

UNSPORTSMANLIKE CONDUCT

Remedying Human
Rights Violations in U.S.
Professional Sports Leagues

February 2023



HUMAN RIGHTS CLINIC

THE UNIVERSITY *of* TEXAS SCHOOL *of* LAW



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EXECUTIVE SUMMARY

Examining sports in light of human rights interests reveals a complex relationship that raises important issues relating to the promotion and protection of the fundamental rights of players. This report, composed by the Human Rights Clinic at the University of Texas at Austin School of Law, illuminates multiple human rights concerns within the world of professional sports in the United States. Since 2021, Clinic students have researched professional sports leagues in the United States through a thorough examination of organizational protocols and by-laws, as well as interviews with stakeholders directly involved in the field. The analysis and research of this report focus on non-confidential information due to the private nature of the arbitration clauses, which themselves reveal a lack of transparency in this area. Ultimately, the report sheds light on the systematic problems relating to due process and access to adequate remedies for players. More specifically, arbitration, which is the current main avenue to seek redress for problems, poses due process concerns and therefore may violate the United Nations Guiding Principles on Business and Human Rights (UNGPs).

Part I of this report lays out details of the Clinic’s methodology before delving into Part II – examining the structure of U.S. Professional Sports Leagues. This section details the regulatory approach taken by the U.S. in relation to professional sports leagues. Although there are substantive variations in the governing structure of these leagues, there are a few common trends that contribute to some of the human rights issues identified later in the report. All the leagues are led by a commissioner who is under the control of the collective team owners. There is little to no player or additional stakeholder participating in the appointment and removal of commissioners, who often wield broad decision-making powers, especially in relation to league operations and potential conflicts.

Part III of this report explains the human rights framework as it relates to professional sports in the U.S. Since the U.S. has ratified multiple international covenants such as the International Covenant on Civil and Political Rights (“ICCPR”), the Covenant Against Torture (“CAT”) and the International Convention on the Elimination of Racial Discrimination (“ICERD”), it has bound itself to international human rights law thus rendering an obligation to ensure, protect, and respect human rights. Therefore, a relevant guideline to follow in professional sports regulation

is Article 14 of the ICCPR: the right to a fair trial and impartial arbitrator. However, this is not guaranteed as has been exemplified in the case analysis of Tom Brady and Ezekiel Elliot. Emphasizing the importance of the UNGP, this report recommends the leagues incorporate those guidelines to avoid further human rights violations in the hopes of forcing state actors to implement those principles and respect, protect and fulfill human rights.

In Part IV, the report delves into the core human rights concerns in professional leagues in the U.S. – lack of an effective remedy. Arbitration is the main remedy available to players in professional sports leagues. Although arbitration has positive aspects of confidentiality, impartiality, and time efficiency it does not necessarily ensure fairness for the parties. There are two main arbitration genres, compulsory and voluntary. In professional sports leagues, arbitration is compulsory leaving the players no other choice but to abide by its laws and waive their rights when signing their Collective Bargaining Agreements (“CBAs”). This report elucidates the human rights violations that result from such a clause by highlighting the importance of having access to an independent and impartial arbitrator and how this right may vary depending on the different arbitration jurisdictions and the league’s jurisdiction. Additionally, due to the arbitration clause, the player’s access to remedy is practically impossible and some stakeholders’ access to arbitration is excluded, which further emphasizes the need for the UNGP in the CBAs. Furthermore, every league grants the commissioner the power to act in the “best interest” of the league. However, this clause may fail to ensure impartiality, thus raising the issue of the right to a fair procedure. In most of the U.S. professional sports leagues, when an arbitration award is given, the decision becomes unappealable. Therefore, when a commissioner has not provided an impartial view on a matter, the right to a fair trial is compromised.

Although there are many complex issues in the world of human rights and sports, there are also plausible solutions. This report concludes by making a list of recommendations for the identified issues. These recommendations focus on taking a human rights-based approach to the regulation and organization of U.S. professional sports leagues. Adding human rights standards into the league’s governing documents as well as taking measures to ensure that compulsory arbitration procedures do not violate players’ rights to access effective remedies and contain due process protections are beginning, essential steps that can help ameliorate human rights concerns in this space.

PART I: INTRODUCTION AND METHODOLOGY

A. Introduction

Professional sports and human rights intersect in multiple ways. This is seen in the statement by National Football League (“NFL”) linebacker Scott Fujita, “Sometimes, people ask me what any of this has to do with football. Some think football players like me should just keep our mouths shut and focus on the game. But we’re people first, and football players a distant second.”[1] As a human activity, professional sports are an arena where human rights values are promoted and an ideal place for bringing visibility to human rights issues. This is particularly true given the social value within the activity of sports.

Sports are an integral part of society: Super Bowl parties’ rival birthdays, children idolize professional players more than global leaders, and fan loyalty brings a feeling of comradeship akin to war-time patriotism. Sports participation can contribute to social relationships, community cohesion, and make communities feel stronger.[2] Further, sports shape ideals of individual excellence and character, as well as provide an arena in which traits and virtues are displayed and developed.[3] Indeed, primary forms of excellence modeled by athletes are inherently physical, like strength, speed, grace, and endurance.[4] But it is also crucial to look to sports for traits such as courage, leadership, cooperation, and fairness.[5] Professional athletes like LeBron James and Tom Brady are commonplace names and can be considered role models for children and adolescents, and can therefore have the power to influence society. Sports, by and large, can shape society on individual and collective levels.[6] The social aspect of professional sports, and sports in general, is the link that binds it with human rights. Sports-related human rights abuses, on the macro level, threaten societal cohesion and put at issue the overall sense of community. The social value of sports is what transforms it from a human activity to a human rights subject.

Within the context of professional sports leagues in the United States (“U.S.”), there have been human rights violations that show how professional sports are not immune to such violations. “This is bigger than

hockey (...) this is bigger than (...) major sports” is one of the calls for social change after the recent unveiling of a sexual assault scandal involving a former member of the Chicago Blackhawks, Kyle Beach.[7] Beach’s story is not alone in its quest for greater recognition of human rights violations in sport. For instance, the team owner of the Phoenix Suns, Robert Sarver, was found to be involved in “instances of inequitable conduct toward female employees” and the use of racial slurs towards Black personnel.[8] In 2015, NFL Commissioner Roger Goodell suspended Tom Brady for four games under the “conduct detrimental to NFL” language of Article 46 of the Collective Bargaining Agreement in the famous “deflategate” scandal. Commissioner Goodell later was the hearing officer for the arbitration appeal, against his own decision, and issued a lengthy opinion confirming

“We’re people first, and football players a distant second.”

the suspension, raising questions about the impartiality of the arbitration process.[9] Beach, Sarver, and Brady’s cases demonstrate that human rights abuses manifest within U.S. professional sports leagues in many contexts. This exists on and off the field. As will be discussed throughout this report, players, their families, as well as other league personnel, are confronted with issues related to physical integrity, domestic violence, discrimination related to race, sex, sexual orientation, or national origin. Taking these cases together, there are multiple issues regarding human rights violations that this report seeks to address.

Particularly, players systematically face issues relating to due process and access to adequate remedy within their leagues.[10] Sports unions, in representing the players, *may* bring grievances or claims against the leagues, either through arbitration or alternative dispute resolution. However, the existence of this grievance procedure is a half-hearted nod to players’ and staff’s rights. The availability of the remedy sought is hindered by numerous factors, including the provisions within the Collective Bargaining Agreement (“CBA”), the type of claim, the person bringing the grievance, and how the claim is adjudicated. Above all, the freedom to seek remedy is qualified by the power dynamic between stakeholders and the

leagues.

This report first illustrates the role of professional sports leagues in the U.S. and how they are governed. Next, this report explains the structure of U.S. professional sports leagues and how they govern themselves, contrasted with the governance of international sports organizations. The report then identifies relevant human rights law applicable to the professional sports context and explores the intersectionality between sports, human rights, and the role of sports in the context of international human rights law. Using established human rights principles and frameworks as guiding tenets, this report will then highlight how U.S. professional sports leagues have a duty to fulfill, ensure, and protect pertinent human rights for the various stakeholders.

The universal right to due process of law and procedural fairness will guide an analysis of the current various dispute resolution mechanisms available in U.S. professional sports leagues. This analysis concentrates on the power of league commissioners, the use of arbitration as a main avenue for remedy, and arbitration's limitations that flag due process concerns. Specifically, the arbitration available is both limited in its scope



“A Patriots fan watches the final seconds of Super Bowl LII, Minneapolis MN” by Lorie Shaull via Flickr licensed under CC BY 2.0

of applicability and in scope of remedies it provides for those who hold a valid claim. Lastly, this report will provide a list of recommendations, pertaining to dispute resolution and discriminatory behavior, for adoption by U.S. professional sports leagues that satisfy guiding principles of human rights: to respect, to protect, and to fulfil the rights of their players and stakeholders.

B. Methodology

The report is written by the Human Rights Clinic (“Clinic”) at the University of Texas at Austin, School of Law. The Clinic is an experiential learning course taught by Professor Ariel Dulitzky, and it combines classroom study with hands-on participation in human rights projects. For the past two years, the Clinic researched U.S. professional sports leagues by investigating their respective legal structures and processes, looking into reports on the intersection between human rights and sports, substantive human rights law, and news articles, as well as conducting several interviews with professionals in the industry. None of the interviewees were official representatives of any of the leagues. Invitations to meet and speak with senior management in Major League Baseball (“MLB”), National Basketball Association (“NBA”), Major League Soccer (“MLS”), National Hockey League (“NHL”), as well as NFL were not accepted. The same applies to senior management in teams from each professional sports league that operates locally in Texas.

Due to the private nature of the current framework for resolving disputes and the lack of public access to data concerning human rights abuses decided by an arbitrator in the Leagues, there were limitations on the Clinic’s research. Consequently, the report is based on non-confidential information from the conducted interviews and materials publicly available.

PART II: THE STRUCTURE OF U.S. PROFESSIONAL SPORTS LEAGUES

A. Values of Professional Sports Leagues

Sports have high social value and are closely linked with societal issues. However, professional sports are a commercialized entertainment business in addition to a competitive arena. The organizational structure of a league is influenced by this and “the relative importance of league management and centralized decision-making regarding certain significant sources of revenue.”[11] The social value of sports is what drives professional sports leagues’ goals of profit-maximization and high-level athletic competition. At the same time, professional sports leagues should comply with the values and principles established by international human rights laws. Even when the operations of an enterprise coincide with its purpose, it still must embed the respect and protection for, and fulfillment of, human rights into the values they promote and how they propagate these values.[12]

While the application of human rights is often treated as a legal or political question, it is also an issue of society and basic human dignity.[13] Sports leagues’ mission and values consist of articulating and reconciling economic strategies with respect for human rights. For example, the NFL conducted biometric sleep monitoring to refine their training programs to better adapt to an individual player’s athletic ability, enhance their performance, and indirectly increased their economic value and organizational performance.[14] However, the National Football Players Association (“NFLPA”) argued that the NFL violated the players’ right to individual autonomy and privacy by conducting such monitoring without giving them a chance to negotiate this matter. Sports leagues, as social spaces, could create, deepen, or consolidate negative social stereotypes and norms.[15] For example, several professional teams have continued the use of Native American mascots despite the National Council of American Indians requesting these names be changed.[16] The use of symbols with significant stature in a Native American community and history, and the

reduction of this to a mascot can, nonetheless, constitute discrimination against Native Americans because it is a caricature of their culture. They are often perceived as negative, and they serve as a reminder of the limited ways others might view Native Americans. As the United Nations has noted, the manifestation of negative norms and discriminatory behavior hinges upon activity in both public *and* private spheres.[17]

The leagues' governance requires a balancing of the interests of the owners and the leagues, their revenue, public confidence in the game, and respect for human rights. Due to the expansive nature of professional sports leagues in society, U.S. professional sports leagues must comply with internationally recognized human rights laws and enforce legal compliance with such laws.

B. U.S. Regulatory Approach on Professional Sports Leagues

The United Nations (“UN”) has laid out a three-tiered framework, the UNGP, that assigns responsibility to States and businesses functioning within them, like professional sports leagues, to govern with respect to human rights. While the UNGP will be further explained in the proceeding sections, their fundamental goal is for States and their enterprises to respect, protect, and fulfill fundamental human rights.[18] Although the UNGP encourages States to take an active role in regulating and encouraging human rights in business, the U.S. government has taken a hands-off approach to regulating professional sports leagues in general and with respect to human rights in particular. Dispute resolutions and professional complaints are deemed largely in-house matters by modern jurisprudence.[19] Consequentially, the very abuses this paper addresses have been met with a “figure it out amongst yourselves” approach, common across many commercial industries in the U.S.

U.S. courts have generally taken a hands-off approach when resolving disputes involving professional sports leagues. The courts have stated that suits involving sports disputes are best handled by sports regulators for two main reasons. First, the courts have found that the leagues, voluntary associations, and private corporations are not subject to constitutional constraints because they are not State actors, but private institutions.[20] Second, the courts have emphasized that sports regulators are in the ideal position to resolve sports conflicts because the

courts are far removed from sports disputes and not in the ideal position to determine athlete eligibility, procedures, and rules of the professional sports leagues.[21] For example, no court has addressed whether a professional sports labor union represents players not in that year's draft, among other disputed collective bargaining procedures.[22] This approach makes it more difficult to assert proper control over U.S. professional sports leagues on human rights matters and may leave many affected persons without proper representation or effective remedies.

Even in the case where league business falls within the scope of relevant law, the judicial system tends to remain deferential to professional sports leagues. Due to the special relationship between owners and players in the professional sports industry, courts have encountered difficulties applying the rule of reason and the per se rule to determine whether there has been a violation of antitrust law in the sports context.[23] The most applicable U.S. anticompetition law to professional sports leagues, Section 1 of the Sherman Act, has been liberally construed by high courts, with respect to professional sports, to generally rule that the leagues are not in violation of antitrust laws.[24] This is done by balancing alleged economic benefits against the potential evils, and the court has allowed reasonable restraints even when they fall into a category usually regarded as per se illegal.[25] This is particularly true with the 100-year-old MLB exemption, where Justice Holmes swiftly dismissed professional baseball as an interstate activity and subject only to labor law.[26] Notably, while this decision was arguably rational at the time, this exemption has stood for nearly a century.[27] When taking these cases as a whole, there is a trend by U.S. courts to relax per se anticompetitive restraints when they are in contention with professional sports leagues.

The courts have also refused to scrutinize professional sports operations on the grounds that Congress has failed to correct systemic errors, like the MLB antitrust exemption.[28] Congress, potentially the principal regulator of U.S. professional sports leagues, has either taken a hands-off approach or has implemented legislation that favors professional sports leagues due to the vast lobbying efforts made by the leagues.[29] One argument that this is problematic stems from the idea that Congress shall reasonably apply antitrust laws to large commercial organizations. [30] Beneficiaries of lobbying results like the MLB exemption are wealthy team owners and professional league executives, while the victims "such as scouts, umpires, and minor league players, are small in number

or politically unconnected.”[31] As such, reasonably regulating these organizations may not be possible from the perspective of Congress.

While government involvement through Congress has generally been limited, Congress has created federally chartered corporations to monitor two sports-related programs and adopted other acts regulating certain sports activities. Congress created the United States Olympic Committee (“USOC”) to aid and streamline the preparation for U.S. participation in the Olympic Games.[32] Congress also passed the Muhammed Ali Boxing Reform Act applicable to domestic professional boxing.[33] Additionally, Title IX of the Civil Rights Act is an example of Congress acting in promotion of sex equality in sports and education.[34] Congress also has passed the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act that aims to “prevent the sexual abuse of minors and amateur athletes by requiring the prompt reporting of sexual abuse to law enforcement authorities...”[35] The effect of such acts is that when private companies fail to uphold their obligations under the acts, the U.S. government must intervene. These three acts demonstrate not only the capacity, but also the constitutionality, of congressional regulating powers in the realm of sports.

Governmental bodies in the U.S. have imposed limited regulation on professional sports leagues. The judicial system has remained deferential to the conduct of the leagues, arguing instead that Congress is in the best position to regulate professional sports. Congress, despite enacting legislation with respect to other areas of sport, has declined to increase regulation of the named leagues. The leagues are structured and operated in a corporate-like fashion, where players are essentially employees and team owners are employers. The economic impact of U.S. professional sports leagues, as enterprises, renders them regulatable like any other large organization; thus, governmental reluctance to do so is idiosyncratic. The following section will provide an illustration of the way each league is structured.

C. Structure of the U.S. Sports Leagues

Each of the five professional leagues is structured and governed in accordance with their respective constitutions. Sadly, none of the five professional leagues include references to the protection of human rights. This silence contrasts with the tendency of many international sport

governing bodies (“SGB”) to include human rights commitments in their governing documents.

The Olympic Charter provides that “the practice of sport is a human right” and requires all National Olympic Committees (including the U.S. Olympic & Paralympic Committee) to ensure that no athlete “has been excluded for racial, religious, or political reasons or by reason of other forms of discrimination.”[36] The International Olympic Committee (“IOC”) adopted the Athletes’ Rights and Responsibilities Declaration (the Declaration) in October 2018.[37] The IOC includes in Article 1.4 of its Code of Ethics “respect for international conventions on protecting human rights insofar as they apply to the Olympic Games’ activities.”[38] The 2017 FIFA human rights policy expresses its commitment “to respecting human rights in accordance with the UN Guiding Principles on Business and Human Rights (UNGP)” and “embraces all internationally recognized human rights, including

those contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the International



“It’s human rights for everybody there is no difference” by Marc Nozell via Flickr licensed under CC BY 2.0

Labor Organization’s Declaration on Fundamental Principles and Rights at Work.”[39]

Many other SGBs have also incorporated human rights references to their documents such as the International Fencing Federation (FIE) (“respect for human rights”);[40] the International Golf Federation (IGF) (“respect for international conventions on protecting human rights” and “adherence to internationally agreed standards, including the UN Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work and the UN Guiding Principles on Business and Human Rights”)[41]; the Fédération Internationale de

Gymnastique (FIG) (the Federation “does not permit any violation of human rights”)[42]; the International Powerlifting Federation (“observing human rights principles”)[43]; the International Tennis Table Federation and the Fédération Internationale de Volleyball (FIVB) (“respect for international conventions on protecting human rights”)[44]; the Federation Internationale de l’Automobile (FIA) (“promote the protection of human rights”)[45] and Formula 1 (“respecting internationally recognized human rights in its operation globally”)[46].

