Full Court Press: How Collective Bargaining Weakened the NBA's Competitive Edge in a Globalized Sport

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FULL COURT PRESS: HOW COLLECTIVE BARGAINING WEAKENED THE NBA’S COMPETITIVE EDGE IN A GLOBALIZED SPORT

I. INTRODUCTION

In the summer of 2005, the National Basketball Association (“NBA”) confronted enormous pressure to reach a new labor contract with its players’ union.¹ After extensive negotiations between NBA Commissioner David Stern and the players’ union president, Billy Hunter, the two sides achieved a new deal and barely avoided a potentially costly lockout.² The terms of the new collective bargaining agreement (“CBA”) imposed many new restrictions on players and team owners.³ Most notably, the CBA increased the NBA’s minimum draft entry age to nineteen years old and instituted a

¹ See No Lockout – NBA Labor Deal Reached, NBCSPORTS.COM, http://nbc-sports.msnbc.com/id/8295646/site/21683474/ (last visited Mar. 8, 2009) [hereinafter No Lockout – NBA Labor Deal Reached] (describing intense pressure to reach new agreement before current contract expired). Failure to reach a new labor contract would likely result in a lockout by the players and a league wide shutdown. See id. (discussing possibility of lockout). Additionally, the owners were aware that failed labor negotiations in the National Hockey League (“NHL”) had resulted in a player lockout and eventually cost the league its 2005 season. See Thomas Heath, NHL, Union to Meet Again, Wash. Post, Feb. 19, 2005, at D1, available at http://www.washingtonpost.com/wp-dyn/articles/A36297-2005Feb18.html (announcing cancellation of 2005 NHL season after collective bargaining negotiations between players and owners stalled); Liz Robbins, N.B.A. Expects Smoother Path to Labor Deal, N.Y. TIMES, Feb. 18, 2005, at D1, available at http://www.nytimes.com/2005/02/18/sports/basketball/18stern.html?_r=1 &oref=slogin (detailing how NBA owners wanted to avoid NHL style lockout by signing new agreement with players). Therefore, representatives on both sides of the NBA faced enormous pressure to remain flexible during negotiations and avoid a stalemate over the specific conditions of employment. See No Lockout – NBA Labor Deal Reached, supra (commenting on key terms that held up negotiations for months).

² See No Lockout – NBA Labor Deal Reached, supra note 1 (recounting moments leading up to 2005 collective bargaining agreement). The NBA announced the agreement less than two weeks before the old CBA expired on June 30, 2005. See id. (detailing timing of new CBA). The effects of a lockout would cost players millions in unearned salaries, teams would lose hundreds of millions in lost revenues and most importantly, the lockout would induce a lasting disdain from fans who would spend less on league merchandise and tickets. See Steve Aschburner, Lockout Revisited, 10 years Later, SPORTSILLUSTRATED.COM, July 808/lockout. revisited/index.html (analyzing major losses sustained after NBA lockout in 1998).

increased salary cap on the maximum expenditure permitted on a team’s roster. 4

NBA officials assumed that these restrictive terms would provide young players with an opportunity to mature at the collegiate level before entering the professional arena and maintain a competitive balance of talent throughout the NBA. 5 These assumptions, however, rested on the principal conviction that the NBA held the title as the premiere global basketball league, which attracted the most skilled domestic and foreign players. 6 Addition-

2010-2011 season and includes an option exercisable by the NBA to extend the CBA one additional season. See id.

4. See id. (presenting 2005 CBA’s age requirement and salary cap for teams). The draft age requirement increased from eighteen to nineteen years old. See id. Specifically, “U.S. players must be at least one year removed from high school and 19 years of age (by the end of that calendar year) before entering the draft. An international player must turn 19 during the calendar year of the draft.” Id. Additionally, under the new agreement, the salary cap increased from forty eight percent of all of Basketball Related Income (“BRI”) in the 2004-2005 season ($49.5 million) to forty nine and one half percent of BRI in 2005-2006 and then to fifty one percent of BRI for the remainder of the contract. See id. In general, BRI “includes all income received by teams as a result of basketball operations – ticket sales, sponsorship, television revenue, and so on . . . .” CONTEMPORARY SPORT MANAGEMENT 106-07 (Janet B. Parks et. al. eds., 3d ed. 2007). For the NBA’s 2008-2009 season, fifty one percent of BRI amounted to $58.68 million. See NBA, NBA Salary Cap for 2008-09 Season, http://www.nba.com/news/salarycapset_080709.html (last visited Mar. 8, 2009) (calculating precise dollar amount of BRI).


ally, under the Commissioner Stern’s guidance, the NBA perceived expansion into overseas markets as an inevitable reality that faced no genuine competitive threat.7

For a few years after the signing, the NBA continued to collectively maintain a monopoly on global talent. As a result of the CBA’s limiting conditions of employment, the labor deal readily produced the desired results.8 Nevertheless, during the 2008 free agency period, the NBA’s global dominance hit an abrupt roadblock when a top domestic high school recruit directly challenged the principals behind the NBA’s age requirement by signing abroad, and an increasingly large number of NBA players entered new contracts with foreign leagues.9

This Comment analyzes why such an abrupt shift occurred by comparing and contrasting the legal restrictions imposed on the


NBA and professional basketball leagues abroad. Section II provides a general overview of the structure of each league and the interaction of the relevant domestic employment laws. Section III analyzes how the CBA's legally binding restrictions place the NBA at an extreme disadvantage compared to foreign leagues and offers possible actions that the NBA may take to counter this new threat. Section IV concludes that the rise of credible international competition has rendered many of the current CBA's goals unachievable and possibly forever changed the premier face of basketball.

II. BACKGROUND

A. Collective Bargaining in the NBA

1. The Interaction between United States Antitrust and Labor Laws

Since its formation, the NBA has seen its fair share of litigation within the United States. Twenty-nine of the NBA's thirty teams are located within the United States and subject to the country's laws regulating union activities, employment contracts and collective bargaining.

Union activities in the United States must comport with the National Labor Relations Act ("NLRA"). The NLRA guarantees the right of employees to unionize under a single organization for the purpose of collectively negotiating their terms of employment.

10. For a further discussion of the legal restrictions surrounding the creation of the NBA and foreign leagues, see infra notes 14-49, 99-116 and accompanying text.

11. For a further discussion of how the two leagues compare, see infra notes 14-116 and accompanying text.

12. For a further discussion of the NBA's disadvantage and possible solutions, see infra notes 117-181 and accompanying text.

13. For a further discussion on how the NBA has changed, see infra notes 182-192 and accompanying text.

14. See Shaffer, supra note 5, at 691-99 (presenting important federal cases involving professional sports teams, which impacts NBA directly or indirectly).

15. See NBA, Teams, http://www.nba.com/teams/ (last visited Mar. 8, 2009) (providing NBA teams geographic locations). While these teams represent a majority of the National Basketball Players Association's ("NBPA") members, players signed to the Toronto Raptors are protected under Canadian judicial and legislative authority on collective bargaining. See Nat'l Basketball Players Ass'n, Collective Bargaining Agreement, art. XXIX, § 11 (July 25, 2005), available at http://www nbpa com/cba_articles/ [hereinafter Collective Bargaining Agreement] (outlining exceptions for Canadian teams). Even so, the legal structures of the two countries are so similar that no major differences currently exist. See id. (referencing Canadian labor laws).

with their employer. Additionally, the NLRA prohibits an employer from unfairly interfering with the union’s activities or practices. Therefore, an employer must permit its employees to unionize and collectively negotiate with the union representatives in good faith.

