

In the Matter of the Arbitration Between

National Hockey League

and

National Hockey League Players' Association

Re: Ilya Kovalchuk

Hearing held August 4 – 5, 2010

Before Richard I. Bloch, Esq.

APPEARANCES

For the League

L. Robert Batterman, Esq.

Shepard Goldfein, Esq.

Elliot A. Silver, Esq.

For the NHLPA

John R. McCambridge, Esq.

Michael P. Conway, Esq.

OPINION

Facts

On July 19, 2010, Ilya Kovalchuk (hereinafter, “Player”) and the New Jersey Devils (“Club”) executed a Standard Player’s Contract (“SPC”) containing a series of substantial terms.¹ First, the term of the agreement was 17 years, the longest multi-year contract in NHL history. Since Kovalchuk was 27 at the time of signing, the SPC would cover his service with the Club until he was 43. A salary of \$102 million was to be paid the Player in annual increments as follows:

¹ Prior to the 2010-11 season, the Player was an Unrestricted Free Agent.

2010-2011	\$ 6,000,000.00 USD
2011-2012	\$ 6,000,000.00 USD
2012-2013	\$11,500,000.00 USD
2013-2014	\$11,500,000.00 USD
2014-2015	\$11,500,000.00 USD
2015-2016	\$11,500,000.00 USD
2016-2017	\$11,500,000.00 USD
2017-2018	\$10,500,000.00 USD
2018-2019	\$ 8,500,000.00 USD
2019-2020	\$ 6,500,000.00 USD
2020-2021	\$ 3,500,000.00 USD
2021-2022	\$ 750,000.00 USD
2022-2023	\$ 550,000.00 USD
2023-2024	\$ 550,000.00 USD
2024-2025	\$ 550,000.00 USD
2025-2026	\$ 550,000.00 USD
2026-2027	\$ 550,000.00 USD

Additionally, the agreement included a “No Move” clause that extended until June 30, 2017, followed immediately by a “No Trade” clause to the end of the contract term.

On July 20, 2010, the League rejected the Kovalchuk SPC. In a letter to the Club², the NHL claimed the SPC “is intended to or has the effect of defeating or Circumventing the provisions of the CBA”. The Rejection letter stated, in relevant part:

The SPC is rejected pursuant to CBA Section 116(a)(i) “because it is or involves a Circumvention of [] the Club’s Upper Limit...” Specifically, the SPC is for a term of 17 years, and provides for almost 97% of the SPC’s total Salary to be paid in the first 11 years of the contract term. The SPC provides for the Player to be paid the remaining 3% of the SPC’s total Salary over the final six years of the SPC, at the conclusion of which the Player will be 44 years old, which is well beyond the typical retirement age for NHL players. We believe the structure of the SPC on its face constitutes an impermissible “retirement-contract,” pursuant to

² NHL Exh. 5.

which the parties can have no reasonable expectation of complete performance in accordance with its terms. By adding illusory years to the SC, the contract is structured so as to artificially decrease the Averaged Amount attributable to each year of the SPC, and therefore, to decrease the Club's Averaged Club Salary in every year of the contract. This, in turn, results in the creation of artificial Payroll Room, and therefore involves a Circumvention of the Club's Upper Limit in violation of Articles 26 and 50 of the CBA. In particular, the SPC in question is intended to or has the effect of defeating or Circumventing the provisions of the CBA.

In addition, the SPC is rejected pursuant to CBA Section 11.6(a)(ii) because the artificial decrease in the SPC's Averaged Amount and Club's Averaged Club Salary, and the consequent creation of artificial Payroll Room, constitute violations of Articles 26 and 50 of the CBA.

The National Hockey League Players' Association ("NHLPA" or "Association") protested the League's action, filing the instant grievance July 26, 2010. The matter was heard before the undersigned, appointed as System Arbitrator for purposes of this case³, on August 4 and 5, 2010.

Issue

Did the National Hockey League properly reject the SPC between Ilya Kovalchuk and the New Jersey Devils? If so, was it properly rejected under 11.6(a)(i) or 11.6(a)(ii)? If properly rejected solely under 11.6(a)(ii), how shall the SPC be reformed?