With respect to the governing documents of the U.S. professional sports leagues, there are substantive variations amongst them, yet they all share a common model in terms of by whom and with what mechanisms they are governed. The following tables will show 1) the structure and power designations amongst stakeholders, 2) available remedies for internal disputes, and 3) alternative dispute mechanisms if any are available. The organization of the leagues requires many competing interests and operational objectives, and the general recommendations set forth at the end of this report will apply to these tables and where human rights-focused adjustments can be made. This section will provide an additional example, the so-called “European Model,” as a case study upon which a contrast can be made with the “U.S. Model.”

i. Who Are the “Stakeholders”?

Like any large corporation, professional sport leagues are comprised of many different actors, “stakeholders,” who wield varying levels of power and responsibilities[47]. The following tables lay out the structure of the leagues with respect to who the various stakeholders are and how their roles fit within the larger landscape of the league.

Figure 1-1: The Commissioner

| League | Title | Authority/Powers | Election Procedure |
|------------------------|---|--|--|
| <p>MLB [48]</p> | <p>Commissioner of Baseball: Derives power from CBA, league Constitution, and by-laws..</p> | <p>Constitution Article II, Section 2(f): The Commissioner has the authority “To make decisions...regarding on-field discipline, playing rule interpretations, game protests and any other matter within the responsibility of the League President...”</p> <p>Section 3: “When a player’s conduct or actions, are not in the “best interest” of baseball, the Commissioner has the ability to take several actions, including “temporary or permanent ineligibility of [that] player.”</p> <p>Article XII of the CBA: Power of the Commissioner to discipline a player whose conduct the Commissioner deems either “[M]aterially detrimental or materially prejudicial to the best interest of Baseball,” which includes conduct in violation of federal, state, or local law.</p> | <p>Election: Elected by a vote of the club team owners for a 5-year term subject to re-election.</p> <p>Removal: “At-will” employment where the Commissioner may be fired at any time by a vote of the club team principal owners with or without cause.</p> |
| <p>NFL[49]</p> | <p>Commissioner of the NBA: Derives power from CBA and Article VIII of the NFL Constitution.</p> | <p>Constitution Article VIII Section 8.3: “[T]ake or adopt appropriate legal action [which] he deems necessary and proper in the best interest of . . . the League or professional football, whenever any party . . . employed by . . . connected with the League or any member thereof is guilty of any conduct detrimental either to the League . . . or to professional football.”</p> <p>Section 8.4: “The Commissioner, on behalf of the League, may incur any expense which, in his sole discretion, is necessary to conduct and transact the ordinary business of the League...”</p> <p>CBA Article 46: “All disputes involving a fine or suspension imposed upon a player for conduct on the playing field . . . or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player [and within three days, the player] may appeal in writing to the Commissioner.”</p> | <p>Election: To become NFL Commissioner, a person first needs to be nominated by a search committee who screens possible candidates. Then, the nominee needs to receive an affirmative vote from either two-thirds of the League members or 18 League members, whichever is greater.</p> <p>Removal: “At-will” employment where the Commissioner may be fired at any time by a vote of the League members with or without cause.</p> |

| | | | |
|------------------------------|--|--|--|
| <p><u>NBA[50]</u></p> | <p>Commissioner of the NBA: Derives power from the CBA, league Constitution, and by-laws.</p> | <p>Constitution Article 24, Section (c): “The Commissioner shall have the responsibility for the general supervision and direction of all business and affairs of the League and shall have all such other powers as may be necessary or appropriate to fulfill this responsibility.” Section (e): “The Commissioner shall have the right to investigate all charges, accusations, or other matters that may adversely affect the Association or its Members”. Section (g): “The Commissioner, on behalf of the Association, may incur any expense which, in his discretion, is necessary to conduct and transact the business of the Association.” CBA Article 2(c): The Commissioner has the right to render any player contract null and void.</p> | <p>Election: Elected by the affirmative vote of three-fourths of members in the Board of Governors of the Association. Removal: The Commissioner’s term of office may be terminated by a vote of three-fourths (3/4) of the Governors at a meeting duly called for such purpose.</p> |
| <p><u>MLS[51]</u></p> | <p>Commissioner of the MLS: Derives power from CBA, league Constitution and by-laws.</p> | <p>Constitution Article 6.14, (A): “The Commissioner has the responsibility for the general supervision and direction of all business and affairs of MLS and all such other authority as may be necessary or appropriate to fulfill his responsibilities”. Constitution Article 6.14, (C): “Subject only to Section 3 below, the Commissioner has full and complete authority to discipline any Member (including all Team Operators), Owner, officer, director, manager, Governor, Alternate Governor, Team president, general manager, coach or other employee of any Team Operator or any employee of MLS, in the manner he determines to be in the best interests of the League.” CBA Article 20, Section (i): “The final adoption of the [team] rules is subject to approval by the Commissioner at his discretion.”</p> | <p>Election: Appointed by the MLS for an undetermined term. Removal: “At-will” employment where the Commissioner may be fired at any time by the MLS with or without cause.</p> |

| | | | |
|-----------------|--|---|---|
| <u>NHL</u> [52] | Commissioner of Hockey: Derives power from CBA, league Constitution and by-laws. | Constitution Article VI, section 6.1: Charges the Commissioner with “the responsibility for the general supervision and direction of all business and affairs of the League and shall have such other powers as may be necessary or appropriate...” Article 6.1(j)(3): States that “[i]n all cases, involving player discipline and/ or the integrity of the game of hockey . . . the Commissioner’s determinations under section (j), shall be final and not subject to any review.” | Election: Elected by Board of Governors and serves as the League’s CEO. Removal: “At-will” employment where the Commissioner may be fired at any time by a vote of the Board of Governors with or without cause. |
|-----------------|--|---|---|

When compared, leagues show several common trends. All leagues are headed by a commissioner that is appointed and removed by the collective team owners. There is no player or other stakeholder participation in the appointment and removal processes. Further, the commissioner has broad discretionary power in the operational and punitive decisions regarding the leagues. Finally, the only check of commissioner powers is the collective of team owners, to whom the commissioners report and take instructions from.

Figure 1-2: Team Ownership Bodies

| League | Ownership Body | Role of Ownership Body |
|------------|---|---|
| <u>MLB</u> | Club Team Principal Owners: Group of 30 owners for each team. | The owner is the head of the organization, they have final authority on the hiring of all positions, and approve the main players signed (or traded) to their organization. Owners also are responsible for setting the tone or vision of their franchise. |
| <u>NFL</u> | Member of the League: Membership is limited to 32 member clubs that are any entity organized for purpose of operating a professional football club. | The owner is contractually obligated to the league to operate the franchise in a manner consistent with the league constitution, rules, by-laws, and commissioner policy. The owner is also the CEO of each individual club and is financially responsible for fulfilling all the club’s fiscal obligations. [53] |
| <u>NBA</u> | Members of the Association: The Association is organized to operate a league consisting of professional basketball teams, each of which shall be operated by a Member of the Association. | The owner is contractually obligated to the league to operate the franchise in a manner consistent with the league constitution, rules, by-laws, and commissioner policy. The Owner is also the CEO of each individual club and is financially responsible for fulfilling all the club’s fiscal obligations. [54] |

| | | |
|------------|---|---|
| MLS | Club Team Principal Owner: Major League Soccer operates under a single-entity structure in which teams and player contracts are centrally owned by the league. Each team has an investor-operator that is a shareholder in the league. | The MLS controls the revenues and expenses of the league and its teams, with all revenue generated by the league belonging directly to the MLS. The MLS will then distribute profits (or losses) to its investors/team “owners” who also have a right to operate a single team subject to the MLS LLC Agreement. [55] |
| NHL | Member Club Owners: Every person, including but not limited to, individuals, corporations, associations, and trusts, that directly or indirectly owns of record or beneficially an ownership interest in, or has effective control over, a Member Club. | The Member Clubs have the exclusive control of the playing of hockey games within its home territory and contractually agree to maintain and operate a hockey team for the purpose of engaging annually in a regular schedule of championship and playoff games with other Member Clubs. [56] |

In sum, with respect to team ownership, the leagues operate on a closed-association model where the team owners are bound by contractual relations with the leagues. With respect to each individual franchise, the team owners have final decision-making powers with respect to operations in their teams. Finally, there is no athlete or other stakeholder participation in the decision-making process inherent in the governing bodies.

Figure 1-3: Player Associations [57]

| Association | Members | Structure | Decision-Making |
|---|--|--|---|
| The Major League Baseball Players Association (“MLBPA”): The MLBPA assists players with grievances and salary arbitration and assures playing conditions for all games involving Major League players meet proper safety guidelines. The MLBPA also serves as a group licensing agent on behalf of all players as well as the representative in negotiations of the CBA. | The MLBPA is the union that represents players on the 40-man rosters of the 30 Major League Baseball teams and oversees MLB Players, Inc. All players, managers, coaches, and athletic trainers who hold or have held a signed contract with a Major League club are eligible for membership in the Association. | The MLBPA has three major divisions: a labor union, a business (Players Choice Group Licensing Program), and a charitable foundation (Major League Baseball Players Trust). The MLBPA is led by a President and an Executive Director. | The Association negotiates the terms and conditions of employment for Players under contract with Major League Clubs and defends their existing rights under the terms as set forth in the Basic Agreement (the collective bargaining agreement). The Association works closely with the union’s Executive Board of Player representatives as well as the agents it certifies to represent MLB Players. |

| | | | |
|---|--|--|--|
| <p>The National Football League Players Association (“NFLPA”): A means of providing the players with formal representation in garnering their rights through negotiations of the CBA and representing the players in judicial disputes involving the NFL.</p> | <p>The NFLPA represents 1) all professional football players employed by a member club, 2) all professional players who have previously been employed by a member or who are seeking employment with a club, 3) all rookie players once they are selected in the draft, and 4) all undrafted rookie player once they commence negotiation with a club.</p> | <p>The NFLPA works from the bottom-up. All power and authority to do anything in the NFLPA comes from the Board of Reps who are elected by the player members. Player Members on each NFL team elect both a Player Representative and an Alternate Player Representative to serve on the Board of Player Representatives (The Board of Player Reps).</p> | <p>The Board of Player Reps meets at least once a year and makes all the important decisions for the organization. The NFLPA then uses these decisions to conduct labor negotiations with the NFL.</p> |
| <p>The National Basketball Players Association (“NBPA”): One of its key roles of the NBPA is to negotiate the CBA with the NBA and arbitrate with the Association if parties could not reach an agreement regarding a provision of the CBA. The NBPA also represents players in disciplinary action proceedings and often seeks to reduce penalties imposed by the Commissioner.</p> | <p>The NBPA represents all current NBA players.</p> | <p>The Executive Committee is comprised of nine members: President, First Vice-President, Secretary-Treasurer and six additional Vice-Presidents. The Board of Player Representative, the governing body, is comprised of one player representative from every team. At the beginning of each season, players from each team elect a single player representative along with an alternate to serve on the Board for that season.</p> | <p>The Executive Committee (“EC”) works with the Board of Player’s representatives at scheduled meetings. The EC reviews and votes on all matters requiring player approval at these meetings. Each Player Representative is entrusted to speak on behalf of teammates and report back any relevant information from meetings. The NBPA as a collective then drafts and negotiates the CBA with the NBA every 6 years.</p> |

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| <p>The Major League Soccer Players Association (“MLSPA”): The MLS recognizes the Union as the exclusive bargaining representative all present and future players employed as such in the League, but not including any other MLS employees. MLS and the Union agree that such players may, acting individually or through a player-agent, on an individual basis, bargain with MLS with respect to and agree upon terms over and above the minimum requirements established by the CBA, to the extent not consistent with the CBA.</p> | <p>The MLSPA represents any soccer player who is signatory to any Standard Player Agreement.</p> | <p>The players on each team vote by secret ballot to elect a Player Representative, and those Player Representatives elect a seven-player Executive Board. The Executive Board governs the MLSPA and makes all major decisions. The Executive Board also hires the MLSPA’s Executive Director, who runs the day-to-day operations of the MLSPA, and its General Counsel, who provides legal advice to the MLSPA.</p> | <p>Players jointly discuss and decide their collective priorities, then elect a group of players from each team (the Bargaining Committee) to represent them in bargaining sessions with the league. The Bargaining Committee makes all the decisions on behalf of the players regarding the development and exchanging of proposals. Once a tentative agreement is reached, all players vote to accept or reject the terms reached by the Bargaining Committee members and the league. If the players vote to accept the terms, the contract is then ratified and legally binds both the players and the league to the terms of the deal.</p> |
| <p>The National Hockey League Players’ Association (“NHLPA”): Works to negotiate fair terms and conditions of the players’ employment, to assist with grievances, discipline, and salary arbitration, to improve working conditions as well as create safety initiatives.</p> | <p>The NHLPA is for any current professional hockey players who are under Standard Player Contracts to any NHL member club.</p> | <p>The Executive Board of the NHLPA is comprised of 32 Club Player Representatives, one from each team. It also consists of an Alternate Club Player Representative from each team. The Executive Director, who is responsible for managing the NHLPA’s daily affairs, is a non-voting member of the Executive Board.</p> | <p>The NHLPA works to negotiate fair terms and conditions of employment and assists players with grievances and salary arbitration. The NHLPA also operates a group licensing program on behalf of the players and is responsible for managing the player agents’ certification program. The Executive Board relays player issues and terms through the CBA negotiation process every 6 years.</p> |

With respect to player associations, in short, professional players are unionized and engage in collective negotiation with the professional leagues on terms of the collective bargaining agreements. These associations also play an important role in representing players in the

context of arbitration. However, there are some limitations to the role of players associations. Eligibility of membership is generally limited, where it is usually available only to players currently under contract, excluding retired players and those playing in minor or development leagues and on associated academies in the U.S. and abroad. Further, there is potential for conflict of interests if two or more players are on opposing sides of an arbitration proceeding. While players associations afford important protections to individual players, in certain cases they are less powerful vis à vis league governing bodies.

ii. Collective Bargaining Agreements

Collective bargaining agreements are contracts made between any professional league and applicable player association that define labor conditions and create a contractual relationship between the players, club teams, and league.[58] The agreement covers a variety of topics including, but not limited to, the following areas: commissioner discipline, club discipline, injury grievances, non-injury grievances, the uniform player contract, drafts, option clauses, waivers, salary information, medical rights, retirement, insurance, and the duration of the CBA.[59] Within the CBAs are the substantive provisions concerning individual rights and league operations, of which the most pertinent to this report are set forth below:

Figure 2-1: CBA Fundamentals

| League | Renegotiation Term (years) | Free Agency | No Strike/ Lockout | Media Rights |
|-----------------|-----------------------------------|--------------------|---------------------------|--|
| MLB [60] | 5 | After 6 years. | | Prohibited posts include those containing profanity or discriminatory language. Also prohibited are posts endorsing, promoting, or sponsoring a commercial product or that includes logos. |

| | | | | |
|-----------------|----|---|---|---|
| <u>NFL [61]</u> | 10 | <p>Unrestricted Free Agency: Any player with four or more accrued seasons shall become an unrestricted free agent at the end of his contract. [62]</p> <p>Restricted Free Agency: Any player with three accrued seasons, but less than four, shall become a restricted free agent at the end of his contract.</p> | <p>Neither the NFLPA nor any of its members will engage in any strike, work stoppage, or other concerted action interfering with the operations of the NFL or any Club for the duration of this Agreement. Any claim that a party has violated this Section 1 will not be subject to the grievance procedure or the arbitration provisions of this Agreement and the party will have the right to submit such claim directly to the courts.</p> | <p>The NFLPA and the Management Council agree that each will use reasonable efforts to curtail public comments by Club personnel or players which express criticism of any club, its coach, or its operation and policy, or which tend to cast discredit upon a Club, a player, or any other person involved in the operation of a Club, the NFL, the Management Council, or the NFLPA.</p> |
| <u>NBA [63]</u> | 8 | <p>A Qualifying Veteran Free Agent is one that becomes a free agent following the second Option Year of his Rookie Scale Contract.</p> | None. | None. |
| <u>MLS [64]</u> | 5 | <p>Free Agency is available for option decline Players who will be at least twenty-eight years old in the year in which the immediately preceding League Season concluded and have at least eight MLS Service Years.</p> | <p>Neither the Union nor any Player shall authorize, encourage, or engage in any strike, work stoppage, slowdown or other individual or concerted interference with the activities of the League during the term of the CBA.</p> | <p>Power within the Teams to create and discipline regarding media rules.</p> |

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|----------|---|--|---|-------|
| NHL [65] | 6 | <p>Unrestricted Free Agents: Group 3 after 7 accrued seasons and age of 27 or older, Group 5 after ten seasons and did not earn more than average league salary in his final year, Group 6 if 25 or older and has completed three or more professional seasons.</p> <p>Restricted Free agency: (1) 18-21 with 3 years of professional experience, (2) 22-23 with 2 years of professional experience, or (3) 24 and older with 1 year of professional experience.</p> | Neither the NHLPA nor any Player shall authorize, encourage, or engage in any strike, work stoppage, slowdown, or other concerted interference with the activities of any Club or of the League during the term of the CBA. | None. |
|----------|---|--|---|-------|

Overall, collective bargaining processes have developed into an important tool to protect the welfare and rights of players due to their inherent value of collective negotiation. These agreements play a substantial role in shaping how a given league operates because they are a core authority of a league that is negotiated between players and their agents, team owners, and the league’s executive management.[66] In other words, collective bargaining gives players “a seat at the table” via negotiation powers as a collective.

