Wanna Go?: A Discussion of the Potential Fight Between NHL Owners and Players over Participation in the 2014 Olympic Games in Sochi

James Larry
Wanna Go?: A Discussion of the Potential Fight Between NHL Owners and Players over Participation in the 2014 Olympic Games in Sochi

James Larry*

TABLE OF CONTENTS

I. Introduction ...........................................................................................................5A
   A. The Organizations .........................................................................................5A
   B. The Conflict ..................................................................................................9A
II. The History of the NHL and the Olympics .................................................11A
III. The Current Collective Bargaining Agreement and the Olympics .....................12A
   A. International Relations Since July 2005 .............................................13A
   B. Olympic Participation Under the Current CBA ....................................15A
IV. Concerns about Future NHL Participation in the Olympics ......................17A
V. Possible Outcomes Regarding 2014 Olympic Participation .........................19A
   A. If No Agreement is Reached .................................................................21A
      1. Suspension ............................................................................................21A
      2. Fines .......................................................................................................23A
      3. No punishment .......................................................................................23A
      4. Injunction ...............................................................................................25A
      5. Injuries During Prohibited Olympic Play ............................................29A
   B. If the Parties Reach an Agreement ..........................................................30A
      1. Same as Current CBA ...........................................................................31A
      2. Player-by-Player Agreement ...............................................................32A
V. Conclusion .........................................................................................................36A

* J.D. Candidate, 2012, Northwestern University School of Law; Bachelor of Arts, 2008, Michigan State University. This Comment is dedicated to Brad McCrimmon, Ruslan Salei, Stefan Liv, and the other members of the Lokomotiv Yaroslavl hockey team tragically lost on September 7, 2011. Покойся с миром.
The purpose of this Comment is to discuss the participation of National Hockey League (NHL or the League) players in the 2014 Olympic Winter Games in Sochi, Russia, and the legal issues that may arise from player participation in the Games. Currently, NHL players are allowed to participate in the Winter Olympics under the terms of the Collective Bargaining Agreement (CBA) between the League and the National Hockey League Players’ Association (NHLPA or the Players’ Association). However, the current CBA expires in 2012 and does not govern the 2014 Olympics. The fact that at least one NHL superstar has threatened to play in the Olympics regardless of the League’s official position on the issue, while the League has indicated that it does not intend to allow player participation, shows the potential for a dispute between the League and the Players’ Association. This Comment discusses the legal considerations and issues that would govern NHL participation in the 2014 Olympics, and the details of the possible legal disputes arising out of participation in the games.

Part I of this Comment introduces the parties involved in the dispute, their histories and involvements in Olympic hockey, and the background of the dispute over the 2014 Games. Part II of the Comment covers in greater detail the history of NHL participation in the Olympics. Part III analyzes the current CBA and the Olympics, issues in international relations under the current CBA, and details regarding the NHL participation in the 2006 and 2010 Olympics. Part IV of the Comment discusses future NHL participation in the Olympics, including the players’ reasons for wanting to play in the games, the team owners’ and the League’s reasons for not wanting to participate, the positions of international sporting associations, and the discussions between the League and the players thus far.

Part V discusses the potential resolutions to any dispute regarding NHL participation in the 2014 Games, the legal issues associated with those resolutions, and the strategic considerations that will dictate the course of action between the Players’ Association and the League. Part VI of the Comment reviews the dispute, and outlines the most likely outcome—an agreement between the League and the Players Association—and its likely terms.

---


2 Id.

I. INTRODUCTION

A. The Organizations

The looming dispute over NHL player participation in the 2014 Olympics involves five principal organizations: the NHL, the NHLPA, the International Olympic Committee (IOC), the International Ice Hockey Federation (IIHF), and the Kontinental Hockey League (KHL). The first NHL games were played on December 19, 1917.\(^4\) The League opened with five original member clubs in 1917, and has since expanded to include thirty member clubs with revenues of almost $2.9 billion,\(^5\) as well as over 950 players from more than fifteen countries.\(^6\) NHL games are played primarily in the United States and Canada, with some pre-season and early regular season games taking place in Europe, and are broadcast worldwide.\(^7\) The NHL is generally considered to be the top hockey league in the world.\(^8\)

Under the current CBA, NHL teams play an eighty-two game regular season, and NHL players are allowed to participate in the World Cup of Hockey, the Olympic Games, and the IIHF World Championships.\(^9\) The World Cup of Hockey is an international hockey competition organized by the NHL, taking place during the NHL off-season, and occurring intermittently during non-Olympic years.\(^10\) The IIHF World Championships take place annually during the NHL playoffs. As a result, the only NHL players allowed to participate are those whose team failed to qualify for, or had been eliminated from, postseason competition.\(^11\) During Olympic years,

---


however, the NHL schedules a two-week break in its season to allow selected players to participate in the Olympic Games.\(^\text{12}\) It is this two-week break, along with the potential for NHL players to suffer injury while participating in the Olympics, that drives the NHL’s hesitance to allow ongoing NHL player participation in the Olympics.\(^\text{13}\)

Organizationally, the NHL consists of its thirty member clubs—the teams—as well as NHL Enterprises, the not-for-profit association responsible for league operations.\(^\text{14}\) Each NHL member club operates individually, with its own revenues and costs, and revenues gained on a league-wide basis, such as television and advertising revenues, distributed among the member clubs.\(^\text{15}\) League-wide operational decisions are made by the Board of Governors, consisting of representatives from the thirty member clubs, and the NHL Commissioner, currently Gary Bettman, who is elected by the Board of Governors.\(^\text{16}\) International operations of business partnerships, marketing, and hockey operations are handled by NHL International, a division of NHL Enterprises.\(^\text{17}\)

The NHLPA “is the labour union for the professional hockey players in the National Hockey League.”\(^\text{18}\) The NHLPA was formed in 1967, and performs the functions of “represent[ing] the players of the [NHL] in all matters dealing with their working conditions and rights as professional hockey players,” and “assur[ing] that the terms of the Collective Bargaining Agreement are met,” among other functions.\(^\text{19}\) The CBA is the document governing the relationship between the players (through the NHLPA) and the teams and League. The CBA governs such issues as players’ share of league revenues, club payrolls, maximum player salary, minimum player salary, performance bonuses, compliance rules, revenue sharing, the Olympics, free agency, signing deadline, entry level players, the entry draft, sal-


\(^{15}\) Kevin McGran, NHL’s Secret Constitution Revealed, THESTAR.COM (June 6, 2009), http://www.thestar.com/article/646798.

\(^{16}\) NHL International, supra note 7.

\(^{17}\) About Us, NHLPA.COM, http://www.nhlpa.com/About-Us/ (last visited Nov. 18, 2011).

\(^{18}\) Id.
ary arbitration, qualifying offers, renegotiation of contracts, the regular-season schedule, training camp, the trade deadline, drug and performance-enhancing substances testing, and salary escrow.\textsuperscript{20} Organizationally, NHLPA membership consists of NHL players, and the NHLPA is run by a group of player representatives from the thirty teams and the Executive Director, who is chosen by the players.\textsuperscript{21} In international hockey, the NHLPA represents the players as they participate in the yearly IIHF World Championships, the Olympics, and the World Cup of Hockey—a “joint effort by the NHLPA and the NHL.”\textsuperscript{22}

The KHL was formed in March 2008,\textsuperscript{23} and is the premier professional hockey league in Russia and Eastern Europe. The KHL consists of twenty-three teams, in Russia (19 teams), Belarus (1 team), Kazakhstan (1 team), Latvia (1 team), and Slovakia (1 team).\textsuperscript{24} In its first year “the KHL . . . made an imprint on international hockey with its huge paychecks to European players and speculated expansion plans in Western Europe.”\textsuperscript{25} Though the KHL has attracted several prominent former NHL players by offering high salary contracts, often free from income tax,\textsuperscript{26} it endured financial difficulties during its first year, and “as many as a dozen teams had problems meeting payroll.”\textsuperscript{27} After its first year, the chairman of the board of the KHL, former NHL player and Hockey Hall of Fame member Viacheslav Fetisov, declared that the KHL may rival the NHL by 2014.\textsuperscript{28} KHL President Alexander Medvedev restated this ambition in summer 2010 when he informally offered NHL All-Star free-agent Ilya Kovalchuk a 17-year co-

\textsuperscript{21} About Us, supra note 18.
\textsuperscript{24} Back to 24, KHL.RU (May 9, 2011), http://en.khl.ru/news/2011/5/9/24094.html. The KHL was scheduled to have twenty-four teams for the 2011–2012 season; however, after a plane crash killed the entirety of the Yaroslavl Lokomotiv team, the league returned to twenty-three teams. See Stu Hackel, KHL’s New Lokomotiv Won’t Play This Season, Red Light, SL.COM (Sept. 12, 2011), http://nhl-red-light.si.com/2011/09/12/khls-lokomotiv-wont-play-this-season/.
\textsuperscript{27} Pakarinen, supra note 25.
tract with a team of his choice. Like its offer to Kovalchuk, however, the KHL’s attempt to surpass the NHL has thus far been unsuccessful.

