

Chapter 2

History of Labour Relations and Working Conditions in the Premier League, NBA and Rugby Union

Abstract Historically a club, team, league or federation unilaterally implemented working conditions in a professional sports league. The contractual terms and organizational rules almost always favoured the entity that was in control of the competition. Measures were introduced that limited a player’s capacity to move between clubs and competitions and kept wages low. Over time, employment law and labour relations law has assisted players in the NBA and the Premier League to gain an involvement in the determination of their working conditions and to negotiate employment terms from a position of relatively equal bargaining power. In a competition organized between national teams, such as the men’s Rugby World Cup, it is more difficult because the relationship between an international federation and a professional athlete is regulatory. An employment relationship, if one exists, will be at a national level. This chapter provides a historical account of the organization and development of labour relations in the Premier League, the NBA and international rugby union.

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2.1 Introduction

The terms and conditions of employment and the regulatory framework of the National Basketball Association (NBA), the Premier League and international rugby union have developed historically from a position of unilateral decision-making by the clubs, league or a national federation to a position in which the

players are included—to varying degrees—in the determination of terms and conditions of employment or the sport's regulatory rules. This chapter is not intended to be a detailed account of each sport's history but will highlight the key developments that have shaped the organization and labour relations in professional football, basketball and rugby union. It will commence with a description of the Premier's League organizational history, including the formation of the Football Association (FA), the Football League and the Professional Footballers' Association. It will discuss the Retain and Transfer System, the Maximum Wage Rule, the cases of *Eastham v Newcastle United Football Club*¹ and *Union Royale Belge des Sociétés de Football Association v Bosman*,² and the genesis of the Professional Football Negotiating and Consultative Committee (PFNCC).

The chapter will also provide a description of the key events in the NBA's history that have characterized the development of the relationship between basketball players, the league and the NBA teams. It will canvass the collective organization of players, the case of *Robertson v NBA*,³ collective bargaining and the various industrial disputes that have arisen. It will conclude with a discussion of rugby union, including the creation of a market at an international level for matches between national rugby union teams, the formation of the International Rugby Board (now known as World Rugby), the principle of amateurism, the organization of the men's Rugby World Cup (RWC) and the events of 1995, which eventually resulted in the sport turning professional.

2.2 Premier League Football

History records that in the mid-1800s, numerous versions of football were played in the public schools, universities, churches and factories throughout the United Kingdom. Some versions of the game involved dribbling the ball while other versions were played under rules that permitted hacking,⁴ scrimmaging,⁵ and for the ball to be touched by hand. The different versions of playing rules frequently led to disputes over which rules to apply during a match. On 26 October 1863, at the Freemasons Tavern in London, a group of football clubs agreed, "*that the Teams represented at this meeting now form themselves into an Association to be called the Football Association*".⁶ The FA's initial membership included those clubs that

¹ *Eastham v Newcastle United Football Club* [1964] Ch 413 (HC).

² C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921 (CJEU).

³ *Robertson v NBA* 72 F.R.D. 64 (SDNY 1976).

⁴ Hacking involved kicking, below the knee, an opposition player who had the ball: Richards 2006, pp. 28–30.

⁵ Richards 2006, pp. 28–30. A scrum is a way of re-starting play in rugby union.

⁶ Minutes of the Football Association dated 26 October 1863 held at the National Football Museum, Preston, United Kingdom.

played a version of football which involved running with the ball as well as some clubs that played football with more limited handling rules.

A preliminary draft of the rules for association football (or soccer as the sport has come to be known in some countries) included running with the ball and kicking the ball through an eight metre high goal.⁷ The suggestion that hacking be removed from association football rules resulted in some clubs declining to attend FA meetings.⁸ Association football with its characteristic feature of dribbling the ball and rugby football, which involved players running with the ball and hacking opponents, grew into two separate and distinct sports. The division between the two codes was confirmed in 1871 when the Rugby Football Union (RFU) was formed and the *Laws of the Game of Football as Played by the Rugby Football Union* codified.

The FA formalized a uniform set of playing rules, organized a national team and promoted the game under its playing rules. It also established an annual knockout competition, known as the FA Challenge Cup Competition (FA Cup) in which the teams of all FA members were eligible to compete and which proved to be an enormous success. According to sports historian Dr Tony Collins, “*sporting culture reflects the society in which it is rooted*.”⁹ The FA rules and those of other sports codified during the 1800s reflected society of the time. Victorian England was hierarchical and class-conscious. Social strata were divided between the wealthier middle and upper classes, such as the landowners or salaried professionals, and the working classes or waged workers from the mines and factories. The difference between an amateur and a professional sportsperson in Victorian England was a social difference rather than an economic one; it was demonstrative of class.¹⁰

Professionalism or receiving payment for participating in sport was analogous to being engaged in a trade and indicative of a master-servant relationship. If a person was “*subject to the command of his master as to the manner in which he shall do his work*”, then that person was an employee.¹¹ The early administrators of football and rugby union came from the middle classes and played the sports for leisure. The administrators organized the sports to reflect their social status and professionalism was excluded not because the clubs could ill-afford to pay the players, but primarily out of a desire to protect a social status.¹² This desire conflicted with the entrepreneurial spirit of some club owners during a period of increasing economic demand for sports entertainment.

⁷ Richards 2006, pp. 33–34.

⁸ *Ibid.*

⁹ Collins 2006a, p. xiv.

¹⁰ Vamplew 1988, p. 183. For a specific history of the development of rugby league and rugby union, see Collins 2006a and for football, see Szymanski and Zimbalist 2005.

¹¹ *Yewens v Noakes* (1880–1881) LR 6 QBD 530, pp. 532–533.

¹² Vamplew 1988, pp. 196–199.

It is easy to assume that the commercialization of sport is a modern phenomenon that is closely linked to the de-regulation of the television industry, to increased competition between television networks for the rights to broadcast sports events and to developments in technology that have enabled sports events to reach a global audience through multiple media platforms simultaneously. History demonstrates otherwise. Sports historian, Wray Vamplew records that commercialized spectator sport for the mass market was an economic success story of late-Victorian England.¹³ Factors such as urbanization which created a concentration of the population in the urban centres, the development of the railways which improved accessibility to sports events, increased leisure-time for the working classes through the recognition of an annual week's holiday and a half-day on Saturdays, an increase in the real wage for working classes in the late-1870s and 1880s and a growing civic attachment amongst the general population to a local football or rugby team, created a market for sports entertainment that encouraged entrepreneurial activity.¹⁴ Demand for football matches was high and grounds were well attended with people watching FA Cup matches, local cup matches or matches between neighbouring towns and villages with "*hereditary territorial rivalry whether born of commerce or sport*."¹⁵ With an increased demand for football matches, there was increased competition between the teams for the best players. Yet the clubs were required to field the best players within the parameters of rules that sought to preserve the amateur status of the sport.

It is well documented that professional football originated in the north of England.¹⁶ Between 1874 and 1880, in particular, numerous clubs were established in the northern English county of Lancashire. Civic rivalries and growing conurbations encouraged clubs to sign better players by making secret payments.¹⁷ Skilled players from Scotland were also enticed to English football clubs with promises of payment either directly or indirectly through the provision of work outside football.¹⁸ The cotton mill owners, industrialists and shop owners who ran the clubs in the north wished to pay the players whereas the amateur southerners who played the sport for leisure did not. Initially there were few restrictions on a player's capacity to move between teams but from the early 1880s the issue of professionalism and the movement of players from Scotland to England concerned the FA.¹⁹ The issue came to a head following a match between Preston North End and Upton Park on 19 January 1884. The match was a draw but Upton Park lodged a complaint with the FA, alleging that Preston North End had paid its players. Preston North End admitted the allegation and was expelled from the competition.

¹³ Vamplew 1988, pp. 43–52.

¹⁴ Vamplew 1988, pp. 43–54.

¹⁵ Catton 1900, p. 56.

¹⁶ See Taylor 2005, see also Lewis 1997.

¹⁷ Lewis 1997, p. 45.

¹⁸ Taylor 2008, p. 49.

¹⁹ Catton 1900, p. 56.

Later that year the FA introduced a residency rule which excluded from the FA Cup any team that employed “*imported players or players of different nationality to that of the team itself, whose names have not been submitted and approved by the Association Committee*” or any team that remunerated players in excess of that already permitted under FA rules.²⁰ The rule antagonized those clubs that favoured professionalism and on 30 October 1884 at a meeting of 19 clubs in the north of England the clubs withdrew from the FA Cup competition and agreed not to register their players with the FA. The formation of a “British Football Association” was also considered.²¹ The FA appointed a sub-committee to consider professionalism and held a series of meetings on the issue before, eventually, approving professionalism on 20 July 1885.

The upper echelons of football in England turned professional; a player was permitted to receive payments and to earn a living in football albeit on the strict terms imposed by the FA. For example, a professional player could not play for a club unless registered with the FA, a player’s registration was annual and a player could not play for more than one club in a season, but at the end of the season was free to move between clubs. In many respects, football has always been a business and whether amateur or professional, a club has required an income to cover costs (even if the goal of the club has not been to make a profit). Gate receipts were the principal form of revenue for a club in the late-1800s and owing to the pressure of player wage payments, the professional clubs required the steady income provided by guaranteed matches between full-strength teams. The FA Cup was a source of income but once knocked-out of the competition, a club relied on local matches and other cup competitions to generate revenue. There was no certainty of fixtures between full strength teams outside of the FA Cup. If a club had an offer of a more lucrative match, it could cancel any conflicting match or send a below-strength team.²²

The formation of a football league that guaranteed regular home and away fixtures for clubs was the initiative of Mr. William McGregor, then a committee member of Aston Villa Football Club in Birmingham. Mr. McGregor was a strong advocate of professionalism, and proposed to establish “*a fixity of fixtures*” so that clubs could have the certainty of a regular income.²³ In 1888 he wrote to some of the more prominent clubs, inviting them to attend a conference to discuss the idea. The idea was well received and on 17 April 1888 in Manchester, the Football League was formed. The 12 founding clubs were situated principally in the north of England and the Midlands.²⁴ At the meeting the clubs agreed the name of the new league, agreed not to share gate revenue but instead to give the visiting team a

²⁰ Catton 1900, p. 58.

