Limiting High Earnings of Professional Athletes: Would the American Concept of Salary Caps be Compatible with Austrian and German Labor Laws?

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Money is no big deal. What
I value is my family and what
I got from my momma and daddy.

Eddie Robinson, legendary football coach at Grambling State University

INTRODUCTION

Coach Robinson's priorities are obviously held by a minority in the world of sports, in particular, professional sports. Since players' salaries began to rise geometrically in the late 20th century, team owners have introduced various means to contain this aspect of operating costs, largely in the form of collective bargaining.

The most common method has been the imposition of salary caps, both at the individual player and total team payroll levels. Four of the major professional sports in the United States—baseball, basketball, football and hockey—have implemented variant versions of such maximum pay controls. The latter three have adopted the salary cap method.

Part I of this paper will summarize the legal history of upper limitations on athletes' salaries, particularly through the collective bargaining process. Part II explains the pay structures of each of the four major American professional sports. Finally, Part III addresses domestic laws in Austria and Germany and relevant laws at the European level that presumably deter, if not prohibit, similar clauses in union contracts in the European professional sports world.

U.S. FEDERAL ANTITRUST LAW AND MAXIMUM PAY

Since 1890, U.S. federal law has prohibited restraints of trade in the form of combination, conspiracy, or contract.[1] The purpose is to prevent monopolies and to ensure fair competition, with the

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latter being an obvious factor in professional sports. One legal scholar has referred to sports as the "oxymoron of competitive cohesion."[2] This reference points to the competition that is inherent in sports, but which nonetheless must be subject to rules and regulations in order to maintain fairness. Antitrust law has affected many facets of sports, including the draft system for post-college professional play, ticket sales, franchises, cable television, and—significant to the theme of this paper—restraints on players' earnings.

A major restraint on players' mobility was the reserve clause system, used in professional baseball since 1887.[3] This mechanism used a standard clause in each player's contract unilaterally permitting the club/owner to assign the player to another team for the remainder of his unexpired contract. The club also retained the right to renew his contract for one year after expiration.[4] The effect was to preclude a player from negotiating with another club during this period.

The reserve clause was clearly a violation of the Sherman Act. Its validity stemmed from the United States Supreme Court's consistent, but inexplicable, exemption of professional baseball from the antitrust laws.[5] The Supreme Court has limited this exclusion from antitrust law to baseball, expressly holding that it does not extend to professional football,[6] basketball,[7] or boxing.[8] By refusing to grant certiorari in *Deeson v. Professional Golfers' Association*,[9] the Court also recognized that no such exemption applies to professional golf.

However, the federal antitrust statutes have been construed to work in tandem with federal statutory labor law, which favors collective bargaining. The 1935 Wagner Act, as amended by the 1947 Taft-Hartley Act,[10] permits workers to organize; both employer and the union must then exercise good faith in bargaining, with the goal of reaching a collective agreement.[11] American federal courts have generally deferred to a collectively bargained arbitration process in settling labor disputes. In *Textile Workers v. Lincoln Mills*,[12] the Supreme Court held that federal courts have jurisdiction to compel arbitration when one party refuses to comply with a commitment to arbitrate that was part of the union contract. In the 1962 triad of decisions generally known as the *Steelworkers Trilogy*,[13] the Court held that a court's function in arbitration processes is to determine: (1) whether arbitration applies; and (2) whether the arbitrator had in fact exceeded his authority in rendering a decision. Arbitration, not the court, was the bargained-for process and forum for dispute settlements that the union and employer bilaterally chose.

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[1] Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1890), *amended by* the Clayton Antitrust Act, 15 U.S.C. §§ 12–27 (1914).
[2] WALTER T. CHAMPION, JR., SPORTS LAW IN A NUTSHELL 52 (West Pub. Co. 1993).
[3] Metropolitan Exhibition Co. v. Erie, 42 Fed. 198, 202-204 (C.C.S.D.N.Y. 1890).
[4] Rule 3(a)–(b), Major League Rules (in existence until 1973).
[5] *See* Fed. Baseball v. Nat'l League, 259 U.S. 200 (1922) (the Court based its decision on its holding that professional baseball was not interstate commerce, a conclusion that has emphatically changed during the years. Professional sports unarguably constitute business). *See also* Toolson v. N.Y. Yankees, 346 U.S. 356 (1953) *and* Flood v. Kuhn, 407 U.S. 238 (1972) (showcasing the Court's intractable retention of baseball's exemption from federal antitrust law coverage).
[6] Radovich v. NFL, 352 U.S. 236 (1955).
[7] Haywood v. NBA, 401 U.S. 1204 (1972).
[8] U.S. v. Int'l Boxing Club, 348 U.S. 236 (1955).
[9] Deeson v. Prof'l Golfers' Ass'n, 158 F.2d 165 (9th Cir.), *cert. denied* 385 U.S. 846 (1966).
[10] 29 U.S.C. §§ 157, 158, 301(a) (1947).
[11] *Id.* 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d).
[12] 353 U.S. 448 (1957).
[13] United Steelworkers v. American Mfg. Co., 363 U.S. 561 (1960), United Steelworkers v. Warrior & Gulf Navigation Co. 353 U.S. 574 (1960), and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

This collective bargaining process caused the demise of baseball's reserve system. Two players, Dave McNally of the Baltimore Orioles and Andy Messersmith of the Los Angeles Dodgers, after having played the one-year-post-contract-expiration required service, demanded releases from their respective clubs. The teams argued that the issue was not arbitrable because Article XV of the collective bargaining agreement expressly disclaimed any resulting effect on the reserve system. Although the Supreme Court had held in *American Manufacturing Co.*[14] that the issue of arbitrability was also one to be made by the arbitrator, the clubs filed a petition in federal district court, seeking a declaratory judgment that the arbitration clause did not cover this question.