League Position

The League claims the SPC amounts to a circumvention of the Collective Bargaining Agreement by its having been structured so as to (in the words of Article 26) "defeat or Circumvent" the Team Payroll Range provisions of the CBA,

³ See Article 48.1, "System Grievance", and Article 48.5, "System Arbitrator," *infra*, p. 8.

which establish and detail, among other things, the negotiated salary cap system. The end result of the SPC in this case, says the League, was to improperly expand the “payroll room” available to the Club for salaries by artificially depressing the “Averaged Amount” of the SPC.⁴

The League states:

We believe this SPC constitutes an improper manipulation of payroll room, improperly and currently lowering its average Club salary and potentially giving the Club an artificial and inappropriate increase above the upper limit, although nominally remaining within.⁵

Specifically, the League claims the last six years of the Kovalchuk contract are “illusory”.⁶ It says one cannot reasonably conclude this is an agreement that will be, or was intended to be, fulfilled. This is apparent, it claims, not only from the age of the Player by the end of the contract (43), but also from the salary structure, one that is heavily frontloaded so as to pay the Player some 97% of the contract value -- over \$98,000,000 -- prior to the final 6-year period in question, leaving just 3% to be paid out during those years. Also telling, says the League, is the agreement in the SPC to convert the comprehensive “No Move” clause to a “No Trade” provision. This can only be read as signaling an expectation that the Player will not be with the NHL club and that, should Kovalchuk retire (in

⁴ Article 50.5(d)(ii) states: “Averaged Amount” for any multi-year SPC, for purposes of calculating the Club’s Averaged Club Salary in any League Year, the Averaged Amount of such SPC shall be used. That is, the Player Salary and Bonuses for all League Years shall be averaged over the length of the entire term of the SPC, using the stated amount, by dividing the aggregate stated amount of all Player Salary and Bonuses to be paid during the term of the SPC by the number of League years in the SPC...”

⁵ Transcript I, p. 14. Transcript references will hereinafter be shorthanded as “Tr.”

⁶ Tr., p. 8.

response, for example, to being sent down) the team, for its part, will be relieved, then, from the continuing impact of the Player's \$6 million salary cap burden. The NHL contends, therefore, that its actions in rejecting the contract were consistent with its rights under Article 11 of the CBA. and should be sustained.

Association Position

The Association claims the SPC contravenes neither the Club's Upper Limit nor any of the other CBA provisions limiting the form and content of SPCs.⁷ Specifically, there are no negotiated restrictions that would serve to restrict the term, annual salary stipends, "backdive" (decreased payments during the final years) or the Move/Trade language. As such, says the Association, the Circumvention claim must fail.

The NHLPA directs the Arbitrator's attention to, among other things, the preamble of Article 26, which notes, specifically, that while the Article is designed "to prohibit and prevent conduct that Circumvents the terms of this Agreement," the parties made it clear that the terms of Article 26 were not designed for "detering or prohibiting conduct permitted by this Agreement, the latter conduct not being a Circumvention."⁸ Accordingly, says the Association, since these provisions are permitted by the CBA, they cannot be considered elements of

⁷ See Grievance Letter of July 26, 2010.

⁸ *Id.*, citing Article 26.

Circumvention. The League erred, therefore, in rejecting the contract. The Association requests that the League be ordered to accept the Kovalchuk SPC.⁹

Relevant Contract Provisions

ARTICLE 11

Rules and Procedures Governing Standard Player's Contract

- 11.1 *Standard Player's Contract.*** The standard form Spec annexed hereto as Exhibit 1 will be the sole form of employment contract used for all Player signings after the execution of this Agreement. The standard form SPC may not be amended or modified in any manner whatsoever. Filed form 1995 SPCs will be considered valid and effective until their expiration, as deemed modified by this Agreement and the Compliance Rules attached as Exhibit 16 hereto, provided, however, that notwithstanding anything to the contrary contained herein, any previously, and still outstanding, rejected SPC shall not be deemed to be registered or approved pursuant to this provision or otherwise, and such rejected SPC shall be grieved in accordance with Article 17 of this Agreement.
- 11.2 *Impartial Arbitrator/System Arbitrator.*** A Grievance pursuant to this Article shall be heard by, and the term Arbitrator as used in this Article shall mean, the Impartial Arbitrator or the System Arbitrator, as the case may be, as required by the terms of Article 17 and Article 48 of this Agreement.
- 11.3 *Validity and Enforceability.*** Except as expressly set forth in Section 11.5 below, no SPC shall be valid or enforceable in any manner whatsoever unless and until it has been filed with Central Registry and approved by the League or the Arbitrator. Except as expressly set forth in Section 11.6 below, no Player will be permitted to play in an NHL Game or be entitled to receive his Paragraph 1 Salary or any other rights or benefits pursuant to an SPC unless and until he has executed an SPC with a

⁹ Article 11.6(a)(v). If the Arbitrator rules the League's SPC rejection was not proper, the sole remedy is to "direct the League promptly to approve and register such SPC" and to direct the Club to pay the applicable salary and bonuses.

