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More Than Just Spelling: How Differences in International Labor Laws Create Barriers to Expansion of the American National Sports Leagues into Europe

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ABSTRACT:

For decades now, all four of the U.S. National Sporting Leagues have been discussing a potential international expansion into Europe. Exhibition games have been scheduled abroad to increase interest. Plans have been created to decrease the number of times teams would have to travel between continents to play. Provisions regarding international expansion have even been entered into several of the leagues' Collective Bargaining Agreements (CBA). However, one large roadblock remains: international labor laws. As recent events in the NFL have shown us, the nature of a country's labor law can have a monumental effect on how bargaining progresses. Without the player association's threat of an antitrust suit bargaining may have progressed quite differently. Labor negotiations in the United States are regulated by a compromise known as the nonstatutory labor exemption whereby the courts will uphold provisions of a CBA, so long as it (1) primarily affects the parties of the CBA, (2) is a mandatory subject of collective bargaining, and (3) is a result of good faith, arms length, bargaining. This compromise allows the national leagues to impose restrictions necessary to their survival, which otherwise might run afoul of antitrust laws. However, European countries do not have as broad a labor exemption as the United States, which then begs the question: whose labor law prevails? This Comment will first look at the jurisprudence stemming from those national leagues containing Canadian teams, and attempts to extrapolate from there the effect European teams would have on the bargaining process. It will then examine other international leagues, such as the Union of European Leagues for Basketball, to suggest a way of organizing a European expansion.

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1. Introduction

1.1 Rumors of Expansion

In the United States, the four most popular professional sports leagues are the National Football League (hereinafter NFL), the National Hockey League (hereinafter NHL), the National Basketball Association (hereinafter the NBA), and Major League Baseball (hereinafter MLB). These leagues use a collective bargaining process to create a contract known as the collective bargaining agreement (hereinafter CBA) which governs the relationship between the league and its players, as well as setting forth standards which individual player contracts, those between a player and his team, must meet.¹ This collective bargaining process is done on a league-wide level, rather than between an individual team and its players.

In the past few years, there have been rumors regarding a possible European expansion of each of these leagues. The NHL Players' Association Executive Director Paul Kelly has said that "the door is very much open" to an expansion into Europe, and

¹ Mathieu Fournier & Dominic Roux, Symposium, *Labor and Employment Law Issues in Sports: Labor Relations in the National Hockey League: A Model of Transnational Collective Bargaining?*, 20 MARQ. SPORTS L. REV. 147, 151-152 (2009) (evaluating the way in which the NHL has adapted to overcome the "inherently territorial" nature of labor law).

stated that they have been studying the possibility.² The Commissioner of the NBA, David Stern, has discussed expansion on several occasions, even going so far as to announce four possible plans for the expansion.³ With regards to the NFL, the commissioner Tagliabue has said "once you get beyond 32 [teams], I definitely think international expansion [could be an option]."⁴ It is noteworthy that currently the NFL does have 32 teams.⁵ Lastly, Major League Baseball has gone so far as to discuss the possibility of expansion in its current Collective Bargaining Agreement.⁶

However, discussions of any expansion are typically soon overshadowed by discussions of the infeasibility of such an option. Critics argue that transportation would be too costly, there would not be enough home games to make a season cost effective, there are not enough proper venues in Europe, there is not enough interest from international fans, and the idea is

² Rob Rissi, *Bettman Expounds on Euro Expansion*, PITTSBURGH TRIB. REV., Oct. 6, 2008, http://www.pittsburghlive.com/x/pittsburghtrib/sports/s_591811.html, available at LexisNexis Academic.

³ Ian Whittell, *NBA Declares Intention to Expand into Europe*, TIMES (London), March 12, 2002, available at LexisNexis Academic.

⁴ *NFL Sees Worldwide Expansion*, WASH. POST, Aug. 27, 1998, at B.08, available at LexisNexis Academic.

⁵ *Official Site of the NFL*, <http://www.nfl.com/> (last visited Jan. 23, 2011).

⁶ MLB CBA Article XV, J(2) Possible Expansion, available at http://mlb.mlb.com/pa/pdf/cba_english.pdf. See also, Jason S. Weiss, *the Changing Fact of Baseball: In an Age of Globalization, is Baseball Still As American as Apple Pie and Chevrolet?*, 8 U. Int'l & Comp. L. Rev. 123, 128(2000) ("In the Basic Agreement Between The American League of Professional Baseball Clubs and the National League of Baseball Clubs and the Major League Baseball Players Association . . . an entire section is devoted to "International Play", which supports the possibility of Major League Baseball's expansion").

unpopular with European sporting officials.⁷ However, these barriers are lessening. Transportation and other logistical issues are becoming easier, and more importantly, the leagues have been working to improve fan interest in European countries through Exhibition games.⁸ But, even if these commonly cited roadblocks are overcome, there is still another issue to be considered: What affect will the additional countries' laws have on the collective bargaining process?

One way to discuss future effects of a European expansion is to look at past effects of Canadian expansion. Currently, there are Canadian teams in three of the national leagues: the

⁷ Rebecca Bryan, *NBA Stars Head for Europe*, AGENCE FRANCE PRESSE, Sept. 29, 2006, available at LexisNexis Academic (noting the difficulty in raising enough money in the overseas games to replace lost revenues in the United States); Jean LeFebvre, *NHL's European Adventure*; *Herald Scribe Takes Tongue-in-Cheek Look at League's Expansion Dream*, CALGARY HERALD, Feb. 16, 2008, at E3 (explaining Europe's hostility toward a European expansion, and analyzing the difficulties of "globe-trotting," modest arena sizes, lack of interest, and difficulties with time changes); Jim Slater, *NBA Players Cautious over European Expansion*, AGENCE FRANCE PRESSE, Feb. 16, 2008, available at LexisNexis Academic (reiterating the typical problems of expansion).

⁸ Bryan, *supra* note 7 (discussing the use of training camps and European games to increase interest in basketball overseas) James Edwards, *Eli Manning Plays London and the NFL Wins Big*, EVERY JOE (May 19, 2007, 1:09 AM EST) <http://everyjoe.com/sports/eli-manning-plays-london-and-the-nfl-wins-big> (discussing the NFL exhibition game at Wembly Stadium in London); James Edwards, *A Super Bowl in London Would be Super*, EVERY JOE (May 10, 2009, 9:10 PM EST) <http://everyjoe.com/sports/a-super-bowl-in-london-would-be-super> (discussing what other national leagues have done to increase national appeal, and suggesting the NFL do the same); LeFebvre, *supra* note 7 (stating that a way to overcome the logistical issues would be to have only the winners of each continent hop across the pond); *NFL Sees Worldwide Expansion*, *supra* note 4 (noting that European interest in the European NFL is on the rise with increased attendance at the developmental league); Allen Panzieri, *NHL Expansion in Europe? Don't Hold Your Breath; But Bettman Wants More Games There*, THE GAZETTE (Montreal), Oct. 7, 2008, at C2 (discussing increasing NHL expansion in Europe to foster interest); *Tabliabue: Expansion in NFL Europe Possible*, ASSOCIATED PRESS WORLDSTREAM, June 14, 2003, available at LexisNexis Academic (stating the NFL is pumping a lot of money into increasing popularity of American Football abroad).

NHL⁹, NBA¹⁰, and MLB.¹¹ Because the teams are construed by courts as being the employers, instead of the league, that means there are foreign employers within the national leagues already.¹² An analysis of Canadian sports law's effect on collective bargaining can aid in anticipating issues which might arise with a European expansion.