Moreover, once the employer officially recognizes an exclusive representative from the union, federal law prohibits any employee from independently engaging in any subsequent employment negotiations. The resulting agreement between the employer and union representative signifies a contract, which legally binds the two parties together under the expressed conditions of employment. Courts have broadly interpreted the term “party” in the agreement to include subsequent employees, who were not privy to the initial negotiations. As a result, American workers can negotiate preconditions necessary for entry into respective employment positions, such as age limits, for all current and future employees.

In addition to these labor laws, employers engaged in interstate commerce in the United States cannot implement unfair competitive practices. The Sherman Antitrust Act ("Sherman Act") prohibits an employer from acquiring a monopoly in its respective

17. See id. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . .").
18. See id. § 158(a) (stating illegal labor practices). The Act states that unfair labor practices include the use of coercive, discriminatory or forceful tactics. See id.
19. See id. (providing employer’s obligations).
23. See United Mine Workers of Am. v. Pennington, 381 U.S. 657, 664 (1965) (holding union and employer may decide terms of employment as long as they constitute “mandatory subjects” of bargaining and do not violate federal labor practices); see also Clarett, 369 F.3d at 140-41 (holding “mandatory subjects of bargaining” included age limits). Similar protections for workers have been upheld in Canada’s highest court, which recently held that collective bargaining was a fundamental right inherent to all employees. See generally Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391, 2007 SCC 27 (Can.) (holding collective bargaining has important role in worker’s rights).
24. See Shaffer, supra note 5, at 689-91 (describing intersection of labor laws and anti-trust laws).
industry through collusion with other industry owners or by preventing the emergence of competition. The United States government has utilized the Sherman Act since its enactment to break up large corporations that unfairly restrain free trade in their respective industries. Moreover, the Clayton Antitrust Act ("Clayton Act") provides individuals with the legal right to file a complaint in federal court against any employer engaged in monopolistic practices for economic damages suffered from the restraint in trade.

The federal legislative and judicial branches recognized that antitrust legislation conflicted with the legal right of unions to negotiate restrictive terms of employment and engage in bargaining tactics, such as strikes and pickets, which adversely affect trade. Therefore, the government formulated two exemptions to antitrust scrutiny to allow unions to legal coexist with antitrust laws. First, the Clayton Act and the Norris-LaGuardia Act provide a statutory exemption for certain labor union tactics undertaken during collective bargaining provided the union enacted them unilaterally.

25. See 15 U.S.C. §§ 1-2 (2000) (prohibiting collusion with other employers in same industry or monopoly of trade). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." Id. § 1 (2000).


[An]y person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue . . . in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id. § 15. Moreover, a party suing under the Act must "prove (1) a concerted action between the defendant and a third party, (2) a restraint on trade, and (3) an effect on foreign or interstate commerce." Shaffer, supra note 5, at 688. Courts use two types of tests in determining whether the elements are satisfied: the rule of reason approach and/or the per se approach. See id. at 688-89 (citing Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1, 55, 59-70) (presenting in more detail two tests established by Supreme Court).

28. See Spira, supra note 26, at 811-13 (explaining congressional and judicial role in exempting labor unions from anti-trust). For a further discussion of U.S. labor laws, see supra notes 16-23 and accompanying text. Additionally, for a further discussion of U.S. anti-trust laws, see supra notes 24-27 and accompanying text.

29. See Shaffer, supra note 5, at 689-91 (outlining exemptions to anti-trust).


Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the pur-
Second, the Supreme Court carved out a non-statutory exception for employment negotiations between union representatives and employers. The Court held that non-statutory exceptions apply when a union and a non-union labor party negotiate conditions considered terms of employment under the NLRA.

In 1972, the Supreme Court reaffirmed the notion that professional sports teams qualify as employers that may be subjected to antitrust scrutiny. The Court determined that professional sports engage in interstate commerce, opening the door to possible antitrust suits. Since then, various professional athletes, unsatisfied with their restrictive employment conditions, have filed antitrust claims against their respective leagues. These players generally argued that their league, as the sole professional organization for that poses of mutual help, ... or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Id. § 17 (2000). In addition, the LaGuardia Act limited the court's power and influence over labor unions. See 29 U.S.C. § 104 (2000) (holding courts are without jurisdiction to restrain unions from engaging in strikes or picketing).

See United States v. Hutcheson, 312 U.S. 219, 231 (1941) (formulating non-statutory exception that labor and anti-trust laws must be read in harmony); see also Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1976) (restating non-statutory exception). Recently, the Supreme Court reasoned:

As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable. Thus, the implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.


See Brown, 518 U.S. at 250 (stating terms necessary to apply non-statutory exception).

See Flood v. Kuhn, 407 U.S. 258, 282-83 (1972) (holding professional basketball, among other professional sports, is not exempt from anti-trust laws). With the exception of professional baseball, the Supreme Court has allowed anti-trust claims against professional sports teams to advance in the legal system. See Yoskowitz, supra note 5, at 582-88 (detailing anti-trust application in professional sports).

See Kuhn, 407 U.S. at 282-83 (holding professional sports engage in interstate commerce).

See Yoskowitz, supra note 5, at 592 (providing seminal suits against NBA for anti-trust violations); see also Ryan Rodenberg, The NBA'S Latest Three Point Play, 25 ENT. & SPORTS LAW. 14, 15 (2008) (commenting on anti-trust application in professional sports).
particular sport in the United States, unfairly restrained trade by limiting a player's movement, income or entry requirements. 36

In Wood v. NBA, the Second Circuit analyzed the conflict of labor and antitrust laws in the NBA's then current CBA. 37 The court determined that while the provisions in the CBA regulating the salary cap would unreasonably restrain a player's potential earnings, these rights could legally be eliminated through collective bargaining and the non-statutory labor exception, thereby precluding any antitrust scrutiny. 38 The Second Circuit reaffirmed its position in NBA v. Williams, concluding that a legally valid CBA circumvented any antitrust concerns. 39

In determining whether a restrictive CBA rule embodies the non-statutory exemption, the circuit courts have applied two tests. 40 The first, created by the Eighth Circuit in Mackay v. NFL, has three factors that must be established for a legally valid claim. 41 First, the restrictive condition must only affect the bargaining parties. 42 Second, the condition must concern a mandatory subject of the negotiations. 43 Last, the condition must have been the product of a bona-fide negotiation. 44

The second approach, employed by the Second Circuit in Clarett v. NFL, rejects the Mackey approach and uses a more expan-