The IIHF was founded in 1908 as a “federation of member national hockey associations governing the sport of ice hockey.” Currently, the IIHF has seventy “member national associations,” including Canada, the United States, Russia, and others. The national “member organizations,” such as USA Hockey, Hockey Canada, and the Ice Hockey Federation of Russia, are the governing bodies for ice hockey within their respective nations. The national member organizations have purposes such as “promot[ing] the growth of hockey in America and provid[ing] the best possible experience for all participants by encouraging, developing, advancing and administering the sport.” The objectives of the IIHF include acting “[t]o promote friendly relations among the member national associations” and “[t]o operate in an organized manner for the good of the sport.” The IIHF aims to accomplish these objectives by holding “a clear jurisdiction of ice and in-line hockey internationally” and “[o]versee[ing] the international transfers of players.” This essentially means that, in practice, the IIHF oversees any dispute arising between national member organizations, and acts as the governing body and operator of its international competitions.

Canada and the United States are member nations in the IIHF; however, “the NHL is not an IIHF member association.” The NHL has no authority overseas to punish players who “leave their NHL teams for international clubs,” because the NHL relies on a different player-transfer system than the one in place between all other IIHF member organizations. As the

33 Id. at 3.
34 Id. at 4.
35 IIHF Mission Statement, supra note 30.
36 Id.
37 Id.
39 Id.
NHL Player Participation in the Sochi Olympics
32:3A (2011)

governing body of international hockey, the IIHF works with the International Olympic Committee (IOC) to administer the ice hockey tournament at the Winter Olympics. As part of its administration of the Olympic hockey tournament, the IIHF’s powers include governing player eligibility and rules of the game.\(^{40}\)

B. The Conflict

The NHL first allowed its players to participate in the Olympics at the 1998 Games in Nagano, Japan.\(^{42}\) Before that, Olympic hockey was effectively an amateur competition. NHL players most recently participated in the 2010 Games in Vancouver, and it appears as though the players—especially the Russian players—desire to play in the 2014 Winter Olympics held in Sochi, Russia. However, there is currently no agreement in place allowing NHL player participation.\(^{43}\)

The 2005 NHL CBA binds the NHL and NHLPA to cooperate in participating in the Olympic Games, “as well as other International Hockey Games and tournaments.”\(^{44}\) The Players’ Association and the League agreed to the current CBA after a labor dispute between the two organizations caused the cancellation of the 2004–2005 NHL season.\(^{45}\) The current CBA runs through the 2011–2012 NHL season.\(^{46}\)

The agreement between the League and the Players Association expires before the 2014 Games; therefore, there is currently no agreement regulating player participation in Sochi. The players generally are in favor of continued participation,\(^{47}\) while the League, along with the team owners and general managers, is less enthusiastic about continued participation.\(^{48}\)


\(^{43}\) Kevin Allen, Would Players Revolt If NHL Didn’t Go to Sochi, Mucking and Grinding, USA TODAY (Aug. 24, 2010, 7:52 PM), http://www.usatoday.com/community/profile.htm?UID=7f199720956b03f0&plckPersonalPage=BlogViewPost&plckUserld=7f199720956b03f0&plckPostId=Blog%3a7f199720956b03f0&plckController=PersonaBlog&plckScript=personaScript&plckElementId=personaDest.

\(^{44}\) 2005 NHL CBA, supra note 1, § 24.5.


\(^{46}\) 2005 NHL CBA, supra note 1, § 3.1.

\(^{47}\) See generally Allen, supra note 43.

While further Olympic participation will be negotiated during the next round of collective bargaining, it is possible that no agreement will be reached and the players will be forced to choose between missing out on the Games and playing in violation of the League’s orders.\(^{49}\)

The fact that the Games will take place in Russia further complicates the potential dispute between the League, its players, and the IIHF. In the three seasons since the formation of the KHL in Russia, there have been repeated disputes regarding player contracts between the KHL and the NHL.\(^{50}\) The tension arising out of these disputes has lurked in the background of the discussion to date regarding NHL participation in the Sochi games.\(^{51}\) The IIHF has found itself in the middle of the disputes between the KHL and NHL, and, as such, the tension between the parties extends to include the IIHF.\(^{52}\) Though the discussions between the NHL and the NHLPA regarding Olympic participation do not depend on resolution of the disputes between the NHL and the KHL, one cannot fully understand the nature of the negotiations without understanding the strained relationship between the NHL and its European counterpart.\(^{53}\)

\(^{49}\) Allen, supra note 43.

\(^{50}\) Jeffrey P. Gleason, From Russia with Love: The Legal Repercussions of the Recruitment and Contracting of Foreign Players in the National Hockey League, 56 BUFF. L. REV. 599, 605 (2008). These disputes are discussed in further detail in Part III.A, infra.

\(^{51}\) See Ken Campbell, THN at the Olympics: KHL Poised to Offer Kovalchuk Huge Contract, HOCKEY NEWS (Feb. 27, 2010, 3:55 PM), http://www.thehockeynews.com/articles /31789-THN-at-the-Olympics-KHL-poised-to-offer-Kovalchuk-huge-contract.html; see also Pakarinen, supra note 25 (“Since the NHL and the IIHF don’t have a transfer agreement in place, the marketplace is more unpredictable than in the past and the NHL’s participation in the 2014 Sochi Olympics is on the line.”).

\(^{52}\) See generally Gleason, supra note 50 (discussing the history of player poaching in international hockey).

\(^{53}\) It is difficult to explain exactly why the player poaching issues between the NHL and KHL matter in a negotiation between the NHLPA and the NHL. The NHL really appears to be fighting a battle on three fronts: one against the Players’ Association, which wants Olympic participation guaranteed in the next CBA; one against the IOC and IIHF over media and marketing rights, scheduling issues, and other logistical control issues in Olympic participation; and one against the KHL and the IIHF. Regarding this last battle, the implication seems to be that the NHL knows that the Russians highly value the participation of Russian NHL players at the Sochi Games, and that by threatening to sit out, the NHL may be able to use Olympic participation as a bargaining chip in a future player transfer agreement with the KHL. This tactic seems questionable for two main reasons: the KHL and others associated with Russian hockey are aware that the NHL players overwhelmingly support Olympic participation, and they are aware of the threats by Russian NHL players (the ones who the Russian hockey authorities value the most) to play in the Games regardless of NHL decree. See

The looming dispute over NHL participation in the 2014 Olympics raises several interesting legal and business issues. Three main questions dominate the discussion of the dispute, and will be the focus of this Comment: if an agreement is reached between the League and the Players’ Association, what will it look like?; if the two sides fail to come to agreement, what will happen if players abandon their teams to play in the Olympics, against league orders?; and finally, what will happen if a player is unable to perform for his NHL team due to an injury sustained while participating in the Sochi games without League permission?

II. THE HISTORY OF THE NHL AND THE OLYMPICS

Ice hockey debuted as an amateur competition at the 1920 Summer Olympics in Antwerp, Belgium. In that inaugural competition, Canada won the gold medal and the Americans won silver. Once the Winter Olympics began play in 1924, ice hockey became a Winter Olympic sport. In 1956, the Soviet Union participated in Olympic Hockey for the first time. The Soviet team was a powerhouse because the best Soviet players were effectively required to play domestically and thus were not considered professionals. This led to the famed “Miracle on Ice” in 1980, in which a rag-tag group of collegiate Americans beat the Soviets four goals to three in a semi-final game, and went on to beat Finland to win the gold medal.

