

COLLECTIVE BARGAINING IN SPORT: CHALLENGES AND BENEFITS

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Abstract: This article analyses the relationship between sport law and employment law – in particular, the legal recognition and involvement of collective bargaining in professional sport. Drawing on a number of specific examples – professional rugby, Formula One motor racing and mixed martial arts – this article attempts to identify existing and possible future challenges for the applicability of collective bargaining in this unusual legal context. Section B sets out the general advantages of collective bargaining in a sporting context, then explores the applicable legal structures and characteristics present in professional sport in more detail. Section C examines these characteristics in the specific context of professional rugby, motor racing and mixed martial arts. Finally, Section D examines both systemic and specific legal issues that may arise if and when collective influence grows in the professional sporting employment relations. The conclusion of this article, Section E, is that, whilst collective bargaining presents a number of challenges to the law of professional sport, these challenges can (and should) be overcome.

A. INTRODUCTION

Collective bargaining is not readily associated with the world of professional sport, at least in the United Kingdom.¹ However, a significant body of academic writing, primarily in the United States,² and growing comment on the need to protect the welfare and rights of professional athlete-employees³ suggests that collective bargaining in professional sport may be a desirable phenomenon. This paper analyses the interaction between sport law and collective bargaining, drawing on a number of specific examples to demonstrate that the peculiar nature of sport law creates a number of different challenges for the applicability of collective bargaining. However, it will also be argued that many of these challenges are not insurmountable and that collective bargaining may increase in prevalence as a result.

Section B outlines the general advantages of collective bargaining in employment law, then discusses the legal framework governing professional sport and the employment

* LLM (UCL), Solicitor. I would like to thank Dr Nicola Countouris for his extremely useful assistance and supervision, and Laura Fraser and Qiulae Wong for their valuable comments and feedback on earlier versions of this article. Any errors or omissions are, of course, my own.

¹ For example, Simon Gardiner and others, *Sports Law* (4th edn, Routledge 2012) 399; Adam Lewis and Jonathan Taylor (eds), *Sport: Law and Practice* (2nd edn, Butterworths 2003) 838.

² See generally Heather R Insley, 'Major league umpires association: is collective bargaining the answer to or the problem in the contractual relationships of professional sports today?' (2001) 29 Cap U L Rev 601; Gabriel Feldman, 'Brady v NFL and Anthony v NBA: The Shifting Dynamics in Labor-Management Relations in Professional Sports' (2012) 86 Tul L Rev 831; Robert C Berry and William B Gould, 'A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes' (1981) 31 Case W Res L Rev 685; Andreas Joklik, 'The Legal Status of Professional Athletes: Differences Between the United States and the European Union Concerning Free Agency' (2004) 11 Sports Lawyers J 223.

³ For example, Leanne O'Leary, 'Regulating the Employment Relationship in Professional Team Sports' (2012) 41(2) ILJ 184; Susan Smailes, 'Sports Law and Labour Law in the Age of (Rugby) Professionalism: Collective Power, Collective Strength' (2007) 28 Industrial LJ (Juta) 57.

relationships therein. Section C analyses the legal structures underpinning the employment relationships of three sports – rugby union football, Formula One motorsport (F1), and mixed martial arts (MMA) – and the varying levels of collective influence they possess. Finally, Section D uses these examples and the background of Section B to assess several legal challenges facing collective bargaining in professional sport: the proper parties to any collective bargaining agreement, superstar players, the effect of competition law, and possible conflict of laws issues.

B. BACKGROUND AND THE LEGAL FRAMEWORK OF PROFESSIONAL SPORT

1. The desirability of collective bargaining in the employment relationship⁴

The arguments for the involvement of trade unions in the formation and maintenance of the employment relationship in sport are as strong as any other industry. As noted by Greenfield, ‘the theoretical law of contract often fits uneasily into the relationship of employer and employee’ given the inherently unequal bargaining power between the parties.⁵ Trade unions are able to provide a collective voice which matches the bargaining power of the employer in the employment relationship and imparts a degree of balance.⁶ Without such a collective voice, an employee is arguably vulnerable to the imposition of harsh terms in their employment contract. In the context of sport, Insley summarises the advantages well:

Collective bargaining provides greater equality in bargaining power and contracts, and is fairer to the players and officials than traditional contracts. ... By forcing both labor and management to come to the table and bargain together, collective bargaining provides for an agreement which best represents both sides. In contrast, individual contracts created under traditional contract law result in complete control by the all-powerful management.⁷

The employee, given collective voice, is better able to take advantage of the legal mechanisms designed at safeguarding employee rights as they are applied more forcefully en masse. Thus, matters such as contract length, compensation, grievance procedures, and player safety become bargaining chips rather than unilaterally imposed conditions.⁸

⁴ This paper only briefly summarises some of the main advantages of collective bargaining relevant to sports law. For an excellent overview of the literature on this subject, see Yitchak Haberfeld, ‘Why do workers join unions? The case of Israel’ (1994) 48 *Indus & Lab Rel Rev* 656, 657-659.

⁵ Steve Greenfield and Guy Osborn (eds), *Law and Sport in Contemporary Society* (Frank Cass 2000) 127.

⁶ *ibid.*

⁷ Insley (n 2) 601-2 (footnotes omitted).

⁸ *ibid* 613.

2. *The special nature of sport*

There are, however, a number of specific characteristics relating to professional sport that inexorably colour these general advantages. These factors must be considered when considering how (or if) to implement and control collective bargaining.

a) History

Collective bargaining in sport has a long history in the United States, where the three most popular domestic sports – American football, basketball, and baseball – are now heavily unionised. Baseball was the first sport to be professionalised in the late eighteenth century.⁹ Initial American collective bargaining agreements were threadbare in their coverage¹⁰ but have since evolved to union-dominated industries with fiercely negotiated collective agreements.¹¹ These agreements now cover matters such as player transfers and freedom of movement.¹² Collective bargaining in United States professional sport has led to a large number of work stoppages.¹³ Stoppages have been implemented both through employee strikes and employer lockouts; Feldman notes that in the United States, ‘the last seven work stoppages in professional sports have been the result of lockouts’.¹⁴

The scope and complexity of collective bargaining in the major United States sports means that they are not analysed in substantive detail in this paper. United States sports are relative outliers in that the same level of collective culture has not developed in other areas. Thus, the focus of this paper is on sports without developed collective bargaining cultures. Professional rugby in New Zealand has been chosen as a ‘collectivised’ example due to its relatively recent development and self-contained structure.

b) Particular features of the sport industry

As with any industry, there are a number of legal features particular to professional sport which affect the dynamics of the employment relationship. The first is the nature of sport itself. Unlike many industries which operate as a ‘pure’ economic activity, sport has ‘historically been more of a social, cultural and educational activity rather than an economic pursuit ... a leisure-time activity rather than as an entertainment “product”’.¹⁵ Although

⁹ *ibid* 602. See also Leslie Michele Lava, ‘The Battle of the Superstars: Player Restraints in Professional Team Sports’ (1980) 32 U Fla L Rev 669.

¹⁰ *ibid*.

¹¹ Lewis and Taylor (2nd edn) (n 1) 838.

¹² Lava (n 9) 684, citing *Robertson v National Basketball Association* 389 F Supp 867 (SDNY 1975) in respect of basketball.

¹³ Feldman (n 2) 832; Trevor E Brice, ‘Labor Pains on the Playing Field: Why Taking a Page from Europe’s Playbook Could Help the United States’ (2013) 20 UCLA Ent L Rev 49, 61.

¹⁴ Feldman (n 2) 832.

¹⁵ Lewis and Taylor (2nd edn) (n 1) 333.

professionalism has eroded this truth to a degree,¹⁶ it is undeniable that regulation of professional sport, particularly in respect of employment, must take account of ‘the good of the game’.¹⁷ Professional sport also brings intangible benefits such as a ‘positive impact on the psyche of the viewer [and a] sense of community’.¹⁸ Thus, the Council of Europe has noted that regulatory oversight of sport must focus (inter alia) on ‘the promotion of sport for all as a means of improving quality of life’.¹⁹

Secondly, competitors within the sport industry must collude and co-operate with each other on some level to ensure that ‘unpredictability [and thus integrity] of sporting events may be guaranteed’.²⁰ As Feldman notes, ‘each of the teams must reach agreements with each other on a variety of matters, including the rules of the game, schedules, procedures for signing and trading players, and other terms and conditions of employment’.²¹

Third, the governing body of a given sport – the organisation charged with the regulation and operation of a sport’s professional competition – is unusual in that it is able to unilaterally impose alterations to athletes’ orthodox employment relationship.²² Regulatory measures²³ can be imposed with impunity and without any true consent (or even awareness²⁴) from employees, given that acceptance of such terms is the only realistic way in which participation in the sport is possible.²⁵ This is reflective of a governing body’s monopolistic position in a given sport which gives it effectively complete control as ‘buyer’ or employer of the skills of players wishing to take part in their respective competitions.²⁶

Finally, trade unions themselves are uniquely defined in respect of professional sport. The most obvious point is that athletes’ typically short careers result in a constantly fluctuating and uncertain union membership.²⁷ Further, employees in a sport union are uniquely positioned in that ‘athletes are not fungible to employers and ... do not possess

¹⁶ *ibid* 333-4. See also Adam Lewis and Jonathan Taylor (eds), *Sport: Law and Practice* (3rd edn, Bloomsbury Professional 2014) 1124-5.