The court declined to rule on the basis of *American Manufacturing,* and the three-member arbitration panel ruled 2–1 that the grievants were entitled to releases. This decision and the deferral of the courts to the arbitration process emphatically confirmed that the foundation of dispute settlement in the United States is private negotiation by way of the collective bargaining process.[15] In a decision holding that an individual could not waive his rights under Title VII, the U.S. Supreme Court still ruled that a "union may waive certain statutory rights related to collective activity," even though the individual had lost a grievance filed under a collective bargaining contract with workers' rights identical those in that statute.[16] This principle permitting the balancing of rights via collective bargaining is the linchpin of the distinction between the U.S. salary cap clauses and the European concept of adhering strictly to antitrust prohibitions.[17]

PROFESSIONAL SPORTS' UNION CONTRACTUAL CLAUSES LIMITING PLAYERS' COMPENSATION

With the partial extinction of reserve clauses in baseball and the non-exemption from antitrust coverage for other sports, free agents may negotiate with other teams after the expiration of a current contract. As unions became stronger in professional sports, the leverage for increasingly higher salaries resulted in packing a wealthier team with better players, upsetting the competitive balance necessary to maintain fan support. The primary tactic of owners was to insist upon negotiations on limits to total team salaries, and, at times, a maximum limitation on individual players' salaries. "Wages" is one of the mandatory subjects of bargaining in the Taft-Hartley Act.[18]

Although professional football and basketball have been relatively free of labor strife, both hockey and baseball have experienced work stoppages when renewing their collective bargaining agreements. The "deal-breaker" has always been players' compensation.

A. Football

The National Football League was founded in 1920 in Canton, Ohio, as the American Professional Football Association. The Association became the National Football League (hereinafter, NFL) in 1922, with the original league of 24 teams since having expanded to its current 32. The head authority over teams and players is the commissioner, currently Roger Goodell.

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[14] 363 U.S. 561 (1960).
[15] *See* DAVID P. TWOMEY, LABOR AND EMPLOYMENT LAW 300 (South-Western Publishing Co., 9th ed. 1994).
[16] Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974). Even though the Court held that an employee who had lost a grievance over a dispute involving contract language identical to that in Title VII nonetheless retained the right to sue under the statute, the Court expressly stated that a union can waive some *collective* rights of workers.
[17] *See infra*, Part III.
[18] 29 U.S.C. § 158(d) (2006). The other two mandatory subjects of bargaining are working hours and terms and conditions of employment.

Football is the only American professional sport with a "hard" cap,[19] that is, one with no exceptions. The current contract, in effect since March 8, 2006, will expire on December 31, 2011.

The team salary caps in the current collective bargaining agreement[20] are:

Year	Maximum Team Pay
2006	$102 million
2007	$109 million
2008	57.5% Projected Total Revenue (PTR) for 2008, divided by total number of teams (32)
2009	57.5% PTR (as for 2008)
2010	58% PTR

The salary cap is triggered when total player costs are below 46.868% PTR.[21]

The NFL union contract also has a minimum pay scale, gauged according to a player's years of experience:[22]

Years of Experience	Minimum Salary
0	$285,000
1	$360,000
2	$435,000
3	$510,000
4 to 6	$595,000
7 to 9	$720,000
10 or more	$820,000

The guaranteed league-wide salary (in salary cap years) is 50% of total revenue.[23]

Unlike collective bargaining agreements in the other three major sports, the NFL negotiates all television contracts as a single entity. This is beneficial to the league for two reasons: (i) teams benefit competition-wise; and (ii) risk is reduced, since one team may have a bad year with low ticket revenues, but enjoys the same media coverage as other teams. This single contract offsets the lower ticket sales of a team vis-à-vis another team's relatively high sales, making costs stable and thus, predictable.[24]

Some comparative figures across the years offer some perspective. The highest earner in 2004 was New England Patriots defensive back Richard Seymour, who earned $24,691,160. Although Indianapolis Colts quarterback Peyton Manning's total earnings (compensation and bonus) that year was $35,037,700, this figure included a signing bonus supplementing his base earning. The highest paid

[19] An excellent essay commending the NFL hard cap is Mark Yost, "In the Best Interests of the League," Ch. 11 in TAILGATING, SACKS AND SALARY CAPS: HOW THE NFL BECAME THE MOST SUCCESSFUL SPORTS LEAGUE IN HISTORY (Kaplan Publishing, 2006).
[20] 2006–2012 NFL collective bargaining agreement, Article XXIV, § 4, *available at* http://www.docstoc.com/docs/20343876/NFL-Collective-Bargaining-Agreement-2006-2012.
[21] *Id.* at Article XXIV, § 2.
[22] *Id.* Note that such minimums, unless collectively bargained, would also violate the antitrust laws. *Cf. with* former bar associations' minimum fee schedules, held to violate the Sherman Act in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
[23] *Id.* at Article XXIV, § 3.
[24] John Vrooman, *In a League of Its Own*, THE ECONOMIST, Apr. 27, 2006. Vrooman is a Vanderbilt University sports economist.

player in 1980, Chicago Bears running back, Walter Payton, only received $8,542,700.[25] The 1980 top salary pales in comparison with today's highest earning.

B. Basketball

The National Basketball League was organized later than professional football and baseball. The National Basketball Association (hereinafter, NBA), founded in post-war 1946 in New York City as the Basketball Association of America, was comprised of 13 teams. Today's NBA has 30 teams (29 in the U.S.A. and one in Canada), and the present-day commissioner is David Stern. The collective bargaining agreement, which took effect on June 30, 2005, will expire on June 29, 2010.