The 1988 Winter Olympics in Calgary were largely an amateur affair. “[A] handful of NHL players participated,” but “they were required to take unpaid leaves from their NHL clubs.” In 1991 the Soviet Union dissolved, and, after a player-owner lockout and shortened season in 1994–1995, an agreement was reached in 1995 between the IOC, the IIHF, the NHL, and the NHLPA to allow NHL players to participate in the Olympics. NHL players were freely able to participate in the Olympics for the
first time in the 1998 Games in Nagano. Unlike the current CBA, which explicitly provides for participation in the Olympics, the 1995 CBA (the operative agreement at the time of the 1998 Olympics) did not contain a provision for Olympic participation as originally drafted, and—prior to the IIHF-NHL agreement mentioned above—NHL players were prohibited from participating in non-NHL games, with the exception of some exhibition games between NHL teams and players and foreign opponents explicitly provided for in Article 24 of the 1995 CBA. The NHL adjusted its schedule to accommodate the games, though some players from smaller countries missed preliminary games because of NHL schedule conflicts.

In 2001, the NHL and the IIHF reached their first player transfer agreement, governing player transfers between NHL clubs and European IIHF national member organizations, requiring the NHL to pay the European teams when a player under contract with a European team leaves for the NHL. This agreement governed player transfers from 2001 to 2004 and provided a mutually agreeable framework that enabled continued Olympic participation. As such, the NHL participated in the 2002 Winter Olympics, employing the same rules and schedule as it had for the 1998 Games.

III. THE CURRENT COLLECTIVE BARGAINING AGREEMENT AND THE OLYMPICS

On September 15, 2004, the Collective Bargaining Agreement between the NHL and the NHLPA expired. The owners locked out the players the following day, which prevented the players from accessing team or league facilities until the Players Association and the League agreed to a new CBA. On February 16, 2005, NHL Commissioner Gary Bettman announced that the remainder of the 2004–2005 NHL Season would be canceled. The Players Association and the League reached a new Collective Bargaining Agreement on July 22, 2005. The new CBA lasts through the
2011–2012 NHL season, and provided for participation in the 2006 Winter Olympics in Turin and the 2010 Winter Olympics in Vancouver.\footnote{id_at_art.24.5.}

Article 24 of the 2005 CBA governs player participation in “International Hockey Games.”\footnote{id_at_art.24.} In addition to providing for participation in the 2006 and 2010 Olympics, Article 24 provides for revenue sharing, contract negotiations and rights, and participation in the IIHF World Championships taking place yearly around the same time as the NHL’s Stanley Cup Playoffs.\footnote{id_at_art.24.5.} As an important supplement to the strict regulations governing player participation in the Olympics, Article 24 of the CBA further provides that “[t]he NHL and the NHLPA shall continue to cooperate in the development of long range international hockey planning, including the World Cup of Hockey and NHL participation in the Olympic Games, as well as other International Hockey Games and tournaments.”\footnote{id.}

The inclusion of a term specifying continued cooperation in development of international hockey suggests that the NHL and the Players Association intended, at least at the time of the execution of the 2005 CBA, to keep the channels of communication open regarding future Olympic participation.

A. International Relations Since July 2005

On August 16, 2005, the NHL and the IIHF negotiated a new transfer agreement to cover the 2005–2006 and 2006–2007 seasons. The Russian Ice Hockey Federation, disagreeing “with the financial compensation, transfer limit, and transfer deadline provisions in the agreement,” refused to sign the agreement, leading to conflicts regarding players transferring between the NHL and Russia.\footnote{Gleason, supra note 50, at 605.} There are two basic types of conflicts between the NHL and Russia that have led to the international tension underlying the Olympic dispute: conflicts over Russian players coming to the NHL and conflicts over players leaving the NHL for the KHL while still under contract in the NHL.

The former type of conflict is exemplified by the controversy surrounding one of the NHL’s best young stars: Evgeni Malkin of the Pittsburgh Penguins. With the second overall pick in the 2004 NHL Entry Draft, the Pittsburgh Penguins selected a Russian, Evgeni Malkin.\footnote{id_at_606; see also Evgeni Malkin Pittsburgh Penguins 2010-11 Bio, PITTSBURGHPENGUINS.COM, http://penguins.nhl.com/club/player.htm?id=8471215&view=bio (last visited Nov. 18, 2011).} When Malkin was drafted by Pittsburgh, he was under contract with his Russian
club—Metallurg Magnitogorsk—through the 2007–2008 season. In August 2006, “[d]espite 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.” When Metallurg went to Helsinki, Finland for a training camp on August 12, 2006—a mere five days after Malkin and Metallurg renegotiated his contract to last only through the 2006–2007 season—Malkin “quietly slipped away,” staying in a hotel in Helsinki until he was able to enter the United States. Once in America, Malkin signed a contract with Pittsburgh, and Metallurg began legal proceedings against Malkin in Russia.

After such covert tactics involving sneaking away in the dead of night and hiding out in Finnish hotels, it should come as no surprise that the legal battle that followed Malkin’s defection was a complex one. In an arbitration hearing in front of the Russian Ice Hockey Federation on September 15, 2006, in which Malkin was not present or represented, the arbitration committee ruled—to no one’s surprise—that Malkin had violated his contract and was barred from playing for any team other than Metallurg.

Additionally, Metallurg filed a lawsuit in the United States District Court for the Southern District of New York against the NHL and the Penguins. Metallurg’s complaint alleged seven causes of action:


Metallurg’s request for a preliminary injunction was denied and ultimately its claims against the League and the Penguins were dismissed. Malkin played for Pittsburgh in the 2006–2007 NHL season; however the legal battle that hovered over his debut is indicative of the problems that have plagued NHL-KHL relations.

The conflict between the NHL and the KHL goes the other way as well. Recently, the NHL and the KHL disputed over the rights to Alexander Radulov, one of the most talented and highly touted young players in

---

75 Gleason, supra note 50, at 606–07.
76 Id. at 607.
77 Id. at 608.
78 Id.
79 Id.
81 Id.
82 Gleason, supra note 50, at 609, 634.
the NHL, who, in 2008 after two seasons in the NHL, returned to Russia when he signed with Russian club Salavat Ufa. Radulov had one year remaining on his contract with the NHL’s Nashville Predators when he signed with Salavat. Money was generally considered to be the primary motivation for Radulov’s defection: he was slated to make a base salary of $984,000 in the final year of his contract with Nashville, while his contract with Salavat was for three years, paying an estimated $13 million, and not subject to income tax. Notably, the Radulov defection came mere days after the NHL, the IIHF, and the KHL reached an agreement not to poach each other’s players.

The IIHF investigated the contract between Radulov and Salavat and found it invalid due to the existence of a binding contract between Radulov and the Predators. However, the IIHF also found that because of its bylaws and the absence of any transfer agreement between the NHL and the Russian Ice Hockey Federation, it could do nothing to enforce its finding that Radulov was still bound by his NHL contract. As of writing, Radulov is still playing in the KHL.

While the controversies regarding Malkin and Radulov may not have any legal effect on the future of NHL participation in the Olympics, they illustrate the tensions that have developed between the NHL, the NHLPA, the IIHF, the IOC, and the Russian Ice Hockey Federation, and demonstrate the difficulties inherent in any dispute between the organizations, including in the upcoming negotiations regarding the Sochi Games.

B. Olympic Participation Under the Current CBA

Under section 24.5 of the 2005 NHL CBA, NHL players were allowed to participate in the 2006 and 2010 Winter Olympics. NHL players dominated the rosters of the Canadian, Czech, Finnish, Russian, Slovak, Swedish, and American teams, accounting for roughly ninety percent of those teams’ rosters. In 2006, Sweden captured the gold medal, with Finland...
taking silver, and the Czech Republic taking bronze.  All major tournament awards were won by NHL players.

All was not good for the League, however. Every NHL general manager’s worst fear came true when star Czech goaltender Dominik Hasek of the Ottawa Senators injured his groin in the first game of the Olympics. Hasek did not play again in the Olympics, and ended up missing the remainder of the NHL season and playoffs. Hasek was having a stellar season before the Olympics, and his NHL team bowed out early in the playoffs without their Hall of Fame goaltender. This fear of injury to a star player is one reason why general managers, team owners, and league executives are hesitant to agree to the further participation in the Olympics. Further compounding this fear of injury is the fact that only the top players in the NHL play in the Olympics, so generally any injury sustained in the Olympics is to a top-tier player on an NHL team. Further, the disruption of the NHL regular season exemplified the League’s concerns regarding scheduling. In addition to instituting a two-week “break” to allow for Olympic participation, the League saw many of its star players unable to return in time for the first games after the Olympics. While the Hasek injury demonstrated every owner’s worst fear regarding Olympic play, the scheduling conflicts represented their most despised reality, as the scheduling problems inherent in Olympic participation are present every time the League participates (though this inconvenience is lessened when the Olympics are held in North America).