1.2 Collective Bargaining in the Sports Law Context

Furthermore, in order to analyze possible effects on collective bargaining, one must first understand the process itself. Generally, in collective bargaining, employees are allowed to choose a representative by vote to negotiate for them

⁹ NHL Official Website Listing Team Roster, <http://www.nhl.com/ice/teams.htm#?nav-tms-main> (last visited Jan. 23, 2011) (listing the Calgary Flames, Edmonton Oilers, Montreal Canadiens, Ottawa Senators, Toronto Maple Leafs, and the Vancouver Canucks as Canadian teams included in the NHL).

¹⁰ NBA Official Website Listing Team Roster, <http://www.nba.com/teams/teamIndividualLinks.html?title=Team%20Roster&file=roster> (last visited Jan. 23, 2011) (listing the Toronto Raptors).

¹¹ MLB Official Website Listing the Team Roster, <http://mlb.mlb.com/index.jsp> (listing the Toronto Blue Jays as the only Canadian team in the MLB).

¹² The question of whether the NFL is a single entity or a collection of competitors is a complicated one, but owing to the recent American Needle decision, this paper will treat them as a single entity. The American Needle decision was an antitrust suit against the merchandising company of the NFL in which the NFL argued that for merchandising purposes, each team was an entity, rather than the company being a league-wide entity. The Supreme Court disagreed and held that the NFL was a single entity for antitrust purposes when selling merchandise. See, *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2212 (2010) (" Each of the teams is a substantial, independently owned, and independently managed business"); See also, *Brown v. Pro Football*, 518 U.S. 231, 248 (1986) (" the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival").

in the process.¹³ This party then has a duty to represent the employees "diligently and in good faith."¹⁴

In a sports law context, the leagues approach this process in a similar fashion. For example, the NHL is made up of thirty privately owned teams, and each team employs a collection of players.¹⁵ The players are organized into a players association, in this case the NHLPA, which is their sole representative in negotiations with management.¹⁶ Once a union is named the sole representative for employees, no other union may be formed by employees of that company.¹⁷ Federal law "prohibits any employee from independently engaging in subsequent employment negotiations," though this restriction does not prohibit the negotiations of individual contracts as long as they conform with the general terms set out in the CBA.¹⁸ In order to effectively bargain with this league wide union, the owners of each league act under the league name in the bargaining process. For instance, the owners of the NHL teams bargain as the NHL, which acts as a "joint venture organized as a non-profit

¹³ Fournier & Roux, *supra* note 1, at 149.

¹⁴ *Id.* at 150.

¹⁵ *Id.* at 147.

¹⁶ Fournier & Roux, *supra* note 1, at 153.

¹⁷ Heather R. Insley, Comment, *Major League Umpires Association: Is Collective Bargaining the Answer to or the Problem in the Contractual Relationships of Professional Sports Today?*, 29 *Cap. U.L. Rev.* 601, 610 (2001) (explaining the MLB umpires attempt to change union representation).

¹⁸ Mathew Epps, Comment, *Full Court Press: How Collective Bargaining Weakened the NBA's Competitive Edge in a Globalized Sport*, 16 *VILL. SPORTS & ENT. L.J.* 343, 347 (2009) (comparing the strengths and weaknesses of the NBA versus the European Leagues of Basketball).

unincorporated association" which acts as "the Clubs' exclusive bargaining agent."¹⁹

These parties, management and union, negotiate until they agree on a CBA to govern their relationship.²⁰ In the case of the national leagues, all employees of a league, Canadian or American, are bound under one collective bargaining agreement per league.²¹ Thus, all hockey players within the NHL are governed by the NHL Collective Bargaining Agreement (hereinafter CBA), and the same goes for players in the other leagues. These CBAs set "forth specific working conditions, rules, grievance procedures, arbitration procedures, benefit plans, and minimum salaries" as well as other terms of employment.²² Players then negotiate their individual contracts with their teams within the confines of the CBA.²³

¹⁹ Brian Ward, Note, *The National Hockey League's Collective Bargaining Agreement: Its Inadequacies in Dealing with League Internationalization*, 23 SUFFOLK TRANSNAT'L L. REV. 747, 748-49 (2000) (criticizing the NHL CBA's ability to regulate certain issues caused by the integration of former Soviet Union players into the league).

²⁰ Fournier & Roux, *supra* note 1, at 150.

²¹ NHL Collective Bargaining Agreement, Article 1, definition of "Native Currency," available at <http://www.nhlpa.com/About-Us/CBA/> (explaining that Canadian teams will be paid in Canadian dollars and American teams will be paid in American dollars); NBA Collective Bargaining Agreement, Article XXIX, Section 11, available at <http://www.nbpa.org/sites/default/files/ARTICLE%20XXIX.pdf> (discussing the implications of the CBA for those players employed within Canada); MLB Collective Bargaining Agreement, Introduction, available at http://mlb.mlb.com/pa/pdf/cba_english.pdf ("This Agreement, effective December 20, 2006, is between the 30 Major League Clubs and the Major League Baseball Players Association . . .").

²² Ward, *supra* note 19, at 749.

²³ *Id.*

When negotiating, certain hard bargaining techniques may be used.²⁴ Unions are allowed to strike to preserve their rights and employers are allowed to lockout their employees to defend against union action.²⁵ However, once the CBA is agreed on, these tactics are prohibited.²⁶

Lastly, if there are any disagreements arising under the CBA, arbitration is required as the sole means to resolve the dispute.²⁷ Thus, the court is excluded from the relationship.²⁸

1.3 Applicable Laws in the Sports Context

Because the sports leagues are governed through the collective bargaining process, employer-employee relations are governed by labor law instead of antitrust law due to a mix of statutory and nonstatutory labor exemptions.²⁹ In the United States, antitrust law is governed by the Sherman Act which prohibits unreasonable restraints of trade in certain situations. Many league policies, such as the draft, might be considered unreasonable restraints of trade, but are protected from antitrust scrutiny by the nonstatutory labor exemption. A nonstatutory labor exemption is not based on any U.S. statute, but rather on the

²⁴ Insley, *supra* note 17, at 611.

²⁵ *Id.*

²⁶ Fournier & Roux, *supra* note 1, at 151.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Brown*, 518 U.S. at 235-236 (explaining that the nonstatutory labor exemption prevents courts from applying antitrust law).

fact that if a union and management bargain with one another, then antitrust law cannot overturn such a bargain. The nonstatutory labor exemption was applied to a sporting league, the NFL, in *Mackey v. NFL*.³⁰ In *Mackey*, the court explained that the nonstatutory labor exemption applies only to issues where "restraint on trade primarily affects only the parties to the collective bargaining relationship", the issue is "a mandatory subject of collective bargaining", and where the agreement sought to be exempted from antitrust law "is the product of bona fide arm's-length bargaining."³¹

The primary legislation governing labor law in the United States is the National Labor Relations Act (hereinafter NLRA).³² Issues involving the NLRA are overseen by the National Labor Relations Board (hereinafter NLRB).³³ The NLRA has two main functions: "to prevent and remedy unfair labor practices, whether committed by labor organizations or employers," and "to establish whether or not certain groups of employees desire labor organization representation for collective-bargaining

³⁰ See generally, *Mackey v. NFL*, 543 F.2d 606 (1976) (challenging a rule requiring a team who signed a player who's contract was up to pay his former team under the Sherman Act).