The NBA's first salary cap was imposed for the 1946–1947 season, the onset of the league. The NBA's cap is referred to as a "soft" cap, promoting a player's ability to remain with a team during his entire career. There are four major differences between the current collective bargaining agreement and previous agreements: (i) the current contract increased the minimum salary; (ii) this contract reduced the impact of the so-called "luxury" tax, that is, a charge imposed upon a team to prevent its exceeding the contractual salary cap; (iii) it decreased the escrow account from the luxury tax and the withholding by way of the luxury tax to 8%; and (iv) it guaranteed that players would receive at least 57% basketball-related income (hereinafter, BRI).[26]

The projected BRI is agreed upon as a provision in the collective bargaining agreement, a figure that progressively increases until the expiration of the contract.[27]

Year	projected BRI
2005–2006	49.5%
2006–2007	51%
2007–2008	51%
2008–2009	51%
2010–2011	51%

This same provision provides that an expansion team will have a salary cap of 66 2/3% of the cap for other teams during its initial year. The salary cap for an expansion team in the previous collective bargaining agreement was 48%. Interestingly, the NBA Players Association agreed to use the figure of $49.5 million as the cap for the 2005–2006 season, rather than the calculated figure, which would have been $50.9 million. An expansion team in any year of a salary cap has a cap of 66 2/3% of that of all other teams.

The contract includes a minimum team salary, which must be 75% of the salary cap. If less, a team is penalized at the end of the season, and the amount is distributed to players.[28] The maximum individual player salary is also measured by length of service.[29]

The minimum player's salary is similar to that in the NFL, that is, determined according to the player's length of service.[30]

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[25] Joe Pacielli, "NFL Player Salaries for 2007," Aug. 22, 2007, *available at* www.docsports.com/current/nfl-player-salaries.html.
[26] Larry Coon, "NBA Salary Cap and Collective Bargaining Agreement FAQ," (2005), *available at* http://members.cox.net/lmcoon/salarycap.html.
[27] NBA Collective Bargaining Agreement, Article VII, § 2(a)(1), *available at* http://www.nbpa.org/cba/2005.
[28] *Id.* at Article VII, § 2(b).
[29] *Id.* at Article II, § 7(a) (u)–(iii).

Length of service	Maximum Salary
0 to 6 years	25% salary cap, or 105% salary previous year, or $9 million, whichever is greater
7 to 9 years	105% prior year's salary, or $11 million, or 30% individual player's salary cap, whichever is greater
10 or more years	105% previous contract, or $14 million, or 35% individual player's salary cap, whichever is greater

The individual player's minimum pay is also based according to years of service.[31] For the 2009–2010 season, this figure ranges from $457,588 to $1,306,455.[32] The minimum team salary was $27.844 million for the Charlotte Bobcats in the 2005–06 season, $37.125 million for all other teams.[33]

In order to assure that players' salaries and benefits do not exceed a designated percentage of BRI (57%), at the beginning of each salary year, money is withheld from players' pay and maintained in an escrow account.[34]

Year	Percentage Withheld
2005–2006	10%
2006–2007	9%
2007–2008	9%
2008–2009	9%
2009–2010	9%
2010–2011	8%
2011–2012	8%

At the end of each year, teams' salaries and benefits are compared league-wide. If there has been no overage paid, the escrow funds are reimbursed to players on a *pro-rata* basis. If a team has an overage (above the mean of league-wide salaries and benefits), it is charged a "luxury tax," which is returned to owners. That team's salaries are then reduced accordingly.[35] The surtax level is $67.865 million (total team salaries and benefits). A team that exceeds this amount in any year must pay to the league $1 for each $1 it is in excess.[36]

For the non-economist, the NBA salary caps are surely the most complicated when compared and contrasted with the three American professional sports that have implemented such cost limitations. Arguably, the exceptions to individual players' salary caps present this complexity.

The contract includes 10 exceptions, four that are major:[37]

[30] *Id.* at Article II, § 7.
[31] *Id.* at Article II, § 6(a) and Exhibit C, an attachment to the agreement.
[32] *Id.* at Exhibit C (Minimum Annual Salary Scale),
[33] *Id.* at Article VII, § 2(b).
[34] *Id.* at Article VII, § 12.
[35] *Id.*
[36] *Id.* at Article VII, § 12(e)-(g).
[37] *Id.* at Article VI, § 6.

(i) "Larry Bird" exception: This is for "qualifying" free agents and veteran agents. A team can exceed its team salary cap to re-sign its own free agent up to the maximum single player's salary. In order to qualify, a player must have played at least three seasons for the team, without having been waived or having changed teams. The team might increase his salary up to 10.5% in his first new contract.

(ii) "Early Bird" exception: This is a second part of the veteran free agent exception components, a weaker version of the "Larry Bird" Exception. In order to qualify, a player must have played two seasons without having been waived or changed teams. He can be paid as much as 175% of his former contract, or the average team player salary, whichever is greater.

(iii) "Non-Bird" exception: This is the third component of veteran free agent exceptions for those players who do not qualify under (i) or (ii). A team can re-sign its own free agent at 120% his previous year's salary, 120% the minimum player's salary for the team, or whatever amount needed to tender a qualifying offer, whichever is greater. This exception limits new contracts to five years and any raise in the first year of a new contract to 8%.

(iv) "Mid-level" exception: A team might sign any free agent (whether or not he is a veteran of that team) for the amount of the average team player's pay, even if this amount results in an excess of the team's salary cap. This exception can be split and used for multiple players. An individual such contract can be for up to five years. The mid-level exception is $5.356 million.

Other minor exceptions include (v) the "bi-annual" exception, which cannot be used two consecutive years; (vi) the "rookie" exception for first-round draft picks; (vii) the "minimum salary" exception, which permits a contract for a maximum of two years; in this exception, a team can offer the player the league-wide minimum salary, even this results in its exceeding the team salary cap; (viii) the "traded player" exception, which can be used to sign free agents; (ix) the "disabled player" exception, which permits a team to exceed the team limit in order to acquire to replace a disabled one; and (x) the "reinstatement" exception, which permits a team to re-sign a player at his previous salary, after he had been banned from league play for a drug-related offense.

With this plethora of exceptions, one might conclude that they veritably "swallow the [salary cap] rule."

C. Hockey

Probably ice hockey is a more Canadian-oriented sport than an American one because of the weather factor. The entire country, unlike the U.S.A., is quite cold with snow throughout most of the winter. Children play ice hockey as a school sport throughout, also unlike the U.S.A. The National Hockey League (hereinafter, NHL) was founded in 1917 in Montreal, Canada with only four teams. Today there are 30 teams (24 in the United States and six in Canada). The current commissioner is Gary B. Bettman.