¹⁷ Smailes (n 3) 73; Lewis and Taylor (3rd edn) (n 16) 4-5, 38-39.

¹⁸ Brice (n 13) 69-70 (footnotes omitted). See also Gardiner and others (n 1) 24; John Hargreaves, *Sport, Power and Culture: A Social and Historical Analysis of Popular Sports in Britain* (Polity 1986) 9-10.

¹⁹ Neville Cox, Alex Schuster and Cathryn Costello, *Sport and the Law* (First Law 2004) 17.

²⁰ *ibid* 419.

²¹ Feldman (n 2) 848.

²² O’Leary (n 3) 184. See also Smailes (n 3) 80; Michael Beloff, Tim Kerr and Marie Demetriou, *Sports Law* (Hart 1999) 22-23.

²³ Such as the organisation of competitions, control of access to competitions for players and clubs, the eligibility of players to participate in competitions and a disciplinary code to regulate the conduct of participants: Beloff, Kerr and Demetriou (n 22) 186.

²⁴ *ibid* 190.

²⁵ *ibid* 187.

²⁶ *ibid* 186; Feldman (n 2) 847; Berry and Gould (n 2) 695.

²⁷ Berry and Gould (n 2) 708.

homogeneous skills'.²⁸ As their skills are essentially non-transferable to any other industry, sport unions are at a comparative disadvantage. However, that disadvantage is arguably shared by the employer as well, as it will likely want the best athletes – the ones with those unique, non-transferable skills – to compete in its league. This places a particular gloss on the bargaining process.²⁹

c) Particular features of the sport employment relationship

The unique aspects of the professional sport industry inexorably alter the traditional notions of the employment relationship. The most notable aspect of this is the 'web' of contracting parties involved and the multiplicity of relationships that can result from that 'web'. This is important due to the central role the law of contract (including employment contracts) plays in athletes' participation in a sport.³⁰ Berry and Gould note that there are at least five interests within a professional sport, all with particular and different interests: leagues (governing bodies), clubs, players, agents, and players' attorneys.³¹ Thus, a player will likely be subject to the rules of a governing body, his club, and the leagues in which he competes.³² Beloff has further suggested that players enter into contracts with each other when they take the field.³³

This can affect a player's 'traditional' employment contract or result in a number of different, interrelated employment relationships.³⁴ The relationship between an athlete and the governing body has even resulted in litigation in several cases, a point discussed in more detail in Section D below.³⁵ An athlete's acceptance of control by any or all of these bodies, along with reciprocity in obligation between the parties, may give rise to contractual relationships or a need to expressly recognise and regulate the contractual relationship between them.³⁶ These legal issues beg the question of the appropriate bargaining parties in any collective bargaining relationship, a point discussed in more detail in Section D below.³⁷

3. *The slow development of collective employment culture in F1 and MMA*

There are also a number of external reasons for a lack of collective influence in some specific sports such as MMA and F1, two of the sports discussed in more detail in Section C. These reasons are tied both to the history of these sports, and to definitional issues resulting in

²⁸ Feldman (n 2) 847.

²⁹ Brice (n 13) 76.

³⁰ Beloff, Kerr and Demetriou (n 22) 22.

³¹ Berry and Gould (n 2) 695-6.

³² *ibid* 796, citing *North American Soccer League* 236 NLRB 1317 (1978).

³³ Beloff, Kerr and Demetriou (n 22) 23-24. See also Greenfield and Osborn (n 5) 127.

³⁴ Smailes (n 3) 74-78 in the context of professional rugby in South Africa; Lewis and Taylor (3rd edn) (n 16) 1330.

³⁵ Text to (n 159).

³⁶ See Craig Moore, *Sports Law and Litigation* (2nd edn, CLT Professional 2000) 171-2.

³⁷ Text to (n 143).

laissez-faire governmental attitudes. It should be borne in mind, however, that some of the aspects of the sporting industry discussed above – in particular, the narrowness of the market and monopolistic governing bodies – may also restrict union growth in all sport.

One possible explanation for a lack of developed collective bargaining in F1 (whose popularity and organisation has historically rested mainly in Europe³⁸) and indeed, European sport generally, is the comparatively non-interventionist tradition that has developed in contrast to the heavily unionised United States. Unlike the United States, there is no well-developed legal recognition of sports unions in the European Union.³⁹

However, that is not to say that European Community law ignored the regulation of sport entirely. Several instruments, such as the European Model of Sports in 1998, the Council of Europe's 2002 Nice Declaration, and the 2007 White Paper on Sport,⁴⁰ do set out 'the specialties of European sports, its social role, and the impact of those structures on the legal regulation of the sports world'.⁴¹ However, such measures have been rightly described as 'soft law', which has no binding legal effect.⁴² Moreover, no relevant legislation of any significance exists in the United Kingdom.⁴³ In Europe, the sport employment relationship (indeed, much of its regulation overall) was left to the parties controlling it.⁴⁴

This lack of European state regulation led to development of the sport industry's own private norms known as *lex sportiva*, which brought with it a much more deferential attitude from courts that allowed for sporting leagues and governing bodies to essentially define their own (employment) relationships, which unsurprisingly would not include unionisation.⁴⁵ Thus, 'enormous deference'⁴⁶ is shown to bodies that are presumed to have both the expert knowledge of the sport industry, and its best interests at heart. As noted by Gardiner, this is a dangerous presumption, with there being a real risk that such bodies 'cannot be trusted to uphold these Corinthian values [of fair play and the good of the game]', particularly given the growing internationalisation of professional sport.⁴⁷

Secondly, there arguably has not been enough time for relatively newly professionalised sports such as MMA to develop a strong collective culture, unlike American

³⁸ Cox, Schuster and Costello (n 19) 416; Lewis and Taylor (3rd edn) (n 16) 1148.

³⁹ Lewis and Taylor (2nd edn) (n 1) 838.

⁴⁰ See generally <<http://ec.europa.eu/competition/sectors/sports/policy.html>> accessed 19 January 2015; Cox, Schuster and Costello (n 19) 15-16; Lewis and Taylor (3rd edn) (n 16) 1099-1104.

⁴¹ Joklik (n 2) 228.

⁴² *ibid* 229.

⁴³ Greenfield and Osborn (n 5) 126.

⁴⁴ *ibid* 252.

⁴⁵ Joklik (n 2) 229-30; See also Lewis and Taylor (3rd edn) (n 16) 22-65.

⁴⁶ Cox, Schuster and Costello (n 19) 12; See also Beloff, Kerr and Demetriou (n 22) 69.

⁴⁷ Gardiner (n 1) 71, citing Edward Grayson, *Sport and the Law* (3rd edn, Butterworths 2000).

sports such as baseball, which began to unionise in the late nineteenth century.⁴⁸ This ‘late bloomers’ argument is supported by Greenfield, who notes that rugby in the United Kingdom, which only became professional in 1995, has struggled to form effective unions.⁴⁹ However, it should be noted that effective and powerful rugby unions have evolved since then in South Africa⁵⁰ and New Zealand⁵¹ with only a few more years of professionalism than MMA.

Third, it is arguable that the extreme physical danger presented by sports such as MMA and F1 render collective bargaining more difficult. It is clear that such sports present a very real risk of catastrophic employee injury. Thus, an employer is obviously less likely to be amenable to a collective voice demanding concessions on matters such as athlete safety standards and compensation or pensions for injured employees. The danger of catastrophic injury means that a collective contract (and the bargaining process) must take account of this, in terms of matters such as compensation, insurance and contract length.⁵² However, as with the ‘late bloomers’ point, it must be noted that this argument is not universally applicable. For example, the very dangerous full contact sport of American Football is heavily unionised in the United States, as is rugby in countries such as South Africa and New Zealand, suggesting this is not an insurmountable problem.

Finally, the ad hoc and fragmented nature of union formation in F1 has led to repeated failures in attempts to collectively bargain. Although there are now reasonably well-developed contractual relationships between the relevant parties,⁵³ this was not always the case. Until the late 1990s, for example, teams ‘cared little for the detailed work of tying up commercial agreements [concerning] trackside advertising, gate money, hospitality, television rights and so on’.⁵⁴ Moreover, despite several attempts to unionise since the 1970s, a teams’ union has broken and reformed on multiple occasions, with dissolution as recent as 2013.⁵⁵ Finally, the formation of a drivers’ union, whilst successful in 1961, also dissolved in the 1980s and arguably still suffers from a lack of concrete bargaining power.

⁴⁸ See *Insley* (n 2) 602-08.

⁴⁹ *Greenfield and Osborn* (n 5) 130-31; See also *Lewis and Taylor* (3rd edn) (n 16) 317.

⁵⁰ See generally *Smailes* (n 3).

⁵¹ Text to (n 59).

⁵² *Greenfield and Osborn* (n 5) 143.

⁵³ Text to (n 93).

⁵⁴ ‘Mr Formula One’ *The Economist* (London, 13 March 1997) 72.

⁵⁵ Text to (n 100).

C. COLLECTIVE BARGAINING IN PRACTICE: RUGBY, FORMULA ONE, AND MIXED MARTIAL ARTS

This section analyses examples of collective influence in three sports: professional rugby in New Zealand; Formula One motor racing (F1); and MMA. These sports can be viewed on a spectrum, with rugby at the ‘collectivised’ end, MMA at the ‘individualised’ end, and F1 somewhere in the middle. This section will provide some background to each sport and explain the applicable legal structures for each. These specific examples will then be used in Section D in assessing specific legal challenges faced by collective bargaining in sport.