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36. See Shaffer, supra note 5, at 699-700 (explaining potential anti-trust arguments of players challenging CBA in NBA).
37. See 809 F.2d 954, 958-61 (2d Cir. 1987) (evaluating need to harmonize labor and antitrust laws).
38. See id. at 962 (holding NBA's salary cap and draft did not violate antitrust laws).
40. See Shaffer, supra note 5, at 692-99 (describing two tests).
41. See Mackey v. NFL, 543 F.2d 606, 613-15 (8th Cir. 1976) (outlining three principal factors needed for non-statutory exemption).
42. See id. at 614 ("First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship.").
43. See id. ("Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining.").
44. See id. ("Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining."). A restrictive term included in the collective bargaining agreement, "is presumed to have been the product of bona fide arm's-length bargaining because it was negotiated by both parties, however, when a provision is unilaterally implemented it is likely that it was not the product of bona fide arm's-length bargaining." Nicholas E. Wurth, Comment, The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in Clarett v. NFL, 3 DePaul J. Sports L. & Contemp. Probs. 103, 115-16 (2005) (defining bona fide negotiation).
collective bargaining's effect on NBA

sive test. In *Clarett*, the court upheld the NFL’s minimum age requirement as a legally valid term of employment. The court’s ruling emphasized the existence of strong federal labor laws protecting the right of unionization as a primary precursor to antitrust suits. As a result, the court determined that any condition that could have been negotiated during collective bargaining is excluded from federal antitrust law. Therefore, unlike the *Mackey* test, the Second Circuit held that the restrictive condition imposed on the player did not have to actually have been negotiated; it only needed to have been possible.

2. NBA’s Organizational Structure

Using federal labor and employment law as a structural framework, the modern NBA is composed of thirty privately owned teams located in the United States and Canada. Team ownership ranges from large conglomerations to single wealthy individuals. These

45. 369 F.3d 124, 133-34 (2d Cir. 2004) (discussing how Mackey court did not properly define scope of non-statutory exemption); see also Jack N.E. Pitts, Jr., Comment, Why Wait?: An Antitrust Analysis of the National Football League and National Basketball Association’s Draft Eligibility Rules, 51 How. L.J. 433, 450-51 (describing how Clarett court used broader test).

46. See *Clarett*, 369 F.3d at 143 (holding NFL age requirement did not violate anti-trust laws). Neither side brought up the age requirement during the collective bargaining agreement. See Spira, supra note 26, at 836-38 (discussing how NFL imposed age limit after CBA was signed). The court held that while the players union did not actively negotiate the term, “it was nonetheless a subject of arm’s length negotiation.” Id. at 837.

47. See *Clarett*, 369 F.3d at 143 (emphasizing federal intent to maintain current federal labor policy).

48. See id. at 142 (noting fact union did not actually negotiate eligibility terms with owners was not dispositive that such term was not part of collective bargaining).

49. See Pitts, supra note 45, at 450-51 (noting less demanding test used by Second Circuit). “The holdings of other circuits fall to either side of this divide. The Sixth and Ninth Circuits stand with the Eighth Circuit, while the Third and Seventh Circuits join with the Second.” Herb Smith II, Comment, *Clarett v. NFL: More a Warning Than a Victory*, 7 Fla. Coastal L. Rev. 745, 756 (2008) (listing circuit split over proper application of non-statutory exemption).

50. See Rodenberg, supra note 35, at 14 (discussing NBA’s structure). Currently, twenty-two states have at least one NBA team and only one team is located outside the U.S., in the Canadian province of Ontario. See NBA, Teams, http://www.nba.com/teams/ (last visited Mar. 8, 2009) (listing websites of thirty NBA teams).

ownership entities independently manage their team's daily operations, but collectively use a central committee for league oversight. This central committee appoints a commissioner to market the league, ensure uniform compliance with the rules and represent the management in negotiations with players.

Since 1964, the NBA has recognized the National Basketball Players Association ("NBPA") as the exclusive representative of all NBA athletes. Operating as a union, members of the NBPA elect players to an executive committee overseen by an executive director. As the driving force behind players' rights in the NBA, the NBPA strives to ensure that the NBA provides adequate health insurance, fair and equitable contracts and – when warranted – imposes reasonable penalties.


Collective Bargaining’s Effect on NBA

Approximately every six years since the mid-1960s, team owners and the NBPA have negotiated terms of employment in a CBA, binding all thirty teams and players to one uniform set of rules and regulations. In addition to providing certain benefits to players, owners utilize the CBA to limit a player’s annual salary, restrict trade options and provide minimum requirements for entry into the NBA. Since the mid-1980s, the owners have successfully advocated the inclusion of a salary cap limiting the amount any team in the NBA could spend on its collective salaries. The NBA advocates that such a limit on spending maintains a type of status quo in the league by ensuring that the wealthier and more popular teams cannot corner the market on all-star talent through overwhelming enticements of large long-term deals.

The NBPA conversely argues that a salary cap severely restricts a player’s movement and potential salary, but agrees to such a restriction in turn for employment benefits and guaranteed salaries. The inclusion of a minimum age requirement in the CBA is also a hotly and long contested issue in the negotiations. Previous CBAs have imposed a minimum age in order to prevent students from dropping out of high school to enter the draft. Nevertheless, the

57. See NBPA History, supra note 54 (outlining dates player’s union and NBA signed collective bargaining agreements). Under U.S. labor law, the CBA binds all players under one contract. See N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (holding all employees are bound to collective bargaining terms and conditions).


59. See MARK CONRAD, THE BUSINESS OF SPORTS: A PRIMER FOR JOURNALISTS 136 (Routledge 2006) (noting important milestones in NBA’s collective bargaining history). The NBA established the salary cap system before any other U.S. professional sport. See id. (commenting on NBA wage restrictions). The NBA’s cap, however, is not an absolute maximum and in limited situations teams can exceed the maximum salary ceiling to retain their own free agents. See Ira Winderman, Spin Moves Aside, NBA Salaries Have to Change, NBCSPORTS.COM, http://nbcsports.msnbc.com/id/29499305/ (last visited Mar. 8, 2009) (commenting on exceptions teams can use to exceed NBA’s salary cap).

60. See Conrad, supra note 59, at 136 (discussing impact of salary cap on NBA’s financial stability).

61. See Aschburner, supra note 5, at 685-86 (presenting argument that CBA imposed raw deal on players).

62. See id. (remarking how use of age limit existed in prior CBA).

2005 negotiations marked a dramatic shift, as Commissioner Stern, a strong advocate for increasing the age threshold, believed that players needed more years of development beyond the time that they received in high school. This issue has been open to tremendous debate and was one of the last remaining sticking points that held up the signing of the 2005 CBA. Most players in the NBA oppose this rule and view it as a hollow condition that increases the wealth of colleges at the expense of an athlete's potential earnings.

3. 2005 CBA's Salary and Free Agent Clauses

The NBA's current CBA went into effect after the previous CBA expired in the summer of 2005. It remains effective until the end of the NBA’s 2010-2011 season. The current CBA imposes a number of restrictions on a player's potential salary. The severity of this limitation depends on a number of factors, including how long a player has been in the NBA and the amount of cap space a team has available to sign the player.