²¹ *Ibid.*

²² Inglis 1988, p. 5.

²³ *Ibid.*

²⁴ The foundation teams were Aston Villa, Preston North End, Stoke, Wolverhampton Wolves, Bolton, Blackburn, Everton, Notts County, Derby, Burnley, Accrington and West Bromwich Albion.

guaranteed sum of £15 and agreed to give Football League fixtures priority.²⁵ The original league rules also provided for two divisions of clubs, each consisting of 12 clubs.²⁶ The founding clubs formed a single division and it was not until 1892 that more clubs were admitted to the competition and the two divisions were formalized.²⁷ The mode of entry into the top division through Promotion and Relegation came to apply from 1898.

The Football League organized professional football within the parameters of the FA's regulation of the sport overall. Historian Matthew Taylor points out that the development of professional football related not only to the wider trends in society but also to the internal politics of, and between, the FA, the Football League and the professional clubs.²⁸ The areas of conflict between the FA and the Football League in the first 20 years frequently related to the financial aspects of the Football League. Player wage payments increased and the practice of poaching a player from another team was apparently widespread because there were few restrictions on a player's capacity to move between teams at the end of the season.²⁹ The Football League became concerned to ensure that the clubs did not fall into bankruptcy, that a club was fairly compensated for the loss of a good player and that the more wealthy clubs did not employ all the best players and therefore unbalance "*the overall strength of the competition*".³⁰ Since the clubs were reluctant to share the revenue received from gate-money, the Football League introduced measures to prevent poaching, prescribed a limit of £10 on the amount that a club could pay a player to "sign-on" and implemented the Retain and Transfer System.

The Retain and Transfer System restricted a player's movement between clubs. A club contracted with a player for one playing season, during which the player was required to be registered to play. At the end of the playing season, a player's club had the right to retain the player's services or the player was placed on a transfer list. The club set a fee and when another team paid the fee, the player was free to move. If the player's contract expired while he was on the transfer list, there was no obligation on the club holding his registration to pay him. Without the permission of the club holding his registration, a player was unable to register and play for another club. A player could move and play for a Scottish club or a competing league (of which the Southern League was the only other reasonable alternative at the time) but these alternatives were often not as lucrative as playing in

²⁵ The Football League Rules January 1889 reproduced in Inglis 1988, p. 15.

²⁶ *Ibid.*

²⁷ *Supra* n 25.

²⁸ Taylor 2005, p. 34.

²⁹ See *Radford v Campbell* (1890) 6 TLR 488 in which the football club, Nottingham Forest unsuccessfully sought an injunction to prevent a professional player, from playing for Blackburn Rovers. For a discussion of the case and other early football cases, see also McArdle 2000, Chap. 2.

³⁰ Inglis 1988, p. 38.

the Football League. The FA opposed the system, inclining to the view that there should be no limitation on a player's freedom of movement.³¹ It appointed a commission to confer with the clubs and make recommendations but was unable to compel the Football League to change the system.³² The Maximum Wage Rule was an FA initiative that aimed to limit the amount the teams spent on player wages. It was promoted by the small to medium-sized Football League clubs (the wealthier Football League clubs were against the rule) and came into effect in the 1901/1902 playing season.³³ The rule limited a football player's basic remuneration to £4 per week or £208 per year, although a football player was able to supplement the weekly wage with other financial rewards, such as talent money, bonuses, a benefit, earnings from international matches and occasional endorsement opportunities.³⁴

As football's popularity grew throughout the world, some football clubs in other European and Commonwealth countries adopted aspects of the governance and competition structure present in English football. Some regulatory measures were replicated at an international level when the Fédération Internationale de Football Association (FIFA) was formed. The league format, Promotion and Relegation and the Transfer System became features of professional football in England and other parts of the world. The rules agreed by the professional clubs or the FA were introduced at a time when the players were not collectively represented, labour and employment laws were not as robust as contemporary laws and the FA's regulatory power was not challenged. The professional clubs were able to adopt terms and conditions of employment and organize the competition on terms that served their interests. The FA was able to implement regulatory rules, which served the interests of a majority of its members—who were the amateur and professional football clubs. There has been a trade union in professional football in England for over a hundred years but collective bargaining between the players and the professional clubs, in its current form, is by comparison relatively recent.³⁵ A detailed exploration of the history of unionism and collective bargaining in football is beyond the scope of this book. There are, however, some key points to highlight about the way in which collective bargaining has become an important facet of the relationship between the players, the clubs and the FA.

Dissatisfaction with the working conditions established by the Football League and also the FA contributed to the formation of the first players' union in football. The players accepted that some kind of transfer system was required but desired a fairer system than that unilaterally implemented by the Football League. In 1897, a group of high profile players formed The Association Football Players' Union

³¹ *Ibid.*

³² Catton 1900, p. 97. *See also* discussion of Commission Report in FA Minutes of 13 November 1899, 18 November 1899, 15 April 1900 and 12 November 1900.

³³ Taylor 2001, p. 103.

³⁴ Taylor 2001, pp. 115–116.

³⁵ For a detailed history of unionism in football, *see* Harding 2009.

with the aim of seeking changes to the Retain and Transfer System. The union was initially quite weak. It was unsuccessful with attempts to obtain modifications to the Retain and Transfer System and was powerless to prevent the implementation of a weekly wage cap; eventually the players' union formed in the 1890s ceased to exist. A second, and more successful, attempt at unionization occurred in December 1907 when a group of players met in Manchester and formed The Association Football Players' Union. The union was later renamed the Football Players' and Trainers' Union before adopting the name of the Professional Footballers' Association (PFA) as it is now known. The union, under the leadership of a player from Manchester United Football Club, Billy Meredith, had similar aims to other industrial trade unions of the period, namely to provide welfare and financial assistance to players and to negotiate improved working conditions.³⁶ The key issues for the union were to achieve greater freedom of movement for players and the abolition of the maximum wage. At first, the union had difficulty establishing autonomy and obtaining recognition. Although the FA had permitted professionalism, the issue of amateurism and professionalism still divided the organization. Also, the FA and the professional clubs viewed football as different to other industries and believed that a trade union organized along traditional union lines was not required.³⁷

Early recognition of the union was conditional upon the union submitting financial records to the FA for monitoring and the union's agreement to comply with the industry's rules and procedures. The difficult relationship was demonstrated in 1909 when the union sought to settle a dispute regarding workers' compensation through the civil courts rather than using a procedure established by the FA. The FA objected to the choice of forum for resolving the dispute and withdrew recognition of the union. It also objected to the union becoming affiliated to the General Federation of Trade Unions (GFTU). During the dispute, the FA issued an ultimatum requiring all players to cease their union membership or the player's registration with the FA would be cancelled. Without registration, a player was unable to play for a club, receive wages or benefits; the pressure successfully reduced the union's membership.³⁸ The dispute was eventually resolved but as part of the settlement, the union agreed to canvass its members regarding affiliation to the GFTU and, eventually, withdrew membership to that organization.

Prior to World War 2, there were two court cases which provided mixed results for the players. The first was in 1912 and involved an early challenge to the Retain and Transfer System. In 1906 Herbert Kingaby, a professional player who was employed by a London-based club, Clapham Orient Football Club, agreed to move to Aston Villa Football Club (Aston Villa FC) for £300 and a maximum weekly wage of £4. Aston Villa FC subsequently decided against employing Kingaby and offered to sell his registration back to Clapham Orient for £150; Clapham Orient

³⁶ Taylor 2005, p. 137.

³⁷ Taylor 2005, Chap. 2.

³⁸ Harding 2009, p. 38.

declined the offer. Kingaby found new employment with Fulham Football Club, a club in the Southern League. Clubs in the Southern League were not bound ordinarily by the requirements of the Football League's Retain and Transfer System. However, at around the time that Kingaby was agreeing his move to Fulham Football Club, the Southern League and the Football League reached an agreement to recognize the Football League's registration system.

Kingaby remained an Aston Villa FC player until another club agreed to pay the transfer fee set by Aston Villa FC. With the assistance of the union, Kingaby brought a claim against Aston Villa FC, alleging breach of contract, conspiracy and maliciously procuring a breach of contract.³⁹ The legal arguments presented in court focused more on the tort of malice than the common law doctrine of restraint of trade, which may have provided a different result and enabled the first substantive legal consideration of the Retain and Transfer System. The Court concluded that the club's motives behind its actions were irrelevant and the case was dismissed. The second case arose in 1922 and involved a claim brought by Henry Leddy against Chesterfield Football Club. The claim arose from the decision of the Football League clubs in April 1922 to unilaterally reduce the maximum wage. The wage reduction had the effect of freezing wages for those players who had contracts which provided for an increase in excess of the maximum wage. Leddy was unsuccessful at first instance but succeeded on appeal. The case established that a football club was not permitted to unilaterally reduce wages due under a football player's contract.⁴⁰

The relationship between the players and the clubs collectively has developed within the parameters of labour relations law and policy more generally in the United Kingdom.⁴¹ At certain times in the history of professional football, the PFA, the Football League and the FA have used mechanisms provided under labour relations law to resolve disputes. During the 1940s the players threatened strike action on three occasions. Strike action over wage levels in 1945 was avoided when the players accepted the clubs' offer of a wage increase. A strike—again over the issue of wages—was avoided in 1947 when the dispute was referred to arbitration under the national industrial relations regime that existed at the time. An outcome of the arbitration was the recommendation that a joint negotiating council be formed within the industry to facilitate collective negotiation between the clubs and players. In 1949, strike action was contemplated over the issue of contributions to the Players' Provident Fund (a scheme that guaranteed every player a lump sum payment on retirement). The issue was resolved without a work stoppage, again with the assistance of Government intervention.⁴²

³⁹ *Kingaby v Aston Villa FC* (1912) *The Times*, 28 March 1912.