Figure 2-2: Rights Related Provisions

| League | Anti-Hazing/ Bullying | Domestic/Sexual Abuse | Discrimination |
|-----------------|--|--|---|
| <u>MLB</u> [67] | Prohibits, “bullying” and/or “[d]meaning comments about someone’s race, gender, color, religion, national origin, or sexual orientation, including offensive names or phrases, or jokes about someone’s conformity with gender-norms.” | The Commissioner’s Office provides the Players Association with written notification that it is investigating an allegation that a player has engaged in, domestic violence, sexual assault, or child abuse otherwise known as a Covered Act under this policy. Under the Basic Agreement, the Commissioner may immediately place a Player accused of a Covered Act on Administrative Leave, for up to seven days. Alternatively, the Commissioner’s Office may defer placing the Player on Administrative Leave until the Player is either charged with a crime by law enforcement, or the Commissioner’s Office receives credible information corroborating the allegations. | The Clubs will not interfere with, restrain or coerce Players because of membership in or lawful activity on behalf of the Association, nor will they discriminate because of Association activity in regard to hire, tenure, or employment, or any term or condition of employment. Players covered by this Agreement without regard to race, color, religion, national origin, sexual orientation, or any other classification protected under Federal Law. |
| <u>NFL</u> [68] | None. | None. | This article provides that players should not be discriminated against by the NFL, management, teams, or the union on the basis of race, religion, national origin, sexual orientation, or relation with the union. |

| | | | |
|------------------------|-------|--|--|
| <u>NBA</u> [69] | None. | Acts that constitute domestic violence, sexual assault, and child abuse are prohibited at all times and regardless of where they occur. Parties shall jointly select a service provider to support a 24-hour, confidential hotline that can be used by players, their families, and other victims of domestic violence, sexual assault, and child abuse as defined by this Policy to seek assistance and referrals (the “Service Provider”). | Neither the NBA, any Team nor the Players Association shall discriminate in the interpretation or application of this Agreement against or in favor of any Player because of religion, race, national origin, sexual orientation or activity or lack of activity on behalf of the Players Association. |
| <u>MLS</u> [70] | None. | None. | This CBA shall be applied to all Players without discrimination on the basis of religion, race, color, national origin, sex, sexual orientation, age, disability, marital status, or, except as provided in Article 4, membership or non-membership in or support of or non-support of any labor organization. |
| <u>NHL</u> [71] | None. | None. | The CBA shall be applied to all Players without discrimination on the basis of religion, race, color, national origin, sex, sexual orientation, age, disability, marital status, or, except as provided in Article 4, membership or non-membership in or support of or non-support of any labor organization. |

Taking these substantive provisions together, there are some protections afforded to players, their families, and other possible third parties. However, there are disparities in protections amongst the leagues. Additionally, there are no general human rights protections nor human rights-based language expressed in these provisions apart from anti-discrimination clauses. None of the leagues make references to the UNGP. Even the grounds for protections against discrimination are different amongst the leagues and do not cover all the grounds recognized by international human rights law. In sum, there is an absence of human

rights-compliant protections even in the most relevant provisions.

Figure 2-3: Rights Related Provisions (cont.)

| League | Health Rights | Termination Pay | Disability Rights |
|-----------------|--|--|---|
| MLB [72] | The Players Association may file and pursue through arbitration, a grievance concerning safety and health. The Parties will attempt to avoid grievances on this subject by making every reasonable effort to utilize the Safety and Health Advisory Committee. | Off-Season: Entitled to receive termination pay from the Club in an amount equal to thirty days' payment at the rate of the contract. In-Season: Entitled to receive termination pay from the Club in an amount equal to the unpaid balance of the full salary stipulated his contract for that season. | Disabled List: Players who are injured and not able to play may not be assigned to a Minor League club. Injury Pay: If a Player's Contract is terminated by a Club by reason of the Player's failure to render his services due to a disability resulting directly from injury sustained in the course and within the scope of his employment, he is entitled to receive from the Club the unpaid balance of the full salary for the year in which the injury was sustained. |
| NFL [73] | A player may submit a complaint to the Accountability and Care Committee regarding Club medical care. The complaint shall be referred to the NFLPA, the League and the player's Club, which together shall determine an appropriate response or corrective action if found to be reasonable. | Termination Pay Eligibility: A player is released after his Club's first regular season game and he has made the Active/Inactive List of his Club. He is entitled to any unpaid balance of his salary for that year without any salary earned as a salary guarantee from the terminating Club. | Disabled List: Physically Unable to Perform list ("PUP") Injury Pay: Any player placed on a PUP will be paid his full Paragraph 5 Salary while on such list. His contract will not be tolled for the period he is on PUP. |
| NBA [74] | Players shall submit to reasonable screening and baseline testing (e.g. Pursuant to NBA cardiac and concussion protocols) There is no clause within the health-related provisions that allow a player to challenge a medical determination or recommendation. | If a team decides to terminate a player's contract because they are not good enough and the contract includes Compensation Protection for lack of skill, then the player (with limited exceptions) will still be paid his protected Base Compensation. | Disability Eligibility: To be a "Disabled Player" is one who, as a result of a Disabling Injury or Illness, is unable to render playing services. Compensation: 80% of that season's salary is protected for injury or illness. |

| | | | |
|------------------------|--|--|---|
| <p>MLS [75]</p> | <p>Each Team shall provide its Players with high quality health care that is reasonably appropriate to their needs as elite professional soccer players, including access to health care professionals, in accordance with the requirements set forth in the CBA. If the Player wishes to contest the determination of the League/Team physician, he must be examined by his own physician within seven (7) days of receiving the determination of the League/Team physician or later upon a showing of extraordinary circumstances.</p> | <p>A Player with a Semi-Guaranteed Standard Player Agreement (“SPA”) who is terminated prior to the Contract Guarantee Date shall be paid termination pay of six (6) weeks of his base salary.</p> | <p>Injury Determination: The initial determination of Fitness shall be made by a physician of the League or the Player’s Team. Injury Guarantee: Subject to other provisions of this CBA, if the League or Team’s physician determines that a Player is not Fit due to an injury sustained during the course of his employment as an MLS Player under a current, valid SPA, MLS shall continue to pay the Player the compensation set forth in his SPA.</p> |
| <p>NHL [76]</p> | <p>Each Club shall provide its Players with high quality health care appropriate to their needs as elite professional hockey players, including access to health care professionals. Any disputes concerning compliance with Section 34.1 shall be referred exclusively to the NHL/NHLPA Joint Health and Safety (“Joint H & S”) Committee for discussion and potential resolution, and not to the Impartial Arbitrator.</p> | <p>A team who wants to terminate the contract of a player must pay the remaining amount owed to the player and incur a penalty from the league limiting the amount the team can spend in future years under the league’s salary cap.</p> | <p>Injured Reserve List: A Club may place a Player on the Injured Reserve List only if such Player is reasonably expected to be injured, ill or disabled and unable to perform his duties as a hockey Player for a minimum of seven (7) days from the onset of such injury, illness or disability. Players receive their full salary while on Injured Reserve List.</p> |

Taking these additional provisions, there are some important protections with respect to health and physical integrity. This is especially valuable due to the important role physical health plays in an athlete’s ability to fulfill his employment. However, these protections are further limited in that they do not uniformly cover protection for long-term health or disability problems. Because a player’s career is dependent on his physical state, there should be greater protections and prevention against

serious injury. Additionally, the physical health provisions are recognized not as a player’s human right, but just as a contractual obligation.

iii. The U.S. and European Models: Professional Sports Governance

The value of and attitude towards professional sports leagues is materially varied across continents, yet the importance placed on individual players’ autonomy and human rights is a globally recognized qualification. In the following table, a comparison between the U.S. and the so-called “European Model” highlights the difference in cultural, social, economic, and political approaches to professional sports governance:

Figure 3-1: Differences of Structures

| Category of Difference | U.S. Leagues | European Model |
|-------------------------------|---|--|
| Member Clubs | Most are privately owned. | Most are member associations or residual claimants. |
| Competition Rules | Closed Franchise system under one participating league. | Open competition under multi-league competition with promotion and relegation. |
| Player Market | Draft with teams with worse records given priority and collective bargaining. | Free player market with individual bargaining. |
| Revenue Sharing | Balanced sharing of TV rights and admissions in franchise system. | Negotiated sharing of TV rights and institutional sharing of match day revenues. |
| Salary Cap | Yes. | No (salary negotiation). |
| Main Incentive | Profit maximization. | Win maximization. |
| Regulatory Authority | League. | National league and/or national federation, regional, and international federations. |
| Enforcer | Powerful Commissioner. | Disciplinary Bodies. |

As evidenced in the table, there is a stark difference in the structure of the sports governance for leagues between the European and the U.S. models. This is largely due to the main objective being “win maximization” rather than “profit maximization.” By setting the highest goal as winning

games, rather than *money*, the European model takes a more collaborative approach in operations, where the individual players are treated as talented individuals rather than potential profit earners. On the other hand, in the U.S., the combination of private owners, closed leagues, and profit interests creates an incentive to treat athletes as profit earners rather than individual talent. The overall well-being of players is important, but largely to the extent their well-being generates profit.

Compensation for athletes in the U.S. are further different than those in the European model insofar that it is dependent on the collective power of league players. Under the U.S. model, the players are essentially owned by the league with contracts that are the result of collective bargaining. Because of the profit-maximization model, U.S. players are seen not as individual assets, but as a collective workforce. Inherent in this is the need for union representation and collective negotiation. Without the collective bargaining process, individual players would lack bargaining power and be left without protective provisions in their contracts. In Europe, the leagues are largely not unionized, and collective bargaining is subordinate to individual negotiation. For example, the FA Premier League in the United Kingdom gives players greater freedom in the negotiation of their individual contracts as long as they are within the terms of the League's established standards.[77] This greater emphasis on individual players lessens the importance of collective strength in calculating compensation and creates great disparities among players' earnings.

Further, the contractual nature of domestic professional sports differs from that of the European model in terms of regulation. Under the U.S. model, traditional contract law requires that the relationship is governed by the terms of the CBA and salary cap. This lends leagues more power compared to team owners, where franchises can be ousted without respect to their overall record. The CBA and players' associations are key in securing more negotiating power to U.S. professional athletes. In Europe, there are more established federations that regulate contractual relationships. The regulation of sports employment relationships is essentially left to the federations controlling the particular sport. The Council of Europe has further noted that, "the regulatory oversight of sport must focus on the promotion of sport...as a means of improving quality of life." [78]

PART III: HUMAN RIGHTS IN RELATION TO SPORTS

A. The United States is Bound by International Human Rights Law

As party to several human rights instruments, the U.S., as well as non-State actors within the U.S.'s jurisdiction, are obliged to conform to international human rights law. Human Rights involve the universally recognized right to be treated with dignity.[79] Human rights are recognized in treaties and norms within the international context and are applicable in all sections of society in the national context, including professional sports.[80] This includes recognizing that fundamental rights are absolute and cannot be bargained away.[81] This idea is reflected in the legal standard provided by the Universal Declaration of Human Rights (“UDHR”) adopted by the UN General Assembly in 1948.[82]

As a common standard of achievement for every person and State, the UN sets out several general principles.[83] The principle of universality entails that human beings are all equally entitled to human rights.[84] Equality is also ensured by the principle of non-discrimination.[85] The principle of inalienability emphasizes that human rights cannot be taken away except in specific situations. Further, the UDHR encompasses the principle that human rights are indivisible; they are considered equally important and not subject to any hierarchy. Principles of interdependence and interrelation further affirm that all human rights contribute to the realization of our dignity and development as human beings. Therefore, the fulfillment of one right often depends, wholly or in part, upon another. The principles of participation and inclusion, moreover, include that everyone has the right both to participate in and to gain information about the decision-making processes that affect their lives.[86]

As a legal obligation, the U.S. is bound by several human rights instruments to ensure, protect, and respect human rights. By ratifying the International Covenant on Civil and Political Rights (“ICCPR”), the Convention against Torture (“CAT”), and the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), the U.S.

has bound itself to international human rights law.[87] The ICCPR is the key international human rights treaty that is considered, together with the UDHR, part of International Bill of Human Rights. Finally, the American Declaration on the Rights and Duties of the Man (“ADRDM”) further binds the U.S. to the human rights framework that mandates it to “[...] refrain from supporting, tolerating, or acquiescing in acts or omissions that contravene their human rights commitments.”[88]

The ICCPR obligates parties to the treaty to protect and preserve basic human rights such as the right to life and human dignity, equality before the law, and the right to a fair trial.[89] The Covenant further compels a State to establish legislative and judicial measures in order to protect the rights enumerated in the treaty, as well as to provide an effective remedy.[90] Upon ratification of the ICCPR in 1992, the treaty, like other ratified treaties, became the “supreme law of the land” under the Supremacy Clause of the U.S. Constitution, which gives treaties the status of federal law.[91] The U.S. must comply with and enforce the provisions of a ratified treaty as if it were federal law.[92]

Fundamental human rights are not only an ideal, but an obligation. This legal obligation stems from various international human rights instruments, such as the ICCPR, the UDHR, and the ADRDM, to which the U.S. is a party. Further, the Supremacy Clause extends the U.S.’s obligations to conform to international human rights law in the domestic context.

B. Non-State Actors Should Respect and Guarantee Internationally Recognized Human Rights

While the U.S. itself is undoubtedly bound to the provisions of various human rights instruments, the same instruments also impose duties to secure those rights on private actors and enterprises. The Inter-American Commission on Human Rights has indicated that the U.S. is required to not only respect the rights within them, but also to ensure that individuals within its jurisdiction are able to effectively exercise those rights.[93] Under this legal regime, the U.S. has a double responsibility: a duty to respect individual rights and a duty to guarantee the enjoyment of those rights.[94] The latter, in other words, signifies that the U.S. has a duty to guarantee



Photo taken at NBA Summer League game in Las Vegas, Nevada is in the Public Domain

that the rights recognized in international human rights instruments are protected not only from State action, but also from private and non-State actors.

Human rights jurisprudence refers to the due diligence standard used to analyze a State's compliance with its human rights obligations with respect to private actors, including when a State is obligated to prevent and respond to the acts or omissions of private actors.[95] There are three relevant principles to the application of the due diligence standard. First, a State may incur responsibility for failing to act with due diligence to prevent, investigate or sanction violations committed by private actors. [96] Both the UN and the Inter-American Commission recommend that States should act as regulatory bodies that monitor the behavior of business enterprises. Second, States must adopt the required measures to modify patterns of conduct in public and private contexts to eliminate continued violations.[97] Government involvement can take various forms: direct or indirect government funding, judicial oversight of enterprises, direct regulation through legislative activity, or direct regulation through initiatives implemented by the executive branch.[98] Third, due diligence obliges States to guarantee access to adequate and effective remedies for

victims of violations.[99] These due diligence principles can be used to interpret the scope of the State's legal obligations under various human rights instruments in the private context.

The UNGP is the main instrument that clarifies duties on private actors. The UNGP is a framework that assigns responsibility to States and the businesses functioning within them to prevent and address human rights abuses related to commercial enterprises.[100] The UNGP is founded on a state's obligation to respect, protect, and fulfill fundamental human rights. The UNGP is two-fold: it lists obligations applicable to a State and duties applicable to non-State enterprises, as they are business enterprises. The States' duty focuses on enforcing human rights laws and ensuring that business enterprises respect human rights.

On the other hand, the UNGP states that, "business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved." [101] The duty to respect is a "baseline expectation for all companies" regardless of location, size, or industry.[102] Furthermore, the U.S. endorses the UNGP and encourages all businesses to see it as "a 'floor' rather than a 'ceiling'" for respecting human rights.[103] This duty to respect is entirely independent from the State, and, even if the State is contributing to a substantive human rights violation itself, any given enterprise is still bound to respect, protect, and fulfill human rights.

This nexus between the State and the actions and omissions of its private actors has been validated by international judicial bodies. The European Court of Human Rights ("ECtHR"), for example, has determined that the State can be indirectly responsible for the results and effects of sports arbitration.[104] In *Mutu and Pechstein v. Switzerland*, the European Court specifically denoted that, "...the acquiescence...of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention." [105]

The European Court further affirmed its views on State responsibility for actions of private enterprises in *Ali Riza v. Turkey*. In *Ali Riza*, the European Court expressed that the special features of dispute resolution mechanisms used in the Turkish Football Federation ("TFF"), and the fact that they were used in the context of a business enterprise, did not preclude the application of a European Convention to attach State

responsibility.[106] *Mutu* and *Ali Riza* together demonstrate that a State and a private enterprise are required to guarantee human rights.

C. U.S. Professional Sports Leagues are Bound by Human Rights Law

As private business enterprises, U.S. professional sports leagues are obliged to respect and guarantee human rights. Human rights abuses can and have occurred within the context of sport and such abuses constitute breaches of the duty to respect and guarantee human rights under the UNGP. Inherent in the relationship between sports and human rights is the wide context of ways in which violations can occur. At the crudest but most reported level, uses of slurs and hate speech can be used by and/or against players, coaches, referees or members of the public. Human rights violations in sports manifest themselves in other ways, including violations of players' bodily autonomy, right to due process, and privacy.

Adverse human rights impacts know no boundaries; they do not vanish when the timer runs out, nor do they stay in-bounds. A contractual obligation from their stakeholders gives sports leagues the means to exercise responsibility of players and other employees regardless of location.[107] Further, these leagues have the financial and operational means to create and execute comprehensive policies with potential positive or negative impacts on rights. Individual autonomy, for example, is limited for the benefit of a player's right to health and safety when a league mandates helmet use. In contrast, where a league player is required to play through an injury, his personal integrity and right to health are sacrificed for the franchise's benefit. An illustration of this is seen with Tom Sestito of the NHL, who reportedly overused painkillers and insomnia medication provided by the NHL to power through pain during matches.[108] The operational decisions of leagues committed to furthering their best interest is within their right but cannot be used at the expense of the human rights of athletes. With this operational power comes the possibility of human rights violations, and without appropriate oversight mechanisms, human rights abuses that occur within this closed system can be left without remedy.

The UNGP provide a framework for enterprise governance in accord with substantive human rights obligations, namely the "Corporate

Responsibility to Respect.”[109] Further, the UNGP specifies the role and responsibilities of businesses, including sports organizations, in ensuring that their operations meet a minimum standard of behavior.[110] The UNGP identifies three components to respect human rights. “First, companies must institute a policy commitment to meet the responsibility to respect human rights. Second, they must undertake ongoing human rights due diligence to identify, prevent, mitigate and account for their human rights impacts. Finally, they must have processes in place to enable remediation for any adverse human rights impacts they cause or contribute to.”[111]

Sadly, U.S. professional sports leagues have failed so far to adopt such policy commitments. Using the notion of human rights due diligence in the context of enterprises, the UNGP explains that companies should include assessments of internal procedures and systems and external communications with potential victims affected by its operations.[112] No league has such procedures or systems in place. Companies should then incorporate the findings of their due diligence and verify this by constantly monitoring and evaluating their efforts.[113] Leagues have not communicated any results of their assessments of their potential negative human rights impacts. Companies should communicate how they address human rights impacts.[114] Finally, companies must provide genuine remedies for human rights violations, the criteria for which will be explained in the proceeding section.