³¹ *Id.* at 416 (analyzing case precedent to determine the necessary elements in order that a case be exempted from antitrust scrutiny under the nonstatutory labor exemption).

³² National Labor Relations Act, 29 U.S.C. §§151-169, available at http://www.nlr.gov/about_us/overview/national_labor_relations_act.aspx (describing the NLRA as "the primary law that governs relations between unions, employees and employers in the private sector").

³³ NLRB Overview, http://www.nlr.gov/about_us/overview/index.aspx (last visited Jan. 23, 2011) ("Congress established the National Labor Relations Board (NLRB) in 1935 to administer the National Labor Relations Act (NLRA)").

purpose, and if so, which union.”³⁴ However, the jurisdiction of the NLRB is complicated by the fact that typically the labor law of the country or province one is in is controlling.³⁵ Regardless of the aforementioned principle, the NLRB has ruled that it has jurisdiction over teams within the MLB and NBA, including the Canadian teams.³⁶ There has not been a specific decision regarding the teams of the NHL, though it is likely that the NLRB would take jurisdiction there as well. This issue of concurrent jurisdiction has led to a situation where both Canadian and U.S. labor law has to be taken into account by the national leagues which have Canadian franchises.³⁷ Adding further to the conflict of laws is the fact that Canadian labor law is governed provincially instead of federally.³⁸ Thus, each province has its own labor relations board³⁹ which applies its

³⁴ *Id.*

³⁵ 1 Aaron N. Wise & Bruce S. Meyer, *INTERNATIONAL SPORTS LAW & BUSINESS* 596 (1997).

³⁶ See, William B. Gould IV, *International Labor Standards: Labor Law Beyond U.S. Borders: Does What Happens Outside of American Stay Outside of American?*, 21 *Stan. L. & Pol’y Rev.* 401, 404-405 (discussing how the NLRB has expanded its jurisdiction internationally).

³⁷ See, *The Association of Major League Umpires v. American League & National League of Professional Baseball Clubs & The Toronto Blue Jays Baseball Club, Decisions and Orders of the Ontario Labor Relations Board*, File No. 0298-95-U(O.L.R.D. No. 1543) (wherein the Ontario Labour Relations Board took jurisdiction over a suit involving the MLB).

³⁸ *The Association of Major League Umpires*, (O.L.R.D. No. 1543) (“in Canada, employment and collective bargaining matters are largely subject to provincial regulation”).

³⁹ See e.g., Alberta Labour Relations Board available at <http://www.alrb.gov.ab.ca/> (last visited Jan. 23, 2011); Ontario Labour Relations Board available at <http://www.olrb.gov.on.ca/english/homepage.htm> (last visited Jan. 23, 2011); Labour Relations Board—British Columbia available at <http://www.lrb.bc.ca/> (last visited Jan. 23, 2011); Commission des Normes du Travail Quebec available at <http://www.cnt.gouv.qc.ca/en/home/index.html> (last visited Jan. 23, 2011).

own labor laws.⁴⁰ All of this leads to a system where the collective bargaining process is fragmented by the need to comply with several different legal systems, depending on franchise location.

Because labor law is the primary law which a player might bring suit under in a sports law context, it has played a major role in the development of the leagues. So far, the Canadian teams within three of the national leagues have already had some effect on U.S. sport league jurisprudence. The further additions of European teams to the leagues could cause substantial changes in the collective bargaining relationship.

In analyzing the possible effects on labor relations that a European expansion may have, this paper will first look at whether the NLRA may still be applied extraterritorially, and then look at what changes foreign jurisdictions might cause with regards to strikes and lockouts, arbitral review of the CBA, injunctive standards, and player movement within the leagues. Lastly, the paper will look to the example of the Union of European Leagues for Basketball as a model for avoiding some of these barriers to expansion.

⁴⁰ *E.g.*, The Association of Major League Umpires, (O.L.R.D. No. 1543) (applying Ontario law to collective bargaining actions occurring in Toronto).

2. Choice of Law

2.1 Extraterritorial Application of the NLRA

As previously discussed, labor in the United States is governed by the NLRA⁴¹ which is adjudicated by the NLRB.⁴² Therefore, most cases which involve organized labor are first brought before the NLRB. However, it has been held that the NLRA only applies to activities which occur within the United States,⁴³ so the NLRB will not take control of cases where actions of organized unions occurred overseas, even if it is an American labor organization.⁴⁴ This application of the NLRA only to issues in the United States means that courts have refused to apply the NLRA extraterritorially.⁴⁵ "The concept of extraterritoriality, in the jurisdictional sense, refers to the application of U.S. law to conduct connected to foreign territories or to conduct involving citizens of foreign states." Therefore, even though the players of the individual national

⁴¹ National Labor Relations Act, 29 U.S.C. §§151-169, available at http://www.nlr.gov/about_us/overview/national_labor_relations_act.aspx

⁴² National Labor Relations Board Official Website Overview, http://www.nlr.gov/About_Us/overview/ (last visited Jan. 23, 2011).

⁴³ *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143-144 (1957) ("Congress did not fashion [the N.L.R.A.] to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees").

⁴⁴ Frank Balzano, *Extraterritorial Application of the National Labor Relations Act*, 62 U. Cin. L. Rev 573, 574 (ruling that American labor organizations, acting in foreign territory, are outside the jurisdiction of U.S. labor regulations").

⁴⁵ See generally, *Benz*, 353 U.S. 138.

leagues are part of American labor organizations,⁴⁶ the NLRB will not acquire jurisdiction over labor cases that occur in foreign jurisdictions.

The Supreme Court has ruled that it will not apply U.S. statutes extraterritorially unless there is clear intent on the part of Congress to do so.⁴⁷ In *EEOC v. Arabian Oil Co.*, the Supreme Court stated that they would not apply a federal labor statute extraterritorially without "affirmative intention of the Congress clearly expressed" to do so.⁴⁸ *Arabian Oil* dealt with a Civil Rights Act action against a U.S. company who employed workers abroad.⁴⁹ The court held that the employees stationed in other countries were not entitled to bring a Civil Rights Act suit against the U.S. employer, and instead had to resort to the law of the jurisdiction in which they were employed.⁵⁰ While that case involved a different statute, the Civil Rights Act, the Supreme Court later used this precedent to rule that the NLRA also did not apply extraterritorially because there was no

⁴⁶ Players in the NFL are part of the NFL Players Association (hereinafter NFLPA) [<http://www.nflplayers.com/>]; Players in the NHL are part of the NHL Players Association (hereinafter NHLPA) [<http://www.nhlpa.com/>]; Players in the NBA are part of the National Basketball Players Association (hereinafter NBPA) [<http://www.nbpa.org/>]; and major league baseball players are part of the Major League Baseball Players Association (hereinafter MLBPA) [<http://mlbplayers.mlb.com/pa/index.jsp>]. All of these unions are American unions formed under the NLRA.

⁴⁷ *EEOC v. Arabian Oil Co.*, 499 U.S. 244, 250-251 (statutorily overruled) ("The intent of Congress as to the extraterritorial application of [Title VII] must be deduced by inference from boilerplate language which can be found in any number of congressional Acts").

⁴⁸ *Id.* at 264.