Players acquired through the first round of the draft are limited to a two-year contract with an option to extend it for two additional years. Furthermore, these rookies are subjected to strict...
floor and ceiling guidelines on their potential income.72 Players who did not enter the NBA draft can still sign player contracts with teams, but must still fulfill the draft age requirements in the year in which their contract is signed.73 Draft eligibility principally requires that a player be at least nineteen years old and be one year removed from graduating high school.74

After a rookie’s contract expires, the CBA continues to curtail the annual salary and contract length that can be negotiated by the player.75 The maximum salary that a player can receive is based on a precise formula, factoring in the number of NBA seasons he has played and his prior earnings.76 Additionally, the length of these contracts cannot exceed six years and the acquiring team must en-

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<th>2nd year salary</th>
<th>3rd year option salary</th>
<th>4th year option (% raise over 3rd year salary)</th>
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Larry Coon, NBA Salary Cap, FAQ, http://members.cox.net/lmcoon/salary-cap.htm#88 (last visited Mar. 8, 2009). Teams signing a draft player must use amounts on this chart in formulating player salaries. See id. The final salary accepted can be no less than eighty percent and no greater than one-hundred and twenty percent of the year’s scale salary figure. See id.

73. See COLLECTIVE BARGAINING AGREEMENT, supra note 15, art. X (listing prerequisites for entry into NBA). For a further discussion of draft eligibility, see supra note 4 and accompanying text.

74. See COLLECTIVE BARGAINING AGREEMENT, supra note 15, art. X (detailing requirements for eligibility). The age requirement mandates that the player turn at least nineteen sometime during the calendar year of the draft. See id. A U.S. or foreign player, who does not graduate from high school, must wait one year from the date he would have graduated to be considered eligible for the draft. See id.

75. See id., art. II (recounting precise formula utilized in calculating maximum salaries).

76. See Coon, supra note 72 (providing rookie contract limits). The maximum salary of any active non-rookie NBA player based on CBA is as follows:
sure that it has sufficient annual cap space available for the duration of the contract.\textsuperscript{77}

The CBA further interferes with a player's rights at the expiration of his contract through the establishment of two classifications of free agency: restricted and unrestricted.\textsuperscript{78} An unrestricted free agent can sign with any team that has the available cap space to tender an offer, but a restricted free agent must afford his team the right to match any offer that the player receives from another NBA team.\textsuperscript{79}

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<th>Years in NBA</th>
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<th>2006-07</th>
<th>2008-09</th>
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<td>$12,455,000</td>
<td>$13,041,250</td>
<td>$13,758,000</td>
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<td>$11,000,000 or 30% of cap</td>
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<td>9</td>
<td>$11,000,000 or 30% of cap</td>
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\textit{Id.}

\textsuperscript{77} See Collective Bargaining Agreement, supra note 15 (presenting Article VII and IX on contract formation).

\textsuperscript{78} See Collective Bargaining Agreement, supra note 15, art. XI (providing two classifications for free agents). For a player to be classified as a restricted free agent, the following conditions must be met: (1) player must have been in the league for fewer than three seasons or be in the fourth year of a rookie contract; (2) player's team submitted a qualifying offer to the player; (3) "the qualifying offer... must be for 125% of the player's previous salary, or the player's minimum salary... plus $175,000, whichever is greater;" (4) "The qualifying offer must be for one season." Coon, supra note 72 (providing restricted agency details). All other players are classified as unrestricted free agents. See Collective Bargaining Agreement, supra note 15, art. XI (defining unrestricted free agency).

\textsuperscript{79} See Collective Bargaining Agreement, supra note 15, art. XI (allowing unrestricted free agents to negotiate with any NBA team); see also Coon, supra note 72 (commenting on precise qualifications for teams to impose restricted free agency on players). If the restricted free agent receives an offer from another NBA team, his original team can execute "its right of first refusal by matching the principal terms of the offer sheet, the player is then under contract to his original team." Coon, supra note 72. The right of first refusal is discretionary and "if the player's
The current CBA also contains provisions regulating a player's marketing, ownership and licensing rights. Once a player has entered into a contract with an NBA team, the league is permitted to use his image for promotional activities, request post and pre-game interviews on his behalf and require his attendance at events hosted by sponsors, media and the general public. During these public appearances, the CBA requires the player to act in a respectable manner and represent the league as a positive role model. In addition to these employment responsibilities, a player is also regulated in the type of activities he can engage in during his time off of the court. The CBA binds the player to follow these conditions and permits the Commissioner to impose substantial monetary damages for violations of any enumerated clause.

B. Basketball Overseas

1. Europe's Business Model for Basketball

The Union of European Leagues of Basketball ("ULEB") is the elite basketball association outside of North America. Currently, the ULEB is comprised of sixteen premier national leagues spanning the continents of Asia and Europe. Member leagues utilize this organization to coordinate competitive exhibitions and establish working partnerships between their top affiliated private teams. Twenty-four of these top private teams have been international in nature.

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80. See Collective Bargaining Agreement, supra note 15 (posting CBA Article VI and XXVIII on player restrictions).
81. See id. (expounding upon rights generally retained by NBA).
82. See id., art. VI (detailing cooperation required between league and players).
83. See id., art. XXIII (proving player limitations in off-season). The CBA forbids a player signed with any NBA team from participating in basketball related activities not expressly condoned by the league. See id. In addition, another significant provision in the agreement prevents players from obtaining ownership interest with any NBA team while they are employed. See id., art. XXIX (providing limitation on league ownership by currently employed players).
84. See id., art. XIII (presenting penalties that league can impose).
86. See ULEB, ULEB History, http://www.uleb.net/htm/history1.htm (last visited Mar. 8, 2009) (listing membership of organization). Members include the professional basketball leagues of Italy, Spain, France, Greece, Portugal, Belgium, England, Switzerland, Germany, Holland, Poland, Lithuania, Czech Republic, Israel, Austria and the Adriatic League. See id.
grated into a central conference, entitled Euroleague Basketball ("Euroleague").

Euroleague members derive from nine of ULEB's national leagues and rank among the wealthiest professional basketball clubs in Europe. Team ownership consists of a hodgepodge of financial backers, including extremely wealthy private individuals, private companies and partnerships backed by thousands of common citizens, all of whom have strong national pride for their respective countries. These ownership entities independently manage their team's daily operations, but collectively form the General Assembly for conference oversight.

88. See Europe's Top League Turns 50, supra note 85 (explaining league was previously titled European Cup); see also Press Release, Euroleague Basketball, AEG Announce Global Partnership Agreement, (May 3, 2008) http://www.euroleague.net/item/31718 (recounting league's formation).


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<td>Red Star Belgrade*: 3.12M</td>
<td>Besiktas Istanbul: 6M</td>
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Id. (providing "*" denotes Euroleague team, amounts in millions of U.S. dollars, and totals are unofficial estimates).
An important responsibility of the General Assembly as a governing body entails appointing a chief executive officer to ensure that all member teams comply with its mandates and by-laws.\textsuperscript{92} The chief executive officer also enforces a uniform set of regulations and rules for game play, which are established by the International Basketball Federation, more commonly known by its French acronym, FIBA.\textsuperscript{93} FIBA lacks any affiliation with ULEB or Euroleague and implements uniform rules for all European and international basketball associations.\textsuperscript{94} Most notably, FIBA mandates a minimum transfer age of eighteen years old between all national leagues and provides guidelines for interacting with young players.\textsuperscript{95}

The General Assembly and its chief executive officer, however, do not regulate individual player contracts or team salaries within the conference.\textsuperscript{96} As a result, players and teams negotiate unique employment contracts specifically tailored to individual players.\textsuperscript{97}


\textsuperscript{94} See id. at 17-55 (providing uniform rules for basketball organizations).

