this distinct international character as described *supra* Part I.

85. Nathaniel Grow, Note, *There’s No “T” in “League”*: Professional Sports Leagues and the Single Entity Defense, 105 MICH. L. REV. 183, 184 (2006).

86. See, e.g., *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593 (7th Cir. 1996).

87. See, e.g., *McNeil v. Nat’l Football League*, 790 F. Supp. 871 (D. Minn. 1992); *Clarett v. Nat’l Football League*, 369 F.3d 124 (2d Cir. 2004).

a sector that is rapidly changing, and the rules laid down in previous court decisions may no longer be relevant. Additionally, the Supreme Court has not considered antitrust challenges in each professional sport,⁸⁸ so district courts and circuit courts are left with varying precedent in each jurisdiction.

A. *Refusals to Deal, Group Boycotts, and Professional Sports*

The Sherman Antitrust Act makes illegal “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”⁸⁹ While Metallurg alleged that the NHL, NHLPA, and the Penguins are “engaged in [a] group boycott and concerted refusal to deal with Russian hockey clubs regarding player transfers in violation of Section 1 of the Sherman Act” under the *per se* rule,⁹⁰ the Supreme Court has observed that “there is more confusion about the scope and operation of the of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine.”⁹¹ The reason for such confusion is that “[t]he term ‘group boycott’ . . . is in reality a very broad label for divergent types of concerted activity.”⁹² Despite the confusion, though, courts have continued to find that when a group conspires to boycott, and refuses to deal with a competitor, such conduct is unlawful under section 1 of the Sherman Act.⁹³

In *Fashion Originators’ Guild of America, Inc. v. Federal Trade Commission*, a group of clothing designers formed an organization in order to drive manufacturers out of business when they copied dress designs and sold them

88. See *supra* note 84.

89. 15 U.S.C. § 1 (2000).

90. Metallurg Complaint, *supra* note 62, ¶ 27, at 9-10.

91. *Nw. Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (quoting LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 83, at 229-30 (1977)).

92. *Mackey v. Nat’l Football League*, 543 F.2d 606, 619 (8th Cir. 1976).

93. See, e.g., *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941).

at a lower price.⁹⁴ The Guild required retailers carrying the designers' clothing to refuse to stock products of the copying manufacturers, while retailers who refused to do so would be prohibited from purchasing goods from the Guild's members.⁹⁵ In striking down these restrictions as violative of both the Sherman Act and the Clayton Act, the Court held that even if price and quantity were not affected by the restrictions, such a group boycott is illegal under federal antitrust laws.⁹⁶

In a more recent case, *Hartford Fire Insurance Co. v. California*, the Court found that the multifaceted term "boycott" as used in antitrust jurisprudence includes conditional boycotts, punitive boycotts, coercive boycotts, partial boycotts, labor boycotts, political boycotts, and social boycotts.⁹⁷ The Court stated that:

To "boycott" means "[t]o combine in refusing to hold relations of any kind, social or commercial, public or private, with (a neighbour), on account of political or other differences, so as to punish him for the position he has taken up, or coerce him into abandoning it."⁹⁸

The Court then held that sufficient allegations had been made of a conspiracy between American insurance companies and British reinsurers to refuse to do business with other insurance companies covering certain types of risks, and thus the complaint would withstand a motion to dismiss.⁹⁹

In the context of professional sports, antitrust challenges based on claims or group boycotts and refusals to deal often concern either draft eligibility rules or restrictive standard contract provisions. In *Denver Rockets v. All-Pro Management*, the District Court for the Central District of

94. *Id.* at 461-62. Notably, dress designs cannot be protected by either patent or copyright. *Id.* at 461.

95. *Id.* at 461-63.

96. *Id.* at 465.

97. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 801-02 (1993).

98. *Id.* at 801 (citing 2 OXFORD ENGLISH DICTIONARY 468 (2d ed. 1989)).

99. *Id.* at 811. The Court also addressed issues of possible conflicts with the imposition of U.S. antitrust laws on foreign companies, a conflict that will be discussed later in this Comment.

California addressed one such eligibility rule.¹⁰⁰ At the time the case was brought, the National Basketball Association (NBA) had two different rules in place requiring all players to be four years beyond their high school graduation in order to be eligible for the draft.¹⁰¹ Spencer Haywood, the basketball player whose contract was at issue, had graduated from high school but had only attended two years of college, during which he was named an All-American and also was on the gold-medal-winning 1968 Olympic basketball team.¹⁰² After his second year of college, Haywood signed to play for the Denver Rockets of the American Basketball Association (ABA), which allowed him to bypass a similar four-year requirement through a "hardship" exemption.¹⁰³ In his first year with the Rockets, Haywood was named the Rookie of the Year, the Most Valuable Player, and also led the league in scoring.¹⁰⁴ However, a contract dispute with the Rockets led Haywood to stop playing for the team after that season and sign a contract with the Seattle Supersonics of the NBA.¹⁰⁵ As Haywood was still not yet four years out of high school, the commissioner of the NBA invalidated the contract and Haywood filed suit alleging a group boycott of players in his situation.¹⁰⁶ The court found that the NBA's eligibility requirements constituted an illegal concerted refusal to deal with a class of players like Haywood.¹⁰⁷

An antitrust challenge of a similar age requirement arose in *Linesman v. World Hockey Association*.¹⁰⁸ Ken Linesman was drafted by the World Hockey Association's (WHA's) Birmingham Bulls, but the WHA commissioner

100. *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

101. *Id.* at 1059. If the player did not graduate from high school, the player had to be four years beyond the graduation of his original high school class. *Id.*

102. *Id.* at 1060.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1066. The court found the provisions overly broad, absolute, and arbitrary given that there was no opportunity for a hearing on the player's specific circumstances before the rule was applied. *Id.*

108. 439 F. Supp. 1315 (D. Conn. 1977).

nullified the selection based on a regulation prohibiting players less than twenty years of age from playing professional hockey.¹⁰⁹ Linesman challenged the age requirement, alleging that such a prohibition was an unlawful group boycott under the Sherman Act. The court agreed with Linesman, holding that it was an impermissible restraint of trade for the WHA to prohibit an otherwise capable adult from playing hockey in that league.¹¹⁰ The court also went on to deny the WHA's justification that the regulation was an economic necessity stating that an "[e]xclusion . . . from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins."¹¹¹

In the context of modern professional sports, it is necessary for teams and league management, as well as players' unions, to cooperate outside of the competitive arena in order to promote on-field competition.¹¹² While the establishment of a uniform set of rules and policies promotes parity among teams and thereby creates a better product for sports fans, there is the ever-present danger of anticompetitive collusion among these entities in order to get a larger slice of the multi-billion dollar pie that is professional sports. In response to the antitrust concerns present in such a situation, some leagues have asserted what has been termed the single-entity defense. In the case of challenges under section 1 of the Sherman Act, professional sports leagues assert that defense; in effect stating that the league is a single entity, not a collection of

109. *Id.* at 1317.

110. *Id.* at 1325-26.

111. *Id.* at 1322 (citing *United States v. Gen. Motors Corp.*, 384 U.S. 127, 146 (1966)). *But see Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 166 F. Supp. 2d 1155, 1157, 1162-63 (E.D. Mich. 2001) (upholding a regulation of the Ontario Hockey League, termed the Van Ryn Rule, that prohibited any team from having more than three twenty-year-old players on their rosters while players over the age of twenty are absolutely barred from the OHL). For a critical discussion of the aforementioned decision, see Mark Wilkinson, Note, *National Hockey League Players' Association v. Plymouth Whalers Hockey Club: Antitrust's Rule of Reason and the Van Ryn Rule*, 50 WAYNE L. REV. 1277 (2005).

112. Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U. L. REV. 125, 125 (2002).

teams, and is thus incapable of conspiring with itself within the meaning of the Sherman Act.¹¹³ Indeed, the United States District Court for the Central District of California has held that NHL franchises are not economic competitors and, therefore, the NHL functions as a single unit.¹¹⁴ Other courts, though, have held that franchises are in sufficient competition and do not constitute a single entity.¹¹⁵ However, a complete analysis of the single-entity defense and its possible applicability to Metallurg's claims is beyond the scope of the present examination.¹¹⁶

Notwithstanding the single-entity defense, and in order to protect against the danger present in allowing competitors to cooperate among themselves, courts have used antitrust laws to forbid combinations, in the general economy and in professional sports, which have joined in a group boycott or have used concerted action in refusing to deal with an entity outside of the combination.¹¹⁷ "Agreements among competitors implicate one of two antitrust concerns: either that the agreement will enable its participants to lessen competition among themselves, or that it will result in the exclusion from the market of a rival of the participants."¹¹⁸

113. See *Grow*, *supra* note 85, at 185.

114. *S.F. Seals, Ltd. v. Nat'l Hockey League*, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974).

115. See *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984) (rejecting the single entity defense asserted by the NFL by finding that teams were sufficiently independent and competitive); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982) (rejecting single entity defense in claim that NFL rule preventing owners from owning franchises in other sports leagues violated Sherman Act); *Smith v. Pro Football Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (rejecting single entity defense in finding NFL draft rules constituted group boycott); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976) (holding single entity defense inapplicable in suit by NFL players against league regarding free agency regulations).

116. For a more complete discussion of the single-entity defense, and particularly its applicability in the professional sports context, see *Grow*, *supra* note 85.

117. The Supreme Court, in some of the most influential antitrust cases of the twentieth century, slowly defined and "fleshed out the meaning of 'concerted action' under the Sherman Act." Anderson, *supra* note 112, at 137 n.112 (describing the Supreme Court's analysis in *United States v. Colgate*, 250 U.S. 300 (1919)).

118. Kenneth L. Glazer, *Concerted Refusals to Deal Under Section 1 of the Sherman Act*, 70 ANTITRUST L.J. 1, 4 (2002).

Metallurg alleged that by instituting the policy it did, the NHL and its teams were agreeing to concertedly refuse to deal with any of the Russian hockey teams in negotiating fees for player transfers to NHL teams. However, the Supreme Court has explained that, under the rule of reason analysis used in the majority of cases, the legality of such an agreement or regulation cannot be determined simply by finding whether it restrains competition.¹¹⁹ Since all regulations of market activity bind or restrain, “[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”¹²⁰ What this means for Metallurg is that the NHL could be viewed as merely establishing a framework that promotes competition in professional hockey, as opposed to engaging in a concerted refusal to deal or group boycott. This conflict will be further addressed in Part IV.