⁴⁹ *Id.*

⁵⁰ *Id.*

clear intention on behalf of Congress for it to do so.⁵¹ This would complicate the collective bargaining process if the national leagues were to move to Europe, because the various players' unions would not be protected by the NLRA if the union was to strike or the teams were to lockout players on foreign soil. So before either unions or teams decide to support an expansion overseas, they must take a close look at the effect this move could have on their rights in the bargaining process and decide if such an expansion truly is in their best interest, or at the very least contemplate a reorganization to avoid these issues.

However, there is still a possibility that a dispute between the players association and league teams could be governed by the NLRA, because the distinction of when the NLRA applies has become an uncertain one. In *International Longshoremen's Association*, the Supreme Court ruled that the NLRB had jurisdiction because American unions were picketing a foreign ship on American soil, because it did not affect the "internal discipline" of the foreign vessels."⁵² Compare this

⁵¹ See e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Incres Steamship Co. v. International Maritime Workers Union*, 372 U.S. 24 (1963).

⁵² *International Longshoremen's Association, Local 1416, AFL-CIO v. Ariadne Shipping Co.*, 397 U.S. 195, 199 ("[T]o construe the Act to embrace disputes involving the 'internal discipline and order' of a foreign ship would be to impute to Congress the highly unlikely intention of departing from 'the well established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship'").

with *Inces Steamship Co.* where the Supreme Court held that the NLRB did not have jurisdiction because the American union was picketing foreign labor practices on a foreign ship manned by foreign workers, which affected the internal discipline of the foreign jurisdiction.⁵³ Thus, there might be some argument that the NLRB has jurisdiction over the U.S. teams, so long as their actions do not affect the internal discipline of the overseas teams, though this would most likely still lead to a fracturing of league policy.

Another possible way that the NLRA would be applied would be if the actions of the players union were considered a secondary boycott. In *Dowd v. International Longshoremen's Association*, the Eleventh Circuit allowed NLRB jurisdiction over a case involving a secondary boycott.⁵⁴ There, an American union asked Japanese unions not to unload cargo from a Japanese ship that had been loaded by non-union American labor, and the Japanese union agreed.⁵⁵ The NLRB was allowed jurisdiction, because the American union meant to have an effect within the United States through their actions.⁵⁶ In the case of the national leagues, if the union, within the United States,

⁵³ See generally, *Inces Steamship Co.*, 372 U.S. 24.

⁵⁴ *Dowd v. International Longshoremen's Association*, 975 F.2d 779, 789 (11th Cir. 1992) (holding that the secondary boycott fell within the scope of the NLRA).

⁵⁵ *Id.* at 781-782.

⁵⁶ *Id.* at 788.

incited the players within other countries to strike, the union might still have the protection of the NLRA, because the U.S. union was acting to have an effect within the United States. However, this is based on an Eleventh Circuit case, and other circuits might not follow this precedent.⁵⁷

A possible way around the application of foreign labor law to U.S. union activity abroad could be through the collective bargaining agreements of the different leagues. Whether this could be a solution is still unclear. In *Independent Union of Flight Attendants*, the court said that a CBA cannot create extraterritorial jurisdiction for the Railway Labor Act.⁵⁸ Employees were attempting to sue under the Railway Labor Act (RLA), because the airline had hired new workers in violation of the seniority requirement.⁵⁹ The Court held that the RLA could not be used extraterritorially to cover foreign flight attendants, even if the CBA provided it could.⁶⁰ If this precedent is followed, then merely putting that United States law will apply to a dispute in a CBA will not be enough. However, in another case, the court assumed that the Railway Labor Act applied extraterritorially because it was in the CBA

⁵⁷ However, some authors have argued that the NLRA clearly applies extraterritorially where the union is certified in the United States. See, Fournier & Roux, *supra* note 1, at 154.

⁵⁸ Balzano, *supra* note 44, at 576-577.

⁵⁹ *Id.*

⁶⁰ *Id.*

without doing any analysis.⁶¹ Thus, there is still a possibility that the NLRB will take jurisdiction over a case which involves internationally stationed members of an American union.

Something interesting to note in deciding on the applicability of the NLRA is that if the NLRB does not take jurisdiction, a state court may take jurisdiction over the matter.⁶² This paper's purpose is not to go into the implications that this would present, but it is important to note that the non-extraterritorial application of the NLRA just means that federal law will not govern a labor dispute that does not involve U.S. citizens on U.S. soil, and instead the law of the place where the alleged action is occurring will govern.⁶³

This non-extraterritorial application of the NLRA is controversial. Many different scholars have argued for some manner of extraterritorial application.⁶⁴ It has been argued that in a globalizing world, the non-extraterritorial application makes it more difficult for unions to bargain, because corporations have the ability to move their work

⁶¹ *Id.* at 598 (citing Local 553, Transport Workers Union of America v. Eastern Airlines, 1982 U.S. Dist. LEXIS 17353 (E.D.N.Y. 1982)).

⁶² Bradford T. Hammock, *The Extraterritorial Application of the National Labor Relations Act: A Union Perspective*, 22 Syracuse J. Int'l L. & Com. 127, 131 (1996).

⁶³ *Id.*

⁶⁴ See Generally, Hammock, *supra* note 62; John McDonald, *Don't Cross that Line! The Case for the Extraterritorial Application of the National Labor Relations Act*, 64 U. Miami L. Rev. 369 (2009); Balzano, *supra* note 44.

overseas to avoid union involvement.⁶⁵ The Supreme Court itself has not addressed the issue since 1970, and commerce has become far more global since then.⁶⁶ It is possible that the NLRA might be made extraterritorial by Congress or by the Supreme Court, at which point, league unions operating overseas would have NLRA protection.

There is a possibility that the NLRA might someday be applied extraterritorially. Some of the labor statutes have already been amended to apply extraterritorially, including the Age Discrimination in Employment Act and the Civil Rights Act.⁶⁷ One possible way to make the NLRA extraterritorial is to apply an "effects test."⁶⁸ A general definition of the "effects test" is that it "allows a state to assert jurisdiction over activities occurring outside the boundaries of the state if those activities have a substantial 'effect' within that state."⁶⁹ This type of test has been used in the extraterritorial application of the Sherman Act.⁷⁰ For instance, in *Timberlane Lumber Co.*, the Ninth Circuit Court of Appeals created a three part test for application of the Sherman Act extraterritorially.⁷¹ That test asked: (1) "Does the alleged

⁶⁵ Hammock, *supra* note 62 at 128.

⁶⁶ *Id.* at 140.

⁶⁷ McDonald, *supra* note 64 at 370.

⁶⁸ Hammock, *supra* note 62 at 140.

⁶⁹ *Id.*

⁷⁰ *Id.* at 141-142.

⁷¹ *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (1976).

restraint affect or was it intended to affect, the foreign commerce of the United States", (2) "Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act", and (3) "As a matter of international comity and fairness, should the extraterritorial jurisdiction of the US be asserted to cover it".⁷² The Third Circuit too has addressed the issue and created a similar test.⁷³ The "effects test" has already been denied as a way of applying the NLRA in *Benz v. Compania Naviera Hidalgo*.⁷⁴ In *Benz*, the NLRB looked at all of the contacts the foreign ship had to the United States and chose to assert jurisdiction.⁷⁵ However, the Supreme Court overruled the NLRB jurisdiction, because they required clear Congressional intent for the NLRA to apply extraterritorially.⁷⁶ Regardless of this precedent, if Congress were to eventually choose to allow the NLRA to be applied extraterritorially as they have already done with several U.S. statutes, this effects test is likely to keep the actions of the league unions within the jurisdiction of the NLRB.