The NHL endured three work stoppages because of difficulties in renewing the collective bargaining agreement. There was a 10-day strike in April 1992. A lockout forced the NHL to shorten the 1994 season from 84 games to 48. Finally, and most significantly, was the lockout at the expiration of the union contract on September 15, 2004, the day following the final game of the World Cup of Hockey. Commissioner Bettman announced that clubs had spent approximately 75% of revenues on players' salaries, a percentage that was considerably more than that in the other major American professional sports. Demanding "cost certainty," which was not met by acquiescence by the National Hockey League Players Association (hereinafter, NHLPA), the Commissioner called a lockout. This stoppage lasted 310

days, the longest lockout or strike in professional sports history and the only time that a major North American sports league lost an entire season because of a labor dispute. The NHLPA construed management's insistence upon "cost certainty" as a salary cap in disguise, a provision that the union's chief negotiator, NHLPA Executive Director Bob Goodenow, found unacceptable.[38]

A particular problem regarding the lockout was the issue of teams' right to hire non-union replacement workers during the labor dispute. Canadian law and American law differ in this respect, making the situation difficult. In the United States, the Supreme Court has held that an employer can permanently replace striking workers during an economic labor dispute, a management right that presumably extends to lockouts.[39] According to Peter Bowal, Professor of Business Law at the University of Calgary, Canadian law varies from province to province.[40] Professor Bowal's opinion is that the issue was moot in this situation; his rationale is that replacements would have been ineffective because of the probable resulting lack of fan appeal.[41]

The lockout ended when the NHLPA agreed to a stated "hard" salary cap, despite its earlier refusal. However, the NHL implemented a revenue-sharing system that permitted the league to set a higher figure for its cap.[42] The NHL salary cap is generally referred to as a "semi-soft" one, somewhere between the NFL's "hard" cap" and the NBA's "soft" one, a stricter modification of the NBA "soft" cap. In the NFL, a club might release a player to increase payroll room, but the NHL team might increase its "room" only by trading a higher-paid player to another team for lower-paid players. In other words, NHL players have guaranteed contracts. One sports journalist termed the NHL salary system as "enforced mediocrity" because it eliminates the possibility of very good or very bad teams, thereby forcing each team to the middle.[43] Ostensibly to avoid another long work stoppage, the current collective bargaining agreement ensures that there will be no strike or lockout during its term.[44]

The Preamble to Article 50 of the NHL collective bargaining agreement sets a relationship between league-wide player compensation and Hockey Related Revenues (hereinafter, HRR). For each year, there is an upper limit and a lower limit for each club's spending allocable to salaries. This provides that league-wide player pay rises or falls in direct proportion to the rise or fall in HRR, and that such compensation will equal the player's share. This is accomplished via a two-step method: (i) the Preliminary HRR for the prior year is multiplied by the applicable percentage, the result of which is (ii) divided by the total number of teams (30).[45] The resulting figure is the payroll range (hereinafter, PR). The PR can be adjusted upward as much as 5% in each league year (referred to as the "adjusted midpoint") until the league-wide actual HRR equals or exceeds $2.1 billion. At that point, the 5% growth factor continues unless the clubs or the NGLPA propose a different growth factor based upon actual revenue experience and/or projections. In such case, the parties will discuss and hopefully agree upon a new factor.[46]

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[38] "Your Guide to Hockey," www.nationmaster.com/encyclopedia/Salary-cap#Salary_cap_in_the_NHL.
[39] Nat'l Labor Relations Bd. v. McKay Radio & Telegraph, 304 U.S. 333 (1938). For U.S. Supreme Court treatment of replacements during lockouts, see NLRB v. Brown Food Stores, 380 U.S. 278 (1965).
[40] Electronic mail from Peter Bowal, Professor Business Law, University of Calgary (Nov. 2, 2007, 09.17 PST) (on file with author).
[41] Two plenary sources on labor law in Canada are H.W. ARTHURS *et al.*, LABOUR LAW AND INDUSTRIAL RELATIONS IN CANADA (Butterworths, Toronto, 1993) and GEORGE W. ADAMS, CANADIAN LABOUR LAW (Canada Law Books, 2d ed., 1993).
[42] Nationmaster, *supra* note 38.
[43] Jamie Fitzpatrick, "The NHL Salary Cap Exposed," About.com. Hockey, July 12, 2006, *available at* http://proicehockey.about.com/b/2006/07/12/the-nhl-salary-cap-exposed.htm.
[44] NHL Collective Bargaining Agreement, Article 7, *available at* http://www.nhl.com/cba/2005-CBA.pdf.
[45] *Id.* This percentage is determined according to Article 50.4(b).
[46] *Id.* at Article 50.5(b).

After this adjustment for revenue growth factor, the PR is figured by adding $8 million to the adjusted midpoint to arrive at an "upper limit," and subtracting $8 million from the adjusted midpoint to arrive at the "lower limit." The upper limit for the 2005–2006 season was $21.5 million, and the upper limit was $39 million. For 2006–2007 and following years, the lower and upper limits are calculated by independent accountants no later than June 30 of the preceding league year, using preliminary HRR and preliminary benefits. The lower and upper limits may be adjusted upon the independent accounts' issue of the final HRR report for the immediately preceding year. If the adjustment is increased or decreased by $3 million or more, the PR for that year is adjusted accordingly.[47]

An example of this rather arcane method of calculation is in the collective bargaining agreement.[48] If the HRR report for year two of the agreement determined the HRR to be $1.9 billion, and preliminary benefits to be $66 million, year three calculation of the PR that occurs on or before June 30 of the prior year is:

> In a year during which revenues are below $2.2 billion, the share allocable to players' salaries is 54%. If revenues are between $2.2 billion and $2.4 billion, this percentage is 55%; if revenues exceed $2.7 billion, it is 57%. The midpoint (54%) is applied to $1.9 billion, minus $66 million. This figure is then divided by 30 (number of clubs). The $1.026 billion (54% of the $ 1.9 billion HRR) minus the $66 million paid for benefits is $960 million. Divided by 30 (number of teams), the result is $32 million. The adjusted midpoint is calculated by increasing this $32 million by 5%, resulting in $33.6 million.[49]

The maximum player salary is 20% of a club's upper limit in total annual pay.[50] In 2005–2006, this maximum individual pay was $7.8 million.[51]

As with the other major sports' collective bargaining agreements, the NHL contract has a minimum player salary provision, but unlike the NFL and NBA, there is no correlation to number of years played:[52]

Year	Minimum Salary
2005–06 and 2006–07	$450,000
2007–08 and 2008–09	$475,000
2009–10 and 2010–11	$500,000
2011–12	$525,000 (to the extent the collective bargaining agreement is extended by the NHLPA)

The NHL contract also has an escrow account that is constituted by a withheld percentage of each player's salary and his bonus, if any. If NHL clubs spend in aggregate more or less on players' salaries

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[47] *Id.*
[48] *Id.* at Article 50.5(b)(iv).
[49] *Id.* at Article 50.4(b)(i)(A)–(E).

Author's note: One might conclude that, if a graduate degree in economics is required to figure the NBA cap system, a graduate degree in mathematics is necessary to calculate the NHL system.

[50] *Id.* at Article 50.6.(a)
[51] NHL Collective Bargaining Agreement FAQs, www.nhl.com/ice/page.htm?id=26366.
[52] NHL Collective Bargaining Agreement, *supra* note 42, at Article 11.12(a).

than the players' share in any year, the funds in the escrow are to be distributed to the league (if more) and/or to the players (if less).[53]

D. Baseball

The oldest of American professional sports is baseball. Only eight teams existed when the National League of Professional Baseball Clubs was founded in 1876 in Louisville, Kentucky. Since then, the number of participating teams has grown exponentially to 30. Major League Baseball is the oldest extant professional team sports league in the world. The current commissioner is Albert Hubert (Bud) Selig, Jr.

The current collective bargaining agreement runs from December 20, 2006, until December 11, 2011. It was a renewal of the prior contract with some modifications (largely related to increase of players' minimum pay). American major league baseball has endured eight work stoppages, including five strikes (1972, 1980, 1981, 1985, and 1994–1995) and three lockouts (1973, 1976, and 1990).[54] The 1994 strike was particularly memorable because it led to the cancellation of that year's World Series. A major issue in that labor dispute was management's demand for a salary cap. The parties reached a compromise with the Competitive Balance Tax, commonly referred to as the "luxury tax."[55] A "luxury tax" is imposed on teams exceeding a threshold of total team salaries as stated in the collective bargaining agreement. Baseball remains the only major American professional sport without a salary cap. Control over high salaries, if any, is exercised through this "luxury tax." The tax is imposed on the difference between a team's actual annual payroll and the threshold:[56]

Year	Threshold
2003	$117 million
2004	$120 million
2005	$128 million
2006	$136.5 million
2007	$148 million
2008	$155 million

(Author's note: This provision provided for re-negotiation of the threshold each year subsequent to 2006, so only the figures through that date actually appear in the collective bargaining agreement.)

The same provision also increases the competitive balance tax rate yearly. The rate for 2003 was 17.5%; for 2004 and 2005, 22.5%; for 2006 and following years, the rate is 30%, but with a proviso. Beginning in 2006, a team that exceeded the threshold for the first time was not penalized, but a team that exceeded the threshold for a second time during the effective time of the current collective bargaining agreement is taxed at a rate of 30%. A team in excess for a third or fourth year during the term of the agreement is taxed at a rate of 40%.

On December 20 of each year, the Office of the Commissioner notifies the Major League Baseball Players' Association (hereinafter, MLBPA, the players' union) of all clubs of those who

[53] *Id.* at Article 50.11.
[54] Ross Newhan & Doyle McManus, *Clinton Sets Own Deadline in Strike Talks,* RICH. TIMES-DISPATCH, Dec. 23, 1994, at D1.
[55] For an elaboration on this strike, *see* Carol Daugherty Rasnic, *When Labor Balked and Management Clutched,* 28 BUS. L. REV. 85 (1995).
[56] Major League Baseball Collective Bargaining Agreement, Article XXIII(B).

exceeded the threshold, and payment from each such club is due in the commissioner's office no later than January 31 of the following year. These payments are retained in a Central Fund[57] that is later distributed according to a revenue-sharing plan.[58] Under this plan, each club contributes 34% of its net local revenues and the fund (which also includes the overage paid by those clubs exceeding the team salary threshold) is then divided equally among all clubs.[59]

These tax payments are not directly distributed to players, and use is restricted. The fund retains the first $5 million (or 10%) in reserve for payroll adjustments, deferred salary payments, signing and performance bonuses, and annuity compensation arrangements. Of the remaining amount, 50% is used according to discussion and agreement between the Office of the Commissioner and the MLBPA for the benefit of active players. The next 15% (also by agreement between the two parties) is sent to countries without high school baseball to develop young players. The final 25% is deposited into an Industry Growth Fund.[60] The 1997 collective bargaining agreement created this fund to promote baseball throughout the world, particularly in the United States and Canada.[61]

Some reflection on those clubs that have paid the competitive balance tax is informative. The New York Yankees have traditionally had the highest payroll. In 2006, the Yankees were assessed a tax of $26 million, with its all-time high of $33.98 million in 2005. In 2007, the Yankees' bill was only $23.88 million, but the team still amassed more than $100 million in luxury taxes by 2008. The only other teams required to pay a luxury tax are the Los Angeles Dodgers ($927,059 in 2004) and the Boston Red Sox, by 2008, in its fifth consecutive year of assessment, as is the Yankees club. Boston's total tax for these first four years was $13.88 million. For a comparison, the Yankees' total payroll in 2007 was $148 million, and for 2008, $155 million.[62] The lowest major-league team payroll for 2007 was the Tampa Bay Devil Rays with $24,123,500.[63]