B. *The Professional Sports Antitrust Roadblock*

While the refusal to deal and group boycott cases show that restrictions such as eligibility requirements may be successfully challenged under the Sherman Act, challenges to other restrictions in the professional sports arena may not be so successful. This is because challenges in the context of professional sports often involve the intersection of federal antitrust law and federal labor law and policy.¹²¹ While the Sherman Act seeks to eliminate collusion as ruinous of competition,¹²² national labor policy promotes unionization and collective bargaining, despite the inherent collusion necessary in those processes, as a procompetitive means to leveling the playing field.¹²³ In order to resolve

119. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

120. Anderson, *supra* note 112, at 130 (quoting *Bd. of Trade of Chi.*, 246 U.S. at 238).

121. The federal labor law and policy discussed in this section is embodied by the Clayton Act, 15 U.S.C. § 17 (2000); the Norris-LaGuardia Act, 29 U.S.C. § 101 (2000); and the National Labor Relations Act, 29 U.S.C. § 157 (2000).

122. 15 U.S.C. § 1 (2000); *Bd. of Trade of Chi.*, 246 U.S. at 238.

123. See Sean Treadwell, Note, *An Examination of the Nonstatutory Labor Exemption from the Antitrust Laws, in the Context of Professional Sports*, 23 *FORDHAM URB. L.J.* 955, 960 (1966).

this potential conflict, the Supreme Court has developed the non-statutory labor exemption to antitrust law when the challenged conduct involves mandatory subjects of collective bargaining, such as hours, wages, and working conditions.¹²⁴

Since the players of the four major professional sports¹²⁵ unionized long ago, the non-statutory labor exemption has inevitably entered the antitrust jurisprudence in the professional sports context. In *Mackey v. NFL*,¹²⁶ former and contemporary professional football players challenged the NFL's contract restriction termed the "Rozelle Rule"¹²⁷ on the grounds that it constituted an illegal concerted

124. See *Amalgamated Meat Cutters v. Jewel Tea*, 381 U.S. 676, 689-90 (1965) (plurality) (holding a marketing hours restriction exempt from the Sherman Act when it resulted from arm's-length bargaining and was "intimately tied to wages, hours, and working conditions"). *But see* *Connell Constr. Co. v. Plumber & Steamfitters Local No. 100*, 421 U.S. 616 (1975) (refusing to apply the non-statutory labor exemption where labor union required contractors to hire only those subcontractors that employed union members as the requirement was not a product of the collective bargaining process); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (rejecting application of exemption where employers conspired with mine workers union to set wages at such high levels as to drive competitors out of business that were unable to pay those wages); *Allen Bradley Co. v. Local No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 810 (1945) (refusing to apply exemption where union colluded with "employers and manufacturers of goods to restrain competition, in, and to monopolize the marketing of, such goods"). These mandatory subjects of collective bargaining are dictated by the National Labor Relations Act (NLRA):

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment

29 U.S.C. § 158(d) (2000). This exemption supplements the limited statutory labor exemptions granted by the Clayton Act.

125. The four major professional sports referred to here are Major League Baseball (MLB), the NFL, the NHL, and the NBA.

126. 543 F.2d 606 (8th Cir. 1976).

127. The "Rozelle Rule," named after then-commissioner Pete Rozelle, provided that:

[W]hen a player's contractual obligation to a team expires and he signs with a different club, the signing club must provide compensation to the player's former team. If the two clubs are unable to conclude mutually satisfactory arrangements, the Commissioner may award compensation in the form of one or more players and/or draft choices as he deems fair and equitable.

Id. at 609 n.1.

refusal to deal and a group boycott by denying players the right to freely contract for their services.¹²⁸ While the district court found the rule per se illegal,¹²⁹ the court of appeals applied the rule of reason and found no violation of the Sherman Act.¹³⁰ In its analysis, though, the court of appeals set forth a test to determine the applicability of the non-statutory labor exemption. According to that test, the exemption will apply if “[(1)] the restraint on trade primarily affects only the parties to the collective bargaining relationship; [(2)] the agreement sought to be exempted concerns a mandatory subject of collective bargaining; [and (3)] the agreement sought to be exempted is the subject of bona fide arm’s-length bargaining.”¹³¹ However, if one of the three factors is absent, the alleged restraint may be subjected to traditional antitrust scrutiny.¹³²

Four years after the *Mackey* decision, a similar claim was brought in the Sixth Circuit and in the context of professional hockey. In *McCourt v. California Sports, Inc.*, a hockey player for the Detroit Red Wings had his contract assigned to the Los Angeles Kings pursuant to an NHL bylaw much like the Rozelle Rule.¹³³ The player challenged this assignment as a violation of the Sherman Act. The

128. *Id.* at 609.

129. *See id.*

130. *Id.* at 620-23.

131. Michael S. Kagnoff, *While Free Agents Reap Benefits of NFL Labor Settlement Agreement, Rookies Get Set for Further Legal Battles*, 1 SPORTS LAWYERS J. 109, 118 (1994) (citing *Mackey*, 543 F.2d at 614).

132. *See id.* at 123. The *Mackey* court found that the “Rozelle Rule” was not a product of a bona fide arm’s-length transaction because it was not the product of equal negotiation, but instead was implemented unilaterally by the owners. *Mackey*, 543 F.2d at 616.

133. *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1195 n.3 (6th Cir. 1979). The NHL rule stated that:

Each time that a player becomes a free agent and the right to his services is subsequently acquired by any Member Club other than the club with which he was last under contract or by any club owned or controlled by any such Member Club, the Member Club first acquiring the right to his services, or owning or controlling the club first acquiring that right, shall make an equalization payment to the Member Club with which such player was previously under contract . . .

Id. at 1204 (appending to the court’s opinion the relevant sections of the NHL’s bylaws).

court applied the *Mackey* test and found that the rule both primarily concerned parties to the collective bargaining agreement and involved a mandatory subject of bargaining—the financial interest that the players have in the ability to move between teams in the league.¹³⁴ However, the court then reversed the district court's finding that the rule was not a result of a bona fide arm's-length transaction.¹³⁵ In doing so, the court found that all three factors were met and the non-statutory labor exemption applied.

In 1996, the Supreme Court again decided to address the issue of the non-statutory labor exemption as applied to professional sports in *Brown v. Pro Football, Inc.*¹³⁶ After the NFL and the NFLPA had failed to negotiate a renewal of their collective bargaining agreement, the NFL unilaterally set methods by which development squad players would negotiate for salaries, a move challenged by the NFL players as violative of antitrust laws.¹³⁷ As a policy matter, the Court determined that the non-statutory labor exemption applied to *Brown* because to find otherwise would create a flood of litigation and cause the courts to usurp the position of the National Labor Relations Board.¹³⁸ Despite the fact that the collective bargaining agreement between the NFL and NFLPA had expired, the Court found the restraints to be a part of the collective bargaining process and therefore exempt from antitrust laws.¹³⁹ In doing so, the Court made no distinction between the labor market as it concerns professional sports and the national labor market as a whole.¹⁴⁰

134. *Id.* at 1198.

135. *Id.* at 1198-200.

136. 518 U.S. 231 (1996).

137. *Id.* at 233-35.

138. *See id.* at 247-48, 250. As any law student knows, such a statement by a court indicates almost immediately the eventual outcome of the case.

139. *See id.* at 243-44, 250.

140. *See id.* at 249-50. This distinction made by the Court is particularly important in the instant examination. Presently, it is not apparent whether the market for hockey players and the general labor market in Russia are entirely separate, which may affect how an American court views a Russian hockey player's contract. *See infra* notes 199-205, 252-54 and accompanying text.

In the most recent development, the Second Circuit has taken the above rulings a step further. In *Clarett v. NFL*,¹⁴¹ a star freshman running back from Ohio State University challenged the NFL's draft eligibility rule that players be at least four years out of high school—or three full seasons with special application for eligibility—in order to enter the league.¹⁴² The Second Circuit held that the non-statutory labor exemption applied to any claims brought by athletes against their employers, so long as the claim was based on a mandatory subject of the collective bargaining process.¹⁴³ In doing so, the court stated that “to permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would seriously undermine many of the policies embodied by these labor laws.”¹⁴⁴

However, the problem that leagues face when seeking application of the non-statutory labor exemption is that they must rely on their respective collective bargaining processes and agreements to receive the protection of the federal labor laws.¹⁴⁵ The WHA in *Linesman* and the NBA in *Denver Rockets* both failed to rely on their collective bargaining agreements and thus the courts in those cases did not provide any analysis on whether the exemption applied.¹⁴⁶ The problem that the NHL may have encountered in seeking the application of the non-statutory labor exemption in Metallurg's lawsuit is that, as opposed to the collective bargaining agreement, the Player Transfer Agreement was negotiated with the IIHF. The NHL and the NHLPA were not bargaining with each other, but rather

141. 369 F.3d 124 (2d Cir. 2004). For a discussion of Maurice Clarett's claim against the NFL, as well as the applicability of the non-statutory labor exemption in that case, see Robert D. Koch, Comment, *4th and Goal: Maurice Clarett Tackles the NFL Eligibility Rule*, 24 LOY. L.A. ENT. L. REV. 291 (2004).

142. *Clarett*, 369 F.3d. at 128.

143. *Id.* at 138. The court, however, refused to further analyze the merits of any antitrust claim. *See id.* at 139-40.

144. *Id.* at 135.

145. See Ronald Terk Sia, Note, *Clarett v. National Football League: Defining the Non-Statutory Labor Exemption to Antitrust Law as it Pertains to Restraints Primarily Focused in Labor Markets and Restraints Primarily Focused in Business Markets*, 4 PIERCE L. REV. 155, 160 (2005).

146. For the discussion of *Linesman* and *Denver Rockets*, see *supra* Part II.A.

were working collectively in bargaining with a foreign entity to create the Player Transfer Agreement governing the movement of players internationally. Additionally, the policy forbidding teams from negotiating player transfer fees with Russian hockey teams, though penalized through the provisions of the collective bargaining agreement, was arguably unilaterally imposed by the NHL. This problem will be discussed further in Part IV.

C. *Long Arm of the Law: The Extraterritoriality of the Sherman Act*

In addition to the seemingly unpredictable application of the Sherman Act to controversies in professional sports, as well as the growing non-statutory labor exemption, an antitrust suit brought by a foreign entity, like Metallurg, will assuredly encounter the difficulties of extraterritorial enforcement of the U.S. antitrust laws. While the Sherman Act includes language that asserts jurisdiction over commerce "with foreign nations,"¹⁴⁷ that jurisdiction has been limited over time. In *United States v. ALCOA*,¹⁴⁸ Judge Learned Hand stated that the Sherman Act "does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them."¹⁴⁹ The Supreme Court acknowledged Judge Hand's analysis several years later when it held that "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries."¹⁵⁰ However, in the three decades following *ALCOA*, foreign

147. 15 U.S.C. § 1 (2000).