2.2 Consequences of Non-territorial Application in the League Thus Far

⁷² *Id.* at 613.

⁷³ *See generally*, *Mannington Mills, Inc. v. Congoleum Corporation*, 595 F.2d 1290.

⁷⁴ *Benz*, 353 U.S. 138 at 149.

⁷⁵ *Id.* at 143.

⁷⁶ *Id.* at 146-147.

Thus far, the fact that the NLRA does not apply in foreign jurisdictions has not had a noticeable effect on the leagues with Canadian teams. This might be in part because "American labor law was the inspiration for Canadian labor law."⁷⁷ However, there have been a few instances where Canadian labor boards have taken jurisdiction over disputes involving the national leagues. For instance, in a case involving Major League Baseball umpires,⁷⁸ the Ontario Labour Relations Board took jurisdiction over a suit challenging the legality of a lockout and subsequent hiring of replacement workers.⁷⁹ In that case, the Ontario Labour Relations Board (hereinafter OLRB) looked at the connections the umpires and MLB had to Ontario and found them sufficient to claim jurisdiction.⁸⁰ In that case, the OLRB applied Ontario labor law to the practices of the MLB within Ontario province.⁸¹ The court recognized that their ruling would fragment the collective bargaining jurisprudence involving the MLB, but ruled that the sovereignty of Ontario law outweighed the possible negative consequences of the ruling.⁸²

However, Canadian labor boards have not universally chosen to take jurisdiction in this type of dispute even though it has

⁷⁷ Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 *Berkeley J. Emp. & Lab. L.* 271, 279 (2001).

⁷⁸ See *infra* 3.2 for further discussion of this case.

⁷⁹ *The Association of Major League Umpires*, (O.L.R.D. No. 1543).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

been ruled that a sports organization's constitution, rules, regulations, or contracts cannot prevent Canadian courts from taking jurisdiction.⁸³ For instance, the British Columbia Labor Relations Board (hereinafter BCLRB) refused to take jurisdiction over a dispute involving players on the Vancouver Canucks hockey team, because they did not want to fragment the collective bargaining process,⁸⁴ though the NLRB did extend jurisdiction over the entire NBPL stating that

The National Basketball Players Association . . . has been recognized by the NBA as the exclusive bargaining representative for players to be employed by these teams . . . in the future and has appointed an agent for service in Canada. The record further reveals that the players initially on the rosters of these two teams [the Toronto Raptors and the Vancouver Grizzlies] were acquired from other NBA member teams as a result of expansion draft, and of course, will play close to 50% of the season within the United States. . . . It is well settled that the Board's statutory jurisdiction encompasses foreign employers doing business within the territorial United States.⁸⁵

These cases show that some extraterritorial application of the NLRA is already occurring, and the uncertain jurisdiction of these labor boards have made it difficult for teams to know which law exactly they are supposed to follow. This type of fragmenting of labor policy within a national sporting league will only be exacerbated by an expansion into the EU. All parties involved will need to ensure that their practices follow

⁸³ 2 AARON N. WISE & BRUCE S. MEYER, *INTERNATIONAL SPORTS LAW & BUSINESS* 791 (1997).

⁸⁴ *Id.*; *Vancouver Hockey Club Ltd. V. 8 Hockey Ventures Inc.*, [1987] B.C.J. 1260 (Can.); *Fournier & Roux*, *supra* note 1, at 156-157.

⁸⁵ *Gould*, *supra* note 36 at 405-406.

the law of the country or province in which the franchise is based, which will make it more difficult to agree upon league-wide rules. A second option the leagues might consider is a joint lobby of Congress to make the NLRA extraterritorially applicable.

3. Strikes & Lockouts

As previously discussed, in labor negotiations, union and management bargain with one another to create a collective bargaining agreement.⁸⁶ Sometimes, an agreement which is suitable to both parties cannot be reached, and they are forced to resort to alternative measures. One method a union might use is a strike. Black's Law Dictionary defines a strike as "[a]n organized cessation or slowdown of work by employees to compel the employer to meet the employees' demands . . ."⁸⁷ A method which employers sometimes use to improve their stance at the bargaining table is termed a lockout. Black's law dictionary defines a lockout as "An employer's withholding of work and closing of a business because of a labor dispute."⁸⁸ These two bargaining tools have been used by the national leagues before,⁸⁹ however a European expansion might hamper the parties' ability

⁸⁶ See *infra* 1.2 for an outline of the collective bargaining process.

⁸⁷ Black's Law Dictionary "strike".

⁸⁸ Black's Law Dictionary "lockout".

⁸⁹ For example, the baseball players went on strike in the 1994-1995. See, Claire Smith, *Baseball; Get a Job? Strike Isn't So Bad at Low End of Pay Scale*, N.Y. Times, March 5, 1995.

to use these threats, because collective action will be more difficult to organize if the parties are forced to ensure that their collective actions follow several different foreign laws, rather than just the labor law of the United States.

So far, differences in Canadian and American labor law have already had an effect on the ability of the unions and management to engage in collective action. In the *National Basketball Referees Association*, the OLRB held that the NBA had violated the Ontario Labour Relations Act by locking out the referees from a Toronto NBA exhibition game without going through the proper Ontario conciliation procedure.⁹⁰ There, the OLRB took jurisdiction over a lockout which was occurring jointly in the United States and in Canada, and declared the Toronto portion of the lockout illegal, even though the lockout in the United States complied with U.S. law.⁹¹ Having looked previously at the non-extraterritoriality of the NLRA and other United States labor laws, it is not surprising that the OLRB would take jurisdiction here.⁹² This case created a situation where a league-wide lockout was legal in one country, but illegal in another, thus making it less effective, because of the inability to present a unified front.

⁹⁰ *National Basketball Referees Association v. National Basketball Association*, OLRB Case Rep. No. 1389(1995).

⁹¹ *Id.*

⁹² See *infra* 2.0 on discussion of extraterritorial application of the NLRA.

A second occasion when Canadian law complicated labor negotiations within the United States national sports leagues was during the lockout of the MLB umpires.⁹³ In that case, the umpires filed a grievance against MLB before the OLRB for hiring replacement workers,⁹⁴ because there was an Ontario statute forbidding replacement workers.⁹⁵ There the OLRB again took jurisdiction over the dispute and forbade the MLB from using replacement umpires in Ontario games.⁹⁶ The court realized that the ruling would lead to a fragmented collective bargaining process, but found that "the adverse collective bargaining consequences to broader based bargaining are sufficient, in themselves, to prompt the Board AS A MATTER OF DISCRETION not to apply Ontario law to collective bargaining activity in Ontario."⁹⁷

These two instances of the OLRB taking jurisdiction over collective bargaining activities in Ontario, which were part of a larger league-wide activity primarily centered in the United States, shows the difficulty that will arise if one or more of the leagues were to expand overseas. Then, the players' union

⁹³ The Association of Major League Umpires, (O.L.R.D. No. 1543).

⁹⁴ *Id.*

⁹⁵ Section 73.1 of Ontario's Labour Relations Act forbids the engagement of replacement workers. This statute has since been repealed, but British Columbia has a similar provision in their Labour Relations Code, Part 5; R.S.B.C. 1996, c. 244, s. 68, so the issue of replacement workers in Canada is still relevant.

⁹⁶ The Association of Major League Umpires, (O.L.R.D. No. 1543).