1. Professional rugby in New Zealand

The New Zealand Rugby Union (NZRU) is the governing body of professional rugby in New Zealand. It is an incorporated society formed under the Incorporated Societies Act 1908.⁵⁶ The NZRU is a member of the International Rugby Board (IRB), the international governing body of professional rugby; and South Africa New Zealand Australia Rugby Ltd (SANZAR), which organises the Super Rugby⁵⁷ and the Rugby Championship⁵⁸ tournaments. The NZRU is responsible for the organisation of the New Zealand national provincial championship. The NZRU collectively bargains and contracts with the New Zealand Rugby Players Association (NZRPA). The NZRPA is, similarly, an incorporated society under the 1908 Act, and was formed in 1999 ‘in response to the growing demand from players to be represented by their own independent body on issues that concern both themselves and the game’.⁵⁹ The NZRPA is a union registered under Part 4 of the Employment Relations Act 2000 (ERA).

a) The collective bargaining process, strikes, and lockouts

The ERA is the governing law on employment agreements in New Zealand; any contract purporting to contract out of its provisions is ineffective.⁶⁰ An ‘employer’ means a person employing an employee or employees⁶¹ and clearly includes the NZRU as the employer of professional rugby players in New Zealand. A ‘union’ is defined as a union registered under Part 4 of the ERA.⁶² A registered union is entitled to represent its members in relation to any matter involving their collective interests as employees.⁶³

⁵⁶ Incorporated Societies Act 1908 (NZ), s 5(1).

⁵⁷ A tournament involving five regional teams each from New Zealand, South Africa, and Australia.

⁵⁸ A yearly international tournament held following the conclusion of Super Rugby between the national teams of Australia, New Zealand, Argentina and South Africa.

⁵⁹ New Zealand Rugby Players Association (NZRPA), ‘Our History’ <www.nzrpa.co.nz/page/about-us/history> accessed 19 January 2015.

⁶⁰ Employment Relations Act 2000 (ERA) (NZ), s 238.

⁶¹ *ibid.*

⁶² *ibid* s 5.

⁶³ *ibid* s 18.

The bargaining process in New Zealand is imposed with a statutory duty of good faith.⁶⁴ On a general level, the duty requires the parties *inter alia* to not do anything to mislead or deceive each other and be ‘active and constructive in establishing and maintaining a productive employment relationship’.⁶⁵ An employee bound by a collective agreement may agree to additional terms and conditions with the employer, so long as they are not inconsistent with the terms and conditions in the collective agreement.⁶⁶

Strikes and lockouts are dealt with under Part 8 of the ERA. Both are lawful in certain circumstances. Strikes or lockouts must relate to the bargaining process; occur 40 days after bargaining has commenced; and occur after expiry of a previous collective agreement.⁶⁷ A strike or lockout is unlawful *inter alia* if a collective agreement binding the employees is in force or if the strike or lockout relates to a personal grievance, a dispute, a bargaining fee clause, or freedom of association.⁶⁸ The NZRPA has publicly threatened a strike on at least one occasion. In 2013, the head of the NZRPA stated that ‘international representative players could take strike action “as a last resort” to press claims for an integrated international season with fewer matches’.⁶⁹ This threat, although eventually avoided, was supported by the New Zealand national team coach.⁷⁰

b) The current collective bargaining agreement (CBA)

The most recent CBA between the NZRU and NZRPA was signed on 21 August 2013.⁷¹ The agreement places central and exclusive control of rugby governance in the hands of the NZRU, which (*inter alia*) selects and manages NZRU teams, administers all competitions, and grants franchises to groups wishing to compete in Super Rugby.⁷²

The CBA allows the NZRU to contract with individual players depending on ability,⁷³ using one of several tiered standard form contracts. The NZRU remains the central employer

⁶⁴ *ibid* ss 4(4) and 32.

⁶⁵ *ibid* s 4(1A).

⁶⁶ *ibid* s 61.

⁶⁷ *ibid* s 86(1)(b).

⁶⁸ *ibid* s 86(1).

⁶⁹ ‘Players may strike over rugby test schedules’ (*stuff.co.nz*, 13 May 2013)

<www.stuff.co.nz/sport/rugby/international/8666454/Players-may-strike-over-rugby-test-schedules> accessed 19 January 2015.

⁷⁰ *ibid*.

⁷¹ ‘New Collective Employment Agreement for New Zealand Rugby’ (*NZRPA Press Release*, 21 August 2013) <www.nzrpa.co.nz/media/documents/MEDIA_RELEASE_-_New_Collective_Employment_Agreement_for_New_Zealand_rugby_1.pdf> accessed 19 January 2015.

⁷² ‘Collective Agreement between The New Zealand Rugby Union and the Rugby Players Collective’ (15 August 2013) <www.nzrpa.co.nz/media/documents/Collective_Agreement_2013-2015.pdf> accessed 19 January 2015 (NZCBA), cls 1.1-1.4.

⁷³ *ibid* cl 50.1.

in all cases.⁷⁴ To be eligible for the national team, a player must (inter alia) be a party to a NZRU contract at Super Rugby level under the CBA.⁷⁵ Further, the agreement (inter alia) grants the NZRU a licence to use a player's image rights on a limited basis each year;⁷⁶ deals with rugby-specific terms such as non-selection for certain teams;⁷⁷ includes a wide misconduct clause;⁷⁸ sets minimum (but no maximum) remuneration levels;⁷⁹ guarantees employer contributions to a superannuation scheme;⁸⁰ ensures that young players are subject to a 'personal development programme';⁸¹ and arranges employer-funded trauma and medical insurance.⁸²

2. Formula One (F1)

F1 is the highest level of motor racing sanctioned by international motorsport's governing body, the *Fédération Internationale de l'Automobile* (FIA). The FIA is an international federation of 236 national motoring and sporting organisations from 141 countries (Member Clubs).⁸³ It is a non-profit voluntary association formed under the French *Association loi de 1901*.⁸⁴ Accordingly, the FIA is governed by its own internally created statute. That statute states that the General Assembly is the sole governing body of international motor sport,⁸⁵ and consists of the President, the delegation of each FIA Member Club, and the president of the FIA Drivers' Commission.⁸⁶ The World Motor Sport Council (WMSC) is the body charged specifically with the creation and administration of rules in F1. Its membership consists of the FIA President, Deputy President for Sport, seven Vice-Presidents for Sport, and 18 other members.⁸⁷ The President of the Drivers Commission and a representative of the Formula One Constructors are members of the WMSC as of right.⁸⁸ As discussed below, that

⁷⁴ *ibid* cl 79.

⁷⁵ *ibid* cl 33.2.

⁷⁶ *ibid* cls 13.1, 14.5, 29.1.

⁷⁷ *ibid* cls 51.2, 98.1.

⁷⁸ *ibid* cls 51.1, 91-2.

⁷⁹ *ibid* cls 55, 72.

⁸⁰ *ibid* cl 96.

⁸¹ *ibid* cl 97.10.

⁸² *ibid* cl 117. It should be noted that in New Zealand, there is a comprehensive no-fault statutory scheme which covers the cost of most personal injuries in sport: see the Accident Compensation Act 2011 (NZ).

⁸³ 'About the FIA' <www.fia.com/about-fia> accessed 19 January 2015.

⁸⁴ 'Federation Internationale de l'Automobile' <www.asso1901.com/profile.php?l=fr&asso=1060201&pname=FEDERATION-INTERNATIONALE-DE-LAUTOMOBILE> accessed 19 January 2015.

⁸⁵ See Statutes of the FIA

<[www.fia.com/sites/default/files/basicpage/file/Statuts%20FIA%20AGO%2006%2012%202013%20\(FR-EN\)-CLEAN_0.pdf](http://www.fia.com/sites/default/files/basicpage/file/Statuts%20FIA%20AGO%2006%2012%202013%20(FR-EN)-CLEAN_0.pdf)> accessed 19 January 2015, art 4.

⁸⁶ *ibid* art 8.

⁸⁷ *ibid* art 14.

⁸⁸ *ibid*.

constructors' slot is presently held by the head of F1 Management, Bernie Ecclestone. In performing its functions, the WMSC is assisted by various Commissions.⁸⁹

a) The regulatory structure of F1

The regulation of F1 operates on two levels: operational and commercial. The operational aspects are governed by FIA regulations such as the International Sporting Code and Formula One Regulations; the commercial side is governed by a three-party contract known as the Concorde Agreement, between the FIA, the F1 Teams, and Formula One Management (FOM),⁹⁰ which controls the commercial rights to F1. F1 regulations are made under the auspices of the International Sporting Code, which gives specific and detailed guidance on how the FIA is to exercise its power as the sole governing body of international motorsport.⁹¹ There is also a designated disputes resolution process, with the internally-managed International Court of Appeal operating as the tribunal of last resort.⁹²

As mentioned above, the Concorde Agreement, running from 2013 to 2020, plays an important role.⁹³ Although the exact terms are confidential, this tripartite agreement between the FIA, teams, and FOM sets out the distribution of broadcasting revenue from FOM to the FIA and the teams. This structure stems from the acquisition of F1's commercial rights by Bernie Ecclestone in the late 1970s through his control of the Formula One Constructors Association,⁹⁴ and in reaction to an EU Commission investigation in FIA's dominant market position.⁹⁵

b) The Constructor and Driver Associations

F1 operates concurrent Drivers' and Constructors' World Championships.⁹⁶ In 2008, a pseudo-union named the Formula One Teams Association (FOTA) was established to negotiate en bloc with FIA and Formula One Management in respect of a new Concorde Agreement and regulations. This led to fiercely contested negotiations which led (inter alia) to two members of FOTA being suspended for breaking ranks,⁹⁷ and the threat of a

⁸⁹ *ibid* art 22.