148. 148 F.2d 416 (2d Cir. 1945), *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, tit. IV, §§ 401-403, 96 Stat. 1233, 1246-47 (codified as amended at 15 U.S.C. §§ 6a, 45(a)(3) (2000)).

149. *Id.* at 444. This is what has come to be known as the "effects" test of jurisdiction. See Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 160 (1999). Earlier in Judge Hand's opinion, he noted that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *ALCOA*, 148 F.2d at 443.

150. *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962).

governments began strongly objecting to the expansive jurisdiction of the Sherman Act and aggressive enforcement by U.S. courts.¹⁵¹

Following this foreign backlash, the Ninth Circuit attempted to limit *ALCOA*'s effects test, as it was "by itself . . . incomplete because it fails to consider other nations' interests."¹⁵² Instead, the *Timberlane* court adopted a balancing test that involved consideration of factors like conflicting laws of different nations, location of the parties, effects of the conduct as felt in the United States and elsewhere, and the foreseeability of those effects.¹⁵³ These factors sought to take into account concerns over foreign relations and international comity, so as to temper the effect of extraterritorial antitrust enforcement.

Congress soon responded to the uncertainty in such enforcement by amending the Sherman Act through the Foreign Trade Antitrust Improvements Act (FTAIA)¹⁵⁴ in 1982. The FTAIA provided that the Sherman Act would not apply to international commerce, except import commerce, unless:

- (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
 - (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or commerce with foreign nations; or
 - (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
- (2) such effect gives rise to a claim under [federal antitrust laws], other than this section.¹⁵⁵

It is important to note that the FTAIA specifically excluded

151. Griffin, *supra* note 149, at 160-61 (noting that such objections took the form of preventive legislation, diplomatic protests, and reactionary court decisions); *see also id.* at 160 n.6 (describing several cases exemplifying the aggressive extraterritorial application of the Sherman Act).

152. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 611-12 (9th Cir. 1976).

153. *See id.* at 614.

154. Foreign Trade Antitrust Improvement Act § 402. The FTAIA also amended the Federal Trade Commission Acts. *Id.* § 403.

155. *Id.* § 402.

import trade and commerce from its restrictive reach.¹⁵⁶

In *Hartford Fire Insurance*, the London reinsurers moved to dismiss the complaint on grounds of international comity, as described in *Timberlane*, stating that a U.S. court should not exercise jurisdiction over wholly foreign conduct that was lawful where it occurred.¹⁵⁷ However, when the case came before the Supreme Court, Justice Souter, in light of the FTAA, refused to analyze the exercise of antitrust jurisdiction based on international comity.¹⁵⁸ The Court also declined to consider international comity because the London reinsurers did not argue that a conflict existed which prevented them from complying with both U.S. and British laws.¹⁵⁹

In 2004, the Supreme Court set forth the standard for extraterritorial antitrust enforcement in *Empagran*.¹⁶⁰ That case involved a worldwide cartel of vitamin manufacturers and distributors engaged in a price-fixing scheme which led to higher vitamin prices in the United States and Ecuador, though independent of each other.¹⁶¹ The case was brought as a class action "on behalf of foreign and domestic

156. The original bill for the FTAA referred only to "export trade or export commerce," but was amended "deliberately to include commerce that did not involve American exports but which was wholly foreign." F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 163 (2004) (quoting H.R. 5235, 97th Cong., 1st Sess., § 1 (1981)). As the Court stated:

The Subcommittee's 'export' commerce limitation appeared to make the amendments inapplicable to transactions that were neither import nor export, *i.e.*, transactions within, between, or among other nations *Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions*—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor.

Id. (quoting H.R. REP. NO. 97-686, at 9-10 (1982), as reprinted in 1982 U.S.C.C.A.N. 2487, 2494-95).

157. *In re Ins. Antitrust Litig.*, 723 F. Supp. 464, 484 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part and rev'd in part sub nom.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

158. *Hartford Fire Ins. Co.*, 509 U.S. at 798. Justice Souter stated that, even if accepted as true, "international comity would not counsel against exercising jurisdiction in the circumstances alleged here." *Id.*

159. *See id.* at 798-99.

160. *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

161. *See id.* at 159.

purchasers of vitamins,"¹⁶² but the petitioners moved to dismiss the case as to the foreign complainants under the FTAIA's bar to antitrust jurisdiction.¹⁶³ The district court granted the motion to dismiss, but the D.C. Circuit Court of Appeals reversed, finding that since an injured domestic customer could have brought an antitrust action, the FTAIA was inapplicable.¹⁶⁴

On appeal, the Supreme Court recognized the purpose of the FTAIA as "[seeking] to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements . . . however anticompetitive, as long as those arrangements adversely affect only foreign markets."¹⁶⁵ The Court explained that the text and legislative history of the FTAIA show that only foreign conduct which has a direct, substantial, reasonably foreseeable, and harmful antitrust effect domestically may be subject to the Sherman Act.¹⁶⁶ The Court then questioned "[w]hy should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?"¹⁶⁷ The Court distinguished the independent adverse foreign effect from the adverse domestic effect and held that no exception to the FTAIA existed, thus rendering the Sherman Act inoperable against the foreign defendants.¹⁶⁸ The Court did, however, note that comity concerns did factor into its

162. *Id.*

163. *See id.* at 159-60.

164. *See id.* at 160.

165. *Id.* at 161.

166. *Id.* at 161-62.

167. *Id.* at 165.

168. *See id.* at 164; *cf.* *Industria Siciliana Asfalti, Bitumi, S.P.A. v. Exxon Research & Eng'g Co.*, [1977] 1 Trade Cases (CCH) ¶¶ 61, 256 (S.D.N.Y. 1977) (allowing an Italian firm to proceed against an American firm since the purely foreign injury was "inextricably bound up with the domestic restraints of trade," and that the injury occurred "by reason of an alleged restraint of our domestic trade"), *available at* No. 75 Civ. 5828-CSH, 1977 WL 1353, at *11-12

interpretation of the FTAIA.¹⁶⁹

The problem with bringing a foreign entity into an American court is that the set of activities complained of, and alleged to be illegal, will usually have taken place partially, if not entirely, outside of the United States. In addition, courts are reluctant to assert American power over foreign citizens and entities in light of international comity and diplomatic concerns. However, the circumstances surrounding Metallurg's complaint are inapposite. Metallurg's lawsuit presents a different scenario that does not fall within the legal strictures described in *Timberlane*, *Hartford Fire Insurance*, and *Empagran*. Instead of a domestic citizen complaining of conduct by a foreign entity, Metallurg—a foreign sports team—sought the protection of the American court system from the conduct of an American corporate citizen that acts on both a domestic and international level. This would appear to obviate any concerns for international comity due to Metallurg's choice of seeking a remedy. However, there still remains the issue of whether an American court has jurisdiction over allegedly anti-competitive conduct committed abroad. That issue will be discussed in Part IV.

III. HANDS OFF!: TORTIOUS INTERFERENCE WITH CONTRACTUAL OR BUSINESS RELATIONS

"Nobody has ever thought, so far as we can find, that in the absence of some monopolistic purpose every one has not the right to offer better terms to another's [employee], so long as the latter is free to leave."¹⁷⁰ The tort of intentional interference with contractual relations is a widely recognized cause of action for a party who is injured by a third party's intentional and improper interference with the rights under a contract with another party.¹⁷¹ But why a tort claim instead of a traditional contractual remedy claim? The reason for this is to protect the rights of a contracting party where a traditional contract remedy may be insufficient for that party or where the remedy may be

169. *Empagran*, 542 U.S. at 169.

170. *Triangle Film Corp. v. Artcraft Pictures Corp.*, 250 F. 981, 982 (2d Cir. 1918).

171. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 129, at 978 (5th ed. 1984).

inexistent, as is the case with the doctrines of efficient breach¹⁷² and impracticability.¹⁷³

According to the Restatement (Second) of Torts, the cause of action for “inducement of breach of contract” began in 1853¹⁷⁴ with the decision in *Lumley v. Gye*.¹⁷⁵ The plaintiff in that case was a theater owner who had contracted with a singer to perform at his theater.¹⁷⁶ The defendant, owner of a competing theater, induced the singer to break her contract and instead perform at the defendant’s theater.¹⁷⁷ Although no violence, fraud, or defamation was alleged, the court found for the plaintiff on the basis of English law regarding the enticement of servants from their masters.¹⁷⁸ However, this presented a new development in English law as no tortious act was used by the defendant against the singer to induce the breach of contract.¹⁷⁹

In modern law, a *prima facie* case of tortious interference is made when the plaintiff shows that (1) a valid contract existed between the plaintiff and a third party; (2) the defendant had knowledge of that contract; (3)

172. See Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer*, 47 BUFF. L. REV. 645, 647-48 (1999) (discussing the doctrine of efficient breach and arguing that contract remedies may encourage breach by allowing a party to quit performance of the contract in favor of paying less-imposing damages).

173. See RESTATEMENT (SECOND) OF CONTRACTS § 261 (1979) (“Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”); see also *Krell v. Henry*, (1903) 2 K.B. 740, 748 (“[W]here, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless . . . some particular specific thing continued to exist, . . . the contract is not to be considered a positive contract, but as subject to an implied condition and the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.”).

174. RESTATEMENT (SECOND) OF TORTS § 766 cmt. c (1997).

175. (1853) 118 Eng. Rep. 749 (Q.B.).