The collective bargaining agreement states that a player's minimum salary must be at least $380.000.[64] Unlike parallel clauses in the NFL and NBA contracts, there is no relation of this minimum compensation to number of years played. The highest salary for 2007 was Jason Giambi of the York Yankees, paid $23,428,571. Second and third highest were also members of the Yankees' club. Alex Rodriguez received a salary of $22,708,525, and Derek Jeter was paid $21,600,000.[65]

One should look at prior salaries to indicate the metamorphic transition in what is considered suitable pay for the highest paid major league baseball players. In 1966, a year there the average pay was $20,000,[66] Los Angeles Dodgers pitchers Sandy Koufax and Don Drysdale were each paid more than $100,000. In 1988, the Houston Astros had the highest team median salary ($500,000), and the highest paid player was New York Mets catcher Gary Carter ($2,350,714). In 1998, the Baltimore Orioles had

[57] *Id.* at Articles XXIV(B)–(C).
[58] *Id.* at Article XXIV.
[59] *Id.*
[60] *Id.* at Article XXIII(H).
[61] *Id.* at Article XXV. This provision was carried over from the previous contract.
[62] USA Today, http://content.usatoday.com/sports/baseball/salaries/totalpayroll.aspx?year=2008 (last visited Mar. 3, 2009).
[63] USA Today, http://content.usatoday.com/sports/baseball/salaries/totalpayroll.aspx?year=2007 (last visited Mar. 3, 2009).
[64] MLB Collective Bargaining Agreement, *supra* note 56, at Article VI(B). This $380,000 minimum is an increase from the $300,000 minimum that expired in 2006.
[65] USA Today, http://content.usatoday.com/sports/baseball/salaries/top25.aspx?year=2007 (last visited Mar. 3, 2009).
[66] *The 1960's Overview*, *in* AMERICAN DECADES (The Gale Group, Inc. 2001), *available at* http://www.encyclopedia.com/1B2-3468302522.html.

the highest team median salary ($1,800,000) and the Chicago White Sox's Albert Belle was the highest paid player ($10,000.000). By 2008, the highest team median jumped to $3,175,000 (Chicago Cubs). The highest paid player was Rodriguez at $28,000,000, the highest paid baseball player in history.[67] Rodriguez's contract for such a disproportionately high salary for seven months' work (without injuries, and assuming that the Yankees play post-season) was arguably improvident. Not only did Rodriguez admit to having used performance enhancing drugs from 2001–2003 (he won the Most Valuable Player award in 2003),[68] but he sustained a hip injury that could have prevented him from playing for as long as three months.

The chart below shows an across-the-board look at minimum and maximum pay in the four major sports for 2009:

League	Minimum Pay	Salary Cap
NFL	$285,000 to $820,000, depending upon number years of service	Maximum for *team*, according to total revenue produced by all teams[69]
NBA	$358,277 to $1,100,000, depending upon years of service	Maximum for *team*, according to total revenue (no more than 57% BRI) [70]
NHL	$500,000	$7.8 million (2005–06)[71]
MLB	$380,000	No salary cap[72]

EUROPEAN COMMUNITY LAW AND DOMESTIC LAWS IN EUROPE (USING AUSTRIA AND GERMANY AS EXAMPLES)

A. European Law

The European Community began as a post-World War II economic association among six countries: France, Germany, Italy and the three "Benelux" countries of Belgium, Luxembourg, and the Netherlands. Through several successive treaties, this entity has dramatically grown to its current 27 sovereign countries and assuming many mandates in the area of social law, as well as the originally

[67] USA Today. http://content.usatoday.com/sports/baseball/salaries/top25.aspx?year=2008 (last visited Mar. 3, 2009).
[68] Selena Roberts & David Epstein, *Confronting A-Rod,* SPORTS ILLUSTRATED , Feb. 16, 2009, at 28–31. This article includes an extract from the Mitchell Report, confirming the contractual ban on drug usage by players since the 1971 collective bargaining agreement.
[69] The highest-paid NFL player for 2008–09 was the Oakland Raiders' Nnamdi Asomugha ($28.5 million). Sports Agent Blog, www.sportsagentblog.com/2009/2/24/nnamdi.asomugha-highest_paid_player_in_the_NHL.
[70] The highest earner in the NBA during the 2008–09 season was the Boston Celtics' Kevin Garrett ($24,751,934). www.insidehoops.com/nbasalaries.shtml.
[71] The highest-paid player in the NHL for the 2008–09 season was the Ottawa Senators' Dany Heatley ($10 million). www.cbssports.com/nhl/story/10400632.
[72] The highest-paid player in MLB for the 2008–09 season was the New York Yankees' Alex Rodriguez ($28 million). USA Today, *supra* note 67.

intended economic component. Since the 1993 Treaty of Maastricht, the geographic mass of which the European Community is comprised has been known as the "European Union."[73]
The European Commission remains the official law-making body,

The 1957 Treaty of Rome established the European Economic Community and prohibited monopolies.[74] This treaty, similar to the United States' Sherman Antitrust Act, not only forbids agreements restraining trade, but also bans entering into such agreements at all. This includes any maximum limitations on wages or salaries.

With regard to labor and management, an employer's freedom in the conduct of its business is not the only significant matter in European law.[75] Workers' freedom of free movement is also a noteworthy area.[76] The European Court of Justice (ECJ) ruled on this freedom in the domain of professional sports in *Jean-Marc Bosman*.[77] Complainant Bosman, a professional soccer player, attempted to transfer from his Liege, Belgian club to a French club in Dunkerque. However, his Belgian club insisted that he first pay a substantial cost-prohibitive "transfer fee." The Court held that the free movement of workers assured in Article 39[78] banned any such restrictions on EU citizens. This decision essentially enabled athletes to sign with other clubs within the EU, much as had the McNally-Messersmith arbitrator's decision.[79] The effect was the same, but while the American principle derived its source from the collective-bargaining process, the European principle arises from treaty law.