⁹⁰ Formula One World Championship Ltd, a company registered in the United Kingdom, currently holds all commercial broadcasting rights in respect of F1.

⁹¹ See FIA International Sporting Code <www.fia.com/sites/default/files/regulation/file/2014%20International%20Sporting%20Code%20%28FR-EN%29.pdf> accessed 19 January 2015, arts 1-2.

⁹² *ibid* arts 180-182.

⁹³ 'Concorde Agreement' (FIA, 27 September 2013) <www.fia.com/news/concorde-agreement> accessed 16 January 2015.

⁹⁴ See 'Mr Formula One' (n 54) 72; Richard Williams, 'Motor Racing: The Formula for Striking it Rich' *The Guardian* (London, 28 March 1997) 2.

⁹⁵ Text to (n 200).

⁹⁶ The 2014 season involves 22 drivers representing 11 constructor teams.

⁹⁷ Simon Strang, 'Williams team suspended by FOTA' (*Autosport*, 27 May 2009)

breakaway ‘Grand Prix World Championship’ series, due to disagreement on cost control and distribution of broadcasting revenue.⁹⁸ However, in 2011 four teams – including the powerful Ferrari – left FOTA,⁹⁹ leading to the weakened FOTA being disbanded in February 2014.¹⁰⁰ There has been some discussion of the newly formed Formula One Strategy Group (FSG) performing some or all of FOTA’s previous functions.¹⁰¹ The FSG consists of 18 members, split evenly between the FIA, Formula One Management, and six of the leading F1 teams,¹⁰² and advises the F1 Commission, a body formed by the FIA, which in turn advises the WMSC.¹⁰³

The F1 drivers’ union is known as the Grand Prix Drivers Association (GDPA), and was formed in 1961 with the primary aim of improving driver safety.¹⁰⁴ The GDPA is a UK-registered company¹⁰⁵ and is managed by three directors, one of whom is the Chairman. Membership is not compulsory (although 19 of 22 drivers were members in 2014) but it is a requirement that a driver be a current F1 race or test driver.¹⁰⁶ Decisions are reached by a simple majority on a ‘one member, one vote’ basis.¹⁰⁷

The GPDA is not granted any official status by the FIA, nor is it recognised as a trade union under any applicable employment law.¹⁰⁸ However, an open line of communication with the FIA is maintained on an informal level. Further, the FIA informally invites the GDPA to relevant committees and working groups.¹⁰⁹ Further again, there has in the past been proactive dialogue between FOTA and the GPDA, such as the funding (by FOTA) of a pre-race medical check by a private company from 2006.¹¹⁰ There are several other areas in which the GDPA works for its members such as a pooled insurance package which offers lower premiums than individually-arranged policies, and the presence of an ex-F1 driver as a

<www.autosport.com/news/report.php/id/75646> accessed 19 January 2015.

⁹⁸ Jonathan Noble, ‘FOTA teams to launch breakaway series’ (*Autosport*, 18 June 2009)

<www.autosport.com/news/report.php/id/76292> accessed 19 January 2015.

⁹⁹ See ‘Ferrari and Red Bull leave FOTA’ (*BBC*, 2 December 2011)

<www.bbc.co.uk/sport/0/formula1/16009873> accessed 19 January 2015.

¹⁰⁰ See James Allen, ‘The end of the road for F1’s Teams Association’ (*James Allen on F1*, 28 February 2014)

<www.jamesallenonf1.com/2014/02/the-end-of-the-road-for-f1-teams-association> accessed 19 January 2015.

¹⁰¹ Jonathan Noble and Pablo Elizalde, ‘F1’s Strategy Group can replace disbanded FOTA – Claire Williams’ (*Autosport*, 25 March 2014) <www.autosport.com/news/report.php/id/113080> accessed 19 January 2015.

¹⁰² *ibid.*

¹⁰³ Statutes of the FIA (n 85) art 22(1).

¹⁰⁴ Email from Pedro De La Rosa to author (13 March 2014).

¹⁰⁵ Webcheck – Select and Access Company Information (Company Number 03157191)

<<http://wck2.companieshouse.gov.uk/compdetails>> accessed 19 January 2015.

¹⁰⁶ Email from Pedro De La Rosa (n 104).

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

Grand Prix steward to judge racing incidents and penalties.¹¹¹ In terms of driver safety advocacy, the most notable example of the GPDA's work was a threat following the 2013 British Grand Prix to boycott the next race due to several catastrophic tyre failures during that race.¹¹² That threat was made unilaterally, without any discussion with the F1 teams or FOTA.¹¹³

3. Mixed Martial Arts (MMA)

MMA is defined as 'unarmed combat involving the use ... of a combination of techniques from different disciplines of the martial arts'.¹¹⁴ Its popularity has grown enormously in recent years, due at least in part to the growth and success of the world's largest commercial MMA organisation,¹¹⁵ the Ultimate Fighting Championship (UFC). The UFC holds a near-monopoly position in the commercial MMA market.¹¹⁶ The UFC is run by its parent entity, Zuffa LLC (Zuffa), a limited liability company registered in Nevada, USA.¹¹⁷ However, its reach is increasingly global.¹¹⁸ Zuffa (like the NZRU but in contrast to the FIA) is responsible for both operational and commercial activities of the UFC.

Following criticism of its violent nature,¹¹⁹ UFC entered into dialogue with a number of USA State Athletic Commissions to form a set of unified MMA rules. California and New Jersey's commissions were the first to sign off a set of codified rules governing MMA fights for California in April 2000¹²⁰ and for New Jersey¹²¹ in April 2001. In 2009, the Association of Boxing Commissions, an organisation responsible for sanctioning boxing and MMA

¹¹¹ *ibid.*

¹¹² Andrew Benson, 'German Grand Prix: Drivers' withdrawal threat over tyres' (*BBC*, 5 July 2013) <www.bbc.co.uk/sport/0/formula1/23190671> accessed 19 January 2015.

¹¹³ Email from Pedro De La Rosa to author (n 104).

¹¹⁴ Ultimate Fighting Championship, 'Rules and Regulations' <www.ufc.com/discover/sport/rules-and-regulations> accessed 19 January 2015.

¹¹⁵ Josh Gross, 'UFC buys rival Strikeforce' (*ESPN*, 13 March 2011) <<http://sports.espn.go.com/extra/mma/news/story?id=6209923>> accessed 19 January 2015.

¹¹⁶ Greg Byron, 'Industry Dominance: the UFC and its "Monopoly" in the MMA Market' (*MMA Corner*, 24 January 2014) <<http://themmacorner.com/2014/01/24/industry-dominance-the-ufc-and-its-monopoly-in-the-mma-market>> accessed 19 January 2015.

¹¹⁷ See Nevada Companies Registry

<<https://nvsos.gov/sosentitysearch/CorpDetails.aspx?lx8nvq=7sC8ROJcPKwddC%252bHE2Wv%252bQ%253d%253d&nt7=0>> accessed 19 January 2015.

¹¹⁸ See 'Australia tapped as an annual UFC destination' (*MMA Junkie*, 20 February 2010) <<http://mmajunkie.com/2010/02/australia-tapped-an-annual-ufc-destination>> accessed 19 January 2015; 'UFC announces operations in Asia' (*UFC.com*, 27 August 2010) <www.ufc.com/news/ufc-announces-operations-in-asia> accessed 19 January 2015.

¹¹⁹ David Plotz, 'Fight Clubbed' (*Slate.com*, 17 November 1999) <www.slate.com/articles/briefing/articles/1999/11/fight_clubbed.html> accessed 19 January 2015.

¹²⁰ Josh Gross, 'Love of grappling defined Jeff Blatnick' (*ESPN*, 26 October 2012) <http://espn.go.com/blog/mma/post/_id/14999/love-of-grappling-defined-jeff-blatnick> accessed 19 January 2015.

¹²¹ 'Mixed Martial Arts Unified Rules of Conduct' (*New Jersey State Athletic Control Board*, 21 April 2001) <www.state.nj.us/lps/sacb/docs/martial.html> accessed 19 January 2015.

events across the USA and Canada,¹²² adopted the New Jersey rules as the ‘Unified Rules of Mixed Martial Arts’.¹²³

a) *The employment relationship with UFC fighters*

There is no collective bargaining in the UFC. Moreover, fighters competing in UFC events are engaged as independent contractors rather than employees.¹²⁴ Accordingly, each fighter negotiates with the UFC on an individual basis and may be subject to any number of unusual terms due to inequality in bargaining power.¹²⁵ Examples of clauses that are common in UFC fighter contracts are clauses entitling the fighter to remuneration solely through bonuses linked to their success in a fight;¹²⁶ total relinquishment of a fighter’s intellectual property rights (often in perpetuity); and so-called ‘champion’s clauses’ which automatically extend contractual terms of a fighter when a championship is won.¹²⁷ Moreover, a fighter may fall to a lower level of remuneration if he loses a fight during his contract and may even have his contract terminated for losing a fight.¹²⁸

However, there is one aspect of collective culture in the employment relationship: insurance. After a ‘laborious three-year process’ attempting to find an appropriate insurer, Zuffa announced a policy on 9 May 2011.¹²⁹ The policy covers all UFC-contracted athletes both in and outside of the USA; has its premiums paid wholly by Zuffa; covers injuries suffered in training and at UFC events as well as everyday accidents such as falls and car accidents up to \$US50,000 per annum; and includes life and dental insurance.¹³⁰ Zuffa had previously offered insurance only for injuries suffered in a fight.¹³¹

¹²² ‘Association of Boxing Commissions’ <www.abcboxing.com/index.html> accessed 19 January 2015.