176. RESTATEMENT (SECOND) OF TORTS § 766 cmt. c (1997).

177. *Id.*

178. See *id.*

179. See *id.*

the defendant, with improper motive, intentionally induced the third party to breach his contract with the plaintiff; and (4) the plaintiff suffered damages as a result of that breach.¹⁸⁰ The defendant's knowledge of the contract, however, is not enough if the defendant is unaware that he is interfering with the third party's performance of the contract.¹⁸¹ Additionally, the inducement must be such that it causes the effect that was specifically intended.¹⁸² However, a defendant may induce the breach of a contract through a refusal to deal. "Thus *A* may induce *B* to break his contract with *C* by threatening not to enter into, or to sever, business relations with *B* unless *B* does break the contract."¹⁸³ While the general rule is that anyone may refuse to do business with any other person, such a refusal may constitute tortious interference if the refusal is solely intended to cause the other person to break his contract with a third person.¹⁸⁴

A peculiar situation arises when, as is the case in many instances, the employment of a party is terminable at will.¹⁸⁵ Even though an employee may terminate his contract with his employer at any point and for any reason he so chooses, this does not actually act as a bar to a claim for tortious interference with contractual, or business, relations.¹⁸⁶ "Until he has so terminated [the employment contract], the contract is valid and subsisting, and the

180. See *Kronos, Inc. v. AVX Corp.*, 612 N.E.2d 289, 292 (N.Y. 1993); see also *Enercomp, Inc. v. McCorhill Publ'g, Inc.*, 873 F.2d 536, 541 (2d Cir. 1989) (describing the same elements except for a showing of damages). I use these two cases to illustrate the elements of a tortious interference claim because *Metallurg* filed its claim in the District Court for the Southern District of New York and because, since the National Hockey League is based in New York City, any future suit would likely be in the same venue.

181. RESTATEMENT (SECOND) OF TORTS § 766 cmt. i (1997).

182. *Id.* § 766 cmt. h.

183. *Id.* § 766 cmt. l.

184. See *id.* Also, recall *Metallurg's* allegations regarding the NHL's refusal to deal with it in connection with Malkin's transfer, *supra* notes 71-76 and accompanying text, and the analysis of those legal claims, *supra* Part II.A.

185. See generally Alex Long, *The Disconnect Between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context*, 33 ARIZ. ST. L.J. 491 (2001).

186. See *Agugliario v. Brooks Bros.*, 802 F. Supp. 956, 963 (S.D.N.Y. 1992); RESTATEMENT (SECOND) OF TORTS § 766 cmt. g (1997).

defendant may not improperly interfere with it.”¹⁸⁷ This is because an at-will contract generally grants the parties an interest in future relations, and an interference with those prospective relations may still be actionable although the parties have no legal assurance of their continued existence.¹⁸⁸ As many employment contracts rest on the at-will status of the business relationship, a clash of interests is created and the parties must occasionally sort out the controversy in the court system.

In 1996, Sergei Samsonov, a Russian-born hockey player, came to the United States and signed a contract to play with the Detroit Vipers of the International Hockey League (IHL).¹⁸⁹ However, Samsonov’s former team, the Russian Central Sports Army Club (CSKA), alleged that Samsonov was already under contract with CSKA and that the Vipers, along with Samsonov’s agent, intentionally interfered with CSKA’s contractual rights to Samsonov’s services.¹⁹⁰ Both CSKA and the Russian Ice Hockey Federation informed the president of the IHL that Samsonov was under contract with CSKA and that he had not been released from his obligations under that contract.¹⁹¹ Despite these warnings, Samsonov continued to play for the Vipers and led all IHL rookies in scoring.¹⁹²

The court then examined the elements of CSKA’s tortious interference claim. First, the court determined that Samsonov’s contract with CSKA was voidable as he was a minor when he signed the contract.¹⁹³ The court stated that

187. RESTATEMENT (SECOND) OF TORTS § 766 cmt. g (1997).

188. *Id.*

189. *Cent. Sports Army Club v. Arena Assocs., Inc.*, 952 F. Supp. 181, 186 (S.D.N.Y. 1997).

190. *Id.* at 184-85.

191. *Id.* at 186.

192. *Id.* The court also noted that Samsonov was projected to be one of the top picks in the subsequent NHL draft. *Id.*

193. *Id.* at 190. Samsonov was fifteen years old when he first signed with CSKA, and he subsequently renewed that contract when he was seventeen years old. *Id.* at 185. Additionally, Samsonov alleged that he was coerced into signing both contracts upon threat of being pressed into military service with the Russian Army, though the court did not analyze those claims. *Id.* at 185-86. CSKA claimed that Samsonov’s father expressly approved of the second contract, though he did not cosign either that one or the first contract. *Id.* The court determined that the Russian Civil Code allowed a minor to void a contract

“there is no liability for interference with such an agreement absent employment of wrongful means, unlawful restraint of trade, or lack of competitive motive,”¹⁹⁴ and that the Vipers only acted with justifiable business motives.¹⁹⁵ The court also found that Samsonov had decided to leave Russia before signing with the Vipers and that neither the Vipers nor the IHL were involved in that decision.¹⁹⁶ Finally, the court determined that the IHL was not aware Samsonov was under contract until it was notified by CSKA and the Russian Ice Hockey Federation, which notification occurred after Samsonov began playing for the Vipers.¹⁹⁷ As the court found no valid contract between Samsonov and CSKA, no awareness of a contract on the part of the IHL, no inducement from the IHL for Samsonov to break his contract, and no improper motive by the IHL, the court held that CSKA had failed to make a *prima facie* claim for tortious interference with contractual relations.¹⁹⁸

While Samsonov’s contract was voidable on the basis of his minority at the time he entered into the contract, a tortious interference claim made in the United States but based on a sports contract entered into under Russian law encounters an even more difficult problem. While sports in Russia are generally regulated by the Federal Law on Physical Culture and Sports in the Russian Federation (Russian Sports Law),¹⁹⁹ the sphere of employment is more generally regulated by the Labor Code of the Russian Federation (Russian Labor Code), which was most recently amended in 2002.²⁰⁰ The Russian Labor Code provides two means for an employee to terminate his contract. If the

at will if such contract did not contain the express written consent of the minor’s parent or guardian. *Id.* at 190 n.9; *see also* RESTATEMENT (SECOND) OF TORTS § 766 cmt. f (discussing tortious interference in the case of a voidable contract).

194. *Cent. Sports Army Club*, 952 F. Supp. at 190 (citing *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 450-51 (N.Y. 1980)).

195. *Id.* at 190, 192.

196. *Id.* at 191.

197. *Id.* at 191-92.

198. *Id.* at 190-92.

199. *Sobranie Zakonodatel’stva Rossiiskvi Federatsii* [Russian Federation Collection of Legislation] 1999, No. 80-FZ [hereinafter Russian Sports Law].

200. *Kodeks Zakonov o Trude Rossiiskvi Federatsii* [Russian Federation Labor Code] 2002, ch.3, art. 25 [hereinafter Russian Labor Code].

labor contract is for an indefinite period, i.e., at-will employment, the Russian Labor Code allows the employee to terminate that contract at any time upon two weeks advance notice of doing so.²⁰¹ On the other hand, if the labor contract is for a fixed period of time, as many sports contracts are, the employee may terminate that contract upon demand “in case of his illness or disability preventing the fulfillment of the work under the contract, of a violation by the administration of legislation on labour or the collective or labour contract, and for other justifiable reasons.”²⁰² However, an analysis of the Russian Labor Code and its commentaries sheds no light on what may constitute “other justifiable reasons.”

While the Russian Labor Code’s general provisions regarding labor contracts is relatively unclear itself, the problem is further compounded in the context of contracts for professional athletes. Article 351 of the Russian Labor Code stipulates that “[l]abour legislation shall extend to . . . [several particular occupations] . . . and professional sportsmen.”²⁰³ In addition, article 25 of the Russian Sports Law “defines a contract on sports activities as an agreement, which is concluded on the basis of the labor legislation of the Russian Federation.”²⁰⁴ However, article 26 of the Russian Sports Law differs greatly from the Russian Labor Code in that it provides that contracts with professional athletes remain in effect until their expiration or upon transfer, which transfer requires the consent of the original contracting Russian club.²⁰⁵

The provisions of the Russian Labor Code and the Russian Sports Law are in apparent conflict. While the Labor Code allows for the termination of a contract upon two weeks notice or for “other justifiable reasons,” it also allows for the contracts of professional athletes to be

201. *Id.* art. 31.

202. *Id.* art. 32.

203. *Id.* art. 351.

204. Mikhail Loukine, *Legal Regulation of Sports Agents’ Activity in the Russian Federation*, 15 MARQ. SPORTS L. REV. 63, 64-65 (2004). However, it should be noted that article 351 of the Russian Labor Code, discussed above, did not enter into effect until January 1, 2005. Russian Labor Code, art. 351 (commentary).

205. Russian Sports Law, art. 26. (unpublished translation, Tatiana Markel, Executive Publication Editor, *Buffalo Law Review*) (on file with author).

governed by the particularities of other, separate federal legislation. Additionally, while the Sports Law defines an athlete's contract as entered into under the Labor Code, it also stipulates that those contracts are in force and effect for the entire period covered by the contract—again in conflict with that same Labor Code. Thus, it appears that any resolution by a U.S. court of a claim based on a Russian athlete's contract would require a resolution of this inherent conflict.

IV. HYPOTHETICALLY SPEAKING: METALLURG'S CLAIMS REVISITED

Though they were ultimately dismissed, Metallurg's claims present the state of the jurisprudential landscape regarding the contracting of foreign players in the United States as well as the relevant conflict that currently exists in Russian law. As noted above, Metallurg alleged that the NHL and its teams have contracted, combined, and conspired in engaging in a group boycott and refused to deal with Metallurg and other Russian hockey clubs regarding the transfer of players from their Russian teams to NHL teams.²⁰⁶ According to Metallurg, the NHL did this in response to the failure of Russia to sign the IIHF Player Transfer Agreement and by instituting the policy that teams would be free to sign Russian players under contract so long as those players secured releases from their respective clubs.²⁰⁷ At the same time, Metallurg alleged, the NHL enforced that policy by threatening to penalize any team that negotiated or paid a release fee for any player individually.²⁰⁸ Metallurg further alleged that the policy of the NHL had no potential procompetitive benefit, but instead had a "predictable and pernicious anticompetitive effect."²⁰⁹

On its face, it would appear that Metallurg's complaint would be sufficient to make out an initial antitrust claim for a group boycott and concerted refusal to deal. While neither the NHL nor its teams sought to regulate player salaries or

206. See Metallurg Complaint, *supra* note 62, ¶ 27, at 9-10.

207. *Id.* ¶¶ 23-24, at 7-8.

208. *Id.* ¶ 26, at 9.