⁴⁰ *Leddy v Chesterfield Football Club* Unreported, Court of Appeal, 8 May 1923. For a case summary, see McArdle 2000, Chap. 2.

⁴¹ For a detailed history of labour law and policy in the United Kingdom, see Davies and Freedland 1993.

⁴² Harding 2009, p. 124.

The joint negotiating council—which was a recommendation of the 1947 labour dispute arbitration—was established in 1951. The first proposal presented by the PFA requested the abolition of the Maximum Wage Rule and the Retain and Transfer System, amongst other things.⁴³ The clubs rejected the proposal outright and the union approached the Government for assistance to resolve the matter. The Government commissioned an inquiry to look into the terms and conditions of a professional player's employment although the Report of the Inquiry, apparently recommended that both restraints continue.⁴⁴ In 1956 the Football League refused to participate in negotiations in the joint negotiating council. The issue at hand related to advances in technology and whether professional football players should receive extra payment for taking part in floodlit and televised matches. The union announced a ban on member participation in televised matches until the Football League returned to negotiations. Negotiations eventually resumed and an agreement reached under which the clubs would pay match fees, bonuses and a percentage of the television revenue to the PFA in respect of televised matches. The agreement came too late to prevent the cancellation of a match between Wolverhampton Wanderers and Atletico Bilbao.⁴⁵

In the 1960s the PFA achieved two important goals for players: the abolition of the Maximum Wage Rule and collective negotiation of the Retain and Transfer System. The first was achieved in 1961 when, following a threat of strike action by the players, the Maximum Wage Rule that had existed in professional football for sixty years was abolished. Modifications to the Retain and Transfer System came about as a consequence of the players' legal success in the well-known case of *Eastham v Newcastle United Football Club*.⁴⁶ George Eastham was an employee of Newcastle United Football Club and during the course of his playing contract, requested to be put on the club's transfer list. Newcastle United Football Club did not formally reply to his request and instead, in April 1961, offered to retain him on the same salary as his existing contract. Eastham refused the new contract offer and instead brought a claim against the club, the Football League and the FA, alleging that the Retain and Transfer System was unlawful and breached the common law doctrine of restraint of trade.⁴⁷

Wilberforce J accepted that the club, the Football League and the FA had a common, legitimate interest that arose from the special characteristics of the industry in which the restraints applied and the special interests of those concerned with the organization of professional football. However, Wilberforce J rejected the principal argument raised to justify the system, namely, that if a player were free to move between clubs without restriction, then the wealthier clubs would employ

⁴³ Harding 2009, p. 115.

⁴⁴ See Forster 1952.

⁴⁵ Harding 2009, p. 117.

⁴⁶ *Eastham*, *supra* n 1.

⁴⁷ See also Sect. 4.4, *infra*.

the most talented players and the public and the competition would be adversely affected. On the evidence presented, Wilberforce J did not believe that it had been demonstrated that such effects would arise. He inclined to the view that the wealthier clubs already employed the most talented players because the gate-receipts provided sufficient funds for this to occur; removing the restrictions would not change the situation.⁴⁸ Wilberforce J also considered that the provisions which related to player retention were more of a restraint than was necessary to prevent the wealthier clubs from hiring the more talented players. An increase in the contract duration would likely achieve the same result in a less restrictive manner.

The FA, Football League and club argued that the system had applied in professional football for a considerable period of time, which was sufficient evidence in itself to demonstrate that the Retain and Transfer System was in the general interests of football, an argument that Wilberforce J also rejected:

The system is an employers' system, set up in an industry where the employers have succeeded in establishing a united monolithic front all over the world, and where it is clear that for the purpose of negotiation the employers are vastly more strongly organized than the employees. No doubt the employers all over the world consider the system a good system, but this does not prevent the court from considering whether it goes further than is reasonably necessary to protect their legitimate interests.⁴⁹

The Court concluded that the provisions regarding the retention of a player, when combined with the transfer provisions, applied as an unlawful restraint of trade and issued a declaration to that effect.⁵⁰ The consequence for Eastham was that the Retain and Transfer System provisions were not binding on him.

The *Eastham* case represented a turning point for labour relations in professional football. Re-negotiating the Retain and Transfer System had been an important aim of the PFA. Evidence presented in the case on behalf of the Football League and the FA had highlighted that “*unless the Court declared against them, the retain and transfer system would be maintained*”.⁵¹ The Court's declaration that the system was an unlawful restraint of trade provided the leverage that the players required to compel the clubs and the FA to collectively agree the form of transfer system which would apply in professional football. In a series of meetings that followed *Eastham*, the PFA and the Football League agreed to establish a new forum to discuss employment issues, including amendments to the Retain and Transfer System. The forum was established in late-1963 and was known as the National Negotiating Committee (NNC). It consisted of four representatives from the Football League and four from the PFA and the NCC's constitution provided for quarterly meetings.

⁴⁸ *Eastham*, *supra* n 1, p. 433.

⁴⁹ *Eastham*, *supra* n 1, p. 438.

⁵⁰ *Ibid.*

⁵¹ *Eastham*, *supra* n 1, p. 450.

Following the *Eastham* case, negotiations began in the NCC on a new employment contract. In April 1964 a compromise was reached whereby a player could freely negotiate all contractual remuneration and benefits with a club. Each contract would contain an option in favour of the club for renewal of the contract on terms that were no less favourable than those in the original contract. If the club did not exercise the option, the player was free to move to another club without a fee. At the end of the second contract, the club could make another offer on the same terms. If the club wanted the player to transfer, then the original contract continued to run until the transfer was completed. An independent tribunal that consisted of representatives from the Football League and the PFA was established to determine any disputes that arose from the contract and the transfer provisions. The players did not achieve unrestricted free movement but the option clause represented a compromise between the players' interests and those of the professional clubs. Although the option clause appeared to favour the club, according to Harding, in practice the idea of the independent tribunal settling the dispute meant that the clubs were increasingly inclined to settle a dispute in favour of the player.⁵²

Negotiations in the NCC took place in the context of wider issues that were occurring in the industry at the time. Attendance at football matches was declining and there was a disparity of wealth between the clubs that were located in or near larger urban areas and those clubs that did not have a large spectator catchment area. The wealthier clubs were able to afford higher wages to attract the best players. In 1966, following representations by the FA and the Football League regarding the declining state of some clubs' finances, the Government established the Chester Inquiry.⁵³ The Inquiry's terms of reference were to consider the organization, management, finance and administration of football and to make recommendations. The Chester Committee reported in May 1968 and made wide-ranging recommendations, including a recommendation that the transfer system was removed and that the clubs issue longer contracts, with a player free to move at the end of the contract term. The Report proposed a five-year changeover period to allow the clubs to adjust to the changes. On the strength of the Report's recommendations, many of which the PFA agreed with, in 1969 the PFA drew up a list of matters that it proposed to raise in the NCC. These included changes to the option clause in the players' contract, a proper pension scheme, a new employment contract and reform of the disciplinary procedure.

However, the NCC as a forum for collective negotiation was starting to fail. It was a bi-partite forum that did not include the FA and while initially the FA was invited to meetings, the practice was discontinued. Some of the FA Rules impinged upon the employment of players and although there were informal meetings between the FA and the PFA, there was no formal negotiating mechanism between the organizations. In the PFA's view, it was not uncommon for decisions

⁵² Harding 2009, p. 159.

⁵³ See Chester 1968.

that affected its members' interests to be taken by the sport's administrators without proper consultation with the players.⁵⁴ The NCC constitution provided for quarterly meetings but over time these became less frequent. Also, the NCC's constitution only obliged the parties to recommend that their members accept an agreement reached in the forum. The effect of an absence of authority to enter legally binding agreements was illustrated starkly in 1970 when representatives of the PFA and the Football League agreed a proposal to put to their respective members. The proposal encompassed a number of issues relating to pension arrangements, option clauses in player contracts, a player's registration and minimum annual earnings (amongst others). The deal was subsequently rejected at a general meeting of the clubs, and the NCC as an industry forum for discussing employment issues fell into dis-use. With labour relations in the industry at a stalemate, the PFA approached the Government seeking Government support to resolve the issues. Following consultation with industry representatives, the Government requested that the Commission on Industrial Relations examine and report on the relationship between professional footballers and their employers.

The Commission of Industrial Relations was a body established under the (then) Industrial Relations Act 1971 that was empowered to enquire into and report on labour relations in any industry.⁵⁵ One of the key observations that the Commission made in relation to the state of labour relations in professional football was the absence of on-going dialogue between the principal parties:

Differences of views and policy between organisations representing employers and those representing employees are normal in industry. What distinguishes the state of relations in professional football from those in industries in which employers' and employees' representatives enjoy a fruitful relationship is the absence of continual informed dialogue between the principal parties.⁵⁶

The Commission also observed the FA's role as the ultimate authority for on-field discipline and club discipline. It noted the FA's involvement in determining the conditions on which professional players earned their livelihoods (e.g. determining the status of players, the length of the playing season, the form of the contract, the laws of the game, amongst others) and the complex relationship between the FA and the Football League, with whom the FA was obliged to consult on certain matters.⁵⁷

⁵⁴ Commission on Industrial Relations 1974, para 174.