Implementing a human rights framework is a mutually beneficial process. While potential and actual victims of violations are the focus, enterprises provide safeguards through this process. Beyond the legal repercussions under the UNGP,

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[human]
rights is a
responsibility
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seriously not
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imperative, but
because it is
beneficial for
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stakeholders,
and overall
brand.”**

companies who cause, contribute to, or are complicit in human rights violations are faced with reputational damage. The U.S. report on the UNGP warns against this: “Respecting [human] rights is a responsibility companies must take seriously not just as a moral imperative, but because it is beneficial for the company’s shareholders, stakeholders, and overall brand.”[115] Professional leagues and the franchises within them run a high risk of public backlash in the instance of overt human rights abuses. Moreover, because the business model of these leagues is largely dependent on fan and advertising-related income, the reputational risk is even greater to overall profits. This can be seen with the boycott of some NFL fans due to Colin Kaepernick’s long unemployment term.[116] In considering the use of human rights due diligence, private enterprises involved in human rights impact should also weigh the risk of reputational



Photo of Colin Kaepernick by Adam Fagan via Flickr licensed under CC BY-NC-SA 2.0

harm. The use of a human rights-based approach not only guards from public backlash, but also from serious economic harm.

Using such a risk-benefit analysis, other sports governing bodies and sport organizations have already adopted human rights policies. For example, Adidas has published its own “Labor Rights

Charter” as well as the “Corporate Human Rights Benchmark” used to monitor and manage human rights across operations.[117] Moreover, Adidas’ most recent development has been the establishment of a third-party complaints mechanism to mitigate harm done to external actors. [118] Domestically, Nike and Wilson, have established protocols with respect to forced labor and ethical procurement standards.[119] Wilson specifically established the Amer Sports Ethical Policy that sets out the social and environmental standards for its supply chain across all

subsidiaries.[120] What is more, the policy names specific internationally recognized standards, such as the International Labor Organization and the UDHR.[121] Finally, Sportradar released the Comprehensive Code of Conduct for its suppliers that define its goals of social sustainability and ethical business.[122] Like Wilson, Sportradar also uses the UDHR as the guiding standards for the Code.[123] These examples show not only the possibility of embedding a human rights framework into operations, but actual evidence that sports-related corporations are actually engaging in such decision-making.

Under the UNGP, private enterprises have a duty to respect individual human rights and provide spaces for human rights promotion. Due diligence requires private enterprises to provide institutional spaces where open dialogue involves the timely sharing of the relevant information stakeholders need to make informed decisions. Human rights obligations require using feedback to alter operations in compliance with international human rights law. Finally, human rights law demands that those who suffer a violation have access to an effective remedy.

D. Principles on Remedies for Human Rights Violations in Sports

States have an obligation to protect interests safeguarded by international human rights. Corporations like the professional sports leagues are also obliged to protect these interests. The most basic way to achieve this is to provide remedial measures.[124] Art. 2.3 of the ICCPR provides that States shall ensure that “any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy” and “shall enforce such remedies when granted.” The UNGP further affirm that the “State duty to protect rights include ensuring that when human rights are violated by companies within their territory and/or jurisdiction, the State must ensure access to an effective remedy for those affected.”[125] States cannot effectively protect human rights if they fail to restore the human rights violated and compensate damages resulting from such violations.[126]

Enterprises also have a duty to provide access to an effective

remedy. The UNGP further expand the reach of this obligation to private companies, including sports-related ones. They are bound to “... provide for ... effective mechanisms for fielding and addressing grievances from individuals ... who may be adversely impacted by the company’s operations.”[127] Furthermore, the UNGP maintain that establishing a remedy involves a process of multi-stakeholder initiatives and that it must be based on human-rights related standards. In other words, both the State and enterprises within its jurisdiction not only must make available such remedy, but the substantive mechanisms used in a remedy must comply with the standards outlined in the UNGP.

The UNGP outline seven factors to evaluate whether an available remedy is effective: (1) legitimate; (2) accessible; (3) predictable; (4) equitable; (5) transparent; (6) rights-compatible; and (7) a source of continued learning.[128] For a remedy to be effective, the UN has noted that a remedy solely based on financial compensation is problematic. [129] Under the UNGP, the UN argues that there should be “greater consideration of more transformative outcomes.”[130] This requires not only redressing specific adverse human rights violations, but also a holistic assessment of their root causes in order to incite more meaningful changes.[131] For example, the UN commentary to the UNGP suggests that regular analysis of the frequency, patterns, and causes of grievances by an administrative body should be established and recommendations should be continually made.[132] The Interpretive Guide further asserts that in some circumstances, it may be most appropriate for remediation to be provided by an independent entity.[133] For example, if a suit is filed or another governmental proceeding is occurring, it may be more appropriate for professional sports leagues to defer to that process rather than pursue arbitration or direct mediation.[134]

To further explain what a “remedy” is, the UN has provided a non-exhaustive list denoting types of remedies to be available.[135] The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“Basic Principles”), a United Nations Resolution, provides further guidance. It states that the victims’ right to a remedy for human rights violations includes three parts: 1) access to justice, 2) reparation to harm suffered, and 3) access to relevant information concerning violations as well as any reparation mechanism.[136] Furthermore, the remedy should be available for both

State and non-state actions, or omissions, and must *guarantee due process*.^[137]

First, victims must have equal and effective access to justice. States should therefore strive to minimize the costs for victims and their representatives to seek remedies through judicial proceedings. For instance, States should disseminate information about all available remedies and provide proper assistance to victims seeking access to justice.^[138] Multiple human rights bodies have suggested that States must guarantee the victims' access to legal aid when justice requires.^[139] States should also take measures to ensure the victims' safety from unlawful interference with their privacy, intimidation, and retaliation before, during, and after any legal proceeding.^[140]

Second, victims must have adequate, effective, and prompt reparation for harm suffered. Such reparation should be proportional to the gravity of the violations and the harm suffered.^[141] With respect to adequacy, the test is strongly influenced by the state's duty to protect and the notion of compensatory justice: the victim should *actually* receive redress that replaces what was lost.^[142] Adequate remedies necessitate timeliness to reflect the fast-paced nature of the pertinent industries like sports.^[143] The domestic legal systems must also have effective mechanisms for the victims to enforce their judgments when liable parties resist their obligations.^[144]

The Basic Principles further outline five different types of remedies: 1) restitution, 2) compensation, 3) rehabilitation, 4) satisfaction, and 5) guarantees of non-repetition. Each of them has different objectives.^[145] First, restitution should restore the victims to their position before the violations occurred. In other words, it aims to make a person whole again.^[146] Second, compensation should be provided for any economically assessable damages arising out of human rights abuses. The damages may include physical or mental harm, as well as consequential losses like lost opportunities and loss of earnings. Moreover, the parties liable for the harm should pay for legal or expert assistance during any judicial proceeding.^[147] Third, rehabilitation should include social services and medical and physiological care. Fourth, satisfaction includes political remedies such as an official declaration of human rights abuse, public apology, and commemorations to the victims.^[148]

Finally, a guarantee of non-repetition requires a State to strive to prevent the recurrence of human rights violations in the future. Measures

may include increasing the independence of the judiciary, promoting mechanisms for preventing and monitoring social conflicts, as well as reforming any law that contributed to the human rights abuses.[149] What is more, the victims must have access to relevant information concerning violations and reparation mechanisms. Victims and their representatives should be entitled to seek and obtain information relevant to their complaint, and to learn the truth regarding these violations.[150]

PART IV: THE RIGHT TO REMEDY IN PROFESSIONAL SPORTS

Under the international human rights laws discussed, the State and professional sports leagues have a duty to provide access to effective remedy. Access to remedy in professional sports leagues is commonly achieved through a league's forced arbitration proceedings. Although arbitration provides specialized and speedy remedy, it often lacks the necessary due process guarantees to ensure a participant's human rights are protected. By incorporating a human rights approach into a league's governing documents, leagues can provide effective and expedited remedies without simultaneously sacrificing the human rights of their players.

A. The Duty to Provide Access to Effective Remedy

As a part of their duty to protect human rights and access to effective remedy, both the U.S. and U.S. professional sports leagues are charged with ensuring that remedies are legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.[151] Arbitration proceedings in professional sports leagues fall cleanly within the UNGP characterization of non-judicial grievance mechanisms, especially because arbitration proceedings are the main arena for affected individuals to access remedy for human rights violations that occur in professional sports.[152] As such, U.S. professional sports leagues and the State in which they reside (as relevant for this report, the

U.S.) have the duty under human rights law to ensure that their arbitration proceedings provide effective access to remedy.

B. Arbitration Proceedings in Professional Sports Leagues

As the main arena for remedy in professional sports, arbitration proceedings in professional sports leagues can and should ensure that these proceedings protect the human rights of participants.

i. Introduction to Arbitration

Although arbitration may vary slightly between leagues, the structure, support, and drawbacks of these proceedings are shared between leagues. Although arbitration provides efficient results, compelled arbitration proceedings without due process guarantees fall short of protecting participants' access to effective remedy.

Generally, "arbitration is an out-of-court method for resolving a dispute between a worker and an employer."^[153] The settlement procedures are intended to be "a private dispute settlement mechanism by means of which parties aim to avoid the jurisdiction of ordinary courts."^[154] Under the governing documents of each U.S. professional sports league discussed in this report, if a dispute falls within the scope of arbitration, arbitration is compulsory.^[155] The scope of arbitration in every league is wide-reaching – all disputes between players, teams, players unions, and the league are within the scope of arbitration. Contractual grievances, salary negotiations, free agency disputes, appeals of Commissioner discipline for on-field and off-field actions, injuries incurred during play, domestic violence, harassment and discrimination, tobacco treatment, sexual assault, and child abuse, and a myriad of other policies covered by the governing documents are within the scope of arbitration.^[156] As a result, in most if not all cases, arbitration is a players' only method of dispute resolution. Arbitration proceedings take place in front of a chosen qualified professional who acts as neutral decision maker.^[157] The arbitrators in professional sports leagues are chosen based on their legal expertise and knowledge of the system of sports.^[158]

While arbitration may mimic a trial in terms of its similar adversarial

nature, the rules of evidence and procedure are relaxed, and the arbitrator is subject to limited judicial review.[159] Arbitration proceedings are also conducted privately, an element that is appreciated by all participants. Because of confidentiality, parties can solve issues without the risk of public exposure, potential embarrassment, financial loss, and the subsequent damage to fan bases, leagues, and sponsors – arbitration enables parties to preserve relationships, protect brand identity, and minimize business disruption. However, in an era of social media and 24-hour news, many, if not all, of the details of an incident subject to arbitration are known by the public. Thus, the issue of confidentiality is less relevant than it was in the past.

Arbitration proceedings benefit all participants by providing specialized, speedy, and secure remedy, yet other aspects of these proceedings harm players and are not compatible with human rights law.[160] The following tables highlight some of the pros and cons of arbitration, and some of the similarities and differences between the main types of arbitration (salary arbitration, grievance arbitration, discipline appeal arbitration) between the five leagues mentioned in this report.

Figure 4-1: Pros and Cons of Arbitration

| Pros ^[161] | Cons |
|--|--|
| <p>Speed: When it comes to resolving matters, arbitration is much faster than courts. In some situations, players want to resolve issues quickly, so the issues do not impede their future.</p> <p>Simple: Arbitration does not have strict procedures. When evidence is needed, there is no need for interviews or folders of documents</p> <p>Privacy: Confidentiality is a key component in arbitration when an issue at hand could potentially ruin a players’ career.</p> <p>Less expensive: Arbitration is less expensive than trial.</p> <p>Specialized arbitrators: In sports matters, the arbitrators appointed are specialized ones familiar with the contracts and disputes concerning sports.</p> <p>Impartiality: Leagues want arbitrators who are impartial and independent.</p> | <p>Unfairness: Arbitration is not always fair due to Commissioner bias.</p> <p>Not transparent: Proceedings and awards are not publicly available.</p> <p>Limited access and scope: Under the leagues’ CBA, only players and the Commissioner have access to arbitration. Some human rights issues and parties are beyond the scope of arbitration.</p> <p>Limited remedies: Depending on the arbitration agreement, the arbitrator may have limits as to what remedies can be granted.</p> <p>Limited judicial overview: Courts give wide deference to arbitration decisions, even if there are errors within the proceedings.</p> |

Figure 4-2: Salary Arbitration

| League | Selection of Arbitrators | Procedure | Eligibility |
|----------|--|---|--|
| MLB[162] | The Association and the Labor Relations Department shall annually select the arbitrators. In the event they are unable to agree by January 1 in any year, they jointly shall request that the American Arbitration Association furnish them lists of prominent, professional arbitrators. Upon receipt of such lists, the arbitrators shall be selected by alternately striking names from the lists. | The Player and the Club shall exchange with each other in advance of the hearing, single salary figures for the coming season and then shall submit such figures to the arbitration panel. The hearings shall be conducted on private and confidential basis. Each of the parties to a case shall be limited to one hour for initial presentation and one-half hour for rebuttal and summation. | Any player with a total of three or more years of Major League service, however accumulated, but with less than six years of Major League service, may submit the issue of the Player’s salary to final and binding arbitration without the consent of the Club. |
| NFL[163] | The parties shall select one of the Non-Injury Grievance Arbitrators who shall concurrently serve as the Impartial Arbitrator. They shall have exclusive jurisdiction to determine disputes reserved for the Impartial Arbitrator. If the parties cannot agree, the same procedure will be used as in System Arbitration. | If the Arbitrator finds that any party did not engage in good faith negotiations, he may enter a cease-and-desist order; provided, however, that the arbitrator may not compel any party to agree to anything or require the making of a concession by any party in negotiations. | The question of whether or not the Club, the Management Council, the player, or his agent has engaged in good faith negotiations over such other compensation may be the subject of a proceeding before a Non-Injury Grievance Arbitrator. |
| NBA[164] | The parties shall agree upon the appointment of a Grievance Arbitrator, who shall serve for the duration of the CBA. If parties cannot agree, a list of eleven attorneys from the Conflict Prevention and Resolution Intuition (“CPR”) and the parties will agree on an arbitrator. If they still cannot agree, each party can strike up to five names each and if there is not an individual left, the CPR will pick the arbitrator from the remaining individuals. | Not later than seven (7) days prior to the hearing, the parties shall submit to the Grievance Arbitrator a joint statement of the salary issue. If the parties cannot agree on such a joint statement, each party may submit to the Grievance Arbitrator a separate statement setting forth the disputed issue(s), and such separate statement shall be delivered to the other party or parties at the same time it is submitted to the Grievance Arbitrator. | Grievances, including salary grievances, may be initiated, as set forth in the CBA, by a player, a Team, the NBA, or the Players Association after a good faith effort to settle the issue with the opposing party beforehand. |
| MLS[165] | Same as grievance procedure. | Same as grievance procedure. | Same as grievance procedure. |

| | | | |
|------------------|---|--|--|
| NHL [166] | The League and the NHLPA shall jointly appoint eight (8) Salary Arbitrators who are members of the National Academy of Arbitrators. | On December 5th of each League Year, the parties shall in writing, request each Salary Arbitrator to provide seven (7) available dates for the next League Year's salary arbitrations. The Player and the NHLPA, jointly, and the Club and the League, jointly, shall each have a maximum of ninety (90) minutes to present its case and may allocate such ninety (90) minutes between its direct case and its rebuttal case in any manner it so chooses in its sole discretion. | A Player will be subject to only one Club-elected salary arbitration in his career. Subject to age and experience qualifications, a Player as to whom a Club has elected salary arbitration, regardless of whether a hearing took place in connection with that election, is no longer eligible for Club-elected salary arbitration. |
|------------------|---|--|--|

Figure 4-3: Grievance Arbitration

| League | Selection of Arbitrators | Eligibility for Arbitration | Procedure |
|------------------|--|---|--|
| MLB [167] | The impartial arbitrator, who shall in all instances be designated as the Panel Chair, shall be appointed by agreement of the Association and the Labor Relations Department. In the event the Association and the Labor Relations Department are unable to agree upon the appointment of the impartial arbitrator, they jointly shall request that the American Arbitration Association furnish them a list of prominent, professional arbitrators. Upon receipt of said list, they shall alternate in striking names from the list until only one remains. | Any complaint which involves the existence or interpretation of, or compliance with, any agreement, or any provision of any agreement, between the Association and the Clubs or any of them, or between a Player and a Club. Grievance shall not mean a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball. | Any Player who believes that he has a justifiable Grievance shall first discuss the matter with a representative of his Club designated to handle such matters, in an attempt to settle it. If no settlement can be reached, grievance hearings between the MLB and MLBPA are most often held between a tripartite panel made up of a panel chair one neutral arbitrator and one arbitrator each appointed by the league and the MLBPA. Matters are decided via majority panel vote. |

| | | | |
|------------------------|--|---|---|
| <p>NFL[168]</p> | <p>If the NFL and NFLPA cannot agree on the identity of a System Arbitrator, the parties agree to ask the CPR Institute for a list of eleven attorneys. If the parties cannot within thirty days of receipt of such list agree to the identity of the System Arbitrator from among the names on such list, they shall alternately strike names from said list, until only three names remain, at which point the parties shall make reasonable efforts to interview the remaining candidates. After those interviews, and if the parties cannot agree on the selection, the striking process shall resume until only one name remains, and that person shall be the System Arbitrator.</p> | <p>A System Arbitrator can adjudicate all matters related to issues involving the NFL, such as the NFL Player Contract, the CBA, and transitioning rules.</p> | <p>An enforcement proceeding may be commenced upon 72 hours written notice (or upon shorter notice if ordered by the System Arbitrator) served upon the party against whom the enforcement proceeding is brought and filed with the System Arbitrator. All such notices and all orders and notices issued and directed by the System Arbitrator shall be served upon the NFL and the NFLPA, in addition to any counsel appearing for individual NFL players or individual NFL Clubs.</p> |
| <p>NBA[169]</p> | <p>For a non-disciplinary action dispute, a player, a Team, the NBA, or the Players Association may initiate the arbitration. The parties shall agree upon the appointment of a Grievance Arbitrator or request the International Institute for Conflict Prevention and Resolution, an independent arbitral institute, to choose an arbitrator if no consent can be reached.</p> | <p>The Grievance Arbitrator shall have exclusive jurisdiction over any and all disputes involving the interpretation or application of, or compliance with, the provisions of this Agreement or the provisions of a Player Contract, including any dispute concerning the validity of a Player Contract or any dispute arising under the Joint NBA/NBPA Policy on Domestic Violence, Sexual Assault, and Child Abuse. Any Disputes involving discipline imposed by the Commissioner shall be arbitrated by the System Arbitrator.</p> | <p>Upon the filing of a pre-hearing motion, the parties will schedule a conference call with the Grievance Arbitrator for the purposes of setting a schedule for the motion, including a date for the opposing party's opposition brief and a date for oral argument before the Grievance Arbitrator. Oral argument shall be conducted by teleconference. The Grievance Arbitrator shall render a decision on the motion (including any appropriate award) as soon as practicable and the decision shall be accompanied by a written opinion.</p> |

| | | | |
|-----------------|---|--|--|
| MLS[170] | There will be one impartial arbitrator, appointed jointly by the parties (Player Association and League), who shall serve from year to year. | Any dispute involving the interpretation or application of, or compliance with, any agreement between the Union and MLS or between a player and MLS. Any breach of the CBA by a Team shall also be subject to the Grievance and arbitration procedure. | If the Grievance is submitted to the Grievance Committee and the Grievance Committee fails to resolve the Grievance at its meeting, the grieving party may, within ten days after the Grievance Committee meeting, elect to arbitrate the Grievance in front of one impartial arbitrator. The Impartial Arbitrator will issue a written decision within thirty days of the close of the record. The decision of the Impartial Arbitrator will constitute full, final, and complete disposition of the Grievance. |
| NHL[171] | There will be one Impartial Arbitrator, appointed jointly by the parties, who shall serve for the duration of the CBA. The Impartial Arbitrator selected by the parties shall be a member of the National Academy of Arbitrators. | A “Grievance” is any dispute involving the interpretation or application of, or compliance with, any provision of the CBA, including any Standard Player’s Contract. | A grievance needs to be initiated within sixty days from the date of occurrence or non-occurrence. If the grievance is not subsequently resolved or settled by the parties, the grieving party may elect to arbitrate. The parties shall exchange Disclosure Statements in the manner described below, which Disclosure Statements shall not be shared with the Impartial Arbitrator. Transcripts will be taken in Grievance arbitration hearings and the Impartial Arbitrator will issue a written decision within thirty days of the close of the record and receipt of the hearing transcript |