\textsuperscript{95} See id. at 71-72, 88 (forbidding players younger than eighteen years old from transferring between national leagues). FIBA recognizes the NBA as the national league for the United States and therefore regulates player transfers between the NBA and other foreign leagues; see also Heather E. Morrow, The Wide World of Sports is Getting Wider: A Look at Drafting Foreign Players into U.S. Professional Sports, 26 Hous. J. INT'L L. 649, 690-700 (2004) (evaluating international player transfers). The NBA has recognized its agreement with FIBA and encouraged foreign NBA players to participate in international competitions. See NBA Expects Players to Compete Internationally, NBCSPORTS.COM, http://nbcsports.msnbc.com/id/18495522/ (last visited Mar. 8, 2009) (reporting on NBA's recognition of agreement with FIBA).


\textsuperscript{97} See Pete Thamel, Greek Club is Eager to Sign N.B.A. Stars, N.Y. TIMES, Oct. 12, 2008, at SP4, available at http://www.nytimes.com/2008/10/12/sports/basketball/12owner.html (reporting that without player unions agreements are formed by "handshakes"). Nevertheless, "there is a large percentage of contracts in Europe that don't get honored... Teams will give you reasons, claim injuries or tell you the player didn't brush his teeth properly." Id. (quoting international sports agent Mark Bartelstein). For a further discussion of the foreign team budgets, see supra note 89 and accompanying text.
The applicable labor laws imposed on the team represent the only minimum limitations confronted when formulating a contract.98

2. **European Union Labor Laws**

A majority of the Euroleague's professional basketball teams are located within the confines of the European Union ("EU").99 As a result, these teams are subject to both the applicable national law of the member state in which they reside and the overreaching community law established by the Treaty of European Community ("EC Treaty").100 Under the EC Treaty, member states are required to abide by and implement the imposed community laws.101 These community laws are uniformly applied throughout the union and retain primary supremacy over any established national law that conflicts with the terms of the EC Treaty.102

An important protection granted under the EC Treaty can be found in Article 39, which secures movement rights for workers within the EU community.103 Article 39 prohibits any EU employer from discriminating against a worker's nationality or limiting a worker's movement within the member nations.104 The legislative body of the EU enacted these protections to effectively eliminate discrimination in the private workplace and ensure that workers could find employment in any member nation.105

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100. See Joklik, supra note 58, at 228 (noting interaction of domestic and community law in Europe).


102. See Joklik, supra note 58, at 228 (commenting on EU's legal structure).

103. EC Treaty, art. 39, 2002 O.J. (C325/193) (presenting rights of EU workers). "Freedon of movement for workers shall be secured within the Community. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment." Id.

104. See id. (forbidding discriminatory practices).

105. See Joklik, supra note 58, at 246 (presenting objectives behind Article 39's provisions).
In *Walrave & Koch v. Ass'n Union Cycliste International*, the European Court of Justice ("ECJ") interpreted Article 2 of the EC Treaty such that EU community law applied to any private sports organization engaged in "economic activity" within a member state. The ECJ defined "economic activity" as any employment relationship that provides compensation for rendered services. Therefore, the ECJ held that Article 39 of the EC Treaty prevented any professional team from imposing nationality requirements for participation in EU sporting events.

Approximately twenty years later, in *Union Royale Belge des Sociétés de Football Association ASBL v. Bosman*, the ECJ further defined the limitations of Article 39 on professional player contracts. The issue in *Bosman* was whether a professional sports team could demand a transfer fee from a former player after all contractual obligations between the parties had expired. The ECJ ruled that a transfer fee levied after the expiration of all contractual duties amounted to a discriminatory action, which violated a player's right to free movement within the union.

Nevertheless, the ECJ placed limitations on its *Bosman* ruling in *Lehtonen & Castors Can. Dry Namur-Braine v. Fed'n Royale Belge des Societes de Baket-Ball ASBL*. The issue in *Lehtonen* was whether a professional basketball league could impose transfer deadlines lim-

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108. See id. (holding that private sports teams were subject to Article 39).

109. See Case C-415/93, Union Royal Belge des Sociétés de Football Ass'n ASBL v. Bosman, 1995 E.C.R. 1-4921 (addressing restrictions on professional athletes' contracts; see also Thomas M Schiera, *Balancing Act: Will the European Commission Allow European Football to Reestablish the Competitive Balance that It Helped Destroy?*, 32 BROOK. J. INT'L L. 709, 714-16 (2007) (noting importance of Bosman decision in reshaping how European football clubs operated). Before the Bosman ruling, European clubs substantially relied on not having any type of free agency for their players. See Schiera *supra*. Players were, in effect, owned for life by a single club, which demanded large fees from any new team wishing to acquire contractual rights to the specific player. See id. These payments provided a substantial income for clubs, and the Bosman ruling ended this practice. See id.

110. See Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman, 1995 E.C.R. 1-4921 (holding player's rights could not be retained forever by single club).

111. See id. (applying Article 39 to transfer fees).

iting a player's employment options within that league. The ECJ ruled that Bosman did not mandate an absolute prohibition on contractual clauses that operate to limit a player's post-employment opportunities. Rather, the ECJ held that while transfer deadlines restricted the free movement of a player, these deadlines could legally be imposed if the sporting association's governing body provided a legitimate reason for implementing the deadline. Further, the ECJ found that encouragement of a competitive atmosphere amounted to a valid public purpose and provided a legal exception to Article 39.

III. Analysis: Two Competing Basketball Leagues

A. Europe's Competitive Advantage

In the summer of 2008, foreign teams in Euroleague noticed that a weak American economy and restrictive salary cap had placed NBA team rosters in a vulnerable position. To capitalize on this perceived weakness, foreign teams began competing for NBA free agents by matching or exceeding comparable offers. An Italian national club, Pallacanestro Virtus Roma ("Roma"), signed the elite American point guard Brandon Jennings to a multi-million dollar contract. Jennings, an eighteen year old high school standout, effectively by-passed the NBA age limit and jump-started his profes-

113. See id. (commenting on how Belgian team faced league penalties for acquiring player after trade deadline).
114. See id. (holding limited application of Bosman).
115. See id. (requiring legitimate justification for obstacles to player movement).
116. See id. (holding that any player restrictions must be uniformly applied and not distinguish between established country zones).
117. See Jonathan Givony, Tables Turning on NBA's Relationship with Europe, DraftExpress.com, Aug. 1, 2005, http://www.draftexpress.com/article/Tables-turning-on-NBA-s-relationship-with-Europe-1064/ (noting incentives players get to remain in Europe); see also Saraceno, supra note 96 (presenting how economic tables have turned in favor of Europe).
Another team, Greek club Olympiacos, acquired restricted free agent Josh Childress with the largest contract in Euroleague history. By the conclusion of the 2008 free agency period, the NBA had witnessed a mass outflow of NBA free agents headed across the Atlantic for new homes in the Euroleague and braced for a dramatic shift in the world of sports.