⁵⁵ References to the Commission for a report into labour relations in a particular industry came through the Secretary of State for Employment or the National Industrial Relations Court pursuant to s 121(1) of the Industrial Relations Act 1971 (since repealed). The Commission was abolished in 1974 by the enactment of the Trade Union and Labour Relations Act 1974.

⁵⁶ Commission on Industrial Relations 1974, para 168.

⁵⁷ *Ibid.*

The Commission recommended that the NCC continue subject to changes to its constitution. The changes included involving the FA in discussions and a requirement that representatives be empowered to enter legally binding agreements.⁵⁸ An independent chairperson was also to be appointed. Following on from the Commission's recommendations, in 1978, the Professional Football Negotiating Committee (PFNC) was established, with an initial membership of the Football League, the PFA and an independent chairman. It made immediate progress, with the parties reaching an agreement on the Transfer System in 1978. Under the new Transfer System, a player could exercise an option to leave his club. If the club offered new terms that matched the player's existing terms, then the player's existing club was entitled to a transfer fee from the prospective club. If a fee could not be agreed, then a tribunal would determine the fee. If the contract terms were less favourable, then a player could move without the payment of a transfer fee.⁵⁹

Labour relations law in the United Kingdom changed significantly in the 1980s. The United Kingdom's economy was in a recession and the (then) Conservative Government, which came to power in 1979 under the leadership of Mrs Margaret Thatcher, adopted policies that moved the economic focus away from manufacturing—a highly unionized industry—to the financial sector and the wider services industry generally. The policies also included significant reforms to labour relations law. Closed shops were prohibited, secondary picketing was made unlawful and strict balloting requirements prior to commencing strike action, were introduced, amongst others. The reforms had a profound and lasting effect on the trade union movement. Statistics record that trade union membership reached a peak of 13 million in 1979, declined sharply during the 1980s before eventually stabilizing in the 1990s.⁶⁰ Trade union membership was recorded at 6.5 million in 2013.⁶¹ The legislative initiatives taken to reduce the power of the unions had little or no effect on the PFA; on the contrary, union recognition in the football workplace became an accepted norm and membership to the PFA increased throughout the 1980s and 1990s.⁶² Any cost cutting measures introduced by the clubs were challenged by the players through the PFNC and the Football Creditors' Rule applied to ensure that the players' wages had preference for payment in any club insolvency situation.⁶³ The PFA supported the players and the football industry generally through loans provided to some insolvent clubs for player wage payments and through the welfare services, such as educational programmes, that it developed for players.

⁵⁸ Commission on Industrial Relations 1974, paras 229–230.

⁵⁹ Harding 2009, p. 175.

⁶⁰ Department for Business, Innovation and Skills May 2014, p. 5.

⁶¹ *Ibid.*

⁶² Harding 2009, p. 193. *See also* Walters, G (undated) “The Professional Footballers’ Association: A Case Study of Trade Union Growth” available on line at <http://www.bbk.ac.uk/hosted/management/mscmres/oldfootballsite1/papers/pfa-paper>. Accessed on 31 July 2016.

⁶³ *See also* the discussion of the Football Creditors’ Rule in Sect. 8.7.2, *infra*.

Ironically the Conservative Government's employment and labour relations policy in the 1980s, with its focus of reducing the power of the unions domestically, may have strengthened the position of unions at a European level. According to academic Brian Bercusson, a consequence of the United Kingdom's domestic employment policy was the development of social dialogue at a European level.⁶⁴ During the early 1980s the Conservative Government vetoed any employment law proposals initiated at a European level which effectively prevented the European Union from pursuing a policy in the social sphere. At the time, the relevant voting procedures required the unanimous agreement of Member States. Social dialogue became the vehicle through which the European Union encouraged management and labour to consult and agree working conditions and provided an alternative mode of implementing social policy. The social dialogue framework is now an important part of European social policy and a social dialogue committee exists in the professional football sector and for the sports industry generally. The committees are used as the forum for consultation and agreement on certain employment issues that relate to professional athletes.⁶⁵

The case of *Union Royale Belge des Sociétés de Football Association and Others v Bosman*⁶⁶ did not alter significantly the relationship between the Football League clubs, the players and the FA. The case concerned the lawfulness of the transfer system and foreign quota rules adopted by the Union des Associations Européennes de Football (UEFA), which affected the capacity of players to take up employment opportunities in competitions in other Member States. The declaration that the (then) UEFA transfer system restricted the right of free movement and that foreign quota rules were unlawful provided football players throughout the European Union with more freedom to move and take up employment opportunities in other competitions in other Member States.⁶⁷ It strengthened the bargaining power of some players during contract negotiations with a club, resulted in some minor amendments to the Football League Transfer System to bring it into line with European law and abolished restrictions on foreign players in the Football League but it did not affect substantively the collective relationship in the Football League.

With the exception of a few changes to the playing rules, a professional football match played in the modern era is still the same as that played when the Football League was formed in 1888. In some other industries technological advances have affected employees through job losses or a change in work methods but the product of professional football has remained substantially the same over the course of a hundred years. Technological advancement has affected the way a football match is packaged and sold to consumers. Television, the Internet, mobile telephones and other media devices provide football matches to many more consumers than those

⁶⁴ Bercusson 2009, p. 43.

⁶⁵ See Sect. 6.3, *infra*.

⁶⁶ *Bosman*, *supra* n 2.

⁶⁷ See also discussion in Sect. 5.2.3, *infra*.

seated in the stadium. Advances in technology have increased the revenue streams for the clubs and the FA and brought changes to certain terms and conditions for players (such as an increase in the number of games played or changes to travel requirements). The increased revenue has enabled players to negotiate higher wages and also provided the PFA with increased funding to provide services to players.

The potential for increased revenue from the sale of television broadcast rights was the catalyst for the FA's re-organization of professional football in the early 1990s. At the time the Football League was organized into four divisions and the FA proposed to organize the top tier of the league into the FA Premier League (or the Premier League as it is more commonly known), which would commence in the 1992/1993 playing season. Those professional clubs not included in the Premier League were organized under the umbrella of the Football League. Some clubs were not happy with the FA's proposal and a legal challenge was brought, although it was unsuccessful.⁶⁸ In light of the changes to the structure of the professional game, the PFNC's constitution was amended to include the Premier League, the Football League, the PFA and later the FA. It was also re-named the Professional Football Negotiating and Consultative Committee (PFNCC). Collective bargaining on the terms and conditions of employment of players in both the Premier League and the Football League continues in that forum in 2016.⁶⁹

The amount of money that the Premier League receives from the sale of the rights to broadcast Premier League matches domestically and internationally has increased exponentially since the competition was formed. The television broadcast rights for the five Premier League playing seasons from 1992/1993 were sold for a total of £304 million. In 2015 the sale of the rights to broadcast live Premier League matches domestically in the United Kingdom only for the three playing seasons from 2016/2017 to 2018/2019 was £5.136 billion (which will increase overall when the television rights to broadcast the games internationally are sold).⁷⁰ The rights to televise Premier League matches are sold domestically in packages in order to comply with competition law. The games available were split into seven packages and sold to two companies: SKY Television and BT.

Since 1956, there have been various agreements between the FA, the Football League and the Premier League under which the PFA has received a share of the revenue from the sale of television broadcast rights. The money is applied to provide educational programs for the players' education, insurance and other benevolent purposes. Following the formation of the Premier League, there have been two occasions in which the players have threatened industrial action and both

⁶⁸ See *R v Football Association Ltd ex parte Football League Ltd* [1993] 2 All ER 833, a judicial review claim that challenged the FA's decision to re-organize professional football.

⁶⁹ See the discussion in Sect. 8.2, *infra*.

⁷⁰ Premier League Press Release (10 February 2015) League Awards UK Live Broadcast Rights for 2016/2017 to 2018/19. www.premierleague.com/news/60495. Accessed 31 July 2016.

occasions related generally to the PFA's share of the television revenue. In late-1991 the players threatened strike action when the clubs and the players disagreed over the PFA's share of television revenue for the new Premier League competition (amongst other issues). Eventually, an agreement was reached which provided the players with 10 % of the first £10 million and then 5 % to fund education, youth training, football club, community, accident and benevolent fund programmes.⁷¹ The second occasion arose ten years later in 2001, when the agreement regarding the distribution of television revenue was re-negotiated. In the previous year the Premier League had sold the rights to broadcast Premier League matches for approximately £1 billion. The dispute was essentially over the mode of payment and the level of the PFA's share. The players wished to retain the PFA's share as a percentage of the television revenue whereas the Premier League desired a negotiated lump sum payment.⁷²

When the Premier League and the PFA reached a stalemate in negotiations, the PFA balloted its members on the issue of industrial action; 93 % of the PFA's members returned their ballot forms, with 99 % voting in favour of strike action.⁷³ In response, the Premier League sought an injunction to prevent the strike from taking place. The legal proceedings raised some interesting issues about the legality of the strike, the scope of a player's image right and the PFA's entitlement to a share of the Premier League's television revenue.⁷⁴ The matter was settled before a court hearing. The collective representation of players, multi-employer collective bargaining through the league structure and the involvement of the FA in the collective bargaining process is now a key facet of professional football in England. The following section provides an overview of the history of the NBA, a private sports league that is organized outside the regulatory parameters of a national or international federation.

2.3 National Basketball Association

History records that Dr. James Naismith invented basketball at a YMCA training school in Springfield, Massachusetts.⁷⁵ Dr. Naismith had been instructed to come up with an activity that would keep the YMCA students occupied during the winter months after the football season. He designed a sport that involved players throwing a large round ball from a stationary position and scoring points by throwing the ball into a basket that was suspended above their heads. The rules under which the sport was played in the first game held in December 1891 were very

⁷¹ Harding 2009, p. 229.

⁷² Harding 2009, p. 233.

⁷³ Personal interview with the PFA, December 2013, Manchester.