As much as the Hasek situation from the 2006 Olympics embodies the League’s greatest fear, the 2010 Olympic Hockey tournament represents the absolute pinnacle of what the players, the teams, and the League could hope for from a marketing perspective. The 2010 games were played in Vancouver, with most games played at television audience-friendly times for North American viewers. The gold-medal game featured the heavily favored Canadian team against the underdog American team that made an impro-

---

96 See Ice Hockey Results, YAHOO! SPORTS, http://sports.yahoo.com/olympics/vancouver/ice_hockey/results/full;_ylt=AkYrvYcvCslJL2DlSgP2qKDSbV_/?is_medal= (last visited Nov. 18, 2011).
able run to the final.⁹⁷ The finale was the most-watched hockey game in decades, and featured a dramatic comeback by the Americans with seconds left in regulation, before the “face of the league” Sidney Crosby, of Canada, scored the gold-medal-winning goal in sudden-death overtime.⁹⁸ From a business perspective, the NHL could not have scripted a better storyline for the 2010 Olympics.

The 2006 and 2010 Olympics represent the ends of the spectrum as far as NHL participation in the Games is concerned. The 2006 Games saw lengthy travel for the players, time zone issues for television broadcasts of games, a season-ending injury to one of the game’s top players, and several players missing the first game after the Olympics. On the other hand, the 2010 Games saw television-friendly scheduling, an ideal (from a marketing perspective) matchup in the final, a riveting game, record viewership, and overwhelmingly positive exposure and public reaction to the tournament. From the League’s perspective, these two Olympic experiences represent the pros—exciting play and extensive media coverage—and cons—primarily star player injury and significant interruption of the NHL regular season—that must be weighed in their purest form.

IV. CONCERNS ABOUT FUTURE NHL PARTICIPATION IN THE OLYMPICS

Despite the immense success of the 2010 Olympic hockey tournament, future NHL participation is in doubt. The current CBA is only valid through the end of the 2011–2012 NHL season.⁹⁹ As such, there is no agreement in place regarding NHL players and their participation in the 2014 Games in Sochi, Russia. While one may expect the league to want to ride the momentum of the 2010 Games and attempt to capitalize further on the international hockey spectacle, this is not necessarily the case.

NHL executives, general managers, and team owners are hesitant to commit to future Olympic participation because of the possibility of injuries to star players, fatigue to players, and the economic costs (such as maintaining facilities and arenas for an extra two weeks, extending employment of seasonal workers, lost earnings, and reduced television exposure) of shutting down the League for three weeks during February—the middle of the NHL’s regular season.¹⁰⁰

⁹⁹ 2005 NHL CBA, supra note 1, § 3.1.
The players, however, want to play in the Games and in some cases have stated a willingness to play regardless of the NHL’s position on the issue. According to a 2008 NHLPA poll, ninety-five percent of players support Olympic participation. Russian NHL all-stars Alexander Ovechkin and Evgeni Malkin have both stated that they intend to play for Russia in Sochi, regardless of a lack of permission or threat of penalties from the NHL. Washington Capitals owner Ted Leonsis expressed a willingness to support Ovechkin in his Olympic efforts, regardless of the League’s official position, going so far as to say that he “hope[s] it never comes to the league say[ing] no and Alex say[ing] he’s going, because [Leonsis would] probably fly him over [him]self.”

The two Russian superstars are not alone in their willingness to play in the Games regardless of penalty. Referencing an “obligation” to participate in the Olympics, two-time U.S. Olympian and 2010 Team USA Captain Jamie Langenbrunner stated that American and Canadian players might be willing to ignore NHL orders and participate in the Olympics along with the Russians. Regardless of their willingness to ignore the league’s edict, the players want the League to agree to continued Olympic participation.

The conflict regarding Olympic participation was the main subject of discussion at the World Hockey Summit in the summer of 2010. IIHF president René Fasel encouraged the League to bring its players to the 2014 Games and is confident that some sort of agreement will be reached. Joining Fasel in voicing support for NHL participation in the Games at the summit were current players Jamie Langenbrunner and Daniel Alfredsson and retired Hall of Fame player, and now chairman of the board of the KHL, Viacheslav Fetisov. On the other side, NHL Commissioner Gary Bettman stressed that the league will take a cautious, measured approach to

---

101 Burnside, supra note 100.
105 Burnside, supra note 100.
106 Allen, supra note 43.
future participation and will only continue to participate if the benefits outweigh the costs.\textsuperscript{109} Detroit Red Wings General Manager Ken Holland and Toronto Maple Leafs General Manager Brian Burke echoed Bettman’s satisfaction with the 2010 games and reluctance to commit going forward.\textsuperscript{110} While the sides appear to be in opposition and many think that the League will use further Olympic participation as a bargaining chip to gain concessions from the NHLPA in the next round of CBA negotiations,\textsuperscript{111} it is also possible that the League could cave on the issue if it is convinced that it would lose 100 of its best players for three weeks during the 2013–2014 season.

V. POSSIBLE OUTCOMES REGARDING 2014 OLYMPIC PARTICIPATION

Two sets of possible outcomes exist regarding NHL participation in the 2014 Olympic Games: one where the League and the Players’ Association do not agree to allow the players to participate in the Games, and one where the players and the League do reach some sort of agreement to participate. This Comment first discusses the various ways the League could act in response to the players deciding to play in the Games against League orders. In analyzing the legal options, I assume that the grievance provisions and dispute resolution procedures of the upcoming CBA would be the same or substantially similar to those of the current CBA. Accordingly, the current CBA is used for the framework of the legal analysis. I will also analyze the likelihood of the various League responses, and their pros and cons. After discussing those options, I analyze what an agreement allowing for player participation could look like, and the strategic reasons for and against the proposed options.

A. If No Agreement is Reached

The current CBA allows for Olympic participation, but it is impossible to know what the next CBA will mandate. For the sake of clarity, this analysis will proceed as if the next CBA were identical to the current one, except that it will prohibit, rather than allow, Olympic participation. Accordingly, the legal analysis of a potential player revolt will be multifaceted. First, I will discuss how the current CBA would deal with players entering an unauthorized tournament, in order to provide background. I will

\textsuperscript{109} Id.
\textsuperscript{110} See id.
then discuss and analyze the potential legal remedies the League could pursue if the players chose to play in the Olympics absent league permission.

Article 17 of the 2005 CBA governs the grievance process.\textsuperscript{112} A grievance is defined as “any dispute involving the interpretation or application of, or compliance with, any provision of [the CBA], including any” Standard Player Contract (SPC).\textsuperscript{113} The CBA provides a procedure for dealing with grievances. The first step is the filing of the grievance, which must specify the type of remedy sought.\textsuperscript{114} Then, representatives from the NHL and the Players’ Association meet and discuss resolution and settlement as part of a “Grievance Committee.”\textsuperscript{115} If the conflict is not resolved by the Grievance Committee, the CBA allows the party seeking relief the option to take the conflict before an impartial arbitrator.\textsuperscript{116} The arbitrator then hears the case and renders a decision. “The decision of the Impartial Arbitrator will constitute full, final and complete disposition of the Grievance, as the case may be, and will be binding upon the Player(s) and Club(s) involved and the parties to” the CBA.\textsuperscript{117}

In addition to the procedural steps, the CBA governs contractual breaches and remedies. The SPC, included as an appendix to the CBA, provides guidance on how a legal dispute would be decided.\textsuperscript{118} Paragraph 2, subsection C of the SPC mandates that the player “play hockey only for” his NHL club.\textsuperscript{119} To reinforce the point, paragraph 7 notes that injuries sustained in prohibited sporting activities “may impair or destroy his ability and skill as a hockey Player” and prohibits players from playing “football, baseball, softball, hockey, lacrosse, boxing, wrestling, or other athletic sport without the written consent of the Club.”\textsuperscript{120} Paragraph 5 of the SPC deals with payment and compensation for injuries sustained while participating in hockey activities.\textsuperscript{121} If a player is injured while participating in a sport prohibited by paragraph 7, he is not entitled to compensation or payment.\textsuperscript{122}

The principal courses of action the League could pursue include suspending the renegade players after their return from the Games, fining those players, simply not punishing the offending players, or seeking an injunct-
NHL Player Participation in the Sochi Olympics
32:3A (2011)

... tion to prevent participation. The following section discusses the legal issues involved in each of those options, and analyses the advantages and disadvantages of each option. This section also discusses the legal repercussions of a player suffering an injury during prohibited Olympic play.