Several important factors have allowed Euroleague teams to entice players with more money and thus gain a competitive edge in the free agent market. First, contract formation in Europe favors the player because an affiliated FIBA or Euroleague organization negotiates salaries using a “net total after taxes” approach. Under this approach, the team pays the taxes necessary to reach the agreed upon salary. Teams do not have to be concerned with league imposed salary limits when determining the final contract amount and are free to determine a player’s appropriate value on the open market. Additionally, to further entice a player to sign with a particular team, owners frequently offer players special benefits. European teams have tendered free gas, new cars, resi-

120. See Weiner, supra note 119 (commenting on how Jennings had to wait one year before becoming eligible for NBA draft and this impacted his decision to play abroad). For a further discussion of the NBA draft requirements, see supra note 74 and accompanying text.

121. See Thamel, supra note 97 (reporting Childress, received three-year, $20 million contract from Olympiacos, making his, “the biggest contract in basketball outside the United States.”). With a majority of expenses paid by the team “Childress estimated he would take home about $6 million this season, about twice as much as he would have had he played in the N.B.A.” Id.

122. See Weiner, supra note 119 (recognizing shift in global basketball). “The NBA may still be the best basketball league on the planet, but it is not the only league willing to pay big salaries, and players and their agents know it.” Id.


124. See Weiner, supra note 119 (explaining how players and teams negotiate salaries). Euroleague teams utilize such an approach to player contracts because almost every team in the league comes from a different European country. See id. For a discussion of Euroleague member locations, see supra note 100 and accompanying text. Each of these countries has its own unique tax code, and as a result, it becomes difficult for professional athletes to determine their potential salary when evaluating offers coming from all over the EU without a uniform approach. See Can Europe Afford the NBA’s Biggest Stars?, supra note 9 (detailing tax structure in Europe).

125. See Weiner, supra note 119 (describing how final salary is reached by including potential taxes).

126. See Saraceno, supra note 96 (noting lack of salary restrictions in Europe).

127. See The Lure of Europe: Fact and Fiction, supra note 123 (presenting perks Europe offers players).
Players also have the option of becoming partial owners of their team and can sell advertising space on their uniforms.

Conversely, in the NBA, such benefits are prohibited under the CBA. Moreover, the CBA limits the amount a team can offer a free agent depending on the player’s prior salary, years employed in the league and amount of cap space the team has available. In addition, a player’s final contract salary must be included in his gross income and taxed at the both the state and federal level. Due to these factors, the annual salary that an NBA player agrees upon is actually realized as a far reduced amount.

The Euroleague was further able to lure players away from the NBA because of the strong value of the Euro over the U.S. dollar. In the summer of 2008, the U.S. economy experienced large outflows of capital as the domestic financial market experienced a massive credit crunch and a severe weakening in consumer confidence. European markets were also depressed by the financial crisis, however, the Euro continued to exchange at a significantly

128. See id. (reporting on incentives offered to players). “Their expenses are limited to food, incidentals and gasoline. If a guy is smart, it’s a very good living in Europe.” Id. (quoting agent who represents players abroad).

129. See Can Europe Afford the NBA’s Biggest Stars?, supra note 9 (commenting on advertising and ownership rights of players).

130. See COLLECTIVE BARGAINING AGREEMENT, supra note 15, art. II (prohibiting providing NBA players with perks). For a further discussion of marketing and ownership limitations imposed on players under the CBA, see supra notes 71-77 and accompanying text.

131. See Christian Dennie, From Clarrtt to Mayo: The Antitrust Labor Exemption Argument Continues, 8 TEX. REV. ENT. & SPORTS L. 63, 77 (2007), (reviewing restrictions placed on NBA players’ salaries). For a further discussion on the salary restrictions on an NBA player, see supra notes 63-70 and accompanying text. For a further discussion on legal challenges in NBA, see supra notes 29-42 and accompanying text. Courts analyzing such limitations on players have ruled that while the restrictive terms unfairly restrain trade, the players legally negotiated away such rights during the collective bargaining process. See generally Wood v. NBA, 809 F.2d 954 (2d Cir. 1987) (holding limitations on players’ salaries can be considered legally binding under CBA and enforceable).


133. See id. at 972 (commenting on large reduction in salaries after tax).


higher value than the U.S. dollar.\textsuperscript{136} As a result of these economic conditions, Euroleague teams were easily able to extend contracts to mid-range free agents that matched or exceeded comparable offers from the NBA.\textsuperscript{137}

In addition to the large sums of money enticing players, many commentators noticed that the free agents making the jump to Europe were predominantly foreigners returning to their home countries.\textsuperscript{138} Over the years, the NBA has attracted a diverse range of players from all over the world.\textsuperscript{139} During the 2008 playoffs, almost every participating team had an international player on their roster.\textsuperscript{140} Further, as of 2006, almost twenty percent of all players in the NBA came to the league from an foreign country.\textsuperscript{141} Commentators speculated that such a move signaled that these players, in addition to desiring more money, wanted the more active roles available on European rosters and viewed the move without perceived drawbacks.\textsuperscript{142}

B. How Competition Affects the NBA

1. The Immediate Impact on Free Agency

The rise in European competition signals a dramatic reversal of the NBA's dominant hold on global basketball talent.\textsuperscript{143} The salary cap and restrictive wage conditions imposed on NBA players have worked against the primary objectives that owners believed that they would achieve; chiefly, increased growth and competition

\textsuperscript{136} See Musante, \textit{supra} note 134 (discussing disparity between dollar and Euro). One Euro had the purchasing power of approximately one and a half dollars. \textit{See id.}

\textsuperscript{137} See \textit{Can Europe Afford the NBA's Biggest Stars?}, \textit{supra} note 9 (commenting on 2008 free agent signings).

\textsuperscript{138} See \textit{The Lure of Europe: Fact and Fiction}, \textit{supra} note 123 (reporting on players returning to their country of origin).

\textsuperscript{139} See Lee, \textit{supra} note 8 (describing NBA's global power).


\textsuperscript{142} See \textit{The Lure of Europe: Fact and Fiction}, \textit{supra} note 123 (commenting on reasons behind free agency trends toward Europe).

\textsuperscript{143} See Jordan Kobritz, \textit{Bidding War in the NBA}, DAILY COURIER.COM, Aug. 29, 2008, http://prescottdailycourier.com/main.asp?SectionID=2&subsectionID=2&articleID=58679 (discussing how NBA players signing abroad symbolizes reversal of past precedent). For further information on how players can earn more money abroad, see \textit{supra} notes 123-129 and accompanying text.
within the NBA. With the emergence of European teams actively acquiring NBA players, NBA owners witnessed a third party aggressively shaking up the traditional field of free agency.

Before European competition, a free agent would receive offers from only a select few NBA teams that had enough cap space to compete for the player’s services. This practice was advantageous for current owners because in order to retain a restricted free agent owners only had to compete against the few teams that had adequate cap space to make an offer that they could not match. With the emergence of more assertive and competitive offers from Europe, free agents now have a viable bidder competing for their services. This relationship creates a stronger bargaining position for the player to negotiate for a higher salary, which also helps to determine the actual market value of a player.

Furthermore, the upsurge in foreign competition expands a restricted free agent’s freedom of movement. Under the current CBA, teams are given the opportunity to match any offer that a re-

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144. See Mike Cranston, Should NBA Fear a Mass Exodus of Talent to Europe?, USA TODAY, Aug. 6, 2008, http://www.usatoday.com/sports/basketball/2008-08-06-1497920822_x.htm (reporting how restrictive salary limits imposed by CBA have created European option for players). For further information on owners' goals for CBA, see supra notes 5-7 and accompanying text.