⁷⁴ For a discussion of the dispute, see Welch 2012.

⁷⁵ For a detailed history see Kirchberg 2007.

different to those that apply in the NBA today, although the basic premise remains the same. The NBA is a commercial operation and neither the vexed issue of amateurism nor the requirement to fund basketball's development at a grassroots level have been issues for the league. The development of sport at a grassroots level in the USA has occurred principally through the education system and within national borders; unlike in the United Kingdom where sports developed primarily through amateur sports clubs, moved between countries as a consequence of colonization, trade and war and the model of organization and regulation was replicated in countries around the world. The regulation and organization of sport in the United Kingdom and the USA has developed differently as a consequence of history, cultural factors, economic factors and political intervention in sport.⁷⁶

In the USA participation in team sports was initially organized around a team that students formed in universities and schools. School authorities increasingly viewed these activities as detrimental to students' studies, causing problems with injuries and unruly behavior.⁷⁷ The educational institutions asserted control over students' sports activities and sport was organized and included as an extracurricular activity. In this way the education system, schools, colleges and universities came to dominate the development of sport at a grassroots and amateur level. The professional leagues developed nationally—without an international federation—under a profit-oriented managerial control and with an absence of state intervention. When the major sports leagues, like the NBA and its predecessor basketball leagues organized commercially the leagues opted for a closed franchise system. A distinct feature of some professional competitions in the United Kingdom and elsewhere is Promotion and Relegation as a mode of entry into a professional competition.

Teams located in New Jersey and Philadelphia formed the first professional basketball league in 1898 but were unable to make sufficient revenue from the gate receipts to cover costs. The financial position of the league was not assisted by the growth of other competitive leagues that poached players. Inter-league games were not possible because of the distances between the teams and the absence, at the time, of a fast mode of transport. Eventually the league folded in the early 1900s.⁷⁸ Other significant professional basketball leagues in the game's early history included the American Basketball League (1933–1953), the National Basketball League (1937–1949) and the Basketball Association of America (1946–1949). The NBA was formed out of a merger between the latter two basketball leagues in 1949, and although there have been attempts since that year to organize a competitor league to the NBA (namely, the American Basketball Association (1967–1976) and the World Basketball League (1988–1992)), in 2016, the NBA is the pre-eminent professional basketball competition in the USA.

⁷⁶ See Van Bottenburg 2011, pp. 205–225. See also Halgreen 2004, Chap. 3.

⁷⁷ See Van Bottenburg 2011.

⁷⁸ Kirchberg 2007, pp. 23–25.

Professional basketball in the USA has had more competition from competing leagues than the Premier League or international rugby union. Competition from a competing league can assist players to achieve higher wages and improved working conditions.

The NBA Commissioner manages the business of the NBA. There is no equivalent position in the Premier League or at an international level in rugby union. The role was introduced first in professional baseball following the match-fixing scandal that surrounded the 1919 World Series. The Cincinnati Reds won the series against the favourite for the title, the Chicago White Sox, five games to three, but the series was plagued by rumours that the competition was fixed.⁷⁹ A grand jury subsequently indicted eight Chicago White Sox players and five gamblers on charges of conspiracy to commit fraud against certain institutions and individuals in the State of Illinois. The players were allegedly motivated to participate in the fix because of employment conditions. Players caught up in the scandal such as “Shoeless” Joe Jackson were some of the best in baseball at the time yet, by comparison with other players, were not well paid.⁸⁰ The restrictions on player movement in baseball made it more difficult for players to move teams for a higher wage.

The “Black Sox scandal” as it came to be known was the catalyst for the Major League Baseball team owners appointing Judge Kenesaw Mountain Landis as a commissioner in order to restore public faith and confidence in the sport. The Commissioner had the absolute authority to govern the league, resolve disputes and impose penalties or pursue legal remedies for any conduct that the Commissioner considered to be detrimental to the *best interests* of the game. The position of commissioner was created by the agreement of the baseball team owners and recorded in a private contract between the members of the league. Although the players were eventually found not guilty, the Commissioner banned the players from baseball for life. The position of commissioner was replicated in the NBA and the other major sports leagues in the USA. In the NBA the position was given the title “President” initially and Maurice Podoloff, who was the President of the Basketball Association of America, assumed the role for the NBA when the league was formed in 1949. Walter Kennedy was appointed to the position in 1963 and under his tenure the position title was changed to Commissioner. In 1971 the Commissioner was granted increased power to govern the NBA in the “*best interests of the League*”. Larry O’Brien was appointed Commissioner in 1975, David Stern in 1984 and Adam Silver in 2014.

At the time that it was formed, the NBA unilaterally determined the terms and conditions upon which the players provided services to the teams in the league. A version of baseball’s reserve system was adopted unilaterally in the NBA as a

⁷⁹ For an account of the Black Sox Scandal, see Asinof 1963.

⁸⁰ Asinof 1963, p. 15 and p. 265.

mechanism for limiting competition for player services. Competition from rival professional leagues for player services assisted to raise player salaries periodically but the reserve system in basketball and also the draft, which allocated those players entering the competition for the first time between the teams, generally kept salaries low. The National Basketball Players' Association (NBPA) was formed in 1954 and was recognized as the exclusive bargaining agent for the players in 1957. Collective bargaining on the terms and conditions of employment for professional basketball players commenced the following year.⁸¹ With the formation of a trade union, federal labour relations law came to play a central role in the competition's organization and the relationship between the players, the teams and the NBA. The intersection between federal labour relations law and federal competition law (or antitrust law as it is known in that jurisdiction), in particular, has helped shape the terms and conditions of employment for professional basketball players.⁸²

Although there was collective bargaining on some issues between the players and the teams in the late 1950s and 1960s, the case of *Robertson v NBA*⁸³ was influential in bringing about changes to basketball's reserve system and the development of labour relations in that sport. In 1970 there were rumours that the NBA and an existing rival league, the American Basketball Association, planned to merge. The merger concerned the players because two professional leagues increased competition for player services and salaries whereas the restrictive measures in the NBA kept wages low. The players successfully obtained a court order to prevent the merger from taking place.⁸⁴ The court order was subsequently amended to permit merger discussions between the two leagues but any discussion regarding restraints on player services required an NBPA representative to be present and the merger required court approval before it could go ahead.

A group of professional players also filed a claim against the NBA, alleging that numerous rules and practices in the NBA infringed antitrust law.⁸⁵ The players alleged that the reserve clause and other aspects of the competition's organization such as the Draft, the Uniform Players' Contract, option clauses and the NBA prohibition against players playing in another league infringed antitrust law. In the players' view those aspects of the competition's organization had been unilaterally imposed, had not been the subject of collective bargaining, and fell within the purview of a claim under antitrust law. The players sought an award of treble damages,

⁸¹ For a history of collective bargaining in the NBA, see Staudohar 1986, Chap. 4 and *see also* *NBA v Williams* 45 F 3d 684 (2nd Cir 1995).

⁸² *See generally* Berry et al. 1986, Chap. 6.

⁸³ *Robertson, supra* n 3, p. 67.

⁸⁴ *See Robertson, supra* n 3, *American Basketball Players' Association v NBA* 404 F. Supp 832 (SDNY 1975), *Robertson v NBA* 413 F Supp 88 (SDNY 1976), *Robertson v NBA* 389 F Supp 867 (SDNY 1976).

⁸⁵ *Robertson v NBA* 389 F Supp 867 (SDNY 1976).

costs and legal fees. The NBA argued that the restraints had been the subject of *bona fide*, arm's length bargaining and were exempt from antitrust scrutiny because of the non-statutory labour exemption applicable to collective bargaining.⁸⁶ The Court gave a preliminary indication that the restraints were likely to infringe antitrust law,⁸⁷ and on the basis of that indication, the costs of litigation, likelihood of success and the injunction that prevented the proposed merger from taking place, the parties negotiated a settlement. Under the terms of the settlement agreement (the *Robertson* settlement) the NBA agreed to pay US\$4.3 million in compensation to the players together with legal fees and court costs. Changes were agreed to the Draft and clauses that regulated the services of players, and the Court appointed a person—known as a Special Master—to supervise and enforce the agreement.⁸⁸

The players secured more freedom of movement because the reserve system was amended and a Right of First Refusal agreed by both parties. The Right of First Refusal ensured that if a player's contract terminated and the player received an offer from another team, then the player's former team had the right to match that offer. The *Robertson* settlement agreement was binding on the parties until the end of the 1986/87 playing season but did not preclude the players from challenging in court any unilateral imposition by the NBA of a rule, policy, practice or agreement. The settlement terms were also recorded in a collective agreement that expired in 1980 and provided the framework for successive collective agreements until the *Robertson* settlement expired. The general courts also had more involvement in the resolution of labour disputes in the industry—rather than arbitration which is a feature of dispute resolution in collective labour relations in the USA—because of the appointment of a Special Master to oversee the enforcement of the *Robertson* settlement and the fact that the *Robertson* settlement was incorporated in successive collective agreements.

The 1976 Collective Agreement expired in 1980 and was followed by another agreement that, in turn, expired on 1 June 1982. When the time came to re-negotiate, some of the NBA teams were losing money. The NBA attributed the financial difficulties of some teams to high player salaries brought about by changes to Free Agency that were agreed as part of the *Robertson* settlement. The NBA proposed to introduce a Salary Cap and other restrictive measures because increasing expenses, particularly players' salaries and benefits, were causing the NBA teams to lose money. In the NBA's view the Salary Cap and other restrictive measures were required to promote the financial stability of troubled NBA teams and improve competitive balance in the competition.⁸⁹ Although the NBPA disagreed that players' salaries were the sole or principal reason for the financial difficulties

⁸⁶ For a detailed discussion of labour relations law and the exemptions relevant to collective bargaining and trade union activities in the USA, see Sect. 7.3 *infra*.