⁹⁷ *Id.* at paragraph 16.

or multi-employer bargaining unit will find it difficult to engage in concerted action, because laws of different countries will be governing their actions.

However, in some instances where labor has attempted to use this tactic to undermine a hard bargaining action by management, this tactic has failed. For instance, in 2005, the NHL threatened to hire replacement workers when it looked like a strike would continue into the next season.⁹⁸ In response, the NHLPA applied to be certified to represent all players of the Montreal Canadiens team under Quebec law, which contained a provision against replacement workers.⁹⁹ However, the Commission des Relations de Travail (CRT), which is the Quebec labor relations board, held that the NHLPA had been a single union formed under the NLRA for forty years, and refused to certify a portion of the players in a new union under Quebec law.¹⁰⁰ The NHLPA also tried this tactic at the same time in front of the British Columbia Labor Relations Board, but they too refused to certify a new union for only British Columbia hockey players.¹⁰¹ However, it should be noted that this is a case where a portion of the NHLPA tried to recertify as a new union, rather than the

⁹⁸ Fournier & Roux, *supra* note 1, at 155.

⁹⁹ *Id.*; See generally, Association des Joueurs de la Ligue Nationale de Hockey v. Club de Hockey Canadien Inc., 2005 QCCRT 354.

¹⁰⁰ Association des Joueurs de la Ligue Nationale de Hockey v. Club de Hockey Canadien Inc., 2005 QCCRT 354.

¹⁰¹ Orca Bay Hockey Ltd. P'ship and Nat'l Hockey League, BCLRB, no. B172/2007 (2007).

union attempting to prevent the replacement players from playing within the province of Quebec.¹⁰²

Regardless of which stance the provincial labor boards of Canada take, the leagues need to consider the effects foreign labor law will have on these tactics in drafting proposals for overseas expansion.

4. Arbitration

As previously stated, each of the leagues has their own collective bargaining agreement wherein the teams and the unions agree on many of the issues faced by the players. Within each of these agreements, there is a provision which requires disputes involving the CBA to first go into arbitration.¹⁰³ Courts in the United States apply a heavy presumption of arbitrability of any matter discussed in a CBA, so matters are considered capable of being decided in arbitration unless

¹⁰² Compare *Id.* (attempting certification of a separate union), with *Association of Major League Umpires v. American League & National League of Professional Baseball Clubs & The Toronto Blue Jays Baseball Club, Decisions and Orders of the Ontario Labor Relations Board*, File No. 0298-95-U(O.L.R.D. No. 1543) (challenging use of replacement players in a province where such practice was forbidden).

¹⁰³ MLB Collective Bargaining Agreement, Article XI-Grievance Procedure, Subsection B-Procedure 38, available at http://mlb.mlb.com/pa/pdf/cba_english.pdf; NHL Collective Bargaining Agreement Article 17-Grievances, Arbitration, Impartial Arbitrator 89, available at <http://www.nhlpa.com/About-Us/CBA/>; NBA Collective Bargaining Agreement, Article XXXII-System Arbitration 343, available at <http://www.nbpa.org/sites/default/files/ARTICLE%20XXIX.pdf>; NFL Collective Bargaining Agreement, Article IX Non-Injury Grievance 23, available at <http://static.nfl.com/static/content/public/image/cba/nfl-cba-2006-2012.pdf>.

explicitly exempt from arbitration by the CBA.¹⁰⁴ Therefore, in order for something to not be within the jurisdiction of an arbitrator, the CBA must explicitly state that it is not within the scope of arbitration. Furthermore, once a case is arbitrated, the court awards great deference to the decision.¹⁰⁵ In fact, the deference toward an arbitrator is so great that in *Garvey*, the Supreme Court upheld an arbitrator's ruling which was admittedly "silly," because "courts cannot reverse such results even if they are part of improvident, even silly, fact finding." This deference to arbitral decisions has created a system where appeals are nearly useless.¹⁰⁶

¹⁰⁴ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

¹⁰⁵ *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001) ("When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's "improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award"); *Boston Celtics Ltd. Partnership v. Shaw*, 908 F.2d 1041, 1045 (1st Cir. Mass 1990) ("arbitration award is valid so long as it 'draws its essence' from the labor contract).

¹⁰⁶ *Major League Baseball Players Association v. Garvey* deals with a player, Garvey, attempting to receive damages, because the team owners colluded to keep player salaries low. The MLB team owners had been accused of making agreements on bidding for players so that players were not receiving the salaries they should have in a free market. As a result of this litigation, settlement money was put into a fund for all players affected by the collusion. Garvey's suit was an attempt to receive some of that settlement money. In arbitration, he was denied collusion money. Afterward, Garvey presented to the arbitrator a letter from the president of the San Diego Padres stating that they refused to negotiate with Garvey due to collusion. However, the arbitrator, even in light of the new letter, refused to change his ruling. The case was appealed and the 9th Circuit said that the arbitrator was irrational and reversed the case, but the Supreme Court upheld the arbitrator's ruling showing a great deal of deference to arbitration decisions.

Canadian courts also defer greatly to the decisions of an arbitrator.¹⁰⁷ However, unlike the United States, Canadian courts sometimes apply a doctrine called "natural justice."¹⁰⁸ This doctrine allows the court to overturn an arbitral decision they might otherwise leave alone if certain conditions are not met.¹⁰⁹

A minor violation of natural justice is not enough to quash a decision, but if the rule or bylaw is contrary enough to the court's sense of natural justice, it will intervene.¹¹⁰ Furthermore, the courts will also intervene if it believes there to be bias or a likelihood of bias of a tribunal member involved in the arbitration.¹¹¹

This doctrine of natural justice could have had an influence on previous sports arbitration decisions. For instance, it might have overturned the *Garvey* decision,¹¹² because the court will intervene if there is no evidence with which a domestic tribunal could base its decision.¹¹³ Arguably, if a Canadian court had found the fact finding of a case to be "silly" it would not have upheld the arbitrator's decision.

¹⁰⁷ WISE & MEYER, *supra* note 83 at 802.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 803; *Maclean v. Workers' Union* 2 Ch. 602.

¹¹¹ *Id.*

¹¹² *Major League Baseball Players Ass'n*, 532 U.S. 504.

¹¹³ WISE & MEYER, *supra* note 83 at 801.

It has been proposed that this judicial intervention through the doctrine of natural justice has become more frequent.¹¹⁴ This doctrine could increase forum shopping amongst the parties, and increase the length of litigation involving these matters, because of the greater likelihood of having an arbitration decision overturned in Canada is greater than in the United States.

Other countries in Europe also use the doctrine of "natural justice." In fact the United Kingdom is the creator of the doctrine,¹¹⁵ so expanding overseas will increase the use of this doctrine and undermine arbitration decisions, which within the United States would have been nearly non-appealable.

5. Antitrust

As previously stated,¹¹⁶ antitrust laws are not generally applied to labor issues of sports leagues within the United States, because of the nonstatutory labor exemption.¹¹⁷ This means that in the United States, the union cannot sue their affiliated teams for violation of the antitrust act for anything

¹¹⁴ *Id.*; See also, Kelly v. Canadian Speed Skating Assoc., 53 ACWS (3d) 750 (Ont. Ct., Gen Div.) (saying the association breached its duty by changing the selection criteria suddenly); Gray v. Canadian Track & Field Assoc. 39 ACWS 483 (Ont. H.C.) ; Blainey and Ontario Hockey Assoc. 52 OPR 2d 225, reversed 54 OR 2d 513.