145. See The Lure of Europe: Fact and Fiction, supra note 123 (commenting on traditional free agency). For further information on dramatic events unfolding during 2008 free agency, see supra note 9 and accompanying text.

146. See Jonathan B. Goldberg, Player Mobility in Professional Sports: From the Reserve System to Free Agency, 15 SPORTS LAW J. 21, 48-50 (2008) (discussing how NBA’s free agency works); see also COLLECTIVE BARGAINING AGREEMENT, supra note 15, art. XI (providing contract guidelines for restricted free agents and free agents). For a further discussion of the limitations imposed on restricted free agents, see supra notes 78-79 and accompanying text.

147. See The Lure of Europe: Fact and Fiction, supra note 123 (describing how some restricted free agents did not receive any offers). “This summer has exposed the fact that restricted free agency is barely free agency . . . Josh Smith does not get a single offer sheet; Andre Iguodala gets no offers. Nobody offers them a contract because they know it is going to be matched.” Id. (quoting international sports agent Guy Zucker).


149. See Geoffrey C. Arnold, Pick and Roll: Overseas Basketball Gives NBA Free Agents Another Option, TIMES PICAYUNE (New Orleans), Aug. 3, 2008, at 4, available at 2008 WLNR 14450471 (describing how NBA players economically benefit from having competing leagues); see also The Lure of Europe: Fact and Fiction, supra note 123 (detailing impact on players’ salaries).

150. See Arnold, supra note 149 (“Childress doesn’t see himself as a pioneer, but his decision has altered the restricted-free-agent process.”).
restricted free agent receives. The precise language of the option, however, only applies to offers from NBA teams and not foreign clubs. As a result, NBA teams with restricted free agents who entertain international offers are not afforded the opportunity to match the competing proposal and retain the player on their roster.

Moreover, after the player decides to sign abroad, the former NBA team must tender an offer to the player each year that he remains a restricted free agent in order to retain the "right of first refusal" should he ever return to the NBA. If the player opts not to return, tendered offers further limit the team's free agency recruitment for the year because the proposal directly applies against the team's annual salary cap.

2. The Immediate Impact on Young Players

Brandon Jennings' signing with Roma marks a dramatic setback for the objectives of the NBA's age requirement. Commissioner Stern had hoped that a year in college basketball would

151. See Collective Bargaining Agreement, supra note 15, art. XI (providing teams with "right of first refusal"); see also Goldberg, supra note 146, at 49 (discussing restricted free agency). If a restricted free agent fails to receive offer sheets from other NBA teams, the player is forced to accept the qualifying offer submitted by his original team if he wishes to play in the league that year. See Collective Bargaining Agreement, supra note 15, art. XI (providing player options). Teams often used this practice to their advantage to keep restricted free agents on their team at low qualified offers by scaring away competition through statements that they would match any offer. See Arnold, supra note 149 (describing how teams used "right of first refusal" to keep players on their teams at low contracts). For a further discussion of restricted free agents who experienced such a practice, see supra note 147 and accompanying text.


154. See Collective Bargaining Agreement, supra note 15, art. XI (providing how teams can renounce player's restricted free agent status). Once a player's team has renounced their "right of first refusal" the player becomes a free agent who can negotiate with any team. See id. (stating impact of renunciation).

155. See id. (reporting how teams can retain restricted free agent status on players); see also Chavez, supra note 153 ("In Childress's case, Atlanta retains his NBA rights for two more seasons if they make a qualifying offer. If they don't give up those rights, the offer goes against their salary cap. If they do give them up, Childress becomes a free agent.").

156. See Collective Bargaining Agreement, supra note 15, art. X (discussing CBA's age restriction); see also Heisler, supra note 68 (informing age requirement purpose was to prevent players coming directly from high school). For a further discussion on the age requirement, see supra notes 4-5, 62-66 and accompanying text.
allow players to hone their basketball skills and personally mature and provide NBA scouts with the opportunity to objectively evaluate their potential draft stock. Jennings, however, did not share the same philosophy and saw no need to have academics coupled with basketball. By circumventing the age requirement, Jennings turned the restriction against the NBA and blazed the path for top American high school graduates ready for the professional arena to immediately start earning a substantial salary.

3. The NBA's Possible Response

While a majority of the signings from Euroleague teams involved only mid-range free agents, the recent European acquisitions have attracted the attention of the NBA's biggest stars. Two of the league's preeminent players, LeBron James and Kobe Bryant, announced at the 2008 Beijing Olympics their willingness to sign abroad when their respective contracts expire.

In response to these players' high profile announcements and the significant number of summer signings, NBA representatives and owners have consistently repudiated the notion that the NBA's global dominance is declining. Nevertheless, the NBA is formu-

157. See Stern, supra note 64 (noting Commissioner Stern's objectives).
159. See id. (reporting how Jennings move means college teams must compete for talent and NBA teams have to buy out Jennings contract if he returns to NBA after one year).
161. See Lawrence Donegan, Olympics: US Stars Admit They Could Leave NBA for Europe, GUARDIAN.CO.UK, Aug. 8, 2008, http://www.guardian.co.uk/sport/2008/ aug/08/olympicsbasketball.olympics2008 (announcing possibility that top players would leave NBA for annual salary of fifty million dollars). But see Jimmy Smith, No Big Deal: European Teams Created Waves with Lucrative Offers This Summer, But the NBA Shouldn't Fear an Exodus of Elite Players, TIMES-PICAYUNE (New Orleans), Oct. 12, 2008, at A14, available at 2008 WLNR 19441613 ("Bryan dismissed comments attributed to him over the summer about potently playing in Europe as 'a joke'. . . James didn't outright dismiss the idea, saying it was a 'possibility' in Beijing.").
162. See Kobritz, supra note 143 (evaluating why NBA owners are not concerned by move of players); see also Chavez, supra note 153 (quoting Joel Litvin, NBA's president of league and basketball operations as saying, "[w]e're not terribly
lating possible options to counter the exodus of top NBA stars from following the free agency trend abroad.\footnote{See Mike Kahn, \textit{Europe Looking Very Attractive for NBA Free Agents}, \textit{FOX-SPORT.COM}, http://msn.foxsports.com/nba/story/8879370/Europe-looking-very-attractive-for-NBA-free-agents (last visited Mar. 8, 2009) (detailing how moves abroad highlight NBA's financial weakness and noting that unless something is done "this summer will continue to have surprises, only to be outdone by next summer and the summer that follows that").}