Club, and such SPC has been approved and registered by the League or approved by the Arbitrator. Notwithstanding anything to the contrary contained herein, a Club may, simultaneously with filing an SPC with Central Registry, request Waivers on the Player whose SPC is being filed.

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**11.6 Rejection of SPCs and/or Offer Sheets;
Subsequent Challenge and/or De-
Registration of SPCs and/or Offer Sheets.**

(a) **Rejection of SPCs and/or Offer Sheets.** In the case of an SPC or an Offer Sheet, as the case may be, that is filed and rejected by the League, the following rules and procedures shall apply:

- (i) If an SPC or an Offer Sheet is rejected: (A) because it results in the signing Club exceeding the Upper Limit, or (B) because it does not comply with the Maximum Player Salary or (C) because it is or involves a Circumvention of either the Club's Upper Limit or the Maximum Player Salary, and:

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ARTICLE 26

No Circumvention

Preamble. It is the parties' intention that there be full, accurate and timely disclosure and reporting of all revenues and financial information as required by Article 50, as well as of any and all agreements involving payments to Players, and that such disclosures and agreements be consistent with this agreement, including but not limited to the provisions of Article 50. This Article 26 is designed to prohibit and prevent conduct that Circumvents the terms of this Agreement, while not deterring or prohibiting conduct permitted by this Agreement, the latter conduct not being a Circumvention.

26.1 General. The activities described or referred to in, or expressly prohibited by, Sections 26.2 through 26.7, and 26.15,

whether completed or attempted, directly or indirectly, shall be deemed Circumventions under this Agreement and shall be penalized as described in and provided by Section 26.13.

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26.3 Circumventions.

(a) No Club or Club Actor, directly or indirectly, may: (i) enter into any agreements, promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kind, whether express, implied, oral or written, including without limitation, any SPC, Qualifying Offer, Offer Sheet, or other transaction, or (ii) take or fail to take any action whatsoever, if either (i) or (ii) is intended to or has the effect of defeating or Circumventing the provisions of this Agreement or the intension of the parties as reflected by the provisions of this agreement, including without limitation, provisions with respect to the financial and other reporting obligations of the Clubs and the League, Team Payroll Range, Player Compensation Cost Redistribution System, the Entry Level System and/or Free Agency.

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**ARTICLE 48
SYSTEM ARBITRATION**

48.1 System Grievance

(a) A “System Grievance is any dispute involving the interpretation or application of or compliance with the provisions of Articles 49 (Player Compensation Cost Redistribution System), 50 (Team Payroll Range System) and those provisions of Article 26 (No Circumvention), Article 9 (Entry Level Compensation), Article 10 (Free Agency) and/or any other Article in which the grievance resolution could affect the interpretation or application of the provisions of Article 49 or 50.

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48.5 System Arbitrator

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(d) The System Arbitrator shall have the authority to compel the attendance of witnesses and the production of documents in connection with any matter within the jurisdiction of the System Arbitrator.

(e) Awards of the System Arbitrator shall upon their issuance constitute full, final and complete disposition of the dispute,

and shall be binding upon the parties to this Agreement and upon any Player(s) or Club(s) involved.

- (f) The System Arbitrator shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of this Agreement or any SPC.

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ARTICLE 50

TEAM PAYROLL RANGE SYSTEM

Preamble. This Article 50 creates a fixed relationship between League-wide Player Compensation and Hockey Related Revenues, and provides that League-wide Player Compensation will rise or fall in direct proportion to a rise or fall in Hockey Related Revenues, and will equal (i.e. never exceed nor be less than) the Player's share.