The ECJ most recently balanced management's freedom of establishment and freedom to provide services with a union's right to take collective action,[80] evidenced in four decisions rendered in 2007 and 2008.[81] Read together, these Court decisions—all against the unions to these disputes—hold that the union's collective action right, while fundamental, must have the legitimate aim of protecting workers instead of restricting a company's freedom of establishment. In this regard, European law resembles U.S. federal law because the collective rights of workers cannot go further than necessary to protect a legitimate purpose. *NLRB v. Babcock & Wilcox, Co* showcased a similar conflict of these rights.[82] The case involved a union's right to picket for organizational purposes on the company's privately owned property. The Supreme Court balanced the employer's constitutional property rights with the union's statutory rights under Taft-Hartley, permitting organizational picketing, but only in restricted areas and during designated hours.[83] Neither in the United States nor in Europe is a union granted a *carte blanche* right to act collectively without any regard to the counterpart rights of management.

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[73] "European Union is a geographical term, but the European Community is the entity comprised of the law-making bodies. Thus, the frequently heard statement that "European Union" is the correct term and that "European Community" has been subsumed is incorrect.
[74] Treaty Establishing EEC, Mar. 25, 1957, 298 U.N.T.S. 3, Article 85.
[75] Most significant among these management freedoms are the freedom of establishment assured in Article 43 and the freedom to provide services, Article 49.
[76] *Supra* note 74, Article 39. *See also* implementing Council Regulation (EEC) No 1612/68, Oct. 15, 1968.
[77] Case C-415/93, ECR 1-4921 (decided Dec. 15, 1995).
[78] *Supra* note 74, Articles 39–42 (ex. Art. 48–51) (provides that workers might freely move and work in any member state).
[79] *See supra* notes 13–14 and accompanying text.
[80] International Labor Organization Convention 87 (ratified by all EU member states).
[81] Int'l Transp. Workers' Fed'n v. Viking Line ABP, Case C-438/05 (Dec. 11, 2007); Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, Case C-341/05 (Dec. 18, 2007); Rüffert v. Land Niedersachsen, Case C-346/06 (Apr. 3, 2008); Commission v. Luxembourg, Case C-319/06 (June 19, 2008).
[82] Nat'l Labor Relations Bd. v. Babcock & Wilcox, Co., 351 U.S. 105 (1956).
[83] 29 U.S.C. § 157 (2006).

B. German Domestic Law

The German antitrust statute[84] was last amended in 1999 in order to harmonize domestic law with European law. As does the EEC treaty, the German statute lists exemptions, subject to approval by the federal antitrust office.[85] Significantly, the German *Bundestag* (federal legislature) did not include in its amended statute an exemption permitted under the EEC Treaty that allows a restriction on trade if the parties can show that it "promote(s) technical or economic progress."[86] This indicates that the *Bundestag* did not intend to supersede competition proscriptions for industrial policy or public interest reasons. Thus, the use of agreed-upon salary caps as a means of controlling team owners' costs and, collaterally, escalating ticket princes that deter fans from attending games would be prohibited under German law. Notably, the law exempts joint broadcasting agreements among sports clubs if some of the proceeds are used to promote youth and amateur sports.[87]

German law provides that workers in a business containing at least five employees have the right to elect a *Betriebsrat,* or works council, a concept incongruous to the American workforce.[88] The size of this body increases proportionately to the number of workers. It has two purposes: discuss with the employer wages, hours, and conditions of employment; and reach an agreement with regard to workplace rules—much like a union contract in the American work setting. Any antitrust legal constraints apply to this agreement.

The union contract is generally a multi-employer contract encompassing an entire segment of a particular type of work throughout the country. Under German law, an employer can unilaterally alter a union contract only if the change inures to the benefit of workers.[89] In professional sports, one or more teams' refusal to pay players any compensation over an agreed upon amount constitutes price-fixing, unlawful under both domestic[90] and European[91] law. This same prohibition applies to agreements among teams not to exceed a specified total team salary. Sports law is a recognized academic area in German law schools, and legal scholars have distinguished American and European law with regard to salary caps.[92]

C. Austrian Domestic Law

The Austrian antitrust statute was most recently amended in 2005.[93] It more closely incorporates the language of European law, but it does not provide for block exemptions. It vests authority in the Minister of Justice to adopt exempting regulations. Generally, Austrian law is stricter than the EEC provision.[94] The absolute language clearly prohibits any effort to impose any limitation on a player's maximum compensation, such as salary caps.[95]

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[84] *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) (Act against Restraints on Competition), 1957 BGBl. I 1081.
[85] GWB § 204.
[86] Treaty of Rome, Belg.-Fr.-F.R.G.-Italy-Lux.-Neth., art. 85, Mar. 25, 1957.
[87] GWB § 31.
[88] *Betriebsverfassungsgesetz* (BetrVG), 1988 BGBl I 2261.
[89] *Tarifvertragsgesetz* (TGV) (Law on Collective Agreements) § 4(3).
[90] GWB §§ 19 Abs.1 and 20 Abs. 2.
[91] Article 81 § 1 and Article 82 § 1 EG.
[92] *See* Holger Rüth, *Tarifvertragliche Gehaltsobergrenzen* ("*Salary caps*") *bei gehältern von Lizenzsportern?*, 2003 SPORT UND RECHT 137 and Frank Bahners, *Einführung von Gehaltsobergrenzen im deutschen Berufsfussball aus wettbewerbsrechtlicher Sicht,* 2003 SPORT UND RECHT.
[93] Kartellgesetz (KartG) (2005) BGBl I Nr 61/2005.
[94] *See* Stephanie Stegbauer and Franz Urlesberger, *Supplement to The 2008 Guide to Competition and Antitrust,* INTERNATIONAL FINANCIAL L. REV. *available at* www.iflr.com/Article/2025655/Austria-Protective-structures.html.
[95] KartG 2005 §§ 1, 4, and 5.