Figure 4-4: Appealing Discipline

| League | Discipline Procedure |
|------------------|--|
| MLB [172] | For disciplinary actions resulting in fines exceeding \$1,000 and suspensions, The Office of the Commissioner will provide the MLBPA with an Incident Report and Notice of Discipline. A Player who believes that he has a justifiable complaint regarding such discipline may, within 7 days of his receipt of written notification of the discipline, appeal in writing to the Special Assistant to the Commissioner, if the discipline was imposed by the Chief Baseball Officer, or to the Commissioner, if the discipline was imposed by him, for an arbitral hearing. |
| NFL [173] | If the player guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract. |
| NBA [174] | The power to discipline a player is exclusively vested in the Commissioner. If a dispute involves a fine of more than \$50,000 and/or a suspension of more than twelve games imposed by the Commissioner, the standard Grievance Procedure shall apply. For less than \$50,000, Players Association may, on behalf of the player, appeal to the Commissioner’s decision, and the Commissioner shall issue a final and binding decision after a hearing. |
| MLS [175] | The Commissioner may establish and enforce League Rules unless any such League Rule directly contradicts an express provision of any Governing Document. All decisions and enforcement by the Commissioners are final, binding, conclusive and not subject to appeal, unless a decision has a material adverse financial impact on Team value, in which case, the decision will be subject to reversal by the Board of Governors by a Super Majority Vote under the Governing Documents. |
| NHL [176] | The Commissioner has arbitral authority when settling disputes that the Commissioner deems as detrimental to the best interests of the NHL or professional hockey or involves or affects the NHL’s different policies. He further has the full and complete authority to use his disciplinary powers based on the information and reports he considers as sufficient. Like the arbitration award, any imposed discipline by the Commissioner is final and not subject to review. The Commissioner or his designee (“League”) can also impose Supplementary Discipline for On-Ice Conduct. This disciplinary power relates to conduct by a player on the ice or in the player or penalty bench area vis-à-vis another player, a coach, or any other on-ice official, in violation of the NHL Playing Rules. |

ii. Arbitration is Compatible with Human Rights Law

Incorporating a human rights approach and guaranteeing due process within arbitration proceedings can be accomplished without sacrificing the efficiency of arbitration. As a matter of principle, arbitration per se is compatible with human rights law. In the proceeding section, this report will analyze in detail two cases and that have been discussed briefly previously in this report: *Mutu and Pechstein v. Switzerland* and *Case of Ali Riza and Others v. Turkey*. These cases were decided by the ECtHR applying the European Convention of Human Rights (“ECHR”). They are

still relevant to professional sports leagues in the U.S. as Article 6 of the ECHR – the article at issue in both cases – addresses the human right to a “fair and public hearing by a[n]. . . independent and impartial tribunal,” the same right protected in Article 14 of the ICCPR ratified by the U.S. The European Court in these two cases discusses the right to a fair trial in the context of sport arbitration and focus on two questions: 1) the difference between human rights in compelled versus voluntary arbitration, and 2) the league’s duty to ensure that due process is guaranteed in arbitration proceedings.[177] The lessons gleaned from these cases provide a backdrop on how arbitration can be made compatible with human rights law U.S. professional sports leagues.

Mutu and Pechstein v. Switzerland [178]

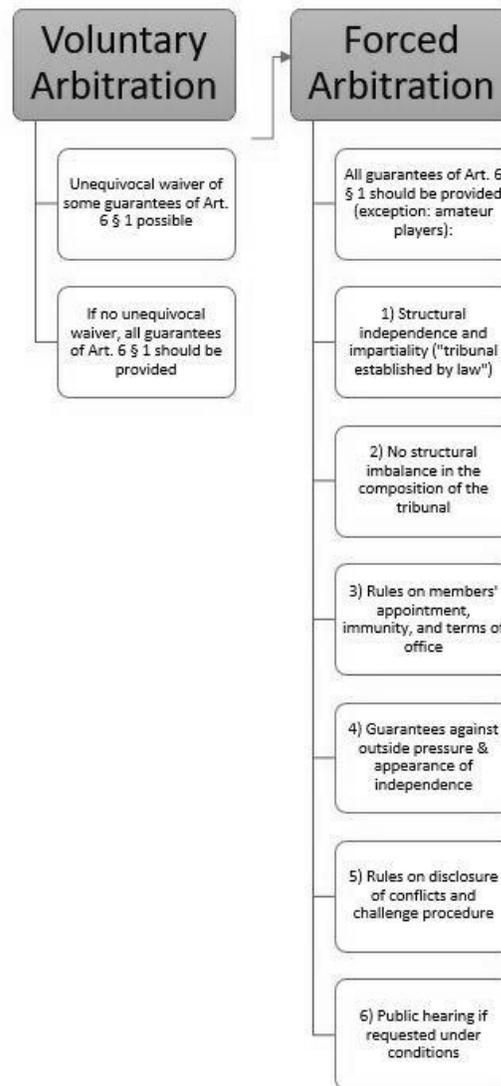
The first complainant in this case, Adrian Mutu, was a Romanian soccer player under contract with Chelsea Football Club. The English Football Association found traces of cocaine in the player’s blood samples and as a result, immediately terminated Mutu’s contract. The Football Association Premier League Appeal committee (“FAPLAC”) confirmed that due to the findings of the test, there was a unilateral breach of the contract without “reasonable cause” on Mutu’s part. On appeal, this decision was upheld by the Court of Arbitration for Sport (“CAS”). Chelsea Football Club informed FIFA that because Mutu breached his contract, they were going to make a claim to the FIFA Dispute Resolution Center to receive compensation from Mutu. Mutu appealed Chelsea’s case against him to the CAS – the same court he lost his first appeal in – and the CAS dismissed his appeal. As a result of having his second appeal dismissed, Mutu made a claim to the Swiss Federal Supreme Court alleging that the CAS procedure was not impartial and independent. The Supreme Court disagreed with Mutu’s claim and rendered it inadmissible, emphasizing that CAS was indeed independent and impartial. Mutu then appealed to the ECtHR.

The second complainant, Claudia Pechstein, was a nine-time Olympic medalist speed skater. After finding traces of drugs in her blood samples, the International Skating Union (“ISU”) banned her from competition for two years. Pechstein claimed that these results were the result of a genetic defect and appealed her case to the CAS who upheld the ban. She appealed again to the Swiss Federal Supreme Court, with the claim that the CAS was not nominating impartial and independent

arbitrators and that she did not have a public hearing. Both of her claims were rejected by the Supreme Court. Pechstein then appealed her case to the ECtHR.

In looking at both claims, the European Court focused on three issues: 1) whether the arbitration clause in the claimants' contracts was mandatory, 2) whether the CAS was an independent and impartial tribunal under Article 6 of the ECHR, and 3) whether the claimants had no access to a public hearing in violation of their rights under the ECHR.

The European Court held that arbitration clauses do not automatically violate the human right to a fair hearing. Because the clauses required certain human rights to be waived, they must be voluntarily accepted. The arbitration clause in Mutu's contract, for example, was voluntarily accepted by Mutu because he did not show evidence that joining the elite Chelsea Soccer Club was the only choice available to him and that no other clubs would have accepted him if he had rejected Chelsea's contract because of the arbitration clause. In contrast, Pechstein's arbitration clause was mandatory because her only choice was to accept the arbitration clause and continue to compete at a professional level, or reject the arbitration clause and lose her ability to participate in her sport. This amounted to mandatory arbitration. As this was forced arbitration, the European Court held that all due process guarantees applied to Pechstein's case.



Voluntary vs Forced Arbitration

When considering the second question, the European Court held that the CAS was an impartial and independent arbitrator. The CAS had picked their arbitrators from a group of specialists known as the International Council of Arbitration for Sports. Just because this group was funded by the SGB did not make them partial, similar to



"Claudia Pechstein at the 2008 World Cup in Hamar" by Bjarte Hetland via Wikimedia Commons licensed under CC BY 3.0

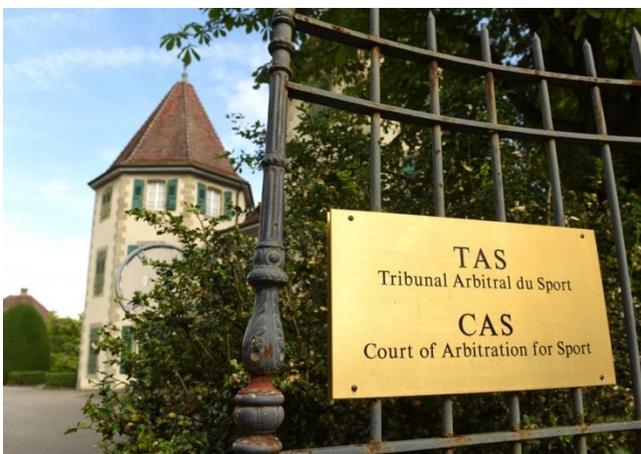
how domestic courts are partially funded by the State but are not partial to the government in the courtroom. Mutu additionally claimed that his arbitrators in the CAS were biased because they had heard his previous case and ruled against him, thus biasing them in his second case. Although this could raise biases, the European Court held that this could only occur if it was the same arbitrators with the same facts on the same question. Because this was a different question, the European Court held Mutu's arbitrators were unbiased.

Concerning the final question, the European Court found that the deprivation of a public hearing occurred in Pechstein's case because her arbitration was mandatory, and her hearings were private. If her arbitration had been voluntary, then she could have waived her rights to a public hearing within Article 6 of the ECHR.

Mutu and Pechstein v. Switzerland show that specialized sporting arbitration proceedings are permissible. If the arbitration is mandatory, the proceedings need to fully guarantee all aspects of due process including impartiality, independence, and publicity.

Case of Ali Riza and Others v. Turkey[179]

Ali Riza was a football player when he abruptly left his football club. The Club took action to fine Riza for his breach of contract which was met with several claims from Riza before the Dispute Resolution Chamber of



Court of Arbitration for Sport in Lausanne, Switzerland by Bumble Dee/Shutterstock

FIFA (“FIFA DRC”). The FIFA DRC deferred the case to the Turkey Football Federation Dispute Resolution Center (“TFF DRC”) where Riza lost his case and appeal. After losing his appeal in the CAS for lack of an international element, Riza brought his case before the European Court.

The European Court found that Turkey breached Article 6

of the ECHR because of structural deficiencies of the TFF. The European Court held that because the arbitration proceedings were mandatory, final, and not susceptible to judicial review, they had to meet all of the requirements in Article 6. However, in contrast to the European Court’s findings in *Mutu*, in Riza’s case, the European Court found that the Board of Directors had too much of an influence over the proceedings and the arbitrators. Most of the members of the Board of Directors consisted of members of executive football clubs and they were the ones who appointed the members of the arbitration committee who were recommended by the Commissioner. This style of appointment procedure does not alone create dependence and partiality; however, if arbitrators are subject to pressure and instructions after being appointed, then that would cast doubt on their independence and impartiality. The European Court found that the Turkish Football Federation did not have proper safeguards in place to protect arbitrators from influence. Arbitrators served the exact same term as their appointees, the Board of Directors, and additionally did not require them to obey a code of professional conduct or swear an oath. As a result, Riza was denied his human right to a fair trial.

Mutu and *Riza* together show that for arbitration to be compatible with human rights, it must either be voluntary arbitration where due process rights can be waived by the participant, or mandatory arbitration where due process rights must be protected (see flowchart on p. 48).[180]

If an arbitration clause is compulsory, as it is the case in U.S. professional sports, that the arbitration proceedings must protect all the components of due process. In Pechstein’s case for example, the arbitrators were not partial just because they were specialists and paid for by the SGB.

The arbitrators in her case were picked from a large, qualified group of arbitrators. In contrast to this, Riza’s arbitrators were dependent and partial to the league because they were hand-picked by the league’s Board of Directors. Using a group of specialized arbitrators keeps the influence of the league one step removed when compared to the Board of Directors picking the arbitrators themselves. Having a hierarchical and vertically integrated structure in a professional sports league has the potential to create partiality issues.[181]

Figure 4-5: Comparing Mutu, Pechstein, and Riza’s Cases

| Categories | Mutu | Pechstein | Riza |
|--|--|------------------------------------|------------------------------------|
| Violation of the convention provisions | Art 6 § 1 Art 4 § 1 Art 8 (inadmissible) | Art 6 § 1 | Art 6 § 1 |
| Applicability of art 6 § 1 | Yes (civil rights and obligations), no explicit waiver | Yes (civil rights and obligations) | Yes (civil rights and obligations) |
| Tribunal under scrutiny | CAS | CAS | TFF Arbitration Committee |
| Applicant contested structural independence of the tribunal | No | Yes | Yes |
| “Tribunal established by law found by the ECHR” | Yes | Yes | No |
| Nature of the dispute | Contractual | Disciplinary (doping) | Contractual |
| Compulsory/ forced arbitration | No | Yes | Yes |
| Terms of office for arbitration in the rules | Yes | Yes | No |
| Challenge procedure of the arbitrators in the rules | Yes | Yes | No |
| Immunity of the arbitrators in the rules | Yes | Yes | No |

| | | | |
|---|-----------------------|-----------------------|-----------------------|
| External financing (eg. from federations) | Yes – not problematic | Yes – not problematic | Yes – not problematic |
| Violations for art 6 § 1 due to the imbalance between federations/ clubs and athletes in the appointment procedure | No | No | Yes |
| Violations of art 6 § 1 for lack of public hearing | Not raised | Yes | Not raised |

C. Arbitration Issues in U.S. Professional Sports Leagues

Arbitration proceedings among the professional sports leagues in the U.S. may be efficient, but they lack the required procedural protections to ensure that all arbitration participants have access to effective remedy when their human rights are violated. Professional sports leagues can alter their current arbitration proceedings to ensure that the right to remedy is protected without ruining the effectiveness of arbitration by incorporating a human rights approach into their arbitration proceedings and adjusting, where needed, in line with guidelines for business laid out in the UNGP.

i. Arbitration is mandatory in U.S. professional sports leagues

The wide-reaching scope of arbitration and the lack of league competition create a compelled arbitration system for all players. Article 14 of the ICCPR states that, “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”[182] For all U.S. professional sports leagues, their respective arbitration system is the only dispute resolution mechanism to resolve matters of high importance. Additionally, players are not able to transfer

their skills to any other leagues – either they accept the arbitration clause, or they do not play professional sports in the U.S. If a player switches teams, they are still subject to the same arbitration clause. Even if a player managed to successfully transfer their skills and switch sports, they are still subject to similar arbitration clauses. For example, when Michael Jordan switched between the NBA and the MLB, he still had to agree to an arbitration clause to play in the MLB.[183] Although Congress requires that all arbitration decisions are appealable to the ordinary court system, in practice, the standard of review for wrongful arbitration proceedings is so high that even proceedings that blatantly violate an individual’s right to due process are upheld (this will be discussed in greater detail below in section 7, Lack of Judicial Oversight: Appealing Arbitration Decisions). As arbitration clauses within the CBAs of U.S. professional sports leagues are compulsory, human rights law requires that due process must be guaranteed for all participants, like the ECtHR in *Mutu and Pechstein v. Switzerland*. Already, U.S. courts have demanded that an association provide basic due process of law when an “interest of substance” is affected.[184] Because membership in a professional association is an interest of substance, U.S. professional sports leagues must provide basic due process in their internal proceedings. To meet the standards of basic due process, a league must follow its own bylaws and procedures, and the proceedings cannot be tainted by bias, prejudice, or lack of good faith. Furthermore, there must be a “meaningful notice and hearing” as procedural safeguards. However, human rights law requires more than these basic right to due process, meaningful notice, and a hearing.

ii. *Arbitration proceedings in U.S. professional sports leagues do not guarantee due process*

Under human rights law, professional sports leagues should ensure that non-judicial grievance mechanisms, particularly forced arbitration, protect the due process rights of participants. The Basic Principles state that the right to a remedy for human rights violations includes three parts: (1) access to justice, (2) reparation to harm suffered, and (3) access to relevant information concerning violations as well as any reparation mechanism.[185] Furthermore, the remedy should be available for both State and non-state actions, or omissions, and must *guarantee due process*. [186] Due process under Article 14 of the ICCPR requires that the

tribunal be independent and impartial.[187] The UNGP expands on this further by requiring the process to be accessible, fair, rights-compatible, and transparent.[188] In *Riza*, the ECtHR held that proceedings should be appealable.[189] The following sections will look at the lack of due process in U.S. professional sports leagues arbitration proceedings, specifically in these seven areas: independence, impartiality, accessibility, fairness, arbitrator power to ensure right compatibility, transparency/public hearings, and judicial oversight. Professional sports leagues in the U.S. currently fall short in protecting these important due process rights for their players.