¹²³ ‘Summary Report – Discussion and Review of Unified Rules of Mixed Martial Arts’ (*Association of Boxing Commissions*, 30 July 2009) <www.abcboxing.com/unified_mma_rules.html> accessed 19 January 2015.

¹²⁴ See John S Nash, ‘Why Isn’t There a Union in MMA?’ (*Bloody Elbow*, 19 July 2013) <www.bloodyelbow.com/2013/7/19/4533358/why-isnt-there-a-union-in-mma> accessed 19 January 2015; Jonathan Snowden, ‘The Business of Fighting: A Look Inside the UFC’s Top-secret Fighter Contract’ (*Bleacher Report*, 14 May 2013) <<http://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract>> accessed 19 January 2015.

¹²⁵ Nash (n 124).

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ Snowden (n 124).

¹²⁹ Mike Chiappetta, ‘UFC Execs, Fighters and Managers Discuss New Insurance Plan’ (*MMA Fighting*, 9 May 2011) <www.mmafighting.com/2011/05/09/ufc-executives-detail-new-insurance-plan-fighters-managers-rea> accessed 19 January 2015; See also Brian Hemminger, ‘Hurts so good: New details emerge about the UFC health insurance plan’ (*SB Nation*, 9 May 2011) <www.mmamania.com/2011/5/9/2162589/hurts-so-good-new-details-emerge-about-the-ufc-health-insurance-plan> accessed 19 January 2015.

¹³⁰ *ibid.*; Chiappetta (n 129).

¹³¹ Ariel Helwani, ‘Union Memo Reveals Its Arguments Against MMA in New York’ (*MMA Fighting*, 11 May 2011) <www.mmafighting.com/2011/05/11/union-memo-reveals-its-arguments-against-mma-in-new-york> accessed 26 March 2014.

b) *Other influences*

There has also been some influence of unions on MMA through a peculiar connection to a dispute between a Nevada-based culinary workers union (CWL) and its casino employer, owned by the UFC.¹³² After a long-running battle with the casino owners, CWL investigated its employers' other business activities, which included the UFC and sent a letter to the Federal Trade Commission in 2011 requesting an antitrust investigation.¹³³

More recently, CWL was instrumental in working with California state assemblyman Luis Alejo to enact state legislation better protecting MMA fighters' contractual rights.¹³⁴ The Bill proposed a number of protections such as a bans against assignment of merchandising rights for an unreasonable period of time and 'champion clauses'; and a lessening of restrictions on fighters' own sponsorship contracts.¹³⁵ The Bill was passed in May 2012 (amending California's Business and Professions Code) despite opposition from the UFC.¹³⁶ The purpose of the Act is stated as 'to protect mixed martial arts fighters from being subjected to exploitive, oppressive, or coercive contractual practices that violate the athletes' freedom to work and their ability to support themselves and their families as professional athletes'.¹³⁷ The law requires the state athletic commission to create and enforce an MMA Ethical Code, breach of which includes entering into contracts that last longer than five years, automatic extension clauses, or a requirement of exclusive bargaining.¹³⁸ It should be noted, however, that this clause falls below the original aims of the Bill. Indeed, some have argued that fuller protections on issues omitted in the Act such as pensions, health insurance and merchandising revenue will require MMA (most likely, UFC) fighters to unionise.¹³⁹

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ The law now forms part of the California Business and Professions Code – see 'Official California Legislative Information'

<www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2051-2100/ab_2100_bill_20120517_amended_asm_v95.html> accessed 19 January 2015.

¹³⁵ Luis Alejo, 'Professional Bill of Rights for MMA Athletes' (*Luis Alejo*, 24 April 2012) <<http://asmdc.org/members/a30/news-room/press-releases/professional-bill-of-rights-for-mma-athletes>> accessed 19 January 2015.

¹³⁶ Jason Hoppin, 'Luis Alejo bill would increase state regulations of mixed-martial arts' (*Santa Cruz Sentinel*, 25 April 2012) <www.santacruzsentinel.com/ci_20480622/luis-alejo-bill-would-increase-state-regulations-mixed> accessed 19 January 2015.

¹³⁷ See California Business and Professions Code (n 134).

¹³⁸ *ibid* s 18649.

¹³⁹ Jesse Zwick, 'No Holds Barred' (*New Republic*, 18 May 2012) <www.newrepublic.com/article/politics/magazine/103397/ufc-mma-labor-unions-carrano-white-gsp-bill-culinary> accessed 19 January 2015.

D. SPECIFIC CHALLENGES FOR COLLECTIVE BARGAINING IN PROFESSIONAL SPORT

This section analyses some specific legal challenges that may arise if collective bargaining employment law is introduced in sports such as F1 and MMA. This section does not attempt to definitively resolve all of these issues but shows that the intersection between sport law and employment law (ie collective bargaining) creates unique challenges specific to professional sport. As discussed in Section B, professional sport involves different bodies such as athletes, leagues, and governing bodies, all of which have some interest in the employment of individual athletes. These conflicting interests have material bearing on the shape of any collectivised bargaining process.

1. *The parties to collective bargaining*

a) The employer and other interested bodies

The ‘employer’ is clear in respect of rugby (the NZRU) and MMA (the UFC), but is less evident in F1. Prima facie, the position may seem clear enough: a driver is contracted by his or her ‘team’¹⁴⁰ (eg Ferrari) in a binary employment relationship. However, there are a number of interrelated relationships between driver, teams, and the FIA, which mean that an employment contract is subject to a number of rules and regulations created through a chain of vertical contracts from athlete to governing body.¹⁴¹

Thus, an F1 driver may be bound by the terms of his employment contract with his team as well as the sporting and technical regulations set out by the FIA. Thus, were the GPDA to unionise and bargain with drivers’ immediate employers, it is arguable that the governing body should also participate in that process due to the material effect they have on this relationship.¹⁴² Moreover, the dual world championships of F1 (driver and team) mean that the teams also have a parallel contractual relationship with the FIA. As discussed in Section C, the team-FIA relationship, whilst not employment in a strict legal sense, has led to varying levels of collectivisation by the teams (eg the Formula One Teams’ Association). There are therefore two levels of possible collective influence in F1: driver and team.

The possibility of a club and governing body acting as a ‘joint employer’ was discussed in the United States decision *North American Soccer League*,¹⁴³ where it was held that league (ie governing body) and club (ie teams) constituted a joint employer for the purposes of collective bargaining, due in part to the league’s power of veto over player

¹⁴⁰ The equivalent of a club in football or rugby.

¹⁴¹ Beloff, Kerr and Demetriou (n 22) 27. See also Lewis and Taylor (3rd edn) (n 16) 1330.

¹⁴² O’Leary (n 3) 184 and 207.

¹⁴³ 236 NLRB 1317 (1978)

transfers and the club's autonomous power to modify the terms of a standard player contract.¹⁴⁴

FOM is also relevant. This is mainly due to its membership of the Formula One Strategy Group (by virtue of its ownership of F1's commercial rights) which advises the World Motorsport Council (and thus the FIA) on the regulatory structure of F1. Through the 'flow-down' of contracts, FOM is therefore able to materially alter a driver's contractual obligations without consultation. The presence of a commercial rights holder as part of a collective employment contracting structure occurs in South African rugby, where the players' union 'interfaces' with both the governing body and the separate commercial rights holder.¹⁴⁵ However, involving the governing body and commercial rights holder in the collective bargaining process carries an obvious risk of conflicts of interest. A governing body's position as impartial protector of the game's integrity may be jaundiced by commercial concerns if acting as an employer too,¹⁴⁶ particularly if a commercial rights holder also has a voice in the process.¹⁴⁷

The asymmetry of interests between drivers, teams, and governing body may also mean that there is an unworkably wide range of voices in any collective bargaining process. The involvement of up to four parties, each with a different imperative vis-à-vis the sport in which they compete may mean that one voice (likely that which holds the most commercial bargaining power) is heard over the other parties whose interests may be more nuanced or conflicted, such as a driver participating to pursue both Corinthian ideals and the ability to make a living. The bargaining power of even a unionised group of drivers is arguably some distance from traditional notions of two-party collective bargaining with an appreciable amount of diametrically opposed interests capable of resolution in a binary 'push and pull' fashion. In an environment as complex as F1, the lack of reciprocity in interests has been borne out by drivers being prepared to in fact pay to compete.¹⁴⁸ It is unclear whether unionisation would allow drivers to ameliorate that difficulty in light of the extremely small and competitive market discussed in Section B above.

That said, such risks are not fatal to collective bargaining. The New Zealand rugby CBA, for example, involves an employer who holds all commercial rights and is also the

¹⁴⁴ See Berry and Gould (n 2) 798.

¹⁴⁵ See Smailes (n 3) 64.