1. Suspension

a. Analysis

One punishment option for the League would be to suspend any players who ignored the League and went to Sochi. The Commissioner has the power to suspend any player for any conduct “detrimental to the League.” Article Six of the NHL Constitution specifies the disciplinary powers of the NHL Commissioner, and they are substantial and broadly defined. The Commissioner has the power to levy punishment whenever he or she determines:

based upon such information and reports as he may deem sufficient, that any person connected with the League or a Member Club has either violated the Constitution, the By-Laws, or any other governing rule or regulation of the League, or has been or is guilty of conduct (whether during or outside the playing season) detrimental to the League or the game of hockey.

The Commissioner has a wide range of disciplinary powers under the NHL Constitution, including “expelling or suspending the person for a definite or indefinite period,” voiding that person’s contract with his team, “imposing a fine on the person not exceeding One Million dollars ($1,000,000) or such greater amount as may be prescribed” by the relevant governing league law, or awarding or taking away draft picks or players. Additionally, the penalties levied by the Commissioner are “final and not subject to any review.”

As discussed above, playing in the Sochi Games without League permission violates the SPC and the CBA. Those are likely considered governing rules and regulations sufficient to warrant supplemental discipline. Further, the Commissioner would certainly be able to claim that by ignoring League orders, and leaving their NHL teams, breaching players participated in conduct detrimental to the League. Given that Commissioner Gary Bettman has previously suspended players for offenses far less damaging and insubordinate than ignoring League orders to play in a tournament dur-

---

123 NHL Const. art. VI, § 3(j)(1).
124 See generally NHL Const. art. VI.
125 NHL Const. art. VI, § 3(j)(1) (emphasis added).
126 NHL Const. art. VI, § 3(j)(1)(a)–(d).
127 NHL Const. art. VI, § 3(j)(3).
ing the NHL season, it is certainly possible that the League would suspend any players who go to Sochi without permission. If the League chose not to pursue an injunction to prevent players from breaching by playing in Sochi, the Commissioner could certainly suspend any breaching players upon their return from Russia.

b. Strategic considerations

The main advantage of the suspension would be that it sends a message to the players to follow League orders. Suspensions could prevent similar conduct in the future, and pre-emptive threats of suspension, and resulting loss of pay, could prevent the players from going overseas in the first place.

However, the suspension option also has several downsides. One downside deals with the length of the suspension. A very short suspension would likely be insufficient to deter players. However, once the suspension became long enough to function as a deterrent, it would likely exacerbate several of the problems the League has with players leaving in the first place—i.e., the teams would be without their best players for even longer, the on-ice product would suffer accordingly, and the League’s business interests would be harmed. Further, suspensions would greatly increase hostility between the players and the League.

Another consideration for the League would be potential fan backlash. If the success of the 2010 Olympic hockey tournament is a valid indicator, the fans of the game approved of NHL participation in the Games. Suspending the best players on fans’ favorite teams would not be a popular move for a league still grappling with the fan fallout of the 2004–2005 lockout. This problem, however, is not unique to the suspension option. Fans may react similarly to the League (through the teams) using the legal system to enjoin players from participating.

The suspension option is a compromise available to the League: the players would get to participate in the Games, but not without punishment. Despite this, the option of suspending players is a far worse option than


\[129\] See Most Watched Hockey Game in 30 Years, supra note 98.
pursuing an injunction to prevent participation, or simply allowing the players to participate without any punishment. Any suspension, or threat of suspension, would either be too short to have any deterrent effect or, if long enough to deter, would exacerbate many of the problems of Olympic participation if any player actually called the League’s bluff. The suspension option would likely fail to prevent participation, making it inferior to an injunction, and would exacerbate the problems of Olympic participation, rendering it an inferior option to simple non-punishment. Because of these problems of implementation, the suspension-only option is the worst of the options at the League’s disposal for preventing players from playing in the Sochi Games.

2. Fines

Perhaps the best “compromise” option available to the League would be to fine the players, but not suspend them, for participation in the Sochi games. In addition to being able to dock the players’ pay for the time missed due to Olympic play, the League could, under Article 6 of the NHL Constitution, impose penalties of up to $1 million for conduct detrimental to the League.\textsuperscript{130} Such heavy fines alone, or combined with suspension, could definitely dissuade players from leaving for Sochi, while leaving extremely high-paid players, such as Ovechkin ($9 million for the 2013–2014 season)\textsuperscript{131} free to choose between money and country.

The fines option would require the League to indicate its intent to fine before the Olympics in order to adequately deter players. The advantages to this option are that fines might actually function as a deterrent, they would allow the players the option of placing a value on their participation, and they would allow the League to continue as-is after the Olympics, without any fan backlash due to player suspensions. The disadvantages of this method are limited: the players may participate anyway and the fans may still disapprove of the League trying to prevent Olympic participation. Threats of heavy fines for Olympic participation are likely the best option for the League if the parties are unable to reach some sort of agreement. The fines would allow the League to implement a very forceful deterrent, while at the same time avoiding the numerous disadvantages the other methods present.

3. No punishment

Another option at the League’s disposal would be to simply not punish the players. The teams would play without their top players for the duration of the tournament and refuse to pay the players during that time, as occurred

\textsuperscript{130} NHL Const. art. VI.
with several players during the 1988 Olympics in Calgary.\textsuperscript{132} The primary advantage of this plan is that it would likely require the least effort and would cause the least possible tension in player-management relations. Additionally, the teams would be able to have their best players return to action as soon as their teams were done in the Games, rather than suspending them and missing out on their best players’ services for even more time. One subtle advantage of this option is that it could work as a sort of parity-imposing mechanism. The top NHL teams generally have the most Olympians. If the players returned only after their national teams were eliminated, the best teams would be more likely to be missing more players for longer than the weaker teams. This could temporarily help improve the competitive balance in the League, at least in theory, though it would harm the stronger teams lacking players.

The disadvantages of such a course of action, however, are numerous. The League would be forced to play without its best players for the duration of the Games. This would result in a lower quality on-ice product and likely a significant decrease in fan attendance, television viewership, and advertising revenues overall, despite any temporary increase in competitiveness by the “weaker” teams. Additionally, not only would the League be without its best players, but also it would be competing for airtime and coverage with the Olympics.\textsuperscript{133} If the League chose not to punish players, it will also lose the ability to use Olympic participation as a bargaining chip in future CBA negotiations. The players would have no incentive to make concessions in order to guarantee Olympic participation if they knew that the League would not punish them for playing anyway.

Choosing to allow the breaching players back into the League without any sort of supplemental discipline or legal action would be a huge concession by the League, and could be viewed as caving in to NHLPA demands. Despite that, non-punishment is still a viable option for the League. Non-punishment would minimize the negative effect on the NHL as a business, would improve player-management relations, and would appease the fans, and is therefore likely superior to the options of suspension and injunctive relief.

\textsuperscript{132} Pellegrino, supra note 59.

\textsuperscript{133} This includes both general coverage of the sport and game telecasts. While live broadcasts of the Olympic Games would not overlap with NHL games due to differences in time zones, some games (games involving the United States and late-round elimination games) are rebroadcast in primetime and may directly compete with NHL broadcasts.
4. Injunction

a. Analysis

A fourth option for the League would be for a team to file a grievance requesting an injunction to prevent a player from breaching his contract.\(^{134}\) The provisions of the Standard Player Contract specifically enable the team to successfully seek an injunction. Paragraph 6 of the SPC reads as follows:

The Player represents and agrees that he has exceptional and unique knowledge, skill and ability as a hockey player, the loss of which cannot be estimated with certainty and cannot be fairly or adequately compensated by damages. The Player therefore agrees that the Club shall have the right, in addition to any other rights which the Club may possess, to enjoin him by appropriate injunctive proceedings without first exhausting any other remedy which may be available to the Club, from playing hockey for any other team and/or for any breach of any of the other provisions of this SPC.\(^{135}\)

There are two important things to note about paragraph 6 of the SPC. First, in addition to containing language providing for injunctive relief, the paragraph contains language intended to satisfy the injunctive requirement that "the defendant is a person of unique or exceptional skill and ability."\(^{136}\) The language in paragraph 6 allowing the team "to enjoin . . . [the player] by appropriate injunctive proceedings without first exhausting any other remedy which may be available to the Club"\(^{137}\) appears to allow the teams to seek an injunction through the grievance process required by the CBA, or by bypassing that requirement and filing suit in court.