Statutory labor law in Austria resembles that of Germany's. An employer with five workers must allow those workers to elect a works council with the same functions one finds in Germany and in most European countries.[96] The comprehensive union contract covering all workers in a given industry throughout the country is also characteristic of Austria.

The law applicable to both the *Betriebsrat* agreement and the union collective bargaining agreement must be read in conjunction with the antitrust proscriptions, which presumably preempt the area of bargaining that would constitute a restraint on trade.[97] As in Germany, salary caps for players or teams violate both European and domestic antitrust laws.

Concededly, one could mutually alter a collective bargaining agreement subsequent to its execution, recognizing the autonomy of parties in a private contractual relationship.[98] This view places the collective bargaining agreement on the level of statutory law, much like the American concept of the agreement as the "law of the shop."[99] However, in Austria, this autonomy is conditional because domestic law ensures that any contract cannot be contrary to general standards of morality.[100] Thus, if a bilaterally agreed-upon salary limitation in a contract appears to transgress such moral norms—for example, if it negatively affects equality of opportunity in the commerce of the sports world — it will be unlawful.[101]

One distinction between German and Austrian law is the relative position of the employer in the bargaining process. Although a collective bargaining agreement in Germany only binds the employer, both the union and the employer are bound in Austria because the provisions are mutually accepted.[102] This means an *individual* player contract (but not the collective contract in which the union is a party) might agree upon a salary cap during a specified period, provided there is a counterpart benefit promised from the team to the player.[103] This would not permit an agreement for an across-the-board maximum salary, either for an individual player or for the teams in their entirety.

D. General conclusions on salary cap possibilities in Austria and Germany

Statutory law in Austria and Germany permit management to unilaterally alter a collective bargaining agreement clause if such change will be favorable to workers. This might be effectuated also through a change in a works council agreement.[104] However, in Germany, the *Kollektivvertrag* (collective bargaining agreement between employer and union) only contains provisions that obligate the employer, whereas the agreement in Austria has rights and obligations for both employer and union.[105]

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[96] *Arbeitsverfassungsgesetz* (ArbVG) and *Betriebsräte-Wahl Ordnung* (BRWO) and *Allgemeines bürgerliches Gesetzbuch* (ABGB).

[97] *See* Carol Daugherty Rasnic and Reinhard Resch, *Salary Cap* (*Gehaltsobergrenzen in Berufssport*), 21 ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES ARBEITS-UND SOZIALRECHT 368, 382 (2007).

[98] *Id. See also supra* note 92 (citing Ulrich Runggaldier in THEODOR TOMANDL, ARBEITSVERFASSUNGSGESETZ (Stand 2007) § 3 (10)).

[99] *See, e.g.*, United Steelworkers v. Warrior & Gulf Navigating Com., 363 U.S. 574, 581–582 (1960) (United States Supreme Court referred to a collective bargaining agreement as the "[common] law of the shop.").

[100] ABGB § 879.

[101] Rasnic & Resch, *supra* note 97 (citing Thomas Summerer in JOCHEN FRITZWEILER, BERNHARD PFISTER, AND THOMAS SUMMERER, PRAXISHANDBUCH SPORTRECHT 110 (2007)).

[102] Electronic communication from Prof. Dr. Reinhard Resch on Mar. 4, 2009.

[103] Rasnic & Resch, *supra* note 97, at 382.

[104] Both Germany and Austria have statutory works councils, or *Betriebsräte* permitting workers to have a worker representative (or representative body).

[105] *See* RUDOLF STRASSER AND PETER JABORNEGG, ARBEITSRECHT II (2001) 153 (2001). In particular, see note 237 in that work.

In both countries, both national and European antitrust laws preclude a salary cap for individual players. However, in Austria, the salary cap is allowed if it is agreed upon as included in an individual player's contract in a *quid pro quo* situation (the player is promised something in return). Additionally, a salary cap imposed upon an entire team violates antitrust law. Even though European law allows restraints on trade in cases of industrial economic concerns, the prohibition of such restraints under Austrian and/or German antitrust laws view as insignificant any management claim of economic necessity to contain salaries. European law's adherence to the antitrust prohibition would preclude any such erosion of that principle through collective bargaining. To distinguish the American policy, such economic concerns provide the underlying basis for collectively bargained team salary caps in American professional sports.

In summary, the law in the European Union, now a vast area with a January 1, 2009, population of nearly 500 million,[106] strictly prohibits any restraint of trade.[107] In general, workers are assured free movement among member nations, and employers have the freedom of establishment[108] and the freedom to provide services.[109] These combined rights and freedoms are tempered by the prohibition on any containment or burdening of competition (Articles 81 and 82). The latter appears to be the proverbial "trump card" that excludes the possibility of an enforced salary cap for professional athletes or any other group of workers in Europe.

CONCLUSION

Among the four major professional sports in the United States, only baseball has not implemented a salary cap. Moreover, union contract maximum-salary clauses in basketball, football, and hockey differ considerably. Professional football remains the only American sport with an absolute ("hard") cap without exceptions.

The United States Supreme Court holds that patent antitrust implications prohibit such restraints on trade with the rather arcane judicial exclusion of baseball. However, this impediment to maximizing salaries has been resolved through common contractual principles that are the give-and-take of the collective bargaining process.

The European Commission and the European Court of Justice adhere more tenaciously to denouncing trade restraints, whether or not waived by a union or player in the bargaining process. Domestic statutory law in Austria and Germany exemplify this compliance at the national level, rendering salary caps in European sports improbable, unless the EC or the Court alters their respective stances.

In the final analysis, market demand leads to dramatically high salaries for star professional athletes, both in the United States and Europe. In the United States, such demand creates a windfall for top players in the bargaining process. In Europe, high salaries reflect a concurrent yield to demands by significant players and a tacit adherence to antitrust compliance.

[106] Eurostat, Statistical Office of the European Commission, http://ec.europa.eu.
[107] http://www.cosmoworlds.com/country-information/European-union.html.
[108] *Supra* note 74, Article 49 (ex. Art. 43).
[109] *Id.* at Article 56 (ex. Art. 49).