¹⁴⁶ Berry and Gould (n 2) 797.

¹⁴⁷ O'Leary (n 3) 191.

¹⁴⁸ See Paul Weaver, 'Pastor Maldonado leads the F1 drivers who bring money to the cockpit' (*The Guardian*, 16 March 2012) <www.theguardian.com/sport/2012/mar/16/pastor-maldonado-f1-money-drivers> accessed 19 January 2015.

governing body for the sport. Similar arguments can be made for the very profitable major professional sports in North America. It is even arguable that facing these conflicts in a transparent manner through parties with equal bargaining strength will protect against 'backdoor' regulatory abuse. It is only through explicitly recognising, accepting and embracing the direct relationship (whether employment or some other quasi-contractual agreement) between athletes, teams and the governing body of a sport that the governing body's ability to abuse that relationship is guarded against. It seems most logical that the party responsible for the organisation and conduct of a sport is accountable to all ultimate beneficiaries of the sport being played: not only the public enjoying the sport but also the participants involved in the creation of that social good.

Moreover, placing the parties under collective employment law will likely engage protections such as the implied term of trust and confidence in all employment contracts, which may restrain the decision-making power of the joint employer.¹⁴⁹ This point is related to the transparency discussed immediately above. If all parties are aware (as this paper argues they should be) that they are actively entering into an employment relationship, then legal certainty demands that one party should know with reasonable certainty the consequences of its actions as against another party. The nature of the relationships in professional sport strongly suggests that the law of collective bargaining provides the most appropriate forum in which to cater for those competing interests.

b) Multi-party bargaining

There is thus a strong argument that, at a minimum, the legal structure of bargaining in F1 should involve a direct employment relationship between drivers, teams, and the governing body. This multi-party bargaining would 'assist [to] balance the employment interests of players with the commercial and regulatory interests in a professional sports competition [and] may provide players with the right to be consulted prior to the implementation of a regulatory measure that affects their employment interests'.¹⁵⁰ A good example supporting this is the 2009 resource restriction agreement (RRA) agreed to by FOTA in response to rising costs in F1. The RRA was an agreement only between the teams, with neither the FIA nor FOM being a party to it.¹⁵¹ This meant that when teams accused each other of breaches, no effective remedy could be granted.¹⁵² The only way the RRA gained proper effect was

¹⁴⁹ *ibid* 193.

¹⁵⁰ *ibid* 184 and 207.

¹⁵¹ Lewis and Taylor (3rd edn) (n 16) 321.

¹⁵² *ibid* 322.

through the FIA, after consulting with its members and FOM, incorporating some terms of the RRA into the sport's regulations.¹⁵³

Courts seem prepared to give legal recognition to this 'athlete-governing body' relationship, even in the absence of formal contractual relations. For example, in *Jones and another v Welsh Rugby Football Union*,¹⁵⁴ a rugby player was found to have a contract with the governing body merely 'by virtue of the player's registration with the Welsh Rugby Football Union and his agreement to be subjected to its disciplinary procedures'.¹⁵⁵ The well-known *Modahl*¹⁵⁶ decision is also instructive. That case involved an athlete claiming damages from her sport's governing body for loss of income whilst serving a contested ban, on the basis of an implied contractual term that the disciplinary process would be fair. This raised the issue of whether an athlete-governing body contract existed. The Court of Appeal held (by a majority) that such a relationship did exist despite there being no documentary evidence of contract or formal agreement.¹⁵⁷

This begs the question of how such a relationship might look in practice. O'Leary has suggested that a 'tripartite agreement between the player, club and governing body could be used'.¹⁵⁸ In F1, this could involve a collective bargaining process between a drivers' union (likely the GPDA); a teams' union (similar to FOTA, discussed in Section C); and the FIA. Any bargaining protocol would have to contain conflict-resolution clauses to deal with possibility of conflict between a driver's two employers.¹⁵⁹ An example of this might be a possible driver boycott on safety grounds,¹⁶⁰ where it is conceivable that the FIA and teams could have differing opinions on the balance to be struck between driver safety and the commercial benefit of holding a race. An alternative to the tripartite structure could be to have a collectivised 'team-FIA' bargaining process, with some expectation or guarantee of consultation with drivers were their contractual terms to be altered by that process.¹⁶¹

2. The issue of superstars

To be effective, collective bargaining must include standardised player salaries.¹⁶² Indeed, the very poor remuneration of baseball players in the nineteenth century led to the first

¹⁵³ *ibid.*

¹⁵⁴ *The Times*, 6 March 1997 (QB).

¹⁵⁵ See Moore (n 36) 171-2.

¹⁵⁶ *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192.

¹⁵⁷ See Gardiner (n 1) 106-7.

¹⁵⁸ O'Leary (n 3) 207.

¹⁵⁹ See Smailes (n 3) 74-78 for a discussion in the context of professional rugby in South Africa.

¹⁶⁰ See text to (n 112).

¹⁶¹ See Smailes (n 3) 79.

¹⁶² Feldman (n 2) 843.

professional sport unions.¹⁶³ A scheme that allows for each player to be remunerated predictably and according to his or her abilities is a critical aspect of any sporting collective agreement; the New Zealand Rugby CBA's detailed provisions dealing with player remuneration clearly show this.¹⁶⁴ The reasons for having a collective remuneration scheme are clear: in essence, all athletes receive a collective voice which encompasses the strongest and the weakest within the industry. That collective voice can then be used in the bargaining process to ensure that each of these employees receives a fair amount of compensation,¹⁶⁵ particularly the weakest members who otherwise would have possessed very little bargaining power.

However, it is in that collective strength that another risk for injustice arises. Collective contracts clearly have less flexibility than individual contracts.¹⁶⁶ Rigidity is useful for raising the bar for 'weak' athletes who might otherwise go underpaid. However, it concurrently lowers the bar for the most talented athletes – the 'superstars' – who are the biggest draw card in any professional sport.¹⁶⁷ Even the rigidly structured pay scale of the American National Football League runs the risk of superstars 'restructuring' lucrative and fiercely negotiated contracts to avoid an overly top-heavy employee payroll.¹⁶⁸ Although superstars are a minority, they have a disproportionately heavy impact on the industry.¹⁶⁹ This risk is heightened by the fact that the superstar's skills are essentially non-transferable to any other employer, much less another industry.¹⁷⁰ Lava summarises the difficulty well:

[It] is the exceptionally talented players, or the superstars, that suffer the most under the process of collective bargaining ... [t]hese players have the greatest interest in seeing competition for their services maximized and player restraints minimized. Once the players' association is certified as the players' collective bargaining agent, however, the individual employees no longer have complete freedom to bargain on their own.¹⁷¹

¹⁶³ Insley (n 2) 602.

¹⁶⁴ See text to (n 79).

¹⁶⁵ Insley (n 2) 623; Greenfield and Osborn (n 5) 130-1.

¹⁶⁶ Insley (n 2) 624.

¹⁶⁷ Berry and Gould (n 2) 72.

¹⁶⁸ Tony Manfred, 'There's A Tricky NFL Salary Cap Loophole That Every Team In The League Has Figured Out' (*Business Insider*, 28 February 2013) <www.businessinsider.com/nfl-contract-restructuring-takes-advantage-of-loophole-2013-2?IR=T> accessed 19 January 2015.

¹⁶⁹ Mainly through their teams winning more games and bringing the economic (and non-economic) benefits associated with a winning team such as increased employment and ticket revenue. See generally Brice (n 13) 69.

¹⁷⁰ Feldman (n 2) 847.

¹⁷¹ Lava (n 9) 681.

However, the New Zealand rugby CBA shows flexibility is still possible. That CBA provides only for minimum salaries, with superstars such as national captain Richie McCaw and Sonny Bill Williams given some latitude to negotiate both higher remuneration and, in Williams' case, freedom from exclusivity provisions.¹⁷² This arguably gives the superstars the flexibility they need to ensure that a union does not unduly lower their remuneration. It is arguable that the NFL 'restructuring' example also falls into the above category and is in fact beneficial to the sport overall. There is force in arguing that, by willingly sacrificing a higher salary so other well-known, (relatively) highly paid athletes can be recruited, a superstar player (usually a quarterback) exercises his own judgment to sacrifice some personal benefit for a net gain in the overall talent of his team's roster: a discretion that arguably only exists, or at least is openly facilitated, by a rigidly-defined pay scale.

The difficulty, of course, with such flexibility is that the entire point of a union is potentially undermined. As Berry & Gould put it, 'the subtle message to the players is that the players' association is largely irrelevant and more likely a hindrance to their interests',¹⁷³ severely eroding player support for unions. There are also risks that some matters agreed between union and employer may be superseded by a number of individual contracts or enter 'into that area which might be within the domain of the exclusive bargaining agent in its collective bargaining'.¹⁷⁴ There is law in the heavily unionised United States that suggests that a special arrangement between employer and superstar may be void if it is inconsistent with the 'basic agreement' formed between union and employer.¹⁷⁵ Therefore, any collective bargaining agreement may have to sacrifice (at least partially) the ability of superstars to earn 'superstar money'.

3. *Europe: the role of competition law*

a) The legal framework

Competition law arguably provides 'the most important controlling factor' on the regulation of legal relationships by sport governing bodies.¹⁷⁶ The main elements of European competition law particularly relevant to sport (and in particular, collective bargaining) are the

¹⁷² NZCBA (n 72) cl 55.1. See also 'All Black bosses back Sonny Bill's boxing career' (*Super XV*, 15 December 2010) <www.superxv.com/news/super15_rugby_news.asp?id=28128#.U7qkfvdXUU> accessed 19 January 2015.