1. Lack of Independence: Appointing and Removing Arbitrators

The ability to protect a tribunal's independence often starts with the approval and removal process of arbitrators. Arbitration panels play a role in each of the major sports leagues in the United States, but to varying degrees and effects.[190] While recognizing the need for an arbitrator to be neutral is good, the procedures behind picking and managing neutral arbitration procedures create human rights issues for players and affected individuals.

When a claim can be appealed, the review is not always conducted by a neutral third-party arbitrator – sometimes the appeal is conducted by a stakeholder with competing motivations. For example, in the NBA, if the player disagrees with the decision of the Commissioner, the Players Association may, on behalf of the player, appeal to the Commissioner's decision; however, the Commissioner is the first party who hears the appeal about their own decision.[191] The Commissioner is not an impartial party when hearing appeals to their own decisions because of personal bias. Similarly, in the NHL, some Commissioner decisions can be heard by the Board of Governors on appeal, comprised of representatives from each team in NHL.[192] The Board of Governors are not impartial due to the interest they have in the financial success of the NHL and their individual teams. But not every league has arbitrators with competing motivations. For example, in the MLS, parties can jointly agree to submit their issue directly to an impartial arbitrator instead of the Grievance Committee. [193] In the NHL, for suspensions of six or more games, the NHLPA may file an appeal to the Neutral Discipline Arbitrator on the player's behalf.

[194] However, leagues that do not provide independent arbitrators risk violating participants' human rights.

Dependent arbitrators have unfortunately resulted in human rights violations in the past. In the MLB, Chicago Cubs third baseman Kris Bryant lost his arbitration grievance in which he sought an extra year of service time, meaning he would not become a free agent until after the 2021 season.[195] An article produced by ESPN said the decision against Bryant was "long expected" due to the arbitrator on Bryant's grievance, Mark Irving's tendency to side with the MLB instead of players over the course of his decade long career as an arbitrator for the MLB.[196] "Irving's decision is so laughably wrong that advocates for players have no expectation of impartiality moving forward." [197] Having no hope of an impartial arbitrator coupled with proceedings already focused on trying to prove "the player is worth less than what he believes he's worth" has led players in recent years to speak out against the process.[198] Although a pattern of an arbitrator ruling in favor of the league does not necessarily make them a partial arbitrator, it does cast their independence into question. Without proper procedures in place to question or investigate reasonable concerns of an arbitrator's partiality, a participant loses the ability to remedy a potential human rights violation of a player's due process right to an independent tribunal.

The role of a neutral arbitrator is not impossible to create and protect. For instance, in the case of Washington Capitals' forward Tom Wilson, a Neutral Discipline Arbitrator was able to protect the player's human rights to due process. Tom Wilson was suspended for twenty-games (equivalent to nearly a quarter of the regular season and \$1,000,000 in salary) after an in-person hearing due to a hit on center Oscar Sundqvist of the St. Louis Blues.[199] After the NHLPA appealed the decision on Wilson's behalf, the Commissioner decided to uphold the suspension.[200] The Commissioner's decision was appealed to the Neutral Discipline Arbitrator who reduced the discipline to only fourteen games based on their findings that the twenty-game suspension lacked evidentiary support.[201] At the time, Wilson had already served sixteen games. He was awarded some of the lost salary and immediately considered as eligible to play. All of this was able to occur within arbitration proceedings, it did not have to involve the owners, and a decision was reached before the season was over. Here, because of the ability for Wilson to appeal the Commissioner's decisions, Wilson

was able exercise his human right to access a remedy by questioning the Commissioner's decision.

Neutral arbitrators allow players to check the power of the Commissioner without ruining the efficiency of arbitration. Leagues can readily incorporate neutral arbitrators into their current arbitration procedures from a human rights perspective by expanding the scope of what Commissioner decisions can be appealed, ensuring the arbitrators are impartial and independent from the Commissioner and the financial health of the league, and allowing players the option of using a neutral arbitrator from the beginning of arbitration proceedings. Making these changes and specifically incorporating a human rights perspective into the leagues' Governing Documents will protect the right to a fair and impartial tribunal without limiting the benefits that arbitration provides.

2. Lack of Impartiality: The Power of the Commissioner

One of the most important and impactful dynamics of any arbitration proceeding is the overseer. Because the overseer determines if the injured party will receive remedy, they have a unique ability and responsibility to secure a claimant's human rights.[202] In all leagues, the Commissioner plays a powerful role in leading different types of arbitration proceedings. [203] As the overseer, the broad powers of the Commissioner create situations in arbitration proceedings where a claimants' human right to remedy and due process are violated due to the lack of impartiality of the Commissioner.[204] Leagues can prevent human rights violations by disseminating the power of the Commissioner to neutral arbitrators.

The ECtHR has considered multiple cases regarding the relationship between the head of an organization and the impartiality of arbitration proceedings. The holdings of the European Court in these cases are informative for discussing the role and power of the Commissioner in the context of human rights law. The European Court has held that a member of the tribunal should be independent of the parties, and that having a relationship between "a judge and a party to a case... may give rise to objectively justified misgivings as to the impartiality of the tribunal." [205] Even the objective appearance of impartiality without subjective evidence of actual impartiality was enough to violate the claimants' human rights to a fair trial because it damaged public confidence in the court system. In

addition, having a single judge perform different functions in the judicial process raises a question about lack of impartiality.[206] When a judge is asked to decide whether they had previously committed an error, that creates a tribunal lacking impartiality under human rights law.[207] U.S. professional sports leagues and the Commissioners specifically should consider these human rights principles when considering their own power and role in arbitration proceedings.

The most common power granted to the Commissioner is their power to act in the “best interest” of the league.[208] In general, the Commissioner of the league acts as the league’s Chief Executive Officer. As Chief Executive Officer, the Commissioner supervises and directs the league’s business affairs, acts as the league’s spokesperson, and manages the leagues day-to-day operations. Professional sports leagues are intended to be profitable businesses and as the head of the league, the Commissioner plays a part in the league’s financial health. None of these league agreements currently include a human rights approach or human rights considerations. The main check on a Commissioner’s power is their ability to be fired by some variety of an oversight board.[209] Some common examples of the power granted to league Commissioners are:

Best Interest Power: As stated previously, all leagues grant the Commissioner broad power to act in the “best interest” of the league in more or less words.[210] For example, the MLB Commissioner has the power to investigate and take appropriate “preventive, remedial or punitive action” on “any act, transaction or practice charged, alleged, or suspected to be detrimental to the best interests of the national game of [baseball].”[211] In addition to this “best interest” power, the NHL Commissioner has the duty to use their power to broadly preserve public confidence in the league. [212] Under this “best interest” power, the NBA Commissioner has the ability to discipline a player when they “made or caused to be made any statement having, or that was designed to have, an effect prejudicial or detrimental to the best interests of basketball or of the Association or of a Member,” or if the player is “guilty of conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, State, and local laws, or that is prejudicial or detrimental to the Association.”[213] In the MLS, the Commissioner’s “best interest” power includes all the authority given to them by the Board of Governors and in the League Rules, but is “not limited” to authority granted by these

documents and bodies.[214] Despite the slight variations between leagues, all Commissioners have a similar broad power and responsibility to protect the integrity of the league. U.S. courts have given Commissioners significant deference under their “best interest” powers, so long as they act within the authority granted to them by the league’s governing documents.[215]

Unappealable Decisions: In general, the Commissioner’s decisions and discipline are final and unappealable with some minor restrictions. In the MLS, all decisions by the Commissioner are final, binding, conclusive, and unappealable, unless a decision has a material adverse financial impact on team value.[216] It is interesting to note that while there is a clause about appealing a decision that has an adverse financial impact on the team, there is nothing about appealing a decision for violations of players’ human rights. Similarly, the NFL Commissioner has “full, complete, and final jurisdiction and authority to arbitrate,” which includes the ability to discipline players for violating NFL rules, suspending players, canceling a contract, and issuing fines at a maximum of five hundred thousand dollars.[217] The NHL Commissioner has the discretion to suspend a player for up to two years without triggering review by the Board of Governors.[218] Despite the impact on the rights of the player, the Commissioner also has discretion to determine whether they want to arbitrate a dispute or not.[219]

Giving the Commissioner “best interest” power is not a violation of human rights per se, but as established and exercised, the Commissioner’s role is too broad and discretionary, which of itself is a violation of human rights principles.[220] This broad power, combined with a lack of judicial oversight through unappealable decisions creates a system where the claimant’s human rights are in the hands of a single individual. In addition, the assessment of how the Commissioner uses these discretionary and unchecked powers depends on differing views on what is proper, required, beneficial or detrimental to the league and/or the players. For example, when new voting laws created a contentious political environment in Georgia, the MLB Commissioner used his power to move the All-Star game to Colorado in the “best interest” of the league. Some critics said this move was “good” by protesting restrictive voting rights laws while some said it was “bad” by unnecessarily involving the league in politics.[221] In another example, after Colin Kaepernick knelt during the national anthem to protest police brutality and support the Black Lives Matter movement, the

NFL Commissioner made a new policy in the “best interest” of the league that allowed players the option to remain in the locker room during the national anthem, allowed the team the option to discipline a player for protest, and permitted the league to fine the team for protesting players. While this policy could be seen as “good” by aligning with the fans and sponsors of the league who found this kneeling disrespectful, after mounting amounts of public pressure over the course of the next two years later, the Commissioner reversed course and publicly admitted that how the league handled this situation was wrong.[222]

In the NBA, star player Kevin Durant was fined \$50,000 by the Commissioner – the maximum fine the Commissioner can give without review by a Player Discipline Arbitrator – for making homophobic statements.[223] In the “best interest” of the league, maximizing the fine under the appealable amount meant the Commissioner and the league were able appear to be giving a harsh punishment (a \$50,000 fine compared to Kevin Durant’s \$42,000,000 salary is like a \$119 fine compared to a \$100,000 salary) while avoiding any chance of an arbitrator potentially reviewing and lowering the punishment. By making the fine exactly \$50,000, Durant has no ability for redress if he thought the action was biased or overly harsh in some way.[224] Additionally, from a business perspective, players like Durant have a significant market impact on the league and it would be economically unwise for the Association to impose a strict sanction and lose revenue from matches, promotions, and potentially sabotage the relationship between the Association and its teams.[225] Additionally, by fining Durant, the Commissioner and the League failed to address the structural problem of homophobic statements.

Prior to this incident, other players, like Kobe Bryant, Rajon Rondo, and Joakim Noah had been disciplined for making homophobic comments, but each of their consequences were different in questionably ways. Kobe Bryant was fined \$100,000 for calling a referee a homophobic slur. Only a short time later, Joakim Noah was fined only \$50,000 for making similar comments toward a fan he was arguing with. The league said that the reason the fines were different was because the injured parties were different, a referee in the first instance, and a fan in the second.[226] However, four years after these incidents, Rajon Rondo repeated the same homophobic slur that Kobe had made to a referee, yet in contrast to Kobe’s \$100,000 fine, Rondo was only suspended for one game as a result.[227] These examples show that while balancing the “best

interest” of the league, the Commissioner has no duty to follow his previous discipline to other players or resolve systemic issues within the league. Additionally, Durant would not be able to use these incidents to show that the Commissioner’s punishment was biased or overly harsh in some way, limiting his ability for redress. A lack of predictability and reliability in discipline procedures and no ability to appeal such decisions result in due process violations for players. It seems that in balancing the “best interest” of the league, players’ human rights are left to the side.

Another example that shows the unchecked power of the Commissioner involves star NFL player Tom Brady. Brady was accused of deflating footballs for the benefit of his team during a game against the Indianapolis Colts in 2014. The investigation against Brady was led by the NFL and NFL’s Commissioner, Roger Goodell.[228] Throughout the course of the investigation, the Commissioner disregarded fair procedures including: Brady was not notified of the possible consequences of his alleged actions within the CBA, he was not permitted to cross-examine one of the players who participated in drafting the Wells Report (the Wells Report contained an investigation concerning the footballs used during a subsequent football game), and he was prohibited from reviewing the league’s investigative notes which included the scientific findings conducted on the footballs. All these actions were taken to protect “the integrity of the game.” When Brady appealed his arbitration to federal courts, the Judge found Goodell’s behavior as arbitrator to be “problematic”; however, because the court could only review whether the Commissioner was acting with the scope of his contractual authority it upheld the four-game suspension.[229] Despite the many injustices during the investigation, the broad and unchecked power of the Commissioner allows him or her to violate the rights of arbitration participants.

While having a powerful Commissioner is efficient and could potentially protect human rights of players and injured parties outside of arbitration, the combination of powers and responsibilities granted to Commissioners make it difficult for affected individuals to secure their human rights to due process and remedy whether they are stakeholders or not.

3. Lack of Accessibility: Excluded Stakeholders

Although arbitration is wide-reaching, some stakeholders or some of their claims could be left out, even if their rights are violated by the league or by anyone in the league. Expanding access to arbitration for specific, reasonable, and injured stakeholders can provide a safe and efficient mechanism by which victims of human rights abuses committed within or by the league can seek remedy.

“Harms that do occur should be addressed. All actors should strive to act responsibly, through their governance, through proper safeguarding, and through protecting/respecting the rights of all stakeholders including athletes, fans, communities, workers, children, volunteers, journalists, human rights defenders, and potentially marginalised groups.”[230]

U.S professional sports leagues affect a variety of stakeholders included in this list, yet, most of these groups are excluded from arbitration and must overcome significant barriers to receive effective remedy even



“Tom Brady, a National Football League player” by Jeffrey Beall via Wikimedia Commons licensed under CC BY 4.0

when their rights are violated.[231] For example, the MLB CBA limits grievance and salary arbitration to the MLB, the MLBPA, and a player. This means that former players and other stakeholders are ineligible for grievance arbitration. The MLB further limits access to salary arbitration to only major league players with a minimum of two years' service and high performance, or players of three years' service.[232] This means that minor league players in development leagues are excluded from arbitration, and even talented players in their first year in the league are excluded from negotiating their salary even if the team is benefiting from their abilities more than they are getting paid. In another example, the NFL CBA states that it only applies to the players and future players of the league. While this might include minor players or players in the year of their draft, it excludes other important stakeholders, such as former players.[233] As a result of these narrow arbitration proceedings, several former NFL players had to bring a lawsuit against the NFL for not protecting their right to physical integrity and health after they experienced concussions and other brain injuries. The NFLPA asserted that the NFL violated players' right to health because the NFL actively put them in harmful and unsafe situations by not creating and enforcing any protocol to limit and/or reduce the odds of a concussion. The NFL eventually settled the case, but if they had decided to litigate the issue all the way to the Supreme Court, it could have taken an additional ten years of litigation where these players would receive no compensation. In some of these cases, ten years means that they would succumb to their health conditions, even committing suicide as one party to the lawsuit did.[234]

Third parties can also have their human rights violated by the league and be denied an effective remedy. From Kevin Durant's homophobic comment case from the previous section, it is shown that sometimes the truly injured party is overlooked. For example, although the Commissioner has broad power and the ability to provide remedy to all injured parties, those outside the league (like the LBGTQIA+ community in these instances) are left without access to remedy. This only strengthens the argument to divest the Commissioner's power to ensure all injured parties have their human rights recognized. Prior to Durant's situation, the LBGTQIA+ community had criticized the NBA's handling of Rajon Rondo and Kobe Bryant's incidents; yet despite these critiques, these players, including Durant, smoothly returned to their teams without any career setbacks.[235]

In addition to excluded parties, some claims are excluded from

arbitration. For example, in the MLB, if disciplinary measures taken against a player result in a fine under \$1,000, then the players have no ability to appeal the decision.[236] Similarly, if an NBA player is fined less than \$50,000 by the Commissioner, the player must appeal to the Commissioner twice, lengthening the time and limiting the scope that any future appeal panels may review.[237] While this amount of money may seem arbitrary and not give rise to a severe enough violation to warrant remedy, the facts of each situation are the basis of the minimum level needed for review. The ECtHR held that even though a conviction for petty theft might seem too minor for an international court to remedy, the unlawful and unfair proceeding leading to that conviction . . . was enough to give rise to remedy. [238] Placing a minimum amount for review in arbitration may promote efficiency, but it also leaves out potential claims and procedurally has the potential to create violations of due process. Although effective remedy through arbitration is not possible for all parties or claims, thoughtfully expanding the scope of arbitration to include those affected or injured by the league's decisions is well within the ability of the leagues and is vital to protect all affected parties' due process rights.

4. Lack of Fairness: Evidence Procedures

When compared to courts, arbitration proceedings provide a much more relaxed take on evidence procedures. For instance, the NHL Commissioner can decide what information, evidence and reports he considers as sufficient, even if it was not available at the time of the League's initial decision.[239] While limiting discovery and evidence proceedings promotes efficiency and lowers the costs for arbitration proceedings, U.S. professional sports leagues have taken this "relaxed" approach too far and as a result, have violated the due process right of their players.

The UNGP specifically states that for arbitration proceedings to be effective and to protect the right to remedy, they must be "seeking to ensure that aggrieved parties have reasonable access to sources of information . . . necessary to engage in a grievance process on fair, informed and respectful terms." [240] U.S. professional sports leagues have a duty to ensure that in the pursuit for efficiency, participants are not denied access to evidence necessary to fairly participate in the proceeding.

U.S. professional sports leagues have denied arbitration participants

this right before. For example, in the NFL, Ezekiel Elliot was accused of domestic violence and was suspended for six games by the Commissioner. [241] The Commissioner used his power under the NFL's Personal Conduct Policy (PCP) which says, "the Commissioner may discipline players even without a criminal charge, arrest or conviction." Yet to do so there must be "credible evidence establishing that the player engaged in conduct prohibited by the PCP." [242] After this discipline was handed down, the NFLPA appealed on behalf of Elliot. Within the following arbitration proceedings, many injustices occurred. First, the arbitrators refused to compel the Commissioner to testify whether he had knowledge about critical facts regarding the case before making his final decision. It was discovered later that the Commissioner did not because special counsel investigator Lisa Friel had hidden critical information about the credibility of Elliot's accuser which would have exonerated Elliot from his suspension. Second, Elliot was denied the opportunity to cross examine his accuser. Third, Elliot was denied critical facts of the case obtained by the League in interviews with the accuser. When Elliot appealed his arbitration, the court granted a preliminary injunction on the basis that the arbitration was unfair. [243] The Judge emphasized that the "court's intervention is justified, and that Elliot's arbitration constituted serious misconduct." [244] Ensuring that all participants in arbitration have a right to remedy and reasonable access to sources of information needed for a fair proceeding is a vital duty for U.S. professional sports leagues to protect.