Second, the language at the end of the paragraph specifying injunctive relief is available "for any breach of any of the other provisions of this SPC"\(^{138}\) is important because it captures Olympic participation within its scope. Playing in the Olympics absent team and League permission would

\(^{134}\) It is possible that a player could elect to participate at Sochi and the team could refuse to seek an injunction (such as the case with Ovechkin and the Capitals, discussed above), in which case the League itself may elect to bring suit. This would raise an interesting issue of the League’s standing to sue, as it is not a party to the contract between player and team. It is, however, party to the contract between the League and the NHLPA, which the League would claim the player would also violate by participating in the Olympics. The League could likely also allege sufficient injury independent of the team’s injury, as the league has an interest in preventing players on other teams from leaving, and in protecting the integrity of the on-ice product league-wide.

\(^{135}\) SPC, supra note 118, ¶ 6.

\(^{136}\) Miller, supra note 8, at 186.

\(^{137}\) SPC, supra note 118, ¶ 6 (emphasis added).

\(^{138}\) Id.
violate paragraph 2, subsection C of the SPC, mandating that the player play hockey only for his NHL team, and paragraph 7, by participating in a prohibited sporting activity. Paragraph 6 allows for injunctive relief to prevent breach of these terms.

Even without the injunction-related provisions in the SPC, the team would likely be able to obtain an injunction. In order to successfully pursue an injunction, the team would need to show that the players have committed or are threatening to commit a breach of contractual duty, and that the contractual “duty is one of forbearance” or “the duty is one to act and specific performance would be denied only for reasons that are inapplicable to an injunction.” Because the injunction would seek to prevent the player(s) from participating in prohibited activity, the team would be seeking to enforce a duty of forbearance and therefore would be eligible for an injunction.

The team would also have to show that damages would be inadequate to protect its interest. In determining whether damages provide an adequate remedy, the arbitrator would consider “the difficulty of proving damages,” the difficulty of obtaining replacement performance using damages, and “the likelihood that an award of damages could not be collected.” A team likely could prove that damages would be insufficient. It would be exceptionally difficult to prove damages with any degree of certainty, if either a star player missed games to participate in the Olympics or if the player missed playing time because of an injury sustained during Olympic play. The player would likely argue that the League or club could look to attendance and revenue differences between the games missed and the season averages; however, such a determination would not be nearly accurate enough as those figures are seriously dependent on factors such as the opposing team, other competing entertainment options, and the recent successes of the teams. Further, the League would argue that competing teams are harmed in a manner that cannot be adequately remedied by damages. The League spends significant amounts of time and money marketing young superstars such as Sidney Crosby, Alex Ovechkin, and Evgeni Malkin. Opposition teams playing home games could be harmed as those teams could see attendance numbers and revenues decline for certain games if the top opposition players were overseas playing in the Olympics.

139 Id. ¶ 2(c).
141 See id. § 357(2)(a).
142 See id. § 359(1).
143 Id. § 360(a).
144 Id. § 360(b).
145 Id. § 360(c).
In 1972, many of these same legal issues played out in a dispute between former NHL goaltender Garry Peters and his team, the New York Islanders.\textsuperscript{146} The Islanders had paid $300,000 for the rights to services for the 1972–1973 season, but Peters had signed a contract for the upcoming season with the World Hockey Association (WHA), a now-defunct competing professional hockey league.\textsuperscript{147} In granting preliminary injunctive relief to the Islanders, restraining Peters from playing in the WHA, the court noted:

\begin{quote}
While a promise to render personal services will not be specifically enforced by an affirmative decree, it has long been settled that injunctive relief may be granted to restrain an employee’s violation of negative covenants in a personal services contract and such enforcement has in fact been granted in numerous cases involving professional athletes.\textsuperscript{148}
\end{quote}

The court held that the principle prerequisite for enforcing a personal services contract “is that the player be an athlete of exceptional talent,” was easily satisfied in the case of a professional athlete.\textsuperscript{149} The court further held that “[t]he elements of irreparable harm to . . . [the Islanders] are clearly present,” and that the Islanders were “entitled to a preliminary injunction enjoining Peters pendente lite from playing professional hockey for anyone but plaintiff during the current hockey season and for rendering any professional services for anyone but plaintiff in that connection for the period to and including” the conclusion of the season.\textsuperscript{150}

As indicated by the CBA, and illustrated by the Peters case, if the players decide to go to Sochi notwithstanding the lack of agreement between the NHL and the NHLPA, a team would almost certainly be able to obtain an injunction ordering the players to not go overseas. Even if a team obtained the injunction, however, there still may be other legal issues associated with the injunction to prevent Olympic participation.

While an injunction would likely prevent the overwhelming majority of players from going overseas, it might not serve as a complete deterrent. It is possible that a high profile Russian player, such as Alex Ovechkin, could decide to play in the Games no matter the consequences. A player of Ovechkin’s caliber would certainly be able to obtain a contract in the KHL, given that several Russian NHL stars—usually when nearing the end of their playing careers—have already signed lucrative deals to return to playing in their homeland.\textsuperscript{151} A player such as Ovechkin might choose defect-

\textsuperscript{147} Id. at 874–75.
\textsuperscript{148} Id. at 875 (citation omitted).
\textsuperscript{149} Id. at 876.
\textsuperscript{150} Id. at 882 (emphasis added).
ing to the KHL and playing in the Sochi games over remaining in the NHL and missing the Sochi Games. This possibility is made somewhat more reasonable by the higher salaries paid in the KHL.  

In order for this to be a viable option for a player, however, he would have to actually be able to play in the KHL and the Olympics. The NHL would surely pursue legal action, most likely to obtain an injunction. If successful, the League would then seek to enforce the injunction. Luckily for the Russians, in such a situation even losing at trial in the United States may not prevent the players from participating in the KHL—though the Olympics may be a different story. In cases involving top-tier players, the poaching league always seems to end up getting its way in the end.

The Russians may even view ignoring an American injunction as payback for the perceived slight in Dynamo v. Ovechkin, a failed attempt by the Russian Ice Hockey Federation to “utilize the 1958 United Nations treaty requiring that courts in one signatory country uphold valid arbitration rulings from other signatory countries.” In Dynamo v. Ovechkin, the arbitration committee of the Russian Ice Hockey Federation found that Ovechkin had renewed his contract with Dynamo Moscow (then a member of the top Russian professional hockey league) despite the fact that he had specifically chosen not to sign such a document. Dynamo then failed in

---

152 See discussion of Alexander Radulov, supra Part III.A.
153 This was the course of action taken by the Russian Federation in poaching disputes involving Ovechkin, Malkin, and Nikolai Zherdev. See Miller, supra note 8, at 177–85.
154 Zdrojeski, supra note 39, at 786 (“[T]he concerned parties rarely achieve mutually agreeable results; the vast majority of player poaching cases never see the inside of a courtroom since the facts typically prove nothing more than a blatant disrespect for both contract law and the hockey leagues of other countries.”).
155 See supra Part III.A (discussing the disputes over Malkin and Radulov—both won by the poaching league); see also Miller, supra note 8, at 184 (discussing the successful poaching of Russian Nikolai Zherdev by the Columbus Blue Jackets); Lincoln Hockey LLC v. Semin, Civil Action 05-02084 (HHK), 2005 U.S. Dist. LEXIS 34047 (D. D.C. Dec. 5, 2005) (failed suit by the NHL’s Washington Capitals to prevent Alexander Semin, then under contract with the Capitals, from playing in Russia for the season following the 2004–2005 lockout, in violation of Capitals team orders).
156 Miller, supra note 8, at 177.
158 Miller, supra note 8, at 178–79.
its attempt to enforce its arbitration victory in the United States District Court for the District of Columbia through “Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which both the United States and Russia are signatories.”

If the KHL were to lose a player-poaching suit, the Russian courts could find a highly attenuated justification for refusing to acknowledge an American arbitration or court judgment. Additionally, attempts by the NHL to prevent players from defecting to the KHL would be hampered by the fact that the Russian Ice Hockey Federation and its arbitration board have not historically shown the utmost respect for due process of the law, or for good faith and fair dealing in legal matters.

b. Strategic Considerations

The injunction is the best option for the League, should it decide it absolutely needs to prevent the players from going to Sochi. The League, or the individual teams, would be very likely to obtain an injunction to prevent players from breaching the terms of the CBA and the SPC by playing in the Sochi Games without League Permission.