¹⁷³ Berry and Gould (n 2) 804.

¹⁷⁴ *ibid* 805; Lava (n 9) 699.

¹⁷⁵ Berry and Gould (n 2) 808.

¹⁷⁶ Lewis and Taylor (3rd edn) (n 16) 945.

prohibition of anti-competitive agreements between undertakings (article 101), and abuse by a single dominant undertaking of its dominant position (article 102).¹⁷⁷

Article 101 prohibits ‘all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market’.¹⁷⁸ An exemption may be granted to agreements that (inter alia) promote economic progress, pass a share of the benefit to consumers, and applies only ‘indispensable’ restrictions.¹⁷⁹ Article 102 prohibits ‘abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it’.¹⁸⁰ No exemptions can be granted.¹⁸¹ Article 102 consists of three main elements: a dominant position within the Union or part of it; abuse of that dominant position; and possible effect on inter-Member State trade.¹⁸² Dominance will most likely be present in professional sport, as there is usually only one governing body in a given market.¹⁸³ However, it is abuse of that dominance which is the critical enquiry.¹⁸⁴

The relevant market involves consideration of the product market and the geographical market, and the concepts of demand-side and supply-side substitutability, that is, the extent to which other products are deemed to be substitutable from the point of view of consumers and suppliers.¹⁸⁵ In the European context, only F1 (along with association football) possesses the requisite popularity to operate in a geographical market consisting of the entire EU.¹⁸⁶

b) The Albany exemption

A collective agreement would be at least partially exempt from competition law, as is also the case in the United States¹⁸⁷ and New Zealand.¹⁸⁸ In *Albany International*,¹⁸⁹ the (Dutch)

¹⁷⁷ Consolidated Version of the Treaty on the Function of the European Union [2012] OJ C326/47 (TFEU); Cox (n 19) 409; Gardiner (n 1) 178. The domestic UK law, namely the Competition Act 1998 and the Enterprise Act 2002, is materially similar to EU law in this respect.

¹⁷⁸ TFEU (n 177) art 101.

¹⁷⁹ *ibid* art 101(3).

¹⁸⁰ *ibid* art 102.

¹⁸¹ Cox (n 19) 416.

¹⁸² Gardiner (n 1) 179.

¹⁸³ Beloff, Kerr and Demetriou (n 22) 149.

¹⁸⁴ Lewis and Taylor (3rd edn) (n 16) 1129.

¹⁸⁵ Beloff, Kerr and Demetriou (n 22) 148.

¹⁸⁶ Cox (n 19) 416; Lewis and Taylor (3rd edn) (n 16) 1147; cf Gardiner (n 1) 180.

¹⁸⁷ Clayton Antitrust Act 1914 (US) ss 6, 20; Norris-La Guardia Act 1932 (US); *Brown v Pro Football, Inc* 518 US 231 (1996). See Feldman (n 2) 852.

¹⁸⁸ Commerce Act 1986 (NZ) s 44(1)(f).

¹⁸⁹ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Opinion of AG Jacobs.

employer Albany had allocated a cheap pension supplier to its employees through a collective bargaining agreement, thereby refusing to contribute to a different, compulsory, state fund. Albany argued that the national scheme was contrary to EU competition law. In holding that the scheme did infringe the Treaty but was nonetheless justified as a matter of general economic interest, the European Court of Justice (ECJ) discussed the applicability of collective employment agreements to EU competition law. The opinion of Advocate General Jacob was that collective bargaining was partially immune from competition law despite prima facie restricting competition due to several Community instruments encouraging its use. He held that competition law did not apply to ‘core subjects such as wages and other working conditions’.¹⁹⁰ This reasoning was based around benefits such as conflict and cost reduction, increased transparency,¹⁹¹ and a lack of appreciable anticompetitive effect between employers, as only one production cost factor of many (wages) was being ‘harmonised’.¹⁹² However, that immunity was limited to guard (inter alia) against the risk of collective bargaining having ‘seriously anticompetitive effects on third parties or third markets’.¹⁹³ Thus, for the exemption to apply the agreement (inter alia) ‘must be one which deals with core subjects of collective bargaining such as wages and working conditions and which does not directly affect third parties or markets’, with the test being whether the agreement goes beyond the labour relationship and affects parties such as clients, suppliers, or consumers.¹⁹⁴

c) F1 and MMA

This limited exemption has direct relevance to a sporting collective agreement, given the peculiar nature of the legal relationships between various interested bodies discussed in Sections B and C. The presence of third parties such as commercial rights holders, broadcasters, and insurers indicates that an agreement may affect third party participation in the industry and thus fall outside the exemption.¹⁹⁵ Although the New Zealand rugby CBA has passed scrutiny from its competition regulator, the Commerce Commission,¹⁹⁶ F1 and MMA present some interesting issues. In respect of F1, the presence of FOM is possibly problematic. A collective bargaining process involving a commercial rights holder is

¹⁹⁰ *ibid* [179].

¹⁹¹ *ibid* [181].

¹⁹² *ibid* [182].

¹⁹³ *ibid* [189].

¹⁹⁴ *ibid* [193].

¹⁹⁵ Lewis and Taylor (3rd edn) (n 16) 945.

¹⁹⁶ ‘Media Release’ (*Commerce Commission New Zealand*, 1 April 2011) <<http://www.comcom.govt.nz/the-commission/media-centre/media-releases/detail/2011/commerce-commission-decides-rugby-union-authorisation-no-longer-required>> accessed 19 January 2015. The Commission had previously exempted rugby’s salary cap from the Commerce Act 1986 due to the benefits of even competition it would provide.

arguably precisely the kind of case that should be caught by *Albany*. Competing broadcasters would likely face an insurmountable barrier to entry due to the exclusive employment relationship between the FIA, the F1 teams, and FOM (and the broadcasters those bodies would contract with). Moreover, the presence of exclusivity in a collective agreement on matters such as track access, tyre suppliers, and driver insurance or pensions (as was in the case in *Albany* itself) may also fall outside the competition law exemption.

A complaint against such conduct could conceivably be brought under Article 101, but would require a union to be classified as an ‘undertaking’. *Albany* held that unions, as agents of employees, fell outside that definition¹⁹⁷ whilst at the same time leaving borderline cases such as professional sport open.¹⁹⁸ However, a complaint under article 102 against a sport’s governing body would be possible and more conceptually clear. This kind of concern was raised in 1999, albeit outside the context of collective bargaining, when the European Commission investigated the FIA and indicated a possible breach of competition law due to the FIA possessing both regulatory and commercial interests in the sport.¹⁹⁹ This led to the commercial-regulatory split discussed in Section C above.²⁰⁰

In respect of the UFC, the insurance arrangement discussed in Section C is relevant.²⁰¹ If such an arrangement were to form part of a collective bargaining agreement between the UFC and a fighters’ union, then the position is arguably materially similar to *Albany* in that it may result in a material lessening of competition through restricting other insurers’ rights to offer their services to fighters. The argument would likely then turn to whether such a restriction actually fell within the limits of the *Albany* exemption or whether it is aimed more at the ‘work conditions’ of employees.

d) Broader deference

As well as the *Albany* exception to immunity, broader arguments about the nature of the sporting industry may lead to some level of deference being applied even if the wider *Albany* exception is not engaged. The 2007 White Paper on sport makes clear that the Commission ‘takes into account the specificities of sport in order to regulate the sector in the most effective and proportionate way’.²⁰² This approach recognises that a court imposing its own

¹⁹⁷ *Albany* (n 189) [227].

¹⁹⁸ *ibid* [217].

¹⁹⁹ See Simon Gardiner and Roger Welch, ‘The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules the Beautiful Game?’ (2007) 5 *ELSJ* 1, 9; Cox (n 19) 428-9; Lewis and Taylor (3rd edn) (n 16) 1162-3.

²⁰⁰ See text to (n 92).

²⁰¹ See text to (n 127).

²⁰² Lewis and Taylor (3rd edn) (n 16) 1142. See also Cox (n 19) 12 and 418; Lewis and Taylor (2nd edn) (n 1) 335; Gardiner (n 1) 347.

view of Community sport policy would be inappropriate.²⁰³ Thus, the co-operative nature of sport; the participation of volunteers; its social and educational function; the necessary element of co-operation between actors; the necessity for uncertainty in result; and relatively monopolistic governance will all be taken into account.²⁰⁴ In *Re Televising Premier League Football Matches*,²⁰⁵ for example, the Restrictive Practices Court held that it was ‘facile’ to speak of a club having individual broadcasting rights, as each club depended on the other to present an economically valuable product to a broadcaster.