Within the context of the Player's Share, this Article 50 is also intended to permit some flexibility in spending among the individual Clubs, and therefore this Article provides for a Team Payroll Range for permissible Club SPC commitments for Player Salary and Bonuses for each League Year, not to exceed an Upper Limit or be below Lower Limit. The Upper and Lower Limits of the Team Payroll Range will be subject to annual adjustment, as set forth herein

50.5 *Team Payroll Range System: Lower Limit and Upper Limit; Payroll Room; Lower Limit and Upper Limit Accounting.*

(a) *Overview of Operation of Team Payroll Range.*

Team Payroll Range created by this Agreement consists of a Lower Limit and an Upper limit during each League Year for permissible spending by each Club based on its Averaged Club Salary. The Team Payroll Range provisions do not permit Clubs to have Averaged Club Salary that is below the Lower Limit. Nor does the Team Payroll Range permit Clubs to have Averaged Club Salary that is above the Upper Limit, except for two (2) limited exceptions provided in this Agreement, with respect to bona fide, long-term Player injuries or illnesses, as set forth in Section 50.10(d),

and with respect to the “Performance Bonus Cushion,” as set forth in Section 50.5(h).

For purposes of calculating any Club’s “Payroll Room” at a given point in time, the Upper Limit for such League Year shall be measured against the Club’s “Averaged Club Salary,” as defined below. Any Club with an Averaged Club Salary that is less than the Upper Limit has available Payroll Room in the amount of the difference between the Averaged Club Salary and the Upper Limit. As set forth below, if a Club has Payroll Room during a League Year, the Club may use such Payroll Room to contract for or otherwise acquire additional Player Salaries and Bonuses. A Club may contract for or otherwise acquire additional Player Salaries and Bonuses only to the extent of its Payroll Room, subject, however, to certain limited exceptions as set forth herein.

(b) “Lower Limit” and “Upper Limit.” For each League Year there shall be a “Lower Limit” and an “Upper Limit” at or between which each Club must have an Averaged Club Salary. The range between the Lower Limit and Upper Limit shall be known as the “Team Payroll Range” (the “Payroll Range” or “Range”).

50.7 “100 Percent Rule” for Multi-Year SPCs. The difference between the stated Player Salary and Bonuses in the first two League Years of an SPC cannot exceed the amount of the lower of the two League Years. Thereafter, in all subsequent League Years of the SPC, (i) any increase in Player Salary and Bonuses from one League Year to another may not exceed that amount.

Analysis

This is a case of contract interpretation. The Arbitrator’s charge, in such instances, is not to somehow construct his or her own notions of industrial justice or perceived equities, but to read and apply the CBA’s bargained terms. The

parties have made these jurisdictional boundaries clear in Article 48.5(f) of the CBA:

The System Arbitrator shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of this Agreement or any SPC.

The League's right to review and approve or reject an SPC is clearly set forth in CBA Article 11¹⁰ and is not here at issue. It is, instead, the contractual premises for such action that divides the parties. The NHLPA observes, and the League concedes, that the individual elements of this SPC are in no way proscribed by the CBA. Accordingly, says the Association, the inquiry may stop there.

The Association bases its case on language in Article 26.3 that unambiguously provides that conduct permitted by the CBA cannot be considered Circumvention. The Preamble to the Article notes: "Article 26 is designed to prohibit and prevent conduct that circumvents the term of this Agreement, while not deterring conduct permitted by this Agreement, the latter conduct not being a Circumvention." This same concept is repeated in 26.3(h)(i), where the drafters specified that "Any act, conduct or activity that is permitted by this Agreement shall not be a Circumvention." These words, says the Association, suggest a bright line test: Absent any bargained restriction on the length of an SPC or on inclusion of any other of the other particular contractual elements, there can be no resulting evasion of the CBA's letter or spirit. Where, as here, the

¹⁰ See Article 11.3, for example, *supra*, p. 7.

individual SPC provisions themselves breach no aspect of the CBA, there can be no contrary result by considering them collectively.