While there is the very slight possibility that players such as Ovechkin or Malkin could ignore such an injunction and simply return to Russia, this is unlikely, especially considering how difficult it was for those players to go from Russia to the NHL. Further, if a player tried to leave the NHL for the KHL in order to play in the Games, the IOC and the IIHF would most likely respect an injunction and prohibit that player from participating in the Games. As such, the legal clout that would go with an injunction would almost certainly suffice to prevent players from going to Sochi. Here, the simplest option is the best. If the League truly wants to prevent its players from participating in the Sochi Games, it should seek an injunction preventing the players from breaching the terms of the SPC.

5. Injuries During Prohibited Olympic Play

Another interesting legal question deals with how the teams and League would respond to a player suffering an injury while playing in the Olympics against League orders. If a player is seriously injured while competing in the Olympics, it will be very damaging for the player finan-

---

159 Id. at 179.
160 Dynamo, 412 F. Supp. 2d at 29.
161 See, e.g., Miller, supra note 8, at 171–73 (discussing how Malkin was forced by KHL team officials to sign a contract extension at 3 a.m., and how team officials seized his passport immediately thereafter to prevent him from leaving for the United States); see also Jason Cato & Karen Price, Arbitration Committee Rules Against Malkin, TribLive: News (Sept. 16, 2006), http://www.pittsburghlive.com/x/pittsburghtrib/s_470833.html (noting that Malkin was not present or represented at his arbitration hearing before the arbitration committee of the Russian Ice Hockey Federation).
cially. As discussed above, any injury suffered during prohibited Olympic play would be considered an injury from a prohibited activity under paragraph 7 of the SPC; if the player is unable to return to play, the contract will be discharged.162 If the injury is less severe, the player will miss out on pay for the duration of the injury.163

A situation like this occurred with former All-Star defenseman Uwe Krupp. Krupp signed a four-year, $16.4 million contract with the Detroit Red Wings before the 1998–1999 Season.164 After the team discovered that Krupp had been participating in dog sledding while trying to recover from a pre-existing back injury, the team suspended him without pay for roughly two seasons for violation of paragraph 7 of the SPC.165 The NHLPA filed a grievance on Krupp’s behalf, but the dispute was settled before the grievance committee rendered a decision, when the team brought Krupp back after he received medical clearance before the 2001–2002 Season.166 Had Krupp suffered the initial injury while dog sledding, the suspension without pay would almost certainly have been upheld. The Krupp dispute does, however, raise an interesting potential problem for the League. If a player were to aggravate a pre-existing injury, or delay his recovery from a pre-existing injury while participating in the Olympics, it may be more difficult to suspend that player without pay.

The legal situation regarding injuries during prohibited Olympic play is not as clouded as it is for some of the other legal issues surrounding Olympic participation. Essentially, a breaching player would bear the full financial risk of injury during the Games. As the Uwe Krupp dispute showed, however, the injury issue may be complicated if a player merely aggravates an existing injury, or delays full recovery from an existing injury.

B. If the Parties Reach an Agreement

The League and the Players’ Association will most likely reach some sort of agreement providing for NHL participation in the 2014 Olympic Games in Sochi. Team ownership and league management are not as united against Olympic participation as they were in advocating for a salary cap before the 2004–2005 lockout. Additionally, the players are almost universally in favor of continued Olympic participation, perhaps even more so.

162 See supra Part V.A.
163 SPC, supra note 118, ¶ 5(n).
166 Id.
than they were against the concept of a salary cap. The League will realize that it does not want to risk the possibility of having to play without the best 100 or so players in the League for three weeks. Finally, the massive success of the 2010 Games, both in terms of increasing League exposure and appeasing current fans, will provide a constant reminder of the sizeable upside to Olympic participation. The NHL will also likely reach agreements with the IOC and IIHF to resolve some of its complaints regarding previous Olympic experiences.\footnote{167 See Jeff Marek, \textit{Timing of Fehr Appointment Curious}, CBCSPORTS.CA (Aug. 26, 2010, 12:14 AM), http://www.cbc.ca/sports/hockey/story/2010/08/26/sp-marek-fehr-hockey-summit.html (discussing the various complaints of the NHL experiences in previous Olympics).}

If the League and the Players’ Association do reach an agreement in the next round of CBA negotiations, it will likely take one of two forms: an agreement in the next CBA similar to Article24 (International Hockey Games) of the 2005 NHL CBA providing for continued Olympic participation, or an agreement allowing for player-by-player, contract-by-contract agreements between teams and players in a manner similar to no-trade clauses (NTCs) and no-movement clauses (NMCs) under the 2005 CBA.\footnote{168 No-trade clauses are contractual provisions that prevent a player from being traded without consent. Similarly, no-movement clauses prevent players from being traded, waived, or sent to the minor leagues without consent. \textit{See e.g.}, Islanders Claim Evgeni Nabokov, ESPN (Jan. 22, 2011, 10:05 PM), http://sports.espn.go.com/new-york/nhl/news/story?id=6048076.}

1. \textit{Same as Current CBA}

The final agreement will most likely be similar to that in the current CBA, as contained in Article 24 on International Hockey Games, providing specifically for Olympic participation in the appropriate years during the term of the CBA. The previous CBA, signed in 1995, did not contain a provision allowing for Olympic participation because it was signed before the League allowed the players to participate.\footnote{169 See generally 1995 NHL CBA, \textit{supra} note 62.} The 2005 CBA contains two subsections dealing specifically with Olympic participation. CBA section 24.5 specifies that the NHL and the NHLPA will “continue to cooperate” in the international development of hockey, including Olympic participation.\footnote{170 Id. \textsection 24.5.} Section 24.8 provides specifically for NHL participation in the 2006 and 2010 Olympic Games.\footnote{171 Id. \textsection 24.8.}

There are two principal reasons why any agreement reached between the Players’ Association and the League would resemble that in the current CBA. One reason is that none of the disputes over Olympic participation deal directly with the CBA language itself. The League’s main complaints...
with Olympic participation are either with the entire concept of Olympic participation— injuries, shutting the league down, travel, etc.—or are with various IIHF and IOC actions and policies, such as excluding NHL team officials from post-game access to players. Section 24.8 of the CBA specifies that Olympic participation is contingent on “negotiation of mutually acceptable terms with the IIHF.” Assuming that the League was able to overcome its generalized concerns and allow Olympic participation, and was able to reach an agreement with the IIHF, the only changes necessary to the CBA would be in section 24.8, where the text would need to be changed from “the NHL and the NHLPA commit to participate in the 2006 and 2010 Winter Olympics,” to reflect the extent of the agreement.

The second reason the parties would likely agree to a term similar to Article 24 is simplicity. As discussed above, the problems involving Olympic participation have not been due to language in the CBA. Further, the language of the CBA providing for Olympic play is surprisingly simple, taking up only four lines of the entire document. If the Players’ Association could get the League to consent to player participation in the Olympics, and the League could reach acceptable terms with the IIHF, the parties would not need to change the operative language. Any concessions made by the Players’ Association during the bargaining process in order to secure Olympic participation would likely take place elsewhere, in the form of decreased share of revenues or lower maximum salary amounts or something of that ilk, rather than within the term specifically providing for player participation.

The NHL’s problems with Olympic participation lie with issues inherent in the concept of participation, rather than with the term of the CBA providing for participation. As such, if the Players’ Association and the League could agree to player participation in future Olympics, the parties would likely agree to update the two relevant CBA provisions providing for Olympic participation that worked well for the 2006 and 2010 Games.

2. Player-by-Player Agreement

a. Analysis

A second option, should the League and Players’ Association agree to continued Olympic participation in the next CBA, is for participation to be negotiated on a player-by-player, contract-by-contract basis, in a manner similar to NTCs and NMCs under the 2005 CBA. This section will first explain how the process is similar to the negotiation of NTCs and NMCs, as

172 See Marek, supra note 167.
173 2005 NHL CBA, supra note 1, § 24.8.
174 Id. §§ 24.5, 24.8.
NHL Player Participation in the Sochi Olympics
32:3A (2011)

well as how those clauses are regulated by the 2005 CBA. Then I will discuss how an Olympic-participation clause would be negotiated into a players’ contract and the effects of such negotiation. I will then discuss the possibility of owners choosing to refuse to agree to Olympic-participation clauses and the legal effects of such a decision. The next section will analyze the positives and negatives of this method of providing for Olympic participation.