5. High Standard of Review and Lack of Remedial Power

Even when arbitration panels are made up of neutral arbitrators, the standard that arbitrators must meet to overrule the Commissioner can be extremely high and the power granted to the arbitrator to remedy ills is low. The MLS states that if a dispute involves a fine of more than \$5,000 and/or a suspension of more than five games imposed by the Commissioner, a Grievance Arbitrator shall apply an "arbitrary and capricious" standard of review for the Commissioner's decision. [245] A decision is "arbitrary and capricious" only if the Commissioner had "no reasonable basis" or was "without reasonable grounds or adequate consideration" considering the circumstances. [246] Although these high

standards of review are only overtly used in the MLS, when a league limits the power of appeals panels to lowering Commissioners decisions, and only if the Commissioner's decision was "arbitrary," the league is limiting neutral arbitrators from exercising the full power of review and ensuring due process is met. In contrast, the appeal panel in the Court of Arbitration for Sports ("CAS") has "full power to review the facts and the law." [247]

In the MLS, the decision of the Impartial Arbitrator constitutes the full, final, and complete disposition of the claim and is binding upon the parties *if* the Impartial Arbitrator's decision does not add to, subtract from, or alter the leagues Governing Documents. In other words, the Impartial Arbitrators only have authority to interpret, apply and determine compliance with any provision of the applicable documents, not full remedial power as what human rights law should have. [248] While having and protecting the role of the Impartial Arbitrator is important, the line between "adding" to a Government Document and "interpreting" a Governing Document is inherently hazy and potentially limits the amount and type of remedy the Impartial Arbitrator can award. In the NHL, for a suspension of six or more games, the NHLPA, on the player's behalf, may file an appeal to the Neutral Discipline Arbitrator. [249] The Neutral Discipline Arbitrator is appointed by the NHL and the NHLPA at the start of the CBA. [250] The Neutral Discipline Arbitrator reviews the Commissioner's decision, conducts a hearing, and they have final and binding "*full remedial authority* in respect of the matter should they determine that the Commissioner's decision was not supported by substantial evidence." [251] In this context, full remedial authority means that the arbitrator has final say on the merits of the Commissioner's decision, without the possibility of being appealed to a higher authority. However, the Neutral Discipline Arbitrator's remedies do not include important ones under international human rights law, such as rehabilitation, compensation, and prevention. While having a Neutral Discipline Arbitrator is good, only giving the Neutral Discipline Arbitrator's authority to offer remedial awards is a material limitation to their ability to secure a player's right to remedy. In both the MLS and the NHL, by making sure the neutral arbitrators are sufficiently neutral, these leagues divest the power of the Commissioner and give players access to remedy if they feel the Commissioner's decision was unfair, even if the authority of these neutral arbitrators to award remedy is limited. These leagues would do much better if arbitrators had the ability to address

human rights violations and provide a remedy that includes rehabilitation, compensation, and prevention, especially when it is not originally provided by the Commissioner.

6. Lack of Public Hearings: Transparency

Both arbitration proceedings and mediation discussions are kept confidential from the public.[252] While confidentiality benefits all parties involved – for example, by allowing the injured party to negotiate a favorable agreement and the at-fault party getting to avoid publicly admitting liability for damages – secrecy can create a system that violates the human rights of arbitration participants. These rights specifically include the due process right to a public hearing as discussed previously under *Mutu* and *Pechstein v. Switzerland*, a lack of public procedure, and lack of a published decision. A lack of publicity for hearings and procedures creates accountability problems for the tribunal and the way it is conducted. A lack of a published decision makes it impossible to know the rationale of the decision and to police the conduct of the different arbitrators, which makes it difficult to prevent repetitive offenses, ensure impartiality, and offer reliable precedents. All this inhibits players' rights to due process for themselves and for future proceedings. Keeping confidentiality while ensuring public accountability is admittedly difficult, but it is important to remember that ensuring the human rights of participants is not a balancing act; it is a mandatory minimum level of guaranteed rights that should not be limited by even well-intentioned business interests.

The negative side of a lack of transparency in arbitration are showcased in a case involving an NFL coach, Brian Flores.[253] New England Patriot's coach, Bill Belichick, congratulated coach Brian Flores for receiving a head coach job he was interviewing for in three days. In a follow-up text apologizing for his mistake, Belichick claimed that the job was already slated for someone else. Flores still had to sit for the interview, despite knowing the job was being given to someone else, due to the NFL's Rooney Rule, which mandates that a certain number of diversity slots for head coach interviews.[254] The rule has now become the basis of Flores' lawsuit against the NFL for its discriminatory hiring practices, for which the NFL successfully compelled arbitration.[255] In response to the NFL's Motion to Compel Arbitration, Flores' lawyers said, "It is obvious that the NFL is trying to hide behind this process and avoid public scrutiny

of the racial discrimination and retaliation claims we have brought. If they are confident in their defenses, they should let the process play out in court so the public can see.”[256] While arbitration creates efficiency, in clear human rights violations like Flores’ case, transparency creates a cover for the league to avoid reasonable censure from the public while simultaneously have the potential to abuse the procedures in a closed proceeding and violate Flores’ rights to due process.[257]

The pros and cons of a lack of transparency in mediation are showcased in a case involving former member of the Chicago Blackhawks, Kyle Beach.[258] A published investigation issued by an independent law firm (commissioned by the Member Club) revealed that in 2010, senior management mishandled a sexual abuse claim made by Beach against then-assistant coach, Brad Aldrich. Beach filed a lawsuit in 2021 against the Chicago Blackhawks due to the mishandling of his claim.[259]

At the center of this investigation was the finding that advancing to and winning the Stanley Cup with Aldrich was prioritized over Beach’s allegations, his physical health and mental well-being. [260] Beach agreed to mediation in hopes of settling his case without litigation.[261] As a result of the mediation, the Commissioner fined the Chicago Blackhawks \$2,000,000, dismissed multiple members of the 2010-senior management, and initiated an anonymous hotline for workplace issues open to all Member Clubs. As



“Kyle Beach at a practice for the Chicago Blackhawks” by Hockeybroad via Wikimedia Commons licensed under CC BY 3.0

a result of this situation, the NHLPA voted to approve an additional, individual investigation to uncover its own role.[262] Although parts of the Commissioner's decision were made public, future players who may experience sexual harassment and have their claims of harassment covered up by the league, will have no ability to rely on Beach's experiences in bringing a claim of their own. The disciplinary powers and remedies utilized – although substantial – showed that the NHL does not see the lack of accountability for human rights abuses like sexual abuse in the current framework in the NHL as a systemic failure, rather only as a one-off incident.[263] Having transparency of mediation decisions available could put pressure on the league to prevent human rights violations.

While keeping arbitration proceedings and mediations private may be good for both parties in the short term, this lack of transparency leads to a lack of precedent and calls for a true institutional change in the long run, which could prevent human right abuses from occurring. Procedures that require some transparency regarding the decision-making process, even if that transparency was only used by arbitrators and/or mediators for internal review, would have a significant impact on a players' right to fair and impartial hearings.

7. Lack of Judicial Oversight: Appealing Arbitration Decisions

No matter what procedures are followed in arbitration, there is no such thing as a perfect system. Having a robust appeal system is vital to ensure fair decisions are made in any proceeding. Without a functioning appeal system, human rights abuses that occur during an arbitration proceeding have the potential to be unchecked. In the U.S., this has resulted in two major difficulties in bringing arbitration decisions to court: the high bar to have courts listen to the merits of the case, and the Baseball Exemption. Both have a significant effect on the human right to due process for participants in arbitration procedures.

The High Bar for Appealing Arbitration Decisions

While litigation is uncommon given the expansive and broad reach of the CBA and league Constitutions, some claims and some stakeholders as discussed previously (for example, retired players) are excluded from

arbitration and their claims can only be resolved through litigation.

[264] Otherwise, claims that reach litigation are appeals from arbitration decisions. Most of the time, civil claims result in court-ordered mediation or settlements.[265] As who can access arbitration has been discussed previously, this section of the report will address the procedural issues in appealing arbitration decisions through litigation.

Under the Federal Arbitration Act, any party may enforce an arbitral award in a federal court unless the losing party challenges its validity.

[266] A court may vacate an award and render it ineffective based on procedural grounds such as due process violations and excess of arbitrator authority, yet the statute does not grant an opportunity for substantive review to courts.[267] In other words, courts are not able to review the important issues in the case; rather, courts are limited to reviewing and ruling on whether the arbitration proceedings were conducted fairly (and sometimes courts are bound by precedent that does not allow them to rule against even an unfair proceeding). There are three main reasons for a federal court to review an arbitration decision. First, the court will review the arbitration decision if the arbitrator does not understand and abide by the terms of the CBA.[268] Second, the court would review the decision from arbitration if the decision violated public policy.[269] Lastly, the court will review the decision if the arbitrator committed misconduct or there was evident partiality, bias, or fraud in the decision.[270] Though the federal court will review the arbitration decision in these scenarios, the courts tend to defer to the arbitration decisions and provide “substantial deference to the Commissioner’s judgment” by upholding actions taken so long as they are “pursuant to this authority.”[271] Even if there is procedural unfairness, the courts defer to arbitration decisions because the parties had bargained on the CBA, which provides that an arbitral award shall be final and binding with limited appeal power.[272] “When the parties’ delegate the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue.”[273] This is true even where the court thinks that the decision or argument that the arbitration agreement relied on in a particular dispute is “wholly groundless.” [274] As there are no human rights standards for courts to address, even if an arbitral decision violates human rights standards, many arbitral decisions contrary to human rights will stand. The bar for appealing arbitral decisions is so high that the right to due process and the right to remedy, which are required

for compelled arbitration procedures, are not protected.

Leagues could argue that they also suffer consequences when courts defer to arbitration proceedings that do not go their way; however, it does not follow that leagues being hurt by a court's broad deference to arbitration proceedings means that this precedent then protects the human rights of players (even if it sometimes does) – to the contrary, because of this precedent, the only way to ensure a player can exercise their right to remedy is to require leagues to incorporate a human rights approach to arbitration in their governing documents. One example of a league being hurt by courts deferring to arbitration decisions happened in the NHL and concerned a former player of the Calgary Flames, Dennis Wideman, who injured a hockey official by raising his stick in the air and contacting the official during a game.[275] The League imposed a twenty-game suspension due to the incident, which was later confirmed by the Commissioner after an appeal.[276] The NHLPA then appealed the decision to the Neutral Discipline Arbitrator and, as a result, the twenty-game suspension was reduced to ten games.[277] Eventually, the NHL filed a complaint in court to modify the Commissioner's decision on the grounds that the Neutral Discipline Arbitrator had exceeded its authority under the CBA.[278] The NHLPA filed a motion to, among other things, confirm the Commissioner's decision.[279] The court in question held that it could only inquire if the Neutral Discipline Arbitrator was at least arguably constructing or applying the CBA, and could not review the Commissioner's decision on the merits.[280] Mindful of its limited role, the court found that the Neutral Discipline Arbitrator had not exceed its contractual authority in Wideman's case.[281] Although the court sided with Wideman in this one circumstance, the rarity of this type of decision makes it a weak counterargument that this precedent protects the human right to remedy.

The Baseball Exemption

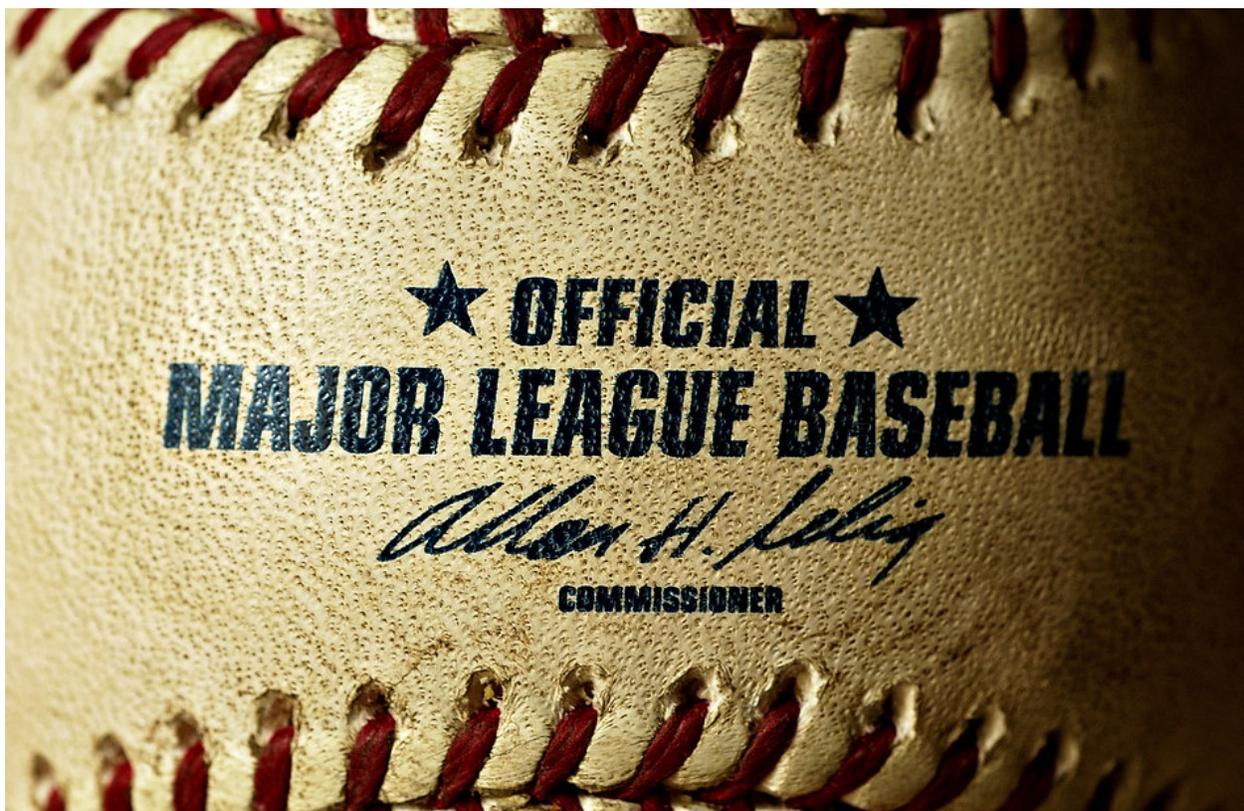
The Baseball Exemption, as formulated in the *Federal Baseball*, *Toolson*, and *Flood* Supreme Court cases, bars most outside litigation claims from State court jurisdiction through a loophole in antitrust laws. [282] After reanalyzing these three opinions in *City of San Jose* nearly a century after the exemption was first established, the Ninth Circuit Court of Appeals held that the antitrust exemption still applied to “the entire

'business of providing public baseball games for profit between clubs of professional baseball players.'"[283] The opinion read that "Baseball is an exception to the normal rule that federal antitrust laws supplement, not displace, State antitrust remedies." [284] The exception "establishes a universal exemption" preempting any contrary State regulation.[285] Even if they wanted to, courts have felt that because of stare decisis, they are not permitted to change the system through their rulings. The court expressed that the Baseball Exemption is an anomaly in terms of anti-trust regulation, but the "aberration is an established one", recognized in "five consecutive cases." [286] In *Wyckoff v. Office of the Comm'r of Baseball*, the Supreme Court said that the Baseball Exemption was, "an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court." [287] In 1998, Congress passed the Curt Flood Act which provided an exception to the Baseball Exemption, but emphasized that this new law only applied to MLB players,[288] not to others "employed in the business of organized professional baseball." [289]

The implication of Baseball Exemption and human rights is displayed in *Major League Baseball Associations v. Garvey*, decided by the U.S. Supreme Court in 2001.[290] In the 1980s, the Major League Baseball Players Association filed grievances against the Major League Clubs, on grounds that the clubs had damaged players by colluding to drive down contract prices of free-agent players. The Players Association and the Clubs entered into an agreement in which players who had been offered an extension by a Club team that was later rescinded due to the collusion were eligible to receive funds. Garvey, a former player for the San Diego Padres, alleged that his contract had not been extended due to the collusion. The MLBPA rejected Garvey's claim due to insufficient evidence. The MLBPA was upheld by an arbitrator. Garvey sued in federal court and moved to vacate the arbitrator's award but was denied by the trial court. However, the Appeals Court reversed the trial court with the instruction to award Garvey the amount he claimed, finding that the arbitrator incorrectly questioned the validity of Garvey's evidence. On writ of certiorari, the Supreme Court reversed the Court of Appeals, barring further proceedings and holding that it was not the role of Court of Appeals to resolve disputes on merits.[291] The complete inability for State courts to regulate the biased decisions of arbiters, poses a concern particularly in relation to the fulfilment of human rights.

This narrow scope of Congress' Curt Flood Act also had an impact

on the human rights of other stakeholders in the MLB. This is exemplified in the case of *Salerno v. American League of Professional Baseball Clubs*. In *Salerno*, a group of umpires brought a claim that they had been fired in retaliation for an attempt to organize into a collective bargaining unit; however, the court denied relief to umpires because their claim was barred by the Baseball Exemption.[292] If the merits of their claim had been heard, there would have been a clear human rights question regarding the right to unionize and collectively bargain. In addition, in *McCoy v. Major League Baseball*, labor talks broke down which led to a work stoppage and ultimately resulted in the cancellation of the end of a season and postseason.[293] A group of fans and business owners attempted to file a class action lawsuit against MLB for loss of revenue.[294] When the groups alleged unfair restraints on trade, the MLB moved to dismiss under the Baseball Exemption – the district court granted the motion.[295] In *Miranda v. Selig*, the Ninth Circuit denied relief to a group of professional minor league baseball players in a case about low wages.[296] Before the case could be heard on the merits, the defendants filed a motion to dismiss



"Official Major League Baseball - Close-Up Shot" by Jason Michael via Flickr licensed under CC BY-NC-SA 2.0

under the Baseball Exemption, which was granted by the court.[297] The claim the minor league baseball players wanted to be heard involved a violation of their human right to fair work and a living wage; however, because of the Baseball Exemption, their pleas were unable to be heard, denying them their right to remedy.

Overall, appealing arbitration decisions through litigation is a difficult process due to the current wording of the league Constitutions and CBAs and the legal precedent giving deference to arbitration decisions even if they are blatantly wrong or unfair. While arbitration is generally a more efficient and effective remedy for players, litigation provides a valuable check on arbitration proceedings to ensure they are fair and impartial. Leagues can improve the fairness of arbitration proceedings and protect the human right to a fair and impartial hearings by incorporating human rights protections into the framework of their Constitutions and CBAs, so that way, they are part of the enforceable contract if litigation is pursued.