⁸⁷ *Robertson v NBA* 389 F Supp 867 (SDNY 1976), pp. 896–897.

⁸⁸ *Robertson v NBA*, *supra* n 3.

⁸⁹ *Re New York Knickerbockers Basketball Club* 630 F Supp 136 (SDNY 1986) 136.

of some teams, it appreciated that it was in everyone's interests "*to have a financially stable league*".⁹⁰ The NBA and the players negotiated the terms of a Salary Cap wage payment model, which was the first of its kind to be introduced in any of the four major sports leagues in the USA. It was unique because it created a revenue sharing arrangement and partnership between the players and the teams. The NBA and the NBPA concluded a collective agreement that continued until the end of the 1986/1987 playing season when both the *Robertson* settlement and the collective agreement expired.

When the *Robertson* settlement and the 1983 Collective Agreement expired, the teams and the players were unable to reach a new agreement. In October 1987 the players initiated legal proceedings, alleging that the restrictive measures agreed as part of the *Robertson* settlement, incorporated in subsequent collective agreements and which still applied to the competition even after the expiry of the collective agreement, infringed antitrust law.⁹¹ The players refused to return to the bargaining table until the claim was resolved; the NBA in turn utilized labour relations law and laid an unfair labour complaint with the National Labor Relations Board seeking a directive that the players return to the bargaining table.⁹² The players' legal proceedings were eventually settled and the terms of the settlement agreement incorporated in a new collective agreement. The settlement terms continued the Salary Cap, the Draft and certain restrictions on Free Agency. The collective agreement expired on 30 June 1994, without the parties signing a new agreement.

As part of negotiations for a new agreement in 1994, the players demanded that the teams discontinue the Draft, the Salary Cap and the Right of First Refusal. The NBA teams did not agree to the demands and sought a court declaration that the disputed provisions in the expired collective agreement were lawful under antitrust law and, in any event, were immune from antitrust scrutiny because of the non-statutory labour exemption. The players counterclaimed alleging that the practices were restraints between competitors that prevented competition for players' services, fixed prices and suppressed salaries, and that the practices were unlawful because the practices were not contained in an existing collective agreement. The players obtained an interim order preventing the teams from entering into contracts with the players until the claim was resolved. At a full hearing of the issues, the players' claim was unsuccessful,⁹³ with the District Judge expressing the view that:

I am convinced that this is a case where nether party cares about this litigation or the result thereof. Both are simply using the court as a bargaining chip in the collective bargaining process. Each is truly guilty of this practice.⁹⁴

⁹⁰ *Ibid.*, p. 137.

⁹¹ *Bridgeman v NBA* 675 F Supp 960 (DNJ 1987).

⁹² For a discussion of unfair labour practices under federal labour law in the USA, see Sect. 7.2.2, *infra*.

⁹³ *NBA v Williams* 857 F Supp 1069 (SDNY 1994).

⁹⁴ *Ibid.*, p. 1079.

He urged the parties to return to collective bargaining:

No court, no matter how highly situated can replace this time-honoured manner of labour dispute resolution. Rather than dogging the courts with unnecessary litigation, the parties should pursue this course.⁹⁵

The players appealed the District Court's decision but were unsuccessful.⁹⁶

The NBA has encountered work stoppages (although there have been fewer work stoppages when compared to the other major sports leagues).⁹⁷ The players have not taken strike action but the team owners have locked out the players on four occasions, the first of which was in 1995. The lockout occurred during the pre-season when the parties were unable to agree the terms of a new collective agreement and lasted for 77 days; it did not affect the playing season. The disputed issues included Free Agency, the Salary Cap and bonus payments. A new collective agreement was eventually finalized and extended to 2001. The NBA teams exercised a right to re-open the collective agreement at the end of the 1998 season because of a desire to limit the players' salary increases. Negotiations between the teams and the players failed and on 1 July 1998 the owners again implemented a lockout of the players. The disputed issues included the Salary Cap and bonuses.

This time the lockout was more disruptive to the NBA's business, with the work stoppage continuing for 191 days. 424 games were lost and the NBA All-Star game—a highlight of the NBA calendar—was cancelled. Negotiations were hostile and the NBA Commissioner at the time, David Stern, threatened to cancel the entire season and hire replacement players for the following season unless an agreement was reached. A new collective agreement was eventually agreed on 20 January 1999 and the players returned for a reduced season. The Salary Cap, Free Agency and drug testing were the main issues of disagreement during collective bargaining in 2004/2005 but the parties avoided legal proceedings and a lockout when a new collective agreement was reached in 2005. A brief lockout occurred in July 2006 when a dispute arose regarding the distribution of television revenue. The teams locked out the players but the matter was resolved within a few hours and there was no disruption to the regular season.

The NBA and the players commenced negotiations for a new collective agreement two years before the 2005 Collective Agreement was due to expire on 30 June 2011. Negotiations did not proceed smoothly. The teams asserted that they had made a loss of US\$300 million in each of the three preceding seasons; the players disagreed. In May 2011 the NBPA filed an unfair labour practice complaint against the NBA, alleging that the teams were not bargaining in good faith. The day after the collective agreement expired, the teams locked out the players. The NBA also brought an unfair labour practice complaint against the NBPA and as a pre-emptive measure, it sought a declaration from the court that the lockout

⁹⁵ *Supra* n 93, p. 1079 (Kevin Thomas Duffy DJ).

⁹⁶ *NBA v Williams* 45 F 3d 684 (CA 2 (NY) 1995).

⁹⁷ For a summary of the labour relations disputes in each of the four major sports leagues, see Birren 2014.

did not infringe antitrust law, that it was protected by the non-statutory labour exemption and that any disclaimer of interest in the union was a sham.⁹⁸ The disputed issues concerned the distribution between the players and the teams of Basketball Related Income (amongst other things).

Negotiations continued without success before the NBPA disclaimed interest in representing the players. Since the disputed issues had previously been agreed through collective bargaining, the players could not argue that the issues had been implemented unilaterally. Instead to challenge the restraints under antitrust law, the players dissolved the union and elected to pursue an antitrust claim rather than rely on labour relations law.⁹⁹ Neither the NBA proceedings for a declaration nor the players' antitrust claims proceeded to a substantive hearing because the parties agreed a new collective agreement on 6 December 2011. The players eventually agreed to a 49 % share of the revenue, which was a decrease from 57 % under the 2005 Collective Agreement and reportedly saved the owners more than US\$1 billion over the duration of the agreement.¹⁰⁰ The new agreement included the Draft and a Salary Cap, and expanded the NBA's revenue sharing arrangements between the teams.¹⁰¹ The lockout, which resulted in the cancellation of 480 games in 2011, was called off and the regular season commenced eight weeks late on Christmas Day. The 2011 Collective Agreement expires on 30 June 2021, although each party has the option to terminate the agreement on 30 June 2017 following notice to the other party. The next section provides a summary of rugby union's history.

2.4 International Rugby Union

The codification of the playing rules for rugby union is intertwined with that of football. According to one historical account, the sport of rugby union was created when Mr. William Webb Ellis picked up and ran with the ball in hand during a football match at Rugby School in the United Kingdom in the early 1800s (although it is difficult to prove that Webb Ellis was the first person to run with the ball).¹⁰² After the FA was formed in 1863, those clubs that preferred a version of football that included handling the ball, formed the Rugby Football Union (RFU) and the *Laws of the Game of Football as Played by the Rugby Football Union* were

⁹⁸ *NBA v NBPA* (USDC SD New York No 11CV05369, 2 August 2011) (2011 WL3274242 (S.D.N.Y.)).

⁹⁹ *Anthony v National Basketball Association* (Complaint No. 11-05525 (N.D. Cal. 15 November 2011)) and *Butler v National Basketball Association* (Complaint, No. 11-03352 (D. Minn. 15 November 2011)). For further discussion, see Sect. 7.3, *infra*.

¹⁰⁰ Brice 2013, p. 60.

¹⁰¹ *Ibid.*

¹⁰² Collins 2006a. See also Collins 2006b.

codified in 1871. In common with some other national federations of that era, the RFU administered rugby union as an amateur sport. The FA permitted professionalism in July 1885 but the RFU was vehemently opposed to professionalism and adopted rules that prohibited player wage payments in 1886. The RFU's stance on payments to players was the catalyst for 21 rugby union clubs in the north of England withdrawing from the RFU on 29 August 1895 and forming the Northern Rugby Football Union (NRFU).¹⁰³ Rugby union players who worked in the coalmines or factories in the north of the country lost wages for playing a game on a Saturday or had to forgo playing rugby union altogether. The NRFU teams in the north of England recognized the importance to players of compensation for lost wages and permitted payments to players as compensation for "*bona fide broken time only*".¹⁰⁴ The maximum level of a player's wage payment was set at six shillings provided a player could demonstrate that he was in employment and had lost a day's pay.¹⁰⁵ Three years later, the NRFU approved professionalism.¹⁰⁶

With the added financial cost of players' wages, the NRFU changed the rules of rugby union to make the game quicker and more exciting for the spectators who paid to attend matches. The rule changes included reducing the number of players on a rugby team from 15 to 13, removing the line-out as a way of re-starting the game and permitting a tackled player to get up and re-start play by tapping the ball back between his legs, to another team member who was positioned behind. In 1922 the NRFU changed its name to the Rugby Football League (which is still the name of the national federation for rugby league in England in 2016). The sport became known as rugby league. The changes to the rules of rugby union created a different sport but the skills required to play rugby league were similar to that of rugby union. Players and coaches were able to apply their skills in both codes subject only to the RFU rule which prohibited professionals in rugby union. Following the formation of the NRFU, and perhaps to prevent other rugby union teams joining the organization, the RFU amended its rules and declared that all NRFU teams and players were "professional" and prohibited from playing rugby union.¹⁰⁷ The RFU's members and rugby union players were prohibited from playing a match on a ground operated by a professional rugby team and a professional rugby team was not permitted to play on a ground operated by a rugby union team.¹⁰⁸ The ban on rugby league players playing rugby union continued in various forms until 1995.