Under section 11.8 of the 2005 CBA, players with sufficient experience within the League may negotiate limitations on the ability of teams to trade, waive, demote, or otherwise “move” a player during the term of his SPC. When free-agent players are negotiating with teams, the offer of an NTC or NMC is usually made in exchange for a lower annual salary or a shorter-duration contract. When faced with contract offers from multiple teams, free-agent players often choose the contract with the NMC or the NTC, valuing the short-term security and stability provided by the clauses. Some general managers have lamented the prevalence of NTCs and NMCs under the current CBA, “[b]ut competitive pressures will always guide [NHL general managers] and if guaranteeing a player’s final say in whether and where he gets traded is part of the equation when it comes to signing them, GMs will continue to happily dole them out like candy kisses on Halloween night.”

Olympic participation could be allowed on a basis similar to the NTCs and NMCs under the upcoming CBA. The CBA could contain, in its section on International Games, a section similar to the following:

The SPC of any Player may contain an Olympic-participation clause. An Olympic-participation clause shall allow a Player to participate in the hockey tournament at the Olympic Games for the duration of the SPC. Absent an Olympic-participation clause, however, a Player may not participate in the Olympic Games unless otherwise provided by the League and the Club.

This option would be negotiated on a contract-by-contract basis by free-agent players and member clubs, just as NMCs and NTCs are currently. Players would, like they have in negotiating NTCs and NMCs, be willing to effectively pay a premium for the ability to participate in the Olympics. A player who highly values Olympic participation, such as

175 2005 NHL CBA, supra note 1, § 11.8(a)–(b).
177 Id.
178 Id.
179 For instance, NHL Hall-of-Famer Brett Hull once noted during contract negotiations with the St. Louis Blues, “I’m not going to take less money and less years without a no-trade. I want to stay.” Rich Strom, No No-trade Clause, No Hull, CHI. TRIB. (March. 22,
Ovechkin or Malkin, would likely be willing to take slightly less money from a team offering an Olympic-participation clause over an offer for more money but no Olympic participation from a competing team. With NHL general managers always looking for a competitive advantage, it is likely that the teams would offer these clauses in their attempts to sign the best players possible under the salary cap.

b. Strategic Considerations

The option of individualized negotiations for Olympic participation offers some advantages over the simple renewal of Article 24 of the CBA; however the maintenance of the status quo with regard to Olympic participation is still the best option.

There are many advantages to the option of individually negotiated Olympic-participation clauses. One is that it allows for player participation in the Games—and all of the associated benefits of participation—at a price or value acceptable to owners and players alike. Additionally, the players who would be selected to represent their countries in the Games—i.e. the best players—are also the ones who would have the leverage in contract negotiations to demand or negotiate an Olympic-participation clause. This has generally been the practice involving NMCs and NTCs, and there is no reason that that would not be the case with Olympic-participation clauses. Along similar lines, the individualized-negotiation option has the advantage of being similar to an NTC or NMC, and therefore a workable framework already exists for implementing individualized Olympic-participation clauses.

Perhaps most importantly, individualized negotiations for Olympic participation would allow the owners to price the cost of Olympic participation into contracts on an individualized basis. The owners would be able to factor the risk of player fatigue and injury into the premium they charge the players to participate. Also, the option of the Olympic-participation clause could lead to lower salaries and player costs, which has occurred through the negotiation of NTCs and NMCs. A more subtle possible advantage of the individualized-participation negotiations is that the owners would price the cost of participation only into the contracts of those players who thought they needed the clauses. Less talented players, and players with no desire to play in the Olympics, would not negotiate for the clauses and would therefore bear less of the cost of League participation than they would if generalized participation were granted in exchange for players receiving a

180 Campbell, supra note 176.
lower share of overall revenues. A final advantage to the individualized-negotiation process is that it would maintain goodwill between the League and the Players’ Association, and between the NHL and the IOC, the IIHF, and the IIHF member associations.

Despite the numerous advantages to the individualized-participation option, it has disadvantages sufficient to make it the weaker of the two options outlined. Two of the problems deal specifically with implementation. The first problem is league-wide in scope: none of the current players’ contracts include such a provision, and some of the contracts run past the 2014 Games. Adopting an individualized-negotiation provision in the next CBA would do nothing to remedy the issue of Olympic participation for those whose contracts run through 2014, aside from allowing players already under contract to negotiate contract modifications with their teams. The individualized-negotiation option is viable for all contracts signed after the implementation of the next CBA; however, the individualized option does not deal with how to provide for participation for those players already under contract through the Sochi Games. This problem would be most prevalent in the 2014 Games, because as time progresses, more and more of the contracts would contain the Olympic-participation clauses. However, by creating such a problem of implementation for the very Games at the root of the dispute, the individualized-negotiation option is seriously flawed.

Secondly, the individualized-negotiation option creates an issue for younger players. Rookies, less experienced players, and players without a history of being elite players often would not have the leverage, or often even the initiative, to negotiate Olympic-participation clauses. This could result in younger players who are otherwise deserving of being named to Olympic teams being unable to participate, due to team owners’ injury concerns. The same problem applies to players who had not performed to a level sufficient to warrant an Olympic-participation clause, but who, after signing the contract, become elite players. This problem would irritate the players and could create tension with the IIHF member organizations because the Olympic teams would have their selection choices limited by NHL contracts.

Another major problem of the individualized-negotiation option is that while the owners could price injury-related risk and fatigue-related risk in to the contracts of the players who receive Olympic-participation clauses, it would not necessarily resolve the issue of the cost of implementing a three-week-long League break during the Olympics. The League would still have to delay its games while the Olympics occur, to the chagrin of owners. It would be difficult to price this cost into the Olympic-participation clauses because the owners and general managers would not know how many of the clauses would be issued. The teams may know the fixed cost of taking an Olympic break, but without knowing how many Olympic-participation clauses would be issued, they could not know how to price the fixed cost in to each contract.
There is one final reason why the individualized-negotiation option is less likely than simply continuing the current system. The Players’ Association would only be able to get the League and team owners to agree to the individualized-negotiation option if the owners were not completely unwilling to allow Olympic participation; if they were absolutely unwilling to allow participation, no agreement would be reached. But, if the Players’ Association were able to get the owners to agree to some form of participation, that would indicate that the Players’ Association had the stronger bargaining position. With the stronger bargaining position, the Players’ Association would certainly prefer a generalized CBA term providing for Olympic participation over the individualized-negotiations, because the negatives of the individualized option—lower salaries, difficulties in implementation, and problems for “breakout” players—especially affect the players.

If the parties do agree to some form of Olympic participation, it will likely be by continuing as under the 2005 CBA. While the individualized-negotiation option is intriguing, and offers some advantages, the problems inherent in its application make it inferior to the simpler option of continuing under the current system, which has adequately provided a framework for participation. The only way the individualized-participation option is likely to occur is if the League and the Players’ Association are unable to reach an agreement for Olympic participation simply because of a dispute over concessions and cost of participation. In that situation, the individualized-negotiation option offers slightly more bargaining possibilities, and could end up being the source of an agreement.

V. CONCLUSION

If the League and the Players’ Association fail to come to an agreement regarding participation at Sochi, the League will likely either choose not to punish players or to seek an injunction preventing the players from breaching.

The injunction is the more likely option, should the sides fail to reach an agreement. If the NHLPA and the League do not agree on Olympic participation during the 2012 CBA negotiations, that disagreement would be a sign that ownership is very strongly against the idea of Olympic participation. As such, during the run-up to the 2014 Games, the team owners will likely fight hard—as they presumably would have done during the CBA negotiations—to prevent the players from going to Sochi, and as such they would seek an injunction.

Notwithstanding the feasibility of an injunction, the League and the Players’ Association will most likely reach an agreement, similar or identical to that contained in Article 24 of the 2005 NHL CBA, allowing the players to participate at the Sochi Olympics and possibly beyond. The ad-
vantages to League cooperation—increased exposure of hockey and the NHL, pleasing current fans, and appeasing the players—are too significant for the League to ignore. The League will realize that some players will go to Sochi at any cost—and fans will watch—and will try to make the inevitable participation as tolerable for the teams and League as possible. Game On.