One possible option is for the NBA to directly negotiate a restricted free agent transfer agreement with Euroleague.\footnote{See \textit{Does World Basketball Need a Soccer-Style Transfer System?}, \textit{BLEACHER REPORT.COM}, July 23, 2008, http://bleacherreport.com/articles/40340-does-world-basketball-need-a-soccer-style-transfer-system (last visited Mar. 8, 2009) (arguing transfer agreement would compensate teams that are powerless in preventing free agents from signing abroad).} Under such an agreement, an NBA team could loan or sell the rights of a restricted free agent.\footnote{See id. (describing how agreement would work).} The interested European team would be required to compensate the player's NBA team with an established fee in order to enter into negotiations for the player's services.\footnote{See id. (stating fee would work well for NBA's mid-level talent).} The arrangement would be advantageous to the NBA because the fee would produce a revenue flow that could be used to pay any luxury tax overages.\footnote{See id. ("The cash earned from a transfer could help small-market teams pay the luxury tax and remain competitive, while the salary cap would prevent the Los Angeles Lakers and the Chicago Bulls from buying up huge contracts and dominating the league.").} Nevertheless, such an arrangement would undoubtedly be challenged in the United States under antitrust laws and in Europe under Article 39.\footnote{See Schiera, supra note 109, at 714-16 (discussing impact of Article 39 in upholding transfer rights of professional athletes); see also Shaffer, supra note 5, at 699-700 (explaining potential anti-trust arguments of players challenging restrictions in NBA).}

In the United States, the NBA would have difficulty establishing that the restriction fulfilled the non-statutory exemption to anti-trust scrutiny.\footnote{Compare U.S. v. Hutcheson, 312 U.S. 219, 231 (1941) (formulating non-statutory exception that labor and anti-trust laws must be read in harmony), \textit{with} Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996) (holding non-statutory exceptions apply when union and non-union labor party negotiate conditions considered to be terms of employment under NLRA).} If a court reviewing the proposed transfer agreement applied the \textit{Mackey} test, the transfer condition would fall outside the third requirement of a "bonafide negotiation."\footnote{See Mackey v. NFL, 543 F.2d 606, 614-15 (8th Cir. 1976) (outlining three principal factors); see also Wurth, supra note 44, at 115-16 ("[W]hen a provision is concerned . . . . In fact, we see this as a positive indication of how popular the sport of basketball is on a global basis.").} Additionally, under the \textit{Clarett} approach, the NBA would face an uphill
battle persuading the court that the condition was a mandatory subject of employment that could have arisen during bargaining negotiations.\(^{171}\)

The hypothetical transfer agreement would also face challenges in Europe on grounds that it constrained the free movement of workers as prohibited by Article 39.\(^{172}\) Applying the ruling in *Bosman*, the agreement would likely constitute the type of transfer fee that the ECJ held were illegal.\(^{173}\) The NBA could counter *Bosman*, however, by formulating a reason for why the restriction promotes a competitive atmosphere within the NBA and Euroleague.\(^{174}\) The final acceptance of such complicated arguments would prove difficult and the NBA would have the full weight of legal precedent stacked against its potential theories.\(^{175}\)

A more plausible solution for the NBA is to move forward quickly with expansion plans in Europe.\(^{176}\) Under the guidance of Commissioner Stern, the NBA has become a global media powerhouse.\(^{177}\) Currently, the NBA can be seen in over two hundred countries and is accessible on every major continent.\(^{178}\) The NBA has always made global expansion a primary goal, using Michael Jordan and the “Dream Team” to bring the NBA’s culture and stardom to Europe.\(^{179}\)

\(^{171}\) See *Clarett v. NFL*, 369 F.3d 124, 142-43 (2d Cir. 2004); see also *Pitts*, supra note 45, at 450-51 (noting less demanding test used by Second Circuit still has threshold and ruling does not stand for unlimited power).


\(^{173}\) See *Case C-415/93, Union Royale Belge des Sociétés de Football Association ASBL v. Bosman*, 1995 E.C.R. I-4921 (holding transfer fee levied after expiration of all contractual duties violated player’s free movement within union).


\(^{175}\) See *Joklik*, supra note 58, at 225-33, 243-45 (comparing legal status of professional athletes in US and EU concerning free agency).

\(^{176}\) See *Euchner*, supra note 6 (“Expansion offers the best way to head off a rival league.”); see also *Kahn*, supra note 163 (arguing expansion into Europe will halt trend of players signing abroad).

\(^{177}\) See *Euchner*, supra note 6 (discussing evolution of NBA into global sport under David Stern).

\(^{178}\) See id. (“More than 900 NBA games and 45,000 hours of NBA programming are seen in 215 countries in 41 languages with 188 TV partners . . . . ESPN International brings NBA content to more than 25 million households in 97 countries and territories outside the United States.”).

The possibility of a European NBA team has increased in recent years as foreign cities have constructed larger stadiums and the numbers of NBA fans have grown. An expansion team in Europe would place pressure directly on Euroleague teams to maintain a competitive edge in their own country and would place the top contracts of European teams in the NBA’s cross hairs.

IV. CONCLUSION

The NBA’s 2008 free agency period exposed the weakness created by the restrictive conditions in the league’s CBA. Players now have options on a truly international scale. Whether Jennings’ move will be the start of America’s young talent leaving or whether it will remain an isolated incident has yet to be determined. Nevertheless, his lucrative contract with Roma, coupled with a recent endorsement by the global athletic company
Armour, shows critics that a young American player can earn over six figures abroad while waiting for the NBA draft. If more top high school players follow this trend, the age restriction is unlikely to survive the next round of negotiations. At the expiration of the current CBA, the NBPA will also have a bargaining advantage putting them in a stronger position to argue for maximum wage increases and more flexibility in teams' maximum salary cap.

Perhaps seeing Kobe in a Roma or Olympiacos jersey may not be as distant of a future as NBA executives would like to believe. As Euroleague teams continue to acquire mid-range NBA players, the level of play in Europe is bound to increase significantly. Unless the NBA begins to implement expansion plans in Europe sometime soon, the delay may prove costly. Euroleague teams will likely target more talented NBA free agents as the budgetary gap between the Euroleague's top teams and their American counterparts narrows. As one commentator simply stated, "[w]ith every-

you get on a good team, you might not play a lot. Some nights you'll play a lot; some nights you won't play at all. That's just how it is."

Id.


187. See Arnold, supra note 149 (commenting on how bargaining position for players has shifted in players' favor).

188. See Vaccaro, supra note 183 (arguing Kobe or another superstar will eventually be signed in Europe); see also Olympiacos Owner Willing to Pursue More NBA Free Agents, ESPN.COM, Oct. 15, 2008, http://sports.espn.go.com/nba/news/story?id=3644739 (quoting billionaire owner Panayiotis Angelopoulos of Olympiacos) ("I think we'll see a day when a superstar player comes to Europe,. . . . Maybe it will be very soon. Maybe then you realize what I'm telling you is serious."). But see Smith, supra note 161 (arguing Kobe is not interested in more money and would rather win NBA championships instead).

189. See Arnold, supra note 149 (commenting on how former NBA players will increase level of play in Euroleague games).

190. See Kahn, supra note 163 (arguing NBA must expand abroad to sustain its dominance).

191. See NBA salaries for 2007-08, DALLAS MORNING NEWS, http://www.dallasnews.com/sharedcontent/dws/spt/basketball/nba/nbasalaries.html (last visited Mar. 8, 2009); Thamel, supra note 97 (noting six Euroleague teams may have operating budget to sign NBA superstar Kobe Bryant). For a further discussion of the Euroleague's unofficial budget, see supra note 89 and accompanying text.
body being able to pay, the basketball world seems to be – as author Thomas Friedman would say – getting flat.\textsuperscript{192}

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