The League, on the other hand, urges a far broader inquiry. It reads Article 26 as requiring a more global view of the SPC in approaching the question of whether that agreement runs contrary to the bargained terms of the CBA. The CBA, it maintains, permits, indeed, mandates that one consider all aspects of such an agreement, including whether it has the intent or effect of devitalizing any CBA provisions. As noted above, the NHL concedes the individual elements of this SPC are in no way proscribed by the CBA. But the Kovalchuk SPC, taken as a whole, it claims, is structured to effectively guarantee that the last six years will never be performed. That is the portion of the SPC it deems “illusory.” The result of extending the pay schedule into years that performance likely will not occur is to artificially lower the annual cap hit, thus increasing available payroll room for the Club and, ultimately, argues the League, serving to defeat the very protections of competitive fairness within the League that the parties negotiated in 2004-‘05 by way of the Team Payroll Range provisions.¹¹

A careful review of the language at issue and the thorough presentations of the parties compels the conclusion that, for the reasons set forth below, the signatories to the CBA foresaw the need for, and provided language to support, a considerably more comprehensive examination of a particular SPC than that here proposed by the Association.

¹¹ See, generally, Article 50 *et seq.*

Prior to the current CBA, the “No Circumvention” language of Article 26 was relatively brief, even cryptic. In two paragraphs, the parties expressed their mutual agreement that contracts “designed to serve the purpose of defeating or circumventing” the CBA were forbidden:

26.1 No Club or Player shall enter into any Player Contract, Offer Sheet or other agreement that includes any terms which are designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by the provisions of this Agreement, including without limitation, provisions with respect to the Entry Level System or Restricted Free Agency. However, any conduct permitted by this Agreement shall not be considered to be a violation of this provision.

26.2 No Player or Club shall induce any Player or Club or cause any Player or Club to be induced to make or enter into an agreement or make an offer which violates the undertaking in section 26.1 above.

Together with a range of significant changes arising from the 2004-‘05 bargaining, including installation of the Salary Cap system, came a substantial expansion of this article’s Anti-Circumvention language. Now some eight pages long, with 15 separate sections, the provision details a wide range of process, sanctions and definitions. The revised and expanded Article incorporates the old language into 26.3, which is central to resolution of this case:

26.3 Circumventions.

a. No Club or Club Actor, directly or indirectly, may:
(i) enter into any agreements, promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kind, whether express, implied, oral or written, including without

limitation, any SPC, Qualifying Offer, Offer Sheet, or other transaction, or (ii) take or fail to take any action whatsoever, if either (i) or (ii) is intended to or has the effect of defeating or Circumventing the provisions of this Agreement or the intension of the parties as reflected by the provisions of this agreement, including without limitation, provisions with respect to the financial and other reporting obligations of the Clubs and the League, Team Payroll Range, Player Compensation Cost Redistribution System, the Entry Level System and/or Free Agency.¹²

The new language continues to adopt the parties' joint aversion to, among other things, an SPC that threatens to devitalize a CBA provision and, significantly, underscores the conclusion that one may properly examine all aspects of such a deal.¹³ The parties made it clear that any SPC that "is intended

¹² Section 23(b) has similar language applying to "Player or Player Actor."

¹³ Even before institution of the new salary cap mechanism and the revised language of Article 26 in '04-'05, arbitrators sitting in judgment of disputes between these parties (under the terms of the 1995 CBA), alluded to a certain breadth of review based not on specific benchmarks, but rather on a consideration of the totality of circumstances.

In a 1998 Opinion, Arbitrator John Sands ruled that a signing bonus in a player's SPC constituted "conduct permitted" under Section 10.3 of the CBA and that it could not, therefore, violate Section 26. But, the Arbitrator continued:

This is not to say that the League can never question the circumstances of such an Offer Sheet term as the proviso at issue here. Clearly it would be improper from a team that had already been mathematically eliminated from playoff qualification. Where the proper line of accommodation between Section 10.3(f) and Article 26 lies must be determined on a case-by-case basis. It suffices to say here that Carolina has not crossed it. (Opinion, at p. 7.)