¹⁰³ Moorhouse 1989, p. 4.

¹⁰⁴ Moorhouse 1989, p. 6.

¹⁰⁵ *Ibid.*

¹⁰⁶ Moorhouse 1989, p. 61.

¹⁰⁷ Minutes of the Meeting of the Rugby Football Union held 19 September 1895. Copies of the RFU minutes and IRB minutes referred to throughout this book are held at the Rugby Union Museum, Twickenham, London.

¹⁰⁸ *Ibid.*

The International Rugby Football Board—or the IRB as it was then known—was officially formed in Manchester on 5 December 1887.¹⁰⁹ It was a private association whose founding members were the national federations of Scotland, Ireland and Wales. The IRB's mandate was to organize matches between national rugby union teams, to develop a uniform code of rules under which international games were to be played and to act as an arbitrator of disputes that arose in matches played between the member countries.¹¹⁰ The IRB's original byelaws also stated that the IRB had no power to intervene in the organization of rugby union in the members' jurisdiction.¹¹¹ The IRB assumed a monopoly over the organization of rugby union matches between national federations at an international level and each national federation held a monopoly over the organization of the sport in its respective jurisdiction. Absent from the IRB's founding membership was the RFU. The RFU was invited to join the organization but declined because of a disagreement with the other national federations over who determined the international game's playing rules. It also disagreed with equal representation on the IRB Board, considering instead that representation should be proportionate to the number of rugby union clubs within a national federation, of which the RFU had the greater number. Eventually the issues were resolved by private arbitration. As part of the arbitral award, it was agreed that all international rugby union matches would be played under RFU rules, the RFU would join the IRB as a member and the IRB would increase to 12 members: six members representing England and two members from each of Ireland, Scotland and Wales.¹¹²

The minutes of meetings held during the years following the IRB's formation record those issues of concern for the national federations of rugby union. These were the eligibility of players for a national team, the transfer of players between member federations, conflicts with the scheduling of international matches and amendments to the sport's playing rules, issues which are not too dissimilar to those issues occupying some international federations in the modern era.¹¹³ Professionalism was also an issue, particularly following the 1895 breakaway of

¹⁰⁹ Minutes of the IRB Meeting held 5 December 1887 in Manchester, England.

¹¹⁰ IRB Manifesto adopted 29 September 1888.

¹¹¹ International Rugby Football Board Byelaws 1888, bye-law 5.

¹¹² Award by Arbitrators, Lord Kingsburgh and Major F A Marindin, who met in April 1890 which Defines the Regulations of the International Rugby Football Board recorded in the IRB Minutes for that year.

¹¹³ See for example: the discussion regarding the schedule of international matches with “*a view to avoiding a clashing*” (recorded in the Minutes of the IRB Meeting held 8 February 1892, Manchester, England), the discussion of J Marsh's eligibility for England having previously played for Scotland and the IRB's adoption of a rule that determined a player's eligibility based on country of birth or residence (recorded in the Minutes of the IRB Meeting held 8 February 1892, Manchester, England). The IRB resolved, “*No man should play for two countries*”: *ibid*. The transfer of players between national federations was the subject of discussion in 1893 although the IRB resolved, at that time, to leave the issue for determination by the national federations: Minutes of the IRB Meeting held 4 March 1893, Leeds, England.

rugby union teams in England to form the NRFU. The scope of the IRB's power did not initially extend to promulgating rules concerning player wage payments. Instead it was left to the national federations to determine whether a player was entitled to payment for playing rugby union. The RFU had a clear and unequivocal stance on the issue and prohibited outright any form of payment to players. In 1896 a dispute arose at an international level regarding plans by the Welsh Rugby Union to support the gift of a leasehold house to a retiring international rugby union player, Arthur Gould. Supporters outside the federation had arranged the gift.¹¹⁴ Despite the issue being one for the national federations to determine, on 20 March 1896, the IRB adopted a resolution that required the Welsh Rugby Union to prevent the gift exchange.¹¹⁵ It also adopted resolutions confirming that the gifts to Mr. Gould were an act of professionalism.¹¹⁶

The Welsh Rugby Union initially resisted the IRB's pressure to prevent the gift exchange on the basis that the IRB had not been formed to deal with disputes regarding professionalism and that even if it had, it had not adopted any rules to that effect.¹¹⁷ It withdrew from the IRB in early 1897 and some international matches were cancelled as a consequence. The Welsh Rugby Union later re-joined in 1898 but its re-admission was conditional upon agreement to abide by the IRB's rules and to accept that Mr. Gould was a professional insofar as the international game was concerned and unable to play in international rugby union matches.¹¹⁸ In the early 1900s the IRB passed several resolutions declaring that a player who received payment for playing was a professional but did not adopt more comprehensive regulations relating to amateurism until 1958. The ban against people who were associated in any capacity with a rugby league team was also adopted at an international level (although professionals from other sports were permitted to be involved with rugby union). The ban extended to coaches and administrators who applied their skills in rugby league.

As an amateur sport, the matches between national rugby union teams—or international rugby union matches—attracted the most publicity for players and elite rugby union players. Those rugby union players who played for a national team were well known in some rugby union-playing countries. The money the national federations made from hosting international rugby tours or test matches between national teams was used to cover the costs of tours, develop the sport and fund the sport at the lower levels. The movement of elite rugby union players to professional rugby league was an enduring concern for rugby union's administrators because the players who were enticed to play professional rugby league generally played for a national rugby union team. The movement of players

¹¹⁴ Watts Moses 1961, p. 28.

¹¹⁵ Minutes of the IRB Meeting held 20 March 1896 in London, England.

¹¹⁶ Minutes of the IRB Meeting held 25 January 1897 in London, England.

¹¹⁷ Undated Resolutions Passed by the Welsh Union appended to the Minutes of the IRB Meeting held 20 February 1897.

¹¹⁸ Minutes of the IRB Meeting held 25 January 1898 in Crewe, England.

potentially affected the quality of international rugby union and also the number of younger players available to play the sport. Elite players who considered switching codes had to choose between the “honour and glory” of representing a national rugby union team or earning a living from professional rugby league.

Rugby union remained an amateur sport until 29 August 1995. By that time, it was not “amateur” in the sense that a player, coach or administrator did not receive any payment at all for participating in the sport, but amateur as the term was defined in the regulations of the IRB and the national federations. Under IRB regulations a person could receive payments for expenses, for game-related expenditure, personal and communications allowances, compensation for financial disadvantage or payment as a beneficiary of a trust fund established by a union or team for game-related services. National federations were also entitled to adopt more stringent rules relating to amateurism. There were ways of circumventing the regulations and rugby union players and others involved in the game received payments in some countries in breach of the regulations; the regulations were also not enforced effectively or consistently between federations.¹¹⁹ The decision to permit players, coaches and administrators to openly receive material benefit from the game was influenced generally by commercial pressures and competition from professional rugby league.

Rugby union was an attractive product for entrepreneurs. In the early 1980s the IRB faced competition from private entrepreneurs who wished to establish an international rugby union tournament that competed with matches sanctioned by the IRB. To withstand the competition, the decision was made to organize the RWC, the first one of which was held in New Zealand in 1987. Prior to the RWC, matches between national rugby union teams typically took the form of a rugby tour or a single test match. An exception was the (then) Five Nations tournament between the national teams of England, Scotland, Ireland, Wales and France that took place during the northern hemisphere winter. The RWC provided an opportunity for national rugby union teams to compete in a single tournament for the Webb Ellis Cup. It stimulated public interest in rugby union and improved the sport’s commercial value. An increasing number of people watched the game on television and live at matches, and the increased spectator interest benefited the sport financially through sponsorship revenue, gate receipts and the sale of television broadcast rights. It made some of the best players household names: the performance of All Blacks player, Jonah Lomu, in the 1995 RWC, for example, made him a global superstar in rugby union. The quadrennial competition also became a focus of preparation for national teams.

Commercial pressures placed greater demands on the time of players, coaches, referees and administrators, which placed those involved in the game at a disadvantage. Some of the commercial, sponsorship and endorsement opportunities available, particularly to the players, could not be pursued openly and maintaining

¹¹⁹ Pugh 1995, pp. 7–9. Copies of all IRB Amateurism Working Party Reports are held by the Rugby Union Museum, Twickenham, London.

a balance between rugby commitments and full time employment became more difficult. The increased amounts of money flowing into the game, generated mainly through the commercial success and popularity of the RWC, made it increasingly difficult for rugby union worldwide to control amateurism at an elite level. As an amateur sport, elite players generally did not sign a playing contract and in the absence of a contract, were able to move freely between teams, to professional rugby league (subject only to the ban on future participation in rugby union) or to a rival rugby union competition—if one became established. The weaknesses of amateurism in rugby union at an elite level were exposed by events that occurred in 1995.

The de-regulation of the pay television market in Australia in the early 1990s created increased competition between media companies in that country for a pay-television audience. Televised live sport was considered one of the products that would encourage consumers to subscribe to pay television channels. Professional rugby league is a popular sport in Australia and in 1995, the national federation, the Australian Rugby League, organized the ARL Competition. ARL matches were broadcast on media companies owned by entrepreneur, Mr. Kerry Packer.¹²⁰ Another media entrepreneur, Mr. Rupert Murdoch, and his media companies, Foxtel and News Limited, launched Super League, a new professional rugby league competition to be broadcast only on Foxtel, with the aim of enticing viewers to Murdoch's television channels. News Limited induced ARL teams to join Super League and significant salaries were offered to rugby league players and rugby union players to play in the new competition. The matter resulted in litigation between News Limited and the ARL concerning allegations of breach of contract, inducing breach of contract and restraint of trade.¹²¹ The dispute was eventually resolved with the merger of the rival rugby league competitions to form the Australian National Rugby League (or the NRL as the competition is known in 2016).