¹¹⁵ Lee v. Showmen's Guild of Great Britain 1 ALL E.R. 1175 at 1179; WISE & MEYER, *supra* note 83 at 801.

¹¹⁶ See *infra* 1.3.

¹¹⁷ Brown, 518 U.S. at 235-236 (explaining that the nonstatutory labor exemption prevents courts from applying antitrust law).

that (1) primarily affects the parties of the collective bargaining agreement, (2) is a mandatory subject of collective bargaining, and (3) is a result of good faith, arms length bargaining.¹¹⁸ This exemption has allowed sports leagues to enforce rules that might otherwise be seen as violations of the antitrust laws.¹¹⁹

5.1 Canadian Antitrust and its Implications

Thus far, Canadian antitrust law has not had an effect on the actions of the sports leagues with teams in Canada. Canadian antitrust law is controlled by a federal statute titled the Competition Act.¹²⁰ The act has language similar to the court created nonstatutory labor exemption which exempts union activity from the antitrust laws.¹²¹ Section 4(a) of the Canadian Competition Act states

nothing in this act applies in respect of (a) combinations or activities of workmen or employees for their own reasonable protections as workmen or employees . . . or (c) contracts, agreements or arrangements between or among two or more employers in a trade, industry or profession, whether effected directly between or among the employers or through the instrumentality of a corporation or association of which the employers are members, pertaining to

¹¹⁸ *Id.*

¹¹⁹ See e.g., *Yazoo Smith v. Pro Football, Inc.* (holding that the draft is illegal); *Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004) (holding that the age requirements would be illegal, except they receive nonstatutory labor exemption protection because they were in the constitution and bylaws and the union could have bargained over them).

¹²⁰ Competition Act, R.S.C. 1986, c. C-34, available at <http://laws.justice.gc.ca/PDF/Statute/C/C-34.pdf>.

¹²¹ *Id.* at §4(1); *Compare, Mackey*, 543 F.2d 606; & *Brown*, 518 U.S. 231.

collective bargaining with their employees in respect of salary or wages and terms or conditions of employment.¹²²

This exception in 4(1)(c) is very similar to the nonstatutory labor exemption of the United States which gives protection to terms bargained for between labor and management.

Antitrust law was placed further out of reach for unions when the Competition Act was amended to add section 48(2)(a).¹²³ That section¹²⁴ deals specifically with organized, professional sports in Canada.¹²⁵ The act prohibits anyone from "unreasonably [restricting] the opportunities for any other person to participate as a player or competitor, in professional sport or to impose unreasonable terms or conditions . . ." ¹²⁶ or "to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league . . ." ¹²⁷ This "unreasonable" language sounds much like the rule of reason scrutiny which courts in the United States have applied to sporting leagues.¹²⁸ Furthermore, that section of the Act uses the term "to impose unreasonable terms" which some scholars have

¹²² Competition Act, *supra* note 120, at §4(1)(c).

¹²³ JOHN BARNES, SPORTS AND THE LAW IN CANADA, 110 (1988).

¹²⁴ The 2010 version of this statute has been amended to move subsection 32.3 to subsection 48(1)(a), which is what it will be referred to as hereafter.

¹²⁵ Competition Act, *supra* note 120, at § 48(1)(a).

¹²⁶ *Id.* at § 48(1)(a).

¹²⁷ *Id.* at § 48(1)(b).

¹²⁸ Mackey, 543 F.2d 619 (holding that per se analysis is improper because of the nature of sports).

argued exempts terms in a CBA that have been bargained for because they were not "imposed."¹²⁹

A second section, 48(2)(a), allows courts to take into account whether the "violation [that] is alleged is organized on an international basis."¹³⁰ One possible interpretation of this provision is that Canadian courts will "automatically allow restraints which have been approved in numerous American cases," however, this interpretation seems to be a stretch because that statute merely requires courts to "have regard to" foreign jurisdictions.¹³¹ This allows the courts to consider the international nature of the action, but does not require them to rule in any particular manner.

Another portion of Canadian law which a player might use to challenge league rules or terms within the CBA is the "restraint of trade doctrine."¹³² The doctrine may be applied to contract terms or covenants, and has been used previously to strike down covenants not to compete.¹³³ However, it has not yet been applied to U.S. sports leagues.

Because U.S. and Canadian antitrust laws are so similar, the sporting leagues have not had to worry about adding teams in

¹²⁹ BARNES, *supra* note 123.

¹³⁰ Competition Act, *supra* note 120, at § 48(2)(a).

¹³¹ BARNES, *supra* note 123 at 112 (discussing 32.3(2)(a), which is now 48(2)(a)).

¹³² See, Barnes, *supra* note 123 at 116-118.

¹³³ *Id.*

Canada. There is little incentive to forum shop, and the Competition Act itself allows the Canadian courts to cede to established American law in dealing with the national leagues. This similarity, however, is not the case in Europe.

5.2 EU Antitrust Law & Its Implications

Issues involving European Law are complicated by the fact that there are both country-specific laws, and laws promulgated by the European Community. Thus far, expansion has been considered in England, France, Germany, Italy, and Spain.¹³⁴ Of these countries, France, Spain, and Italy have specific sports statutes, similar to that of Canada.¹³⁵ These statutes would have to be studied once a league decided to expand into that country, but this paper will focus solely on general EU competition law.

The purpose of this paper is not to examine the antitrust implications of a move to Europe,¹³⁶ but rather to look at the

¹³⁴ Gordon Forbes, *World League Ends today*, USA TODAY, Oct. 26, 1993 (listing England, Germany, and Spain as the countries likely to have a European team in the next attempt at a world football league, and noting that they were the most successful European franchises); Tabliabue: Expansion in NFL Europe possible, ASSOCIATED PRESS, June 14, 2003, available at <http://www.highbeam.com/doc/1P1-74611076.html> (discussing Hamburg & Madrid as two interested parties for NFL expansion); Ian Whittell, *NBA Declares Intention to Expand into Europe*, TIMES (LONDON), Mar. 12, 2002 (listing these countries as most likely to host a European NBA team, and specifically relating the closeness of British and American sporting leagues).

¹³⁵ Wise & Meyer, *supra* note 35, at 682.

¹³⁶ If one is interested in a more antitrust centric article, See generally, Marc Edelman & Brian Doyle, *Antitrust and "Free Movement" Risks of Expanding*

effect such move would have on the ability of the leagues' labor unions and teams to come to and enforce agreements, however, antitrust factors into this discussion, because the ability to file such a suit provides the union with leverage.¹³⁷ In the United States, the nonstatutory labor exemption has forbid an antitrust suit about issues that have been collectively bargained for until the union and employers are "sufficiently distant in time and circumstances from the collective bargaining process."¹³⁸ This standard makes it difficult for a union in the United States to file such a suit.¹³⁹

Europe, however, does not have as broad a labor exemption as the United States. European competition law first came into being with the Treaty of Rome in 1958.¹⁴⁰ That treaty was replaced by the EC Treaty.¹⁴¹ Competition law under the EC treaty is discussed generally in Article 81.¹⁴² This article

U.S. Professional Sports Leagues Into Europe, 29 NW. J. INT'L L. & BUS. 403 (2009).

¹³⁷ *Powell v. National Football League*, 690 F. Supp. 812, 817 (D. Minn. 1988) ("It would be highly destructive to collective bargaining if major issues could be removed from the bargaining table and preliminarily resolved in isolation in antitrust litigation").