209. *Id.* ¶ 111, at 33.

the output of the product of professional hockey,²¹⁰ such allegations are unnecessary under *Fashion Originators' Guild*.²¹¹ Instead, the NHL, Metallurg alleged, sought to control the actions of its teams regarding the signing of Russian players by threatening to penalize a team that failed to abide by the NHL mandate. That may be the sort of coercive or punitive boycott discussed in *Hartford Fire Insurance*²¹² and likely falls squarely within the definition of a boycott laid out in that case.²¹³

However, Metallurg would not only run into the amorphous jurisprudence of group boycotts and refusals to deal with such a complaint, but would also encounter the unpredictable application of federal antitrust laws to professional sports, and particularly hockey.²¹⁴ Assuming that, as has usually been the case, the court would reject a single-entity defense by the NHL,²¹⁵ the antitrust claims asserted by Metallurg would likely be examined in the context of the non-statutory labor exemption to the application of the Sherman Act. As mentioned earlier, courts disfavor holding professional sports leagues liable for conduct under antitrust laws when that conduct implicates national labor policy and terms subject to the collective bargaining process.²¹⁶ The current IIHF Player Transfer Agreement was negotiated with both the NHL and the

210. See *San Francisco Seals, Ltd. v. Nat'l Hockey League*, 379 F. Supp. 966, 969 (C.D. Cal. 1974) (finding that, for the purposes of section 1 of the Sherman Act, the relevant product market is the production of professional hockey games before live audiences in the United States and Canada).

211. *Fashion Originators' Guild, Inc. v. Fed. Trade Comm'n*, 312 U.S. 457, 466 (1941) (holding that a practice which tends to create a monopoly and deprives the public of free competition advantages offends the policy of the Sherman Act).

212. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 801-02 (1993).

213. See *id.* at 801; see also *supra* text accompanying notes 97-98.

214. See Michael J. Kaplan, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. FED. 489, § 5(e) ("It has been held that there is at least a substantial probability that the business of professional hockey is subject to the application of the federal antitrust laws."). The uncertainty of its application has created only the "substantial probability" as opposed to a judicial rule asserting the Sherman Act's applicability to professional hockey. For more discussion, see *supra* notes 79-88 and accompanying text.

215. See *supra* notes 112-20 and accompanying text.

216. See *supra* Part II.B.

NHLPA,²¹⁷ the two parties that collectively bargain on behalf of NHL franchise owners and NHL current and prospective players.²¹⁸ However, those two parties were on the same side of the bargaining situation, which could negate the application of the exemption as it would no longer be a bona fide arm's-length negotiation. The Player Transfer Agreement, as it delineates fees for player transfers and the process by which players transfer to hockey leagues in other countries, may be said to implicate wages and/or working conditions, which are mandatory subjects of collective bargaining.²¹⁹ Further, even if the Player Transfer Agreement was found not to fall within the non-statutory labor exemption, a court may find that the policy concerns addressed in *Brown v. Pro Football, Inc.*—that it would create a flood of litigation and usurp the

217. See IIHF News, IIHF-NHL Player Transfer Agreement Involving Six Euro Countries, *supra* note 30.

218. *Cf. Claret v. Nat'l Football League*, 369 F.3d 124, 138 (finding that the draft eligibility requirements were collectively bargained on behalf of prospective NFL players). Though the NHL and NHLPA are theoretically on opposite sides of the bargaining table, it has recently come to light that there may have been inappropriate cooperation between Gary Bettman, the commissioner of the NHL, Bill Daly, the deputy commissioner, and Ted Saskin, the former NHLPA executive director. A series of e-mails between the three men has emerged showing that the NHLPA's position during the 2004-2005 NHL lockout may have been undermined, thus calling into question the fairness of the lockout's resolution. See Stephen Brunt, *NHLPA Story Written in Secrecy, Light Being Shed on Daly's Starring Role*, TORONTO GLOBE & MAIL, Oct. 16, 2007, at R6; Helene St. James, *Chelios Berates Bettman, Says More to Come out in Union Saga*, DETROIT FREE PRESS, Oct. 16, 2007, at 6D. In a report prepared for the NHLPA by Toronto attorney Chris Paliare, it was discovered that Saskin had directed a colleague to access current players' e-mail accounts and confidential union records to discover, and potentially weed-out, those players who had voted against the current collective bargaining agreement. See Rick Westhead, *Report "Big Brother" Spied on NHL Players, Fired Executive Saskin Directed Colleague to Open E-mails, Union Files to Ferret out Dissidents*, TORONTO STAR, May 30, 2007, at S4. After the lockout, the NHL and NHLPA entered into the previous Player Transfer Agreement with the IIHF, which would raise the question whether the NHL and NHLPA had the same inappropriate cooperation at that time. While Saskin was not fired until May 10, 2007, after the new Player Transfer Agreement had been reached, he had been forced to go on paid leave in March after the allegations surfaced, and thus was not present when the new agreement was completed. See Allan Maki, *Players Take 90 Minutes to Axe Saskin, Firing Executive Director with Cause Unlikely to be End of Legal Travails*, TORONTO GLOBE & MAIL, May 11, 2007, at S1. For the purposes of the analysis here, I will not consider the allegations of impropriety in examining the non-statutory labor exemption.

219. See *supra* note 124 and accompanying text.

position of the NLRB—cautioned against the application of the Sherman Act.²²⁰

Assuming, arguendo, that the non-statutory labor exemption was asserted by the NHL, and the policy concerns just mentioned did not apply, it may be argued that the exemption would not apply to Metallurg's or another Russian club's claim against the NHL. Under *Mackey*, the exemption will not apply if any of the three factors of the "effects test" is absent.²²¹ First, the restraint on trade alleged by Metallurg, and assumingly any other Russian club in a similar position, may not be said to affect only those parties to the collective bargaining relationship.²²² While the NHL and NHLPA are the exclusive bargaining agents for NHL teams and players, it may not be said that the IIHF is the bargaining agent for the Russian Ice Hockey Federation, Russian hockey clubs, or any other foreign hockey entities. While the IIHF is a collective of national hockey associations that seeks to facilitate international competition,²²³ it was ultimately up to each country to accept and sign the Player Transfer Agreement. As Russia refused, and the current transfer of Russian players to the NHL certainly affects the Russian leagues and teams, the first factor of the *Mackey* test is apparently absent.

Secondly, and as mentioned above, while player transfers may implicate mandatory subjects of collective bargaining, such as wages and working conditions, those subjects may not be said to be collectively bargained between the parties concerned. As was just noted, an agreement for player transfers from Russia to the NHL would have to involve collective bargaining on behalf of both of those parties. As the Russian Ice Hockey Federation did not agree to the resolution reached by the NHL and the IIHF regarding player transfers, it may therefore be said that the conditions of such player transfers were unilaterally imposed on Russia by the NHL's current policy. Therefore, it could possibly be shown that while the

220. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 242, 247, 250 (1996).

221. See *Koch*, *supra* note 141, at 297 (citing *Kagnoff*, *supra* note 131, at 109-10).

222. See *Mackey v. Nat'l Football League*, 543 F.2d 606, 616 (1976).

223. IIHF, IIHF Mission Statement, <http://www.iihf.com/iihf-home/the-iihf/our-mission.html> (last visited Apr. 20, 2008).

agreement concerns mandatory subjects of collective bargaining, those subjects were not collectively bargained and agreed to, and the Player Transfer Agreement would fail the second factor of the *Mackey* test.²²⁴

Lastly, the *Mackey* test requires that "the agreement sought to be exempted is the subject of bona fide arm's length bargaining."²²⁵ However, the Player Transfer Agreement was not bargained by the appropriate parties in this instance, let alone bargained at arm's-length. Thus, it could conceivably be shown that none of the three factors of the *Mackey* test for the applicability of the non-statutory labor exemption are present, and a claim like Metallurg's would therefore be subjected to traditional antitrust scrutiny.²²⁶

Another possible hurdle for Metallurg's antitrust claim could have been the application of the FTAIA²²⁷ and the extraterritoriality of the Sherman Act. Ultimately, Metallurg was a foreign plaintiff alleging conduct that occurred primarily outside of the United States. However, the distinction that must be drawn in this instance would be whether the NHL's conduct may be characterized as importing Russian hockey players—or, more appropriately, importing the services of Russian hockey players—in which case the FTAIA would not apply at all,²²⁸ or whether the conduct may be characterized as neither import nor export commerce, which would make the FTAIA applicable.²²⁹ Once again, if the FTAIA were inapplicable because the NHL's conduct constitutes import commerce, then traditional antitrust scrutiny would apply.

If, however, the NHL's conduct regarding the signing of Russian hockey players was deemed to be neither import

224. See *Mackey*, 543 F.2d at 615.

225. Koch, *supra* note 141, at 297 (quoting *Mackey*, 543 F.2d at 614).

226. See *id.*; *Mackey*, 543 F.2d at 614, 616.

227. 15 U.S.C. § 6a (2000).

228. The FTAIA specifically states that it applies to international commerce *except* import commerce. *Id.*

229. See H.R. REP. NO. 97-686, at 9-10 (1982), as reprinted in 1982 U.S.C.C.A.N. 2487, 2494 (stating that "transactions within, between, or among other nations [that were not import or export transactions] . . . should, for the purposes of this legislation, be treated in the same manner as export transactions").

nor export commerce,²³⁰ the *Empagran* standard for extraterritorial application of the Sherman Act would apply.²³¹ In the case of the applicability of the FTAIA, the domestic-exception applies if “the conduct (1) has a ‘direct, substantial, and reasonably foreseeable effect’ on domestic commerce, and (2) ‘such effect gives rise to a [Sherman Act] claim.’”²³² It would not be difficult to see how bringing a Russian hockey player, like Evgeni Malkin, to the United States to play in the NHL would have an effect on domestic commerce, given not only that professional sports and players’ contracts have been deemed to implicate interstate commerce, but also the likely endorsement contracts he would be offered and the NHL’s use of his name and image in marketing. However, the actions taken to bring Malkin to the United States to play in the NHL were largely committed abroad, in Russia and in Finland. As recognized by the court in *Empagran*, the domestic effect may be distinguished from a foreign action and effect.²³³ Therefore, even if there was a “direct, substantial, and reasonably foreseeable effect”²³⁴ on domestic commerce, it would be separate and distinct from the effect on Russian hockey and Russian commerce. Additionally, as there was a distinguishable effect on domestic commerce, there would be no basis for a Sherman Act claim.²³⁵

While Metallurg’s Sherman Act claims would likely have been unsuccessful due to extraterritoriality concerns had they not been dismissed otherwise, its tortious interference claims may not have encountered the same barriers. As noted above, in order to make out a claim for tortious interference, Metallurg would have to show that it

230. Certainly, such conduct may not be deemed export commerce, so the only assumption here is that it does not constitute import commerce.

231. See *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 159, 164-67 (2004).

232. *Id.* at 159 (citing 15 U.S.C. § 6a(1)(A), (2)).

233. *Id.* at 164.