In the grievance of Sakic, Blake, Turgeon and Nolan (Arbitrator Parker, 2003), the Arbitrator concluded the League had failed to meet its burden in disputing the propriety, under Article 26, of the allocation of certain signing bonuses in particular player SPC's. But the Arbitrator also made it clear that such challenges were fact specific, depending on the nature of the particular agreement:

[T]he Arbitrator agrees with the League that its Article 26 challenges of the signing bonuses at issue are fact specific, and she is deciding in this section of her Opinion only those challenges. Not before her are other possible compensation structures, such as where a Club and a player, having agreed to a level salary for a few years, then allocate all of the compensation to a signing bonus for the season during which a work stoppage is likely. (Opinion, at 27.)

to or has the effect of defeating or Circumventing” the CBA including its Team Payroll Range provisions, was prohibited. This language is comprehensive, explicitly prohibiting “*understandings of any kind*” that serve to devitalize CBA restrictions, or, indeed, that are intended to do so. These broadly drawn admonitions are consistent with the conclusion the parties anticipated the type of broader review here urged by the League, as contrasted with the markedly narrower scope proposed by the Association. The broader approach permits one to read all clauses in Article 26 in harmony with one another. One may thereby acknowledge the absence of restrictions as to SPC term length, dollar amount or compensation structure, taken individually, but conclude, as well, that that is not the necessary end to the inquiry. A contrary conclusion would effectively read Article 26 out of the CBA.

One accepts, therefore, that the CBA does not speak to the length of an SPC, the compensation limit in any single contract, the salary structure in terms of back or front loading or, generally, any affiliated player movement restrictions.¹⁴ But, the language of Article 26(3) speaks loudly to the parties’ intention that one look not only to whether the individual terms of the agreement conform but also to whether the agreement, taken in its entirety, may be said to have been intended, or even if not intended, has *the effect* of defeating or Circumventing the CBA. The possibility, therefore, that a Club and Player could

¹⁴ There are certain rules that attach to the structuring of salary changes. The so-called 100% rule, Section 50.7, places limitations on the year-to-year variations in Player compensation. There is no question, however, that these were observed in the SPC at issue.

construct an agreement, the individual terms of which are inoffensive but which, when taken together, challenge the provisions of the CBA is precisely within the contemplation of the signatories to the CBA.

One turns, then, to the question of whether *this* SPC should be regarded as somehow attacking the vitality of other contract provisions, in this case, the Salary Cap system. The essence of the League's objection is reflected in its claim that the final six years are artificial add-ons, the intended purpose of which is to reduce the annual Salary Cap hit. At risk, it contends, is the ability of the League to ensure competitive balance among Clubs.¹⁵ If this claim has merit, it is a significant element that may properly be considered by the League in rendering its decision to accept or reject the SPC. It is true, as the Association notes, the words "competitive balance" nowhere appear in the CBA.¹⁶ But the core and character of the negotiated Team Payroll Range System provisions of Article 50 are directed to precisely that goal. The Association does not argue that an agreement in name only or form only, one that cannot reasonably be regarded as intended to be actually performed, must be registered.¹⁷ A contract term covering a Player's NHL services to age 70, for example, is not expressly prohibited by the CBA. But the parties to that SPC may not reasonably be found to be seriously anticipating its fulfillment. The Association does not suggest that such

¹⁵ Tr.,p.325.

¹⁶ Tr.,p.289.

¹⁷ A contract term covering a Player's NHL services to age 70, for example, is not expressly prohibited by the CBA. But the parties to that SPC may not reasonably be found to be seriously anticipating its fulfillment. The Association does not suggest that such agreement must pass muster under Article 26.

agreement would pass muster under Article 26. Surely, the operation of such a mechanism runs squarely contrary to the bargained intent of the Team Payroll and Salary Cap provisions of the CBA.

In this case, the record strongly supports the claim this contract is “intended to, or has the effect” of defeating or circumventing the Salary Cap provisions of the CBA. The overall structure of this SPC reflects not so much the hope that Mr. Kovalchuk will be playing in those advanced years, but rather the expectation that he will not. This is a long contract --17 years -- the longest in NHL history. That, in itself, poses no contractual problem, for the reasons discussed above.¹⁸ But Kovalchuk is 27 years old, and the agreement contemplates his playing until just short of his 44th birthday. That is not impossible, but it is, at the least, markedly rare. Currently, only one player in the League has played past 43¹⁹and, over the past 20 years²⁰ only 6 of some 3400 players have played to 42.

In addition, after 11 years with the Club, according to the Salary Schedule²¹ the Player’s salary drops dramatically. From a high of \$11,500,000 per season and an immediately preceding stipend (in 2020-21) of \$3,500,00, the salary drops to \$750,000 in 2021-2022, and \$550,000 for the 5 final years. Here again, there is no contractual prohibition on a “diveback.” It is not uncommon for a Player and Club to recognize the prospect of decreased output in the later years of

¹⁸ According to the evidence, the League attempted, but was unsuccessful in negotiating such a restriction.