¹³⁸ *Brown v. Professional Football*, 518 U.S. 231, 250 (1996).

¹³⁹ Currently, the NFLPA is in the process of decertification so that they are able to be far enough in time and circumstances from the collective bargaining process to file an antitrust suit against the NFL. For more information on the strike See, Judy Battista, *Meetings, not talks, for players and owners*, N.Y. TIMES Jan 17, 2011 at B10.

¹⁴⁰ Edelman & Doyle, *supra* note 136 at 411.

¹⁴¹ *Id.*

¹⁴² Consolidated Version of the Treaty Establishing the European Commission, Chapter 1: Rules on competition, Section 1: Rules Applying to Undertakings, Article 81.

prevents collusion among competitors.¹⁴³ Article 81(3) allows the EC Commissioners to excuse some conduct that might violate section 81, so long as it “contributes to improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit”¹⁴⁴ So far, the EC Commissioners have been lenient toward sporting practices by allowing conduct that would otherwise be legal in the United States.¹⁴⁵ Furthermore, the European Court of Justice has carved out a nonstatutory labor exemption, though it is much narrower than its U.S. counterpart.¹⁴⁶ For example, in *Brentjens*, the court held that provisions within a collective bargaining agreement which directly improved working conditions are exempt from article 81 scrutiny.¹⁴⁷ This is in contrast to the *McCourt* case, where a provision of the CBA was upheld, even though it did not benefit the union, but instead benefited management.¹⁴⁸ There a play challenged the NFL Rozelle Rule which required a team who signed away an unsigned player to pay his old team compensation.¹⁴⁹ This provision of the CBA benefited management not labor,

¹⁴³ See *id.*; Edelman & Doyle, *supra* note 136 at 418.

¹⁴⁴ EC Treaty Article 81(3).

¹⁴⁵ Edelman & Doyle, *supra* note 136 at 419.

¹⁴⁶ *Id.* at 419-420.

¹⁴⁷ *Id.* at 420-421.

¹⁴⁸ *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193 (6th Cir. Mich. 1979).

¹⁴⁹ *Id.*

because it inhibited the free exchange of players.¹⁵⁰ The court there said that because a collective bargaining agreement was the result of multiple compromises, it would be unfair to strike down those that were not beneficial to labor and uphold the provisions that were beneficial.¹⁵¹ This difference in nonstatutory labor exemptions could have a large impact on what the parties can bargain for in their collective bargaining agreements.

A second portion of the EC Treaty dealing with competition which might have a negative effect on league expansion is Article 39 which deals with the free movement of workers.¹⁵² It forbids "any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."¹⁵³ This section has not been read to have a nonstatutory labor exemption.¹⁵⁴ It has been hypothesized that the draft would violate this provision.¹⁵⁵ The European Court of Justice recently heard a case challenging a system that stated that where a team had the maximum number of foreign players it could employ, it could only offer contracts

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² EC Treaty, Title III, Chapter 1, Article 39.

¹⁵³ *Id.*

¹⁵⁴ Edelman & Doyle, *supra* note 136 at 419.

¹⁵⁵ *Id.*

to domestic players.¹⁵⁶ The court found that this system violated the EC Treaty, and forced the football league to implement a two tiered system whereby players from countries not part of the European Economic Council [hereinafter EEC] could be restricted in this manner, but those from EEC countries could not.¹⁵⁷ Thus, if a league was looking to move into an EEC member state, it would have to be careful with its policies regarding player movement, such as the draft, so as not to violate the free movement requirement.

All of these differences between EU and U.S. antitrust law have the possibility of drastically affecting the way the players' unions and teams bargain with one another. Some things which teams may have been able to bargain into a CBA might be declared illegal under Article 81 of the EC Treaty. Further, any restriction on player movement within the EEC comes at a risk. Because certain league practices might not have labor law protection abroad, the leagues will need to take this fact into account in deciding how to structure an expansion.

6. A Model For Expansion

While there are many obstacles to a European expansion of the national leagues, other sports leagues have managed to operate

¹⁵⁶ Union Royale Belge des Societes de Football Association ASBL & Others v. Jean-Marc Bosman, Case C-415/93, ECR I-4921 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61993J0415:EN:NOT#top>.

¹⁵⁷ *Id.*

across borders. For instance, there is the Union of European Leagues of Basketball (ULEB), which might serve as an example for the national leagues.¹⁵⁸ This league is comprised of sixteen national leagues in Asia and Europe that have banded together to organize exhibition games between member teams.¹⁵⁹ Similar to the national leagues, the private teams have members in a General Assembly which oversees the conference.¹⁶⁰ However, unlike the national leagues, this General Assembly does not regulate individual player contracts or team salaries.¹⁶¹ Furthermore, the regulations which govern ULEB are not promulgated by ULEB, but instead by an independent body known as the International Basketball Federation (FIBA).¹⁶² Because of this organizing structure ULEB does not have to deal with cross border collective bargaining, and the labor laws of each country housing a team "represent the only minimum limitations confronted when formulating a contract."¹⁶³ This system seems to have worked with for ULEB, because it is gaining in popularity and even able to poach players from the NBA.¹⁶⁴ A possibility for the national leagues would be to create independent leagues

¹⁵⁸ Epps, *supra* note 18, at 358-362.

¹⁵⁹ *Id.* at 357.

¹⁶⁰ *Id.* 359.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 360.

¹⁶⁴ *Id.* at 362-365.

in European countries and then band them together in a union of leagues similar to ULEB.

7. Conclusion

Introduction of European franchises to any of the U.S. national leagues is an exciting proposition. The feasibility of this type of expansion has been discussed in great detail. However, before the leagues or unions put their support behind such an option, they need to analyze what such a move will do to their bargaining positions and structure an expansion accordingly. An expansion without any change in collective bargaining structure is likely to increase transaction costs and make collective bargaining much more difficult for an industry which relies heavily upon such bargaining. First, it is unlikely that the NLRB will choose to, or be able to, take jurisdiction over all of the parties within a collective bargaining relationship because of the non-extraterritorial application of the NLRA. Second, different jurisdictions have varying laws regarding collective action, which can lead to a fragmentation of such action, thus lessening the efficacy of such a threat. Either party in the collective bargaining relationship will find it progressively more difficult to combine their actions to assert pressure on the other party. Third, differences in how different arbitrators construe the

CBA's vary from country to country, which will lead to the employee-employer relationship varying from country to country, and increase the attractiveness of forum shopping. Also, adding countries whose arbitration systems are more likely to be overturned by courts decreases the finality of arbitration, and may lead to increased litigation as parties attempt to override the findings of the arbitrator. Lastly, the differences between U.S. antitrust law and that of Europe may lead to the overturning of league practices which the parties have gone to great lengths to bargain for, thus depriving one side or the other of benefits they thought they were bargaining for when they ceded on other points.

In sum, if this expansion does occur, the collective bargaining process will become fragmented and thus less effective unless both parties are careful in deciding how to structure an international league. A system similar to that of ULEB, which relies less heavily on a unified CBA and instead allows local labor laws to control individual players contracts and a separate organization to draft league rules, might be a more viable option. Regardless, before such an expansion occurs, both parties in the collective bargaining relationship to evaluate what effects such expansion will have on their

bargaining relationship, and ensure that safeguards are put in place in drafting a league which includes overseas franchises.