234. 15 U.S.C. § 6a(1)(A).

235. See *Empagran*, 542 U.S. at 159. As noted by the Court, the fact that a domestic customer may bring a Sherman Act suit does not prevent the FTAIA from operating against a foreign plaintiff. As applied to Metallurg’s case, if the NHL boycotted or refused to deal with a domestic hockey league regarding player transfers, that effect would still be independent of the foreign effect and the FTAIA would still likely act as a bar to Metallurg’s claim.

had a valid contract with Malkin, that the NHL and the Penguins had knowledge of that contract, that the NHL and the Penguins, with improper motive, intentionally induced Malkin to breach his contract with Metallurg, and that Metallurg suffered damages as a result of that breach.²³⁶

Metallurg's contract with Malkin may have been established with relative ease. When the Penguins drafted Malkin in the 2004 Entry Draft, Malkin was already under contract with Metallurg through the 2007-2008 hockey season.²³⁷ Additionally, Malkin continued to play for Metallurg, under that contract, through the 2004-2005 NHL lockout as well as the 2005-2006 hockey season.²³⁸ On August 7, 2006, Malkin signed a new one-year contract through the 2006-2007 season, shortening the duration of his obligations to Metallurg.²³⁹ It was this second contract that Malkin could be considered to have breached by departing for the United States and signing with the Penguins. However, Malkin has subsequently alleged that he signed that contract under duress and only after officials from Metallurg and the Russian Ice Hockey Federation followed him to his house late at night on August 7.²⁴⁰ That alleged duress would present a hurdle for Metallurg in establishing a valid contract because, under U.S. law, contracts made through means of duress or coercion are voidable.²⁴¹ If such duress or coercion was not found, Metallurg would then only face a determination of which

236. See *supra* Parts I.C, III. As stated by Metallurg in its complaint, it was damaged "in the amount to be proven at trial." Metallurg Complaint, *supra* note 62, para. 70, at 25; para. 90, at 28. Also, as noted in Metallurg's plea for an injunction, Malkin's services are unique, "the loss of which cannot be adequately compensated." *Id.* para. 71, at 25.

237. Price, *supra* note 44.

238. See *supra* notes 43-46 and accompanying text.

239. Neumeister, *supra* note 52.

240. Dave Molinari, *Two Tales of Malkin's Pact with Russians: Penguins Star and His Mother Say He Was Forced to Sign Contract*, PITT. POST-GAZETTE, Nov. 11, 2006, at A1. Though Malkin was a minor when he signed the original contract with Metallurg, the subsequent one-year contract was signed after he had turned eighteen years old, and thus the Samsonov precedent is not applicable in that instance. See Cent. Sports Army Club v. Arena Assocs., Inc., 952 F. Supp. 181, 190 (S.D.N.Y. 1997).

241. See, e.g., Mitchell v. C.C. Sanitation Co., 430 S.W.2d 933, 936 (Tex. 1968).

Russian law governs Malkin's contract²⁴² before it could establish the first element of a tortious interference claim.

Also, the second element of Metallurg's claim, that the NHL and the Penguins knew Malkin was under contract, could possibly have been established. Though the Penguins drafted Malkin in 2004, he was under contract with Metallurg until 2008, and continued to play for Metallurg for the two seasons following his being drafted. Additionally, the NHL was unable to negotiate Malkin's transfer in 2005 due to the Russian Ice Hockey Federation's failure to sign the new Player Transfer Agreement.²⁴³ Further, Malkin's one-year contract with Metallurg for the 2006-2007 season was widely reported in news outlets throughout the United States and especially in Pittsburgh.²⁴⁴ Thus, it would be very difficult for either the NHL or the Penguins to disclaim knowledge of Malkin's contract with Metallurg.

The third element of the tortious interference claim, though, would likely have been the most difficult element to establish. While Metallurg alleged that the NHL instituted its policy regarding transfers of Russian players "to play hardball with the Russian hockey clubs [and] to punish them for the Russian Ice Hockey Federation's [rejection of] the New [Player Transfer Agreement],"²⁴⁵ that would be very difficult to prove. First, the NHL may have asserted that its policy, as released in the press, specifically stated that the NHL teams could sign Russian players *only* after that player had secured a release from his team.²⁴⁶ Secondly, the NHL may have averred, as was found by the court in Samsonov's case, that it acted only "with the justifiable business motive of securing a business asset—in

242. As shown above, the provisions of the Russian Labor Code appear to be at odds with the Russian Sports Law regarding professional athletes' contracts. See *supra* notes 199-205 and accompanying text.

243. Notably, if Malkin was not under contract at that point, a transfer would be unnecessary—the transfer agreement was put into place to regulate the transfer of players *under contract*.

244. See, e.g., Price, *supra* note 44. Though Metallurg also notified both the NHL and the Penguins of the arbitration committee's ruling against Malkin, that occurred subsequent to Malkin's signing with the Penguins on September 5, 2006, and would thus be unavailing in establishing this element.

245. Metallurg Complaint, *supra* note 62, para. 23, at 7-8.

246. See Price, *supra* note 44.

this case, a star hockey player.”²⁴⁷ However, Malkin’s situation may have been distinguished from Samsonov’s case in that Malkin may not have necessarily decided to leave Russia prior to beginning his dealings with the Penguins.²⁴⁸ Indeed, only a day before Malkin signed his one-year contract with Metallurg, the *Pittsburgh Tribune-Review* reported that the Penguins were beginning negotiations with Malkin’s agent to bring him to the United States.²⁴⁹ Therefore, while an inducement may be shown, it would have been difficult to establish that the NHL and the Penguins did so with improper motive given the strong similarities to the precedent set forth in the Samsonov case. However, there may have existed at least the possibility that Metallurg could have recovered damages with their tortious interference with contractual relations claim.

Though the above analysis regarding Metallurg’s claims ultimately depended on those claims going to trial, the discussion must remain hypothetical. On January 29, 2007, United States District Court Judge Loretta A. Preska dismissed both of Metallurg’s lawsuits against the NHL and the Penguins pursuant to Federal Rule of Civil Procedure forty-one.²⁵⁰ Though it took more than two months, many had postulated that since Metallurg lost its injunction claim, and declined to appeal that decision, that such a dismissal would occur.²⁵¹ Throughout most of this controversy, much ado has been made regarding the apparent current conflict in Russian law regarding the status of professional athletes in that country. Indeed, it

247. *Cent. Sports Army Club v. Arena Assocs., Inc.*, 952 F. Supp. 181, 190 (S.D.N.Y. 1997).

248. *See id.* at 191 (finding that Samsonov severed his business ties with CSKA prior to coming to the United States to play hockey). Indeed, Malkin did not fax his two weeks notice that he was terminating his contract with Metallurg until he had already abandoned his team in Helsinki, Finland. *See supra* note 53; *see also supra* Part III (discussing whether such notice was sufficient to terminate a contract under the Russian Labor Code and Russian Sports Law).

249. Price, *supra* note 44.

250. FED R. CIV. P. 41(a)(1). The parties to the action filed a stipulation of dismissal of all claims, indicating that this dismissal was a voluntary one under FRCP 41(a)(1), though the stipulation specifically states that the dismissal was done with prejudice.

251. *See, e.g.*, Shelly Anderson, *Malkin Big Winner in Court*, PITT. POST-GAZETTE, Feb. 2, 2007, at D3.

had been the NHL's position that Malkin's contract was legally terminated by giving two weeks' notice and that, therefore, Metallurg's claims were unfounded. However, while Metallurg's lawsuit has concluded, the apparent conflict in Russian law continues. That conflict between the Russian Labor Code and the Russian Sports Law could continue to represent a hurdle for any Russian team seeking to establish its rights to a player currently on an NHL team.

The disappointing results of litigation in U.S. courts as well as the conflict between the Labor Code and Sports Law brought to light by that litigation has caused a great stir in the hockey community. During the saga surrounding the negotiation of the newest Player Transfer Agreement, it was noted that "NHL clubs are forbidden from acquiring players already under contract in Russia, but can take free agents without compensation. However, Russian players can still easily break their contracts, freeing them to sign with an NHL team."²⁵² In protest, Russian Ice Hockey Federation president Vladislav Tretiak summarized the conflict and responded that: "Today it's very simple to take hockey players. Two weeks and each guy can go. The NHL every year gets Russian players. If the players want to go to the NHL then OK, after their contract [ends]."²⁵³ However, Tretiak, who is also a member of the State Duma in Russia—the equivalent of a lower house of Parliament or the House of Representatives in the United States—announced that the Russian Labor Law would be amended.²⁵⁴ Tretiak indicated that "[t]he new law will enforce the terms of all Russian hockey contracts and will require that those contracts be bought out if a player wants to leave."²⁵⁵ Showing his distaste for the recent trend of departing players, Tretiak stated: "If a player runs away, there will be serious financial reprimands He will think twice about doing it."²⁵⁶

The stipulation dismissing Metallurg's complaint does

252. *Russian Hockey Prez Says Clubs Not Happy with Deal*, *supra* note 41.

253. *Id.* (quoting Vladislav Tretiak).

254. *See Russians Turn Down Transfer Agreement, Club Teams Want More Respect*, *supra* note 42.

255. *Id.*

256. *Id.* (quoting Vladislav Tretiak).

not go into detail or give any analysis as to why it was dismissed. Regardless, the conflict in Russian law presented an initial, very substantial hurdle because the establishment of Malkin's contract with Metallurg was essential to both of its main claims. If Malkin was not under contract with Metallurg, the NHL could not have possibly interfered with such a contract and would not be obligated to negotiate with Metallurg for the release of Malkin from that contract.

Even though Metallurg's complaint was dismissed, and along with it the lawsuits filed by Lokomotiv Yaroslavl, the legal issues presented by this set of circumstances, and by the filing of Metallurg's lawsuit, remain and may result in further conflict. As long as Russia refuses to sign any Player Transfer Agreement, its teams and those of the NHL will remain at odds regarding the transfer of players between leagues and the fees paid for those transfers. The NHL, like most leagues, seeks to have the best players in the world playing for its teams and will seek out those players at a huge expense.²⁵⁷ Russian teams, however, would prefer to retain the players that they have recruited and trained, and may only release those players from their contracts with the payment of a substantial fee, a fee that the NHL is unwilling to pay.²⁵⁸ If an NHL team recruits and signs another Russian player in the same manner that it recruited and signed Malkin, it would not be surprising if that player's Russian team filed a similar complaint against the NHL and that NHL team.