¹⁹ NHL Ex. 6(B).

²⁰ *Id.*

²¹ See the SPC Addendum, p. 2, *supra*.

a career and to adjust compensation accordingly. But these items cannot be viewed in a vacuum. The dynamics of this SPC, with particular reference to its final six years, are such that there is scarce reason for either Player or Club to continue the relationship. The incentives are strongly to the contrary. By year 11, the Player will have received \$98,000,000 of his \$102,000,000 contract, constituting some 97% of the bargain. One may reasonably ask, as the League does, whether a player who had been averaging some \$9,000,000 a year will be satisfied to continue the rigors of an NHL season for a salary that (1) will average slightly more than \$550,000 a year, (2) will represent a 95% reduction against previous average earnings and (3) will undoubtedly constitute compensation well below the then-applicable major league minimum.²²

The economic incentives are not limited to issues of the Player's preferences, alone. During the final six years, the comprehensive "No Move" restriction will have been reduced to a "No Trade" clause. This additional flexibility will allow the Club to, for example, place the Player on waivers or send him to the minors. Here again, one may reasonably ask whether this Player would, at that point, accept such repositioning as an alternative to seeking continued employment outside the League or simply retiring. In either of those events, the team would be relieved of any continuing salary cap hit that, in this case, would amount to a \$6,000,000 adjustment.

²² The current major league minimum is \$500,000.00.

The elements of this Agreement are unique. They include the age of the Player, the dramatic diveback after 11 years, the notable frontloading of the compensation, the relatively minimal payment during the 6-year tail of the contract and the clear incentives and ability of the team to move the Player out and likely rid itself of the continuing salary cap burden during the out years of the contract. All this supports the League's conclusion that it is reasonably unlikely the last years of this contract will be performed. The record reflects that the result of this SPC, considered in its entirety, is to artificially extend the term of that agreement, thereby decreasing the annual salary cap figure and increasing the Club's payroll room in a manner that serves to defeat the intentions of the parties as manifested in the Team Payroll Range provisions.²³

Nothing in this Opinion should be read as suggesting that either the Club or Mr. Kovalchuk operated in bad faith or on the basis of any assumption other than that the SPC was fully compliant with the CBA. While intent is specifically

²³ It is true, as the Association observes, that the NHL has registered contracts with structures similar to the Kovalchuk SPC PA Exh. 8 reflects a list of 11 multi-year agreements, all of which involve players in their mid to late 30's and early 40's. Most of them reflect reasonably substantial "diveback" (salary reductions that extend over the "tails" of the Agreement). Of these, four such agreements, with players Chris Pronger, Marc Savard, Roberto Luongo, and Marian Hossa reflect provisions that are relatively more dramatic than the others. Each of these players will be 40 or over at the end of the contract term and each contract includes dramatic divebacks. Pronger's annual salary, for example, drops from \$4,000,000 to \$525,000 at the point he is earning almost 97% of the total \$34,450,000 salary. Roberto Luongo, with Vancouver, has a 12-year agreement that will end when he is 43. After averaging some \$7,000,000 per year for the first 9 years of the Agreement, Luongo will receive an average of about 1.2 million during his last 3 years, amounting to some 5.7% of the total compensation during that time period. The apparent purpose of this evidence is to suggest that the League's concern is late blooming and/or inconsistent. Several responses are in order: First, while the contracts have, in fact, been registered, their structure has not escaped League notice: those SPCs are being investigated currently with at least the possibility of a subsequent withdrawal of the registration. It is also the case that the figures in Kovalchuk's case are demonstrably more dramatic, including a 17-year term length, a \$102,000,000 salary total and precipitous drop that lasts for the final six years of this contract.

listed as a potentially relevant factor in a proceeding such as this, the System Arbitrator here concludes the SPC terms themselves demonstrate this agreement “has the effect of defeating” the provisions of the CBA, with particular reference to the Team Payroll Range language. For these reasons, the finding is that the League has sustained its burden of demonstrating its actions in rejecting the agreement were in accordance with the bargained authority under Section 11.6(a)(i). Accordingly, the grievance protesting that action will be denied.

AWARD

The grievance is denied.

Richard I. Bloch, Esq.

August 9, 2010