It is important to note that this approach is not an exemption per se but rather a recognition that ‘there is sufficient flexibility in the competition rules to reflect the specific characteristics of sport as a social, cultural and economic product’.²⁰⁶ Until the well-known *Meca-Medina* decision,²⁰⁷ there had been a question of whether ‘purely sporting’ rules (such as the size of a playing pitch) fell outside EC competition law. However, *Meca-Medina* firmly rejected that suggestion, holding that any rule with an economic consequence attracted competition law.²⁰⁸ Whether this means that certain rules do not breach articles 101 or 102, or whether a breach is nonetheless justified, is unclear, but the application of competition law is not in question.²⁰⁹

Thus, the Commission has set out a four-stage test on sport’s application to competition law which includes a requirement of economic activity, examination of overall context of the economic activity, and the proportionality of the measure in light of the sport-specific aim being pursued.²¹⁰ The proportionality enquiry involves consideration (inter alia) of the need to ensure fairness in sport competitions; equal opportunity for all athletes; protection of athletes’ health; and the interdependence of sporting bodies.²¹¹

There is one further point to discuss. Feldman has noted that the most recent round of work stoppages in American professional basketball and football led to player unions dissolving themselves in response to a lockout, so that individual players might challenge

²⁰³ Cox (n 19) 13; Joklik (n 2) 252-3.

²⁰⁴ Lewis and Taylor (3rd edn) (n 16) 1143. See also Lewis and Taylor (2nd edn) (n 1) 346; Gardiner (n 1) 351-2; Gary R Roberts, ‘Single Entity Status of Sports Leagues under Section 1 of the Sherman Act: An Alternative View’ (1986) 60 Tul L Rev 562, 569; Beloff, Kerr and Demetriou (n 22) 145.

²⁰⁵ [2000] EMLR 78; See also Case T-193/02 *Laurent Piau v Commission of the European Communities* [2005] ECR II-209.

²⁰⁶ Lewis and Taylor (2nd edn) (n 1) 346.

²⁰⁷ Case T-313/02 *Meca-Medina v Commission of the European Communities* [2004] ECR II-3291.

²⁰⁸ Lewis and Taylor (3rd edn) (n 16) 1142-5; *Meca-Medina* (n 207) [31] and following.

²⁰⁹ *ibid* 1143.

²¹⁰ *ibid* 1149.

²¹¹ *ibid* 1153.

employer actions under US antitrust law, free from any employment exemption.²¹² Feldman states that it is at least arguable that an employment exemption would cease to apply post-dissolution, as ‘players, like all employees, have a fundamental, statutorily protected right to choose not to be represented by a union and to refrain from collective bargaining’²¹³ and should be able to choose to have relations governed by competition, not employment, law.

e) Conclusion

It is clear that competition law is a potential fetter on collective bargaining agreements in professional sport, largely through controls on pricing and third parties’ entry into relevant markets. However, the possibility for a deferential *Meca-Medina* approach, which recognises the sport-specific benefits such agreements could bring, is a clear possibility. Although a number of other competition law issues in sport have been litigated,²¹⁴ the question of a collective bargaining agreement seems to remain a live issue. It seems, however, that there is a strong argument that collective bargaining agreements may give enough sport-specific benefits²¹⁵ to justify a deferential approach by a court in applying competition law.

4. Private international law

If a governing body (or players’ union) were to accept (or attempt) collective bargaining within their particular sport, any international aspect of that sport might raise private international law issues. F1, which enjoys global popularity, and MMA, which is rapidly increasing its international reach, are interesting examples.

a) Choice of law

The starting point is freedom of contract: parties to any contract, including employment, are free to reach agreement on any matter within the boundaries of the applicable law, including choice-of-law clauses.²¹⁶ For the Nevada-registered UFC and France-registered FIA, the choice of law may be important. It is clear that most international bodies usually incorporate wherever they find it most convenient.²¹⁷ The effect of employment law in a particular jurisdiction presumably does not currently feature in that assessment. However, that convenience may need to be reassessed in light of the relevant employment law provisions that may apply.

²¹² Feldman (n 2) 833, discussing *Brady v National Football League* 779 F Supp 2d 992 (D Minn 2011).

²¹³ *ibid* 856.

²¹⁴ See Lewis and Taylor (3rd edn) (n 16) 1153-1232.

²¹⁵ See text to (n 7) and following.

²¹⁶ Beloff, Kerr and Demetriou (n 22) 9.

²¹⁷ *ibid* 18. According to Beloff, Switzerland is a popular choice.

Several countries in the European Union (including France) have their own specific laws on collective bargaining in sport.²¹⁸ It would presumably be open to the FIA, itself registered in France, to choose to become subject to those specific (eg) French laws. However, to do so would have to be balanced against the differing level of employee or union protections that might be offered in other jurisdictions.²¹⁹ Similarly, any players' union that wished to be recognised under a given jurisdiction would presumably wish to 'jurisdiction shop' in this manner as well.

Further, employment law in a given jurisdiction may apply mandatorily.²²⁰ This will mean that many of the historical and practical advantages of sport's internal dispute regulation²²¹ would be sacrificed. For example, the traditional use of arbitration as a dispute resolution mechanism²²² may have to give way to specialist employment law tribunals. In addition, guarantees as to substantive terms of the employment contract and bargaining process would have to be applied. This would involve an assessment as to whether the employment law of a given jurisdiction is capable of dealing with the regulatory nuances of a given sport – a decision unlikely to be reached easily by a governing body accustomed to effective monopoly control. However, there is a strong view amongst sport law commentators that increased legal supervision such as this is both necessary and desirable, particularly where 'deregulated market mechanisms generate injustices and/or imbalances'.²²³

b) Conflict of laws

Conflict of laws issues may arise if no choice of law is made in an employment contract (or is judicially overridden), or if a union were to attempt recognition in a jurisdiction a governing body does not wish to submit to.²²⁴ This will involve dual questions of jurisdiction and the applicable law, determinable in the EU under the Brussels Convention of 1968 and the Lugano Convention of 1988.²²⁵

In terms of jurisdiction, persons domiciled in a contracting state must, whatever their nationality, be sued in the courts of that state.²²⁶ This suggests that in the case of FIA, the courts of France would have jurisdiction. However, there are a number of exceptions worth

²¹⁸ Joklik (n 2) 230 and 252.

²¹⁹ Discussed in more depth in Beloff, Kerr and Demetriou (n 22) 10-12; O'Leary (n 3) 193-4; Gardiner (n 1) 405-6; Cox (n 19) 312; Lewis and Taylor (3rd edn) (n 16) 738.

²²⁰ See, for example, Employment Rights Act 1996 (UK) s 203; Employment Relations Act 2000 (NZ) s 65. This means that the New Zealand rugby CBA and bargaining process is jurisdictionally confined in this way.

²²¹ See O'Leary (n 3) 185-6; Joklik (n 2) 229; Brice (n 13) 52 and 65.

²²² See Beloff, Kerr and Demetriou (n 22) 253; Smailes (n 3) 71-2.

²²³ Cox (n 19) 10. See also Gardiner and Welch (n 199) 10-2; Gardiner (n 1) 71.

²²⁴ Beloff, Kerr and Demetriou (n 22) 264; Grayson (n 47) 367.

²²⁵ *ibid.*

²²⁶ *Halsbury's Laws of England: Conflict of Laws* (5th edn, 2011) vol 19, para 380.

noting. For example, a defendant may be sued in another jurisdiction in matters relating to employment either where the employer is domiciled, where the employee habitually performs his employment or the last place he or she did so.²²⁷ In a competition such as F1 where there are races across Europe (and indeed the globe), this could create issues.

In terms of the applicable law, the Rome Regulation²²⁸ is relevant. In contracts of employment, a choice of law cannot derogate from mandatory provisions of employment law that an employee can apply to his or her situation using the ‘default’ rules of the Rome Regulation.²²⁹ Those rules state that the contract should be governed by the law of the country in which he or she habitually performs his duties, and if that is not determinable, the place of business of the employer unless it appears from the circumstances as a whole that the contract is more closely connected with another country.²³⁰

This may mean that a UFC fighter performing in the United Kingdom would still be able to avail himself of mandatory provisions of the Employment Rights Act 1996 despite any purported choice of, eg, Nevada law by the UFC. The position is even more complex in respect of F1 drivers, who fulfil their main employment duties – ie drive in Grand Prix – across the globe. Where the employee performs his duties in more than one country, ‘the place ... where the employee habitually carries out his work means the place where he had established the effective centre of his working activities and where he performed the essential part of his duties vis-à-vis his employer’.²³¹ Whilst this would most likely be a driver’s team factory – eg Italy for a Ferrari driver – the inherently international nature of F1 might lead to more creative arguments of truly global employment, or perhaps an argument from the FIA that a driver’s submission to the FIA’s rule render French law the appropriate choice.

E. CONCLUSION

The intersection of the laws of professional sport and collective bargaining presents a number of interesting and unique challenges. Whilst there are undoubted advantages in adopting collective bargaining in professional sport, the legal structures that have evolved in response to the peculiarities of professional sport mean that even in the heavily unionised United States challenges remain in establishing a coherent and just legal framework.

²²⁷ *ibid* art 19(1)-(2).

²²⁸ Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

²²⁹ *Halsbury’s* (n 226) para 633.

²³⁰ Rome I (n 228) art 8.

²³¹ *Halsbury’s* (n 226) para 632 fn 12, citing Case C-125/92 *Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075.

Both the definitional issues of sport and the law that governs it, as well as specific challenges in sports such as F1 and MMA, mean that other areas of the law such as contract, competition and private international law may fit uncomfortably with collective bargaining, at least initially. However, these challenges are certainly not insurmountable. Competition law seems well equipped to develop a clear doctrine to deal with collective sporting agreements; there is growing support for multi-party bargaining, and superstar athletes can retain some flexibility in their contracting arrangements. Thus, the prevalence of collective bargaining may continue to grow in professional sport. This paper has attempted to illustrate the issues that must be faced in the process of such growth.