V. FOREIGN PLAYERS IN THE NHL: A NEW PATH?

In September 2006, the IIHF released a study of the career paths and performances of European hockey players playing in North American Hockey Leagues.²⁵⁹ The study examined 621 players in the NHL and AHL between 2000 and 2006, 93 players that had played in at least 400 NHL games upon retirement, and 575 players that had been

257. Though concrete figures are not reliably available, one can speculate that, in addition to the million-dollar salaries discussed earlier, *see supra* note 77, teams incur great expense in hiring representatives to recruit players and negotiate contracts.

258. *See supra* notes 31-42 and accompanying text.

259. IIHF STUDY, *supra* note 18, at 1.

drafted by the CHL between 1997 and 2006.²⁶⁰ The IIHF found that many of the players drafted into the NHL, or transferred there by some other means, were not ready to play in the NHL and often ended up either stuck in the minor leagues or returning to their home countries.²⁶¹ These players simply were not ready to play in the NHL, arguably the top professional league, as they had not been adequately trained prior to coming to North America and did not receive adequate competition in the minor leagues that would have allowed them to hone their skills.²⁶² However, the NHL seems so eager to sign players from top European leagues that it squanders the potential of many talented individuals who are underprepared and then allows those players to fall by the wayside. Even disregarding national origin, the seven rounds and 211 total picks in the NHL draft create great hopes for those players selected, but “the reality is the [thirty NHL] clubs will be happy if just a few of their prospects . . . become bona fide NHL players.”²⁶³ In other words, the NHL is so actively searching for the next big star that it is willing to allow the careers of many players to falter in exchange for finding a single star. The IIHF proposed, at the conclusion of its study, that the NHL and minor leagues decrease their signing of European players by ten percent in order to allow those players to remain in Europe until they are ready to play in the NHL.²⁶⁴ To be sure, the IIHF is not proposing that European players stop signing with NHL teams, but only that those players do so after they and their skills have matured to a professional level.

While it cannot be said that Malkin was ill-prepared for the NHL—indeed, he led all rookies in points in his first year and won the Calder Trophy as Rookie of the Year²⁶⁵—it may be that the NHL is so eager to sign the top European talent that it will continue to face lawsuits and claims like

260. *Id.*

261. *Id.* at 1-2.

262. *Id.*

263. Spencer, *supra* note 22.

264. See IIHF STUDY, *supra* note 18, at 1.

265. See Shelly Anderson, *He's Got Hart: Crosby Sweeps NHL Major Awards, Malkin Rookie of Year in Big Night for Penguins*, PITT. POST-GAZETTE, June 15, 2007, at F1.

those filed and alleged by Metallurg by doing so. While the NHL has a transfer agreement with most of the European countries from which it signs players, 19.4% of Europeans in the NHL are from Russia²⁶⁶—a country that has now rejected two consecutive Player Transfer Agreements from the IIHF. The Russian Ice Hockey Federation has stated that it prefers to negotiate transfers for each player on an individual basis,²⁶⁷ while the NHL has allegedly forbidden its teams from negotiating with, or paying a player transfer fee to, any individual Russian hockey team.²⁶⁸ So long as this is true, the NHL will continue to face antitrust and other claims, like those brought by Metallurg and Lokomotiv Yaroslavl.

Such claims are not new ground for the NHL, though. In 2005, the Moscow Dynamo attempted to prevent Alexander Ovechkin, the only player chosen before Malkin in the 2004 draft, from playing hockey for the NHL's Washington Capitals.²⁶⁹ Similar to Malkin's case, the Dynamo obtained an award from the Russian Ice Hockey Federation's arbitration committee finding Ovechkin in breach of his contract and banning him from playing for any other club for the 2005-2006 season.²⁷⁰ However, what the Dynamo and the arbitration committee saw as a contract renewal, the court found was merely a series of unanswered letters and dismissed the case for lack of subject matter jurisdiction.²⁷¹ Still, one of the NHL's brightest stars, and eventual Rookie of the Year, was brought to court by his Russian team seeking to stop, or at least stall, the beginning of his NHL career. Russian teams have also sought to stop Ovechkin's teammate Alexander Semin as well as Nikolai Zherdev from playing in the NHL through arbitration proceedings.²⁷² When Ovechkin's, Semin's, and Zherdev's cases are considered, the NHL faced four lawsuits

266. See IIHF STUDY, *supra* note 18, at 5.

267. See *Russians Turn Down Transfer Agreement, Club Teams Want More Respect*, *supra* note 42.

268. See *supra* note 50 and accompanying text.

269. See *Dynamo v. Ovechkin*, 412 F. Supp. 2d 24 (D.D.C. 2006).

270. *Id.* at 26.

271. *Id.* at 29.

272. See *Defiant Russia Rejects Player Transfer Agreement*, CHINA DAILY, May 11, 2007, at 23.

and two arbitration proceedings in two years regarding its teams' signing of high profile Russian hockey players. That represents a dramatic trend that will only continue if both the NHL and the Russian Ice Hockey Federation continue their respective current policies regarding player transfers between the leagues. Indeed, despite the unsuccessfulness they have had thus far, Tretiak has stated that Russian hockey teams "would not back away from further legal challenges."²⁷³

When it comes to hockey, the United States and Russia have never really been on friendly terms. At the 1980 Olympic Games in Lake Placid, New York, the U.S. men's hockey team defeated the Soviet team in the semi-finals in what has been named the "Miracle on Ice."²⁷⁴ Walt Disney Studios even recently made that story into a full-length motion picture.²⁷⁵ It seems almost odd that the semi-final game has become the stuff of legends, while the final game, in which the United States defeated Finland to win the gold medal, has seemingly been dropped from the story. However, the importance of the "Miracle on Ice" rested largely with the existence of the Cold War between the United States and the Soviet Union at that time. It seems that now, a new Cold War may be starting between the NHL and the Russian Ice Hockey Federation, one that can be very dangerous to the careers of the hockey players caught in the feud between the two leagues.

Indeed, a backlash to the recent lawsuits and Russia's refusal to sign the new Player Transfer Agreement may be starting. While a record thirty percent of the players selected in the 2007 NHL draft were American,²⁷⁶ only nine Russian players were taken, the lowest number selected from that country since 1988.²⁷⁷ Additionally, those Russians that were drafted were selected much lower than expected. For example, Alexei Cherepanov broke six-time NHL All-Star Pavel Bure's rookie scoring record while

273. *Id.*

274. Russell Levine, *A Look Back at the "Miracle": U.S. Shocks Soviets*, NHL.COM, Feb. 22, 2000, <http://www.nhl.com/nhl/app?service=page&page=NewsPage&articleid=279285>.

275. *MIRACLE* (Walt Disney 2004).

276. *See* Spencer, *supra* note 22.

277. *See id.*

playing for Omsk in Russia's elite league.²⁷⁸ Generally referred to as the top European skater in the draft because of his great skill, Cherepanov had been projected as a top-five draft pick.²⁷⁹ However, fearing that it would be difficult to bring Cherepanov to the United States to play, many NHL teams passed on the opportunity to draft him.²⁸⁰ Indeed, Cherepanov has stated that he will play another season with his Omsk club instead of coming to the United States immediately.²⁸¹

While it is possible that the IIHF study and not Russia's absence from the Player Transfer agreement contributed to the changes in this year's NHL draft, two other facets of the backlash may not be said to be subject to such debate. In the first instance, Tretiak proposed to the NHL his idea of staging another Summit Series—an eight-game exhibition series between hockey players from Russia and Canada that was originally held in 1972.²⁸² Tretiak claimed to have the support of both Russian President Vladimir Putin and Canadian Prime Minister Stephen Harper²⁸³ and cited this proposal as evidence of his willingness to negotiate with the NHL.²⁸⁴ However, Bill Daly, the NHL deputy commissioner, rejected the proposal, stating that staging such an event would be neither practical nor possible.²⁸⁵ Daly then went on to tell Tretiak that

278. See *Kane Becomes Second Straight U.S.-Born Player Selected First*, *supra* note 22.

279. Pierre LeBrun, *Three Under Hawks' Gaze: Chicago Sizing Up Turriss, Kane and vanRiemsdyk with the No. 1 Pick*, THE HAMILTON SPECTATOR, May 31, 2007, at SP6.

280. See *Kane Becomes Second Straight U.S.-Born Player Selected First*, *supra* note 22. Teams had similar concerns with Ruslan Bashkirov: "The risk with Russian winger Ruslan Bashkirov, taken [sixtieth] overall, isn't with his skill. He's got loads of talent. The risk is wondering whether they'll get him in a Senators uniform given Russia's absence from the NHL-IIHF player transfer agreement." *Senators Take Chance on Talented Russian Winger*, WINNIPEG FREE PRESS, June 24, 2007, at C5.

281. *Kane Becomes Second Straight U.S.-Born Player Selected First*, *supra* note 22.

282. Eric Duhatschek, *NHL Says Nyet to Russia-Canada Series*, TORONTO GLOBE & MAIL, Mar. 30, 2007, at S1.

283. *Id.*

284. See *Russians Turn Down Transfer Agreement, Club Teams Want More Respect*, *supra* note 42.

285. See Duhatschek, *supra* note 282.

“the NHL is looking ‘forward to concluding . . . a new NHL/IIHF player-transfer agreement.’”²⁸⁶ The presence of the rejection of Tretiak’s proposal juxtaposed with the endorsement of the Player Transfer Agreement indicates that the two are not unrelated.

The second facet of the backlash, or rather, a backlash-to-the-backlash, involves a wave of players leaving NHL or AHL teams to play for Russian hockey teams, often for higher salaries, since the Russian leagues do not operate under a salary cap.²⁸⁷ Within a period of a few weeks in October 2007, it was announced that a handful of players were leaving, either fed up with playing in the minor leagues or just seeking a different opportunity to play hockey. Upon being assigned to the Peoria Rivermen of the AHL—after playing five seasons with the NHL’s St. Louis Blues—Petr Cejanek announced he would return to Russia to play for Ak Bars Kazan of the Russian Super League.²⁸⁸ Joining Cejanek on Ak Bars Kazan will be Roman Voloshenko, the Minnesota Wild’s second-round pick in the 2004 draft who played two seasons with the Wild’s AHL affiliate, the Houston Aeros.²⁸⁹ Igor Girgorenko left the Detroit Red Wings’ affiliate in Grand Rapids for the Russian leagues, where he will make \$1 million tax-free as opposed to the \$70,000 he would have made staying in Grand Rapids.²⁹⁰ Most notably, though, are Alexander Svitov,²⁹¹ Alexei Yashin,²⁹² and eight-year veteran goaltender Robert Esche,²⁹³ who all left NHL careers

286. *Id.* (quoting NHL deputy commissioner Bill Daly).