PART V: CONCLUSION AND RECOMMENDATIONS

A. Conclusion

The cross-section between professional sports leagues and human rights is a complex web of business economics, international law, domestic court precedents, and the human rights of players. Both the U.S. government as a State and professional sports league as businesses have a duty and play a vital role in respecting, promoting, and protecting human rights. For a system to meet human rights standards on remedies, it cannot be reliant on the good deeds of the individuals in charge or wash its hands of systemic issues by throwing money at human rights initiatives. Rather, the system itself must have consistent and explicit human rights structures in place to address all types of potential abuses and to hold itself accountable to these standards in courts. To proactively address, minimize, and prevent human rights impacts for the players and non-players alike, the current framework needs to be systematically changed.

Professional sports leagues already have a foundation of documents, policies, and procedures in place that protect certain human rights

of players, including league constitutions, players unions, collective bargaining agreements, human rights initiatives, and arbitration proceedings. Leagues can do more, however, to ensure that the human rights of their players are protected, specifically their right to access an effective remedy through arbitration procedures. Currently, many players find themselves outside of arbitration and without a remedy even though they are stakeholders who have had their human rights violated. Those within the scope of arbitration proceedings may find themselves subject to an arbitrator who is influenced by the league or without the power to provide a remedy. In those cases where a participant finds their arbitration remedy unsatisfactory, appealing their remedy in the traditional court system is nearly impossible. By incorporating a human rights perspective into the league's governing documents, leagues will be holding themselves accountable to human rights standards. Adding a human rights standard into these documents will add an extra layer of protection for players in the traditional court system despite the passivity of the Congress. Additionally, by taking steps to ensure that league's compulsory arbitration proceedings protect a participant's right to access an effective remedy and due process, leagues can ensure that the human rights of players are protected now and for the future.

B. Recommendations

There are numerous actions that the professional sports leagues can take to ensure the protection of human rights within the league. The professional leagues analyzed in this report should:

1. Major League Baseball (MLB), Major League Soccer (MLS), National Basketball Association (NBA), National Football League (NFL), and National Hockey League (NHL) should adopt a human rights framework into their Constitution and explicitly state how the league and its business relationships should provide appropriate remedies where abuses occur. Leagues should identify any actual and potential risks to human rights abuses. They should also incorporate due diligence by periodically and independently monitoring and collecting data on how social issues are currently identified and managed and take appropriate action to address, minimize and prevent human rights impacts, including granting players or anyone connected to the leagues access to remedy, if

necessary, by aligning disciplinary procedures and dispute resolution.

2. Take appropriate action to address, minimize and prevent human rights impacts.

3. Build skills, experience, and knowledge on human rights at the board and executive management level, including within relevant commissions and committees.

4. Ensure appropriate division of responsibility for human rights issues at operational, management and board level.

5. Embed the commitment to human rights into relevant internal statutes, codes of conduct governing regulations, and processes including ethics and integrity, anti-bribery and corruption, anti-discrimination and gender, equality and diversity. Particularly, CBAs should include a clear human rights commitment as the over-arching principle and guiding interpretative standard.

6. Ensure access to remedy and dispute resolution bodies in the Constitution and the CBA with human rights commitment. Individuals involved in these mechanisms should have adequate human rights expertise.

7. Modify its current arbitration system in order to fully comply with due process guarantees as recognized by international human rights law.

8. The arbitration system should:

(1) Expand accessibility to arbitration to include, among others, former players, athletes in their first year or entering the draft, players in minor leagues and in affiliated development academies, coaches and referees.

(2) Grant full remedial and review powers to arbitrators.

(3) Guarantee the publicity of the arbitration process, and in particular make public the arbitration awards.

(4) Secure the independence and impartiality of arbitrators by establishing clear procedures to appoint and re-

move them.

(5) Amplify the admissibility of evidence.

(6) Exclude the Commissioner from the arbitration process.

9. Ensure that athletes have all the legal information in their access to remedy.

10. Develop indicators on human rights risk identification and management and review them regularly.

11. Create public reports on human rights risk detections, inform the public about the identification and the management, and inform how the leagues are addressing human rights risks in tournaments and events.

ENDNOTES

¹ *Acceptance by Example, on the Field and at Home*, N.Y. TIMES (Mar. 23, 2013), available at <https://www.nytimes.com/2013/03/24/sports/football/scott-fujita-acceptance-by-example-in-locker-room-and-at-home.html>

² Nico Schulenkorf & Deborah C Edwards, *Maximising Positive Social Impacts: Strategies for Sustaining and Leveraging the Benefits of Intercommunity Sports Events in Divided Societies*, 26 J. Sport Mgmt. 379, 380-383 (2012).

³ Sherman J. Clark, *Why Sports Law?*, 28 Stan. L. & Pol'y Rev. 151, 159 (2017).

⁴ *Id.*

⁵ *Id.*

⁶ Mega-Sporting Events Platform for Human Rights, *Championing Human Rights in the Governance of Sports Bodies*, March 2018, at 6.

⁷ Chris Bumbaca, 'Some things are bigger than winning': How hockey culture filed Kyle Beach, and what can be done now, USA Today (Nov. 30th, 2021, 07:40 PM), available at <https://www.usatoday.com/story/sports/nhl/blackhawks/2021/11/06/blackhawks-scandal-kyle-beach-hockey-culture/6275370001>; See also, Evan F. Moore, Jashvina Shah, & Renee Hess, *Game Misconduct: Hockey's Toxic Culture and How To Fix It* (2021).

⁸ Baxter Holmes, *Adam Silver apologizes to Suns employees, says he takes responsibility for NBA letting them down*, ESPN (Oct 21, 2022), available at https://www.espn.com/nba/story/_/id/34849108/sources-adam-silver-apologizes-suns-employees-says-takes-responsibility-nba-letting-down.

⁹ Roger Goodell, *Final Decision on Article 46 Appeal of Tom Brady*, NAT'L FOOTBALL LEAGUE (Jul. 28, 2015), available at <http://static.nfl.com/static/content/public/photo/2015/07/28/oap3000000504265.pdf>.

¹⁰ The Legal Artist, *The NFL Has A Serious Due Process Problem, And Why Due Process Is Important To Everyone* (Aug. 3, 2015), available at <https://www.thelegalartist.com/blog/the-nfl-has-a-serious-due-process-problem-and-why-due-process-is-important-to-everyone>.

¹¹ Roger G. Noll, *The Economics of Sports Leagues*, 17 LAW OF PROF. AND AMAT. SPORTS (2000).

¹² Mega Sporting Events, *supra* note 6.

¹³ *Id.*

¹⁴ Jared Dubin, *NFLPA reaches agreement to provide players with biometric monitors*, CBS (Apr. 4, 2017), available at <https://www.cbssports.com/nfl/news/nflpa-reaches-agreement-to-provide-players-with-biometric-monitors/>.

¹⁵ G.A. Res. 48/10, U.N. Doc. A/HRC/WG.2/23/2/Add.1 at 8 (May 20, 2022).

¹⁶ Joseph Salvador, *NCAI Shuts Down Manfred's Assertion on Braves' Name, Celebration*, SPORTS ILLUSTRATED (Oct. 27, 2021), available at <https://www.si.com/mlb/2021/10/27/national-congress-of-native-american-indians-rob-manfred-braves-name>.

¹⁷ G.A. Res. 48/10, *supra* note 15.

¹⁸ See Human Rights Council, Report of the Office of the High Commissioner on

Participation in physical activity and sport within the framework of article 30 of the Convention on the Rights of Persons with Disabilities, January 25, 2021, A/HRC/46/49, para. 41.

¹⁹ Mega Sporting Events, *supra* note 6.

²⁰ *See, e.g., Long v. Nat'l Football League*, 870 F. Supp. 101, 105 (W.D. Pa. 1994), *aff'd*, 66 F.3d 311 (3d Cir. 1994).

²¹ *Wood v. National Basketball Association*, 809 F.2d 954, 961 (1987).

²² *See Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 408 (S.D.N.Y. 2004), *rev'd* on other grounds 369 F.3d 124 (2d Cir. 2004).

²³ *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).; *see also Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (holding that previous rule regarding antitrust laws in baseball was an unreasonable restraint on trade).; *Wood v. National Basketball Association*, 809 F.2d. 954 (2d. Cir. 1987) (finding that challenged provisions in the NBA CBA were mandatory subjects of collective bargaining and therefore protected from federal antitrust laws).

²⁴ Roger D. Blair, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*. (1967). 81(2) Harv. Law Rev., 418, 822.

²⁵ *Chicago Bd. Of Trade v. United States*, 246 U.S. 231 (1918).

²⁶ *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

²⁷ Blair, *supra* note 24, at 833.

²⁸ *Toolson v. New York Yankees*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972).

²⁹ Roger D. Blair, *Rethinking Major League Baseball's Antitrust Exemption*, 30 J. of Legal Asp. of Sport, 18, 38 (2020).

³⁰ Marc Edelman, *Antitrust and Free Movement Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 Nw. J, Int'l L. & Bus. 403, 412-414 (2009).

³¹ Blair, *supra* note 29.

³² US Congress, 'Chapter 2205 – United States Olympic Committee' (2014) (However, the act that created the USOC limited government involvement in U.S. Olympics by minimizing the hand of U.S. courts in settling disputes. Disputes brought by athletes are subject to mandatory, binding arbitration in lieu of formal litigation in U.S. Courts).

³³ H. Rep. No.106-449, at 1832, (1999).

(The Act was amended to “direct the Association of Boxing Commissions (ABC) to develop and approve by a vote of at least a majority of its member State boxing commissioners guidelines for: (1) minimum contractual provisions that should be included in bout agreements and boxing contracts; and (2) objective and consistent written criteria for the ratings of professional boxers.”)

³⁴ Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688.

³⁵ S. 534 No. 115-126, at 317 (2017).

³⁶ Olympic Charter, Fundamental Principles of Olympism, at 4 in force as of 8 August 2021, available at https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?_ga=2.79702612.2146138860.1642975571-1414271732.1639837637

³⁷ Available at <https://olympics.com/athlete365/who-we-are/athletes-declaration/>

³⁸ IOC Code of Ethics available at <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Leading-the-Olympic-Movement/Code-of-Ethics/EN-IOC-Code-of-Ethics-2016.pdf>.

³⁹ ‘FIFA’s Human Rights Policy’ (2017), articles 1 and 2.

⁴⁰ FIE Statutes, December 2021, Chapter I, Basic Principles, Vi, Relationship with countries and Article 13, The FIE Family, Article VI.1, available at <https://static.fie.org/uploads/26/131723-FIE%20Statutes%20ang.pdf>.

⁴¹ IGF Code of Conduct, Article 1.4 and IGF Suppliers Code, available at <https://gsites.brightspotcdn.com/34/7b/105862124564bbbed7cc378fea769/igf-policies-charters-version-december-2021.pdf>

⁴² FIG Status 2022, Article 2.2 available at https://www.gymnastics.sport/publicdir/rules/files/en_Statutes%202022.pdf

⁴³ Constitution Of The International Powerlifting Federation, Objectives 1.2.15, available at https://www.powerlifting.sport/fileadmin/ipf/data/about-ipf/constitution-by-laws/IPF_Con_By-Laws_2019_update.pdf

⁴⁴ International Tennis Table Federation Code of Conduct, article 6.1.4 available at https://documents.itf.sport/sites/default/files/public/2021-08/2021ITTFHandbook_v2_clean_version_1.pdf and The Fédération Internationale de Volleyball, Code Of Ethics, article 9.2.4 available at <https://www.fivb.com/en/thefivb/legal> respectively.

⁴⁵ Statutes of the Federation Internationale de l’Automobile, article 1.2, available at <https://www.fia.com/fia-statutes-and-internal-regulations>

⁴⁶ Formula 1, Statement of Commitment to Respect for Human Rights, available at <https://www.formula1.com/en/toolbar/statement-of-commitment-to-respect-for-human-rights.html>

⁴⁷ It should be noted that there is a multiplicity of stakeholders in the sports field. Many of the stakeholders could be victims or abusers of human rights. Some, like the SGB additionally play a role in regulating sporting events. And different stakeholders could be holders of different rights and obligations and subject to a multiplicity of regulatory authorities and jurisdictions. For instance, the European Commission against Racism and Intolerance (ECRI) identifies as stakeholders: “public authorities and bodies (among others, the legislator, the judiciary, human rights institutions, including national anti-discrimination bodies, the police, governmental bodies responsible for sport, educational institutions and local authorities) and nongovernmental organizations (among others, professional and amateur sports federations, sports clubs, local sports associations, athletes’ unions, coaching associations, referee unions, supporters’ organizations, sponsors and the media)” Explanatory Memorandum To ECRI General Policy Recommendation No.12 On Combating Racism And Racial Discrimination In The Field Of Sport, paragraph 7 available at <https://rm.coe.int/ecri-general-policy-recommendation-no-12-on-combating-racism-and-racia/16808b5ae7>. Similarly, the UNESCO refers to: “national and local authorities responsible for sport, education, youth, health, active recreation, development, urban planning, environment, transport, gender and disability matters, and intergovernmental organizations, the Olympic and Paralympic movements, sports organizations, non-governmental entities, the business community, the media, educators,

researchers, sport professionals and volunteers, participants and their support personnel, referees, families, as well as spectators”, UNESCO International Charter of Physical Education, Physical Activity and Sport, Article 3.2 available at <https://unesdoc.unesco.org/ark:/48223/pf0000235409>.

⁴⁸ Major League Constitution, art. II § 2, 9 (1921); Major League Baseball Collective Bargaining Agreement, art. 49 (2017).

⁴⁹ NFL Constitution, art. 8, 29 (1970); NFL Collective Bargaining Agreement, art. 46 (2017).

⁵⁰ NBA Constitution, art. 24 (2012); NBA Collective Bargaining Agreement, art. 2 (2017).

⁵¹ MLS Constitution, art. 6.14 (2002); MLS CBA, art. 2.

⁵² NHL Constitution, art. 6.1 (2009).

⁵³ NFL Constitution *supra* note 49, at art. 3.

⁵⁴ NBA Constitution *supra* note 50, at art. 2.

⁵⁵ MLS Constitution, *supra* note 51 at art. 1.

⁵⁶ NHL Constitution *supra* note 52, art. 5.1.

⁵⁷ *ABOUT* (2022), available at <https://www.mlbplayers.com/about>; *How the NFLPA Works*, (2022), available at <https://nflpa.com/about>; *Overview*, (2022), available at <https://nbpa.com/about/>; *About the MLSPA* (2022), available at <https://mlsplayers.org/about-us>; *WHAT WE DO* (2022), available at <https://www.nhlpa.com/the-pa/what-we-do>.

⁵⁸ Christopher J. McKinny, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 Marq. Sports L. Rev. 223 (2003).

⁵⁹ *Id.*

⁶⁰ MLB CBA *supra* note 48 at art. 20, 29.

⁶¹ NFL CBA, art. 1, 3, 51 (2020).

⁶² *Id.* at art. 1.

⁶³ NBA CBA, art. 8 (2017).

⁶⁴ MLS CBA, art. 6, 8, 29 (2015).

⁶⁵ NHL CBA, art. 6, 10 (2013).

⁶⁶ Economic Environment, *Collective Bargaining Agreements in Sports: How Do They Work in The United States vs Europe*, available at <https://moneysmartathlete.com/economic-environment/collective-bargaining-agreements-in-sports-how-do-they-work-in-the-united-states-vs-europe/> (Aug. 29, 2018).

⁶⁷ MLB CBA *supra* note 48, at art. 50, 52 and art. 15.

⁶⁸ NFL CBA, at art. 49.

⁶⁹ NBA CBA, at Exhibit F, art. 30.

⁷⁰ MLS CBA, at art. 7.

⁷¹ NHL CBA, at art. 7.

⁷² MLB CBA *supra* note 48, at art. 9, 13.

⁷³ NFL CBA, at art. 20, 30, 39.

⁷⁴ NBA CBA, at art. 2, 8, 22.

⁷⁵ MLS CBA, at art. 9, 18.

⁷⁶ NHL CBA, at art. 16, 34.

⁷⁷ Stuart James, *The power shift: Negotiating with Premier League stars whose deals are expiring*, The Athletic (Dec. 1, 2020), available at <https://theathletic>.

com/2232297/2020/12/01/premier-league-contracts-expiring/.

⁷⁸ Eur. Consult. Ass., *Recommendation of the Committee of Ministers to member States on the promotion of good governance in sport*, 1332nd Sess., (Dec. 12, 2018), available at https://www.coe.int/en/web/sport/epas/-/asset_publisher/b9dEDbjJhI5R/content/-advancing-human-rights-democracy-and-the-rule-of-law-in-and-through-sport-discover-the-council-of-europe-s-priorities-for-sport-for-2022-2025?inheritRedirect=false.

⁷⁹ Human Rights Council Res. 17/4, U.N. Doc. A/HRC/17/31, *Guiding Principles on Business and Human Rights: Implementing the United Nations*, (June 16, 2011).

⁸⁰ See United Nations Human Rights, Office of the High Commissioner, *What are Human Rights?* (Oct. 09, 2001, 9:30 PM), available at <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>.

⁸¹ See Restatement (Third) of Foreign Relations Law § 404 (1987).

⁸² *Guiding Principles on Business and Human Rights: Implementing the United Nations*, *supra* note 79.

⁸³ See United Nations Human Rights, *The Foundation of International Human Rights Law* (Oct. 09, 2001, 9:30 PM), available at <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law>.

⁸⁴ *Id.* at art. 1.

⁸⁵ *Id.* at art. 2.

⁸⁶ *Id.*

⁸⁷ International Covenant on Civil and Political Rights, Oct. 5, 1977, S. Exec. Doc. No. E, 95-2.; G.A. Res. 44/144, *Convention Against Torture* (Dec. 15, 1989).; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, U.N.T.S. 195, 212.

⁸⁸ See I/A Court H.R., *Advisory Opinion OC-10/89 “Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,”* July 14, 1989, Ser. A N^o 10 (1989), paras. 35-45.

⁸⁹ International Covenant on Civil and Political Rights, *supra* note 87.

⁹⁰ *Id.*

⁹¹ Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599-695, 601 (2008).

⁹² *Id.*

⁹³ *Lenahan et. Al. v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶118 (2011).

⁹⁴ See, Report N^o 54/