The demand for playing services in rugby league and the improved salaries and working conditions on offer to players in the new competition induced some rugby union players to switch codes. The formation of the new rugby league competition by commercial interests outside the national federation demonstrated the ease with which a national federation could lose control of the top level of a sport to private interests and the elite teams. The national rugby union federations relied on the revenue generated by matches between national teams to develop rugby union at grassroots levels in their respective countries. If private entrepreneurs organized elite rugby union, the national federations would lose control and power in the sport but more importantly, would potentially lose revenue which funded the development of rugby union at a grassroots level. Realizing the commercial value of the properties attached to elite rugby union was necessary to fund the sport's

¹²⁰ For a detailed account of events in rugby league and rugby union in 1995, see FitzSimons 2003.

¹²¹ *News Limited and Ors v Australian Rugby Football League Ltd and Ors* (1996) 139 ALR 193 (HCA).

development. Of broader public interest was the effect of private interests taking control of elite rugby union and an important source of revenue for amateur sport. Who would fund amateur sport or provide the opportunities for children to become elite rugby union players in some rugby union-playing countries if private interests controlled the upper levels of the game?

The competition from rugby league affected in particular those rugby union federations in the Southern Hemisphere, most notably New Zealand and Australia but in order to contract with players, the federations required money. To limit the movement of rugby union players to rugby league, the national federations for rugby union in South Africa, Australia and New Zealand agreed to form two new rugby union competitions, then known as the Super 12 competition and the Tri-Nations competition. The competitions were organized under a company called South Africa New Zealand Australian Rugby Ltd (SANZAR) and SANZAR sold the rights to broadcast the Super 12 and Tri-Nations competitions to Rupert Murdoch's News Corporation for \$US555 million.¹²² The money was used to enter into contracts with national team players and retain the players' services in rugby union.

At the same time as competition between Super League and the ARL increased demand for rugby playing services, a competitor entered the market for the organization of rugby union competitions. The World Rugby Corporation (WRC), a private organization, wished to establish a global professional rugby union competition outside the auspices of the IRB and the national federations. Financial support for the competition was provisionally agreed by Kerry Packer but was only guaranteed if the WRC signed a majority of the world's senior rugby union players to play in the competition.¹²³ The WRC approached and encouraged rugby union players throughout the world to sign contracts in confidence. It was initially successful with signing a majority of players from various countries but was unable to secure the services of any members of the South African national team—which in July 1995 won the third RWC. Without the players from the South African national team in favour of the proposal, the WRC was unable to finalize its financial arrangements and plans for the new competition folded.¹²⁴

The IRB was not oblivious to the issues arising from the sport's amateur regulations or the commercial pressures which the sport faced. The previous year, in 1994, it had formed a Working Party to consider whether or not the sport should amend the regulations relating to amateurism. The Working Party had concluded that the game's amateur status was no more than a "veil", that there were differing interpretations of the IRB's regulations amongst the national federations and breaches of the IRB's regulations were so widespread that "*consistent and effective disciplinary action*" was not possible.¹²⁵ It also pointed out that inconsistency

¹²² FitzSimons 2003, pp. 94–98.

¹²³ *Ibid.*

¹²⁴ FitzSimons 2003, pp. 279–301.

¹²⁵ Pugh 1995, p. b.

between the national federations was creating unfairness for everyone involved in the sport, that the game's amateur principles derived from a social era where receipt of payment was considered unacceptable and that the commercial pressures in rugby union were becoming so great that unless the regulations were reconsidered, the IRB would likely lose control of the sport to those entities which traded on the "*disaffection of the game's most essential participants*".¹²⁶

The national federations, however, were divided on the issue. The New Zealand Rugby Union, for example, believed the amateur regulations should be removed completely and the IRB impose strict regulations on the professional game that included salary caps and restrictions on player movement. The Western Samoa Rugby Football Union opposed professionalism because of a concern of losing players to wealthier national federations, with detrimental social and sporting effects for that country. The Japanese Rugby Union supported retaining amateurism with full compensation and regulations to ensure that there were no undue demands on players, while the RFU advocated revision of the regulations to exclude the word "amateur" but include "no pay for play" and "no pay for coaching a specific team" as well as certain exceptions for elite players.¹²⁷ The absence of consensus amongst the national federations limited the IRB's capacity to respond quickly to events that were occurring rapidly in the sport in 1995. Amateurism at an elite level in rugby union became untenable because of the RWC's commercial success, the competition from private entrepreneurs and competition from professional rugby league. At a special meeting in August 1995, the IRB removed the prohibition against receipt of payment or any other material benefit for involvement in rugby union. The ban against the participation in rugby union of those involved in rugby league was also removed.¹²⁸

Owing to the sport's popularity and the economic conditions in some countries, the organization of rugby union differs between the national federations; in some countries all levels of the sport remain amateur.¹²⁹ In those countries in which the game is professional, national law determines the legal status of a rugby union player. If collective bargaining exists, it occurs at a national level in those countries in which professional players have unionized. An employment relationship, if one is formed at a national level, plays out within the regulatory parameters established by the IRB or World Rugby as the organization is now

¹²⁶ Pugh 1995, p. 19.

¹²⁷ Pugh 1995, Appendix 1.

¹²⁸ See also the Sports Discrimination Bill (UK), a private members' bill introduced in the House of Commons in June 1994, which proposed to "*make it unlawful for any rule-making body for a sport to discriminate against persons who have participated, are participating or are expected to participate in any lawful sport and for any connected purposes*" and see the House of Commons National Heritage Select Committee Third Report 1994–1995. Both the Bill and Select Committee Inquiry considered the ban against rugby league participants being involved in rugby union. The decision to adopt professionalism avoided any direct Government intervention into the administration of rugby union in the United Kingdom.

¹²⁹ See Sects. 3.4.2 and 3.4.3 *infra*.

known. There is no employment or collective bargaining relationship between World Rugby and professional players; instead a regulatory relationship exists.

Since its formation, World Rugby has engaged in dialogue with the national federations as required under its constitution. In 2001 the International Rugby Players' Association (IRPA) was formed. Professional rugby union players organized collectively at an international level because of a lack of involvement in World Rugby's decision-making processes, a lack of transparency in the way in which World Rugby operated and to provide accountability.¹³⁰ IRPA and World Rugby signed a Memorandum of Understanding in 2007. World Rugby and IRPA have also established the Rugby Athlete's Commission that provides a forum for players to discuss aspects of the game at an international level that is independent of the national federations. World Rugby's regulation of the professional game is not as stringent as some national federations expressed a desire for in 1995. There are no regulations regarding salary caps, no fee-paying transfer system similar to that in professional football and no draft. A player's eligibility for a national team is prescribed in the World Rugby Regulations Relating to the Game, together with rules that govern the movement of players between national federations. The RWC Terms of Participation, which a player and national federation are required to sign in order to participate in that competition, are determined prior to each RWC.

2.5 Conclusion

For legal, economic and cultural reasons, the organization of professional football in England, the NBA in the USA and international rugby union has occurred in different ways. Throughout history a feature of all three sports has been the desire of those in control to restrict the movement of players in order to preserve the quality of the relevant competitions and to keep wage costs low. The sports limited player movement using different mechanisms: in the NBA it was the reserve system or option clause in the Uniform Players' Contract and also the Draft; in professional football, it was the Retain and Transfer System; and in rugby union, it was the ban on future involvement in that sport, if a player, coach or administrator moved to professional rugby league. The FA's Maximum Wage Rule also kept wages below the level that a player might otherwise have obtained on the open market. Rugby union's amateur regulations prevented players and others involved in the sport from openly earning a full time living from the game.

The clubs, the league and the federations initially adopted restrictions on player movement, working conditions and regulatory rules unilaterally. Employment laws on both sides of the Atlantic were not as robust as contemporary laws and players were not organized collectively. Challenging the rules individually in a closed work environment was difficult. Over time changes in labour relations laws,

¹³⁰ Telephone interview with IRPA 30 May 2014.

unionization and collective bargaining in the NBA and the Premier League has assisted the professional players in those sports to make economic gains and collectively negotiate less restrictive measures. The pathway that the players have taken to achieve those gains has differed generally because of the mechanisms available under national law to resolve labour disputes.¹³¹ In the NBA the players have used legal proceedings in antitrust law through the general courts to bring organizational rules adopted unilaterally by the teams within the purview of collective bargaining and as leverage during negotiations. Federal labour law has been instrumental in the players achieving improved conditions for basketball players. In professional football, the threat of strike action, legal proceedings under the common law doctrine of restraint of trade and Government assistance at various points in time have created an environment for the collective negotiation and agreement of terms and conditions of employment and those regulatory rules that impinge on the employment relationship in the Premier League.

At an international level in rugby union, commercial pressures and competition from rugby league changed the regulatory parameters for the benefit of all who wished to pursue a living in the sport. Since rugby union turned professional, professional players have organized collectively at an international level and through a process of voluntary engagement with World Rugby have established a pathway for dialogue that is independent of the national federations. The issue is whether a pathway for consultation is sufficient to create a “level playing field” for players, the national federations and World Rugby in decision-making processes that occur at an international level, an issue that is discussed elsewhere in this book.¹³² The next chapter outlines the modern organization and commercial aspects of the Premier League, the NBA and international rugby union.

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¹³¹ For a discussion of the labour relations regime in the USA, *see* Chap. 7, *infra*; in the United Kingdom, *see* Chap. 4, *infra*.

¹³² *See* Chaps 10 and 11, *infra*.

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