287. See Michael Farber, *Cold Shoulder*, SPORTS ILLUSTRATED, Oct. 15, 2007, at 70.

288. See Jeremy Rutherford, *Cejanek is Going to Russia*, ST. LOUIS POST-DISPATCH, Oct. 21, 2007, at D12. Notably, Ak Bars Kazan “will compensate the Blues for close to half of Cejanek’s \$2 million salary.” *Id.*

289. See John Shipley, *Voloshenko Heads Home*, ST. PAUL PIONEER PRESS, Oct. 14, 2007, at C17. Unlike Cejanek, however, the reports of Voloshenko going to Ak Bars Kazan noted that the Wild would not receive compensation because of the lack of a player transfer agreement between the NHL and the Russian league. See *id.*

290. Ansar Khan, *Grigorenko Bids GR Goodbye*, GRAND RAPIDS PRESS, Oct. 22, 2007, at C6.

291. See Farber, *supra* note 287.

292. See *id.*

293. Biron, *Flyers Blank Atlanta*, PITT. POST-GAZETTE, Oct. 17, 2007, at D3.

behind to sign with Russian Super League teams. While it may be the case that some of these players truly were not ready for NHL play,²⁹⁴ as was observed by the IIHF study, that certainly cannot be said of the veteran players who are leaving NHL careers behind for higher Russian salaries. Regardless, the departure of these players from NHL and minor league teams while under contract shows that every action—e.g., Malkin, Ovechkin, Semin—has an equal and opposite reaction.

Despite the bitter relations, backlash, and counter-backlash between the NHL and the Russian hockey leagues, litigation should not always be the answer. The costs of defending or settling antitrust lawsuits, like Metallurg's, are staggering and are generally measured in millions of dollars.²⁹⁵ In the case of Maurice Clarett's lawsuit, the NFL spent nearly \$1 million just defending the injunction sought by Clarett.²⁹⁶ Additionally, if an antitrust

Esche will also be playing for Ak Bars Kazan along with Cejanek and Voloshenko. *Id.*

294. See Farber, *supra* note 287 (explaining that the Russian Super League "is a legitimate alternative for middle-of-the-road Russian players" and that some NHL teams and coaches "are fed up with what they consider high-maintenance players and hope the door doesn't smack them on the way out"). Farber also noted that "[s]ome high-profile Russian players have been notable busts in recent years (Chicago's Sergei Samsonov, Montreal's Alexei Kovalev)." *Id.* The reason for this may be the change in the American game from one dependent on finesse to one that is more physical. "There aren't many Russians who play that style. They're not trained that way. They're trained to stickhandle and pass." *Id.* Indeed, Minnesota Wild's general manager Doug Riseborough commented upon Voloshenko's departure that his "theory is, there's a lot of players who need to play three, four years in the minors before they become good players, and if I thought he was that good, he would have been in the NHL." Shipley, *supra* note 289.

295. See Hoover's In-Depth Company Records, Northrop Grumman Corporation, Jan. 3, 2007 (stating that in December 2006, Honeywell paid Northrop Grumman Corporation \$440 million to settle antitrust and patent infringement claims), available at 2007 WLNR 87003; Shannon P. Duffy, *Auto Paint Antitrust Suit Nets \$105 Million*, LEGAL INTELLIGENCER, Jan. 4, 2007, at 3, 3 (noting that the total recovery in the Auto Paint Antitrust Claims were over \$105 million); Greg Stohr, *Justices Question Antitrust Award*, SEATTLE TIMES, Nov. 29, 2006, at C1 (citing a case currently before the U.S. Supreme Court in which the plaintiffs were awarded \$79 million for claims against Weyerhaeuser).

296. See Mark Fass, *NFL May Sue Insurer Over Costs of Clarett Defense*, N.Y.L.J., Nov. 15, 2006, at 1. The NFL, though, was later able to recover \$850,000 from its insurer as reimbursement for the cost of defending that action. Howard B. Epstein & Theodore A. Keyes, *NFL Goes Back to Basics to*

suit doesn't settle and the plaintiff is awarded damages, those damages are trebled under antitrust laws, forcing the defendant to pay three times the damages found by the jury.²⁹⁷ Further, not only are the costs of defending such suits enormous, antitrust trials are extremely long in their duration, many times taking years, or even decades, to complete.²⁹⁸ Though these figures may make an antitrust lawsuit even more attractive to Russian hockey teams, and even more inconvenient to the NHL and its teams, it will likely not settle the *real* issue—that of player transfers—anytime soon.

In the absence of a Player Transfer Agreement between the NHL and the Russian Ice Hockey Federation, it may behoove the NHL and its teams to negotiate with Russian teams for individual players. Certainly, Russia will continue to churn out talented hockey players that represent attractive prospects to the NHL teams—indeed both Ovechkin and Malkin were named Rookies of the Year. While the IIHF study showed that the NHL appeared to be accelerating its signings of European hockey players, many of whom come from Russia, the most recent NHL draft appears to regress from that, though mainly due to the difficulty encountered in getting Russian players to the United States. However, NHL teams will still seek out the best prospects regardless of nationality,²⁹⁹ and under the NHL's current policy of refusing to negotiate player transfer fees, and forbidding its teams from doing the same, the types of antitrust and tortious interference lawsuits filed by Metallurg and Lokomotiv Yaroslavl will continue to arise. Indeed, Vladislav Tretiak stated that the litigation losses to

Win Clarett and Extra Point, N.Y.L.J., Jan. 1, 2007, at 1.

297. Section 4 of the Clayton Act states that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15(a) (2000); see also Stohr, *supra* note 295 (noting that the \$79 million antitrust award against Weyerhaeuser was the result of trebled damages awarded to the plaintiffs).

298. See, e.g., Hoover’s In-Depth Company Records, *supra* note 295 (noting that the suit against Honeywell, though finally settled in December 2006, was filed in 1990).

299. The best example of this came during the 2007 NHL draft, when the Chicago Blackhawks selected Akim Aliu fifty-sixth overall—Aliu is from Nigeria, hardly a traditional hockey market. See Spencer, *supra* note 22.

date would not deter further litigation.³⁰⁰

Russia's refusal to sign the Player Transfer Agreement may simply be an inefficient hold-out presenting a large roadblock to an efficient system of player transfers between Europe and the United States. The costs of litigating these matters not only affect the NHL teams, but also the Russian teams that file them. If another Russian team were to bring a lawsuit against the NHL, some attorneys would be particularly less inclined to do so on, for instance, a contingency fee basis given the unsuccessfulness of those challenges so far. Additionally, a more fluid system would result if Russian teams were to allow players to transfer under the current agreement because, as evident in the counter-backlash, the players will also flow freely from the American minor leagues back to Russia. Many Russian hockey teams, with budgets of up to \$60 million, are more prosperous than their NHL counterparts who are restricted by the collectively bargained for salary cap.³⁰¹ With more money to spend and a freely flowing labor market for hockey players, more talented players may be enticed to leave their minor league, or even NHL, teams for a larger paycheck in Russia.

Despite its inefficiency, Russia is simply unwilling to sign the Player Transfer Agreement and accept the player transfer fees fixed by that agreement. The rejection of the current agreement is the second time that Russia has put its foot down and insisted on its position. From a pure cost efficiency stand point, the NHL may be better off paying higher player transfer fees for certain Russian hockey players than paying millions to defend antitrust lawsuits and running the risk of a multi-million dollar settlement or judgment. Indeed, this may be what NHL teams will be forced to do if the proposed reform to the Russian Labor Law is successful and hockey contracts are enforced for their full terms, closing the loophole that NHL teams have recently been taking advantage of in getting Russian prospects to the U.S. The payment of higher transfer fees would cause NHL teams to be more cautious and discriminating in which European players they sign, eliminating, or at least curbing, the problems identified by

300. See *supra* note 273 and accompanying text.

301. Rick Westhead, *Nike Calls Timeout*, TORONTO STAR, Oct. 9, 2007, at B1.

the IIHF Study in the mass signing of European hockey players.

It would behoove all parties involved to incorporate at least some of Russia's desires into the IIHF Player Transfer Agreement. That is why I propose an alternative system to the current one contained in the Player Transfer Agreement. European hockey leagues have many levels, similar to the NHL and its minor leagues. Instead of having a flat transfer fee for each player in any of these leagues transferred to the United States, a stratified fee schedule could be both possible and appropriate. For instance, Malkin was playing in Russia's Super League, the highest of Russia's hockey leagues, prior to signing with the Penguins. The transfer fee set for players from that league could be substantially higher than from Russia's Premier League. The higher transfer fee for the better players would satisfy, at least to an extent, the concerns of the Russian Ice Hockey Federation and would, again, make NHL teams more discerning as to the players they sign from European teams. Additionally, in order to ensure that NHL teams do not simply pursue only, and all, the best players, a system akin to the NFL's franchise and transition player tag could be used.³⁰² In such a system, each team from the leagues signing the Player Transfer Agreement would have the opportunity each year to name one player on its team a "franchise player" and/or one player a "transition player." Signing these players would require payment of a drastically stepped-up transfer fee to that player's current team, which fee could be in addition to or in lieu of the transfer fee indicated on the stratified fee schedule. Thus if the Moscow Dynamo had named Ovechkin its franchise player or Metallurg had named Malkin its franchise player, that tag would require the Capitals or the Penguins to make the top-dollar payments that Russia demands while allowing teams to pay less for less talented players.

This system also protects each team's revenue by allowing the retention of the best players for a greater period of time so that the team can build around that player's celebrity locally. The higher transfer fee would force the team to make a real investment in a player, and to put great consideration into the choice to make such an

302. See COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION art. XX (2006).

investment, thus eliminating the great waste of talent that has come with low, or no, transfer fees. Such a system would likely result in the elimination of litigation concerning the recruitment and contracting of these top players as it would satisfy the financial demands of the Russian teams without causing teams to pay exorbitant fees for every foreign player. Further, this system would prevent Russia's top players from running into the same plight that Tretiak himself encountered when he had hoped to play for the Montreal Canadiens as a young goaltender, but "the 'stupid' government in the Soviet Union wouldn't let him."³⁰³ After all, Tretiak's dream is for his grandson to someday play for those same Montreal Canadiens.³⁰⁴

303. Bill Beacon, *Tretiak Proposes Another Summit*, TORONTO STAR, Jan. 30, 2007, at B5.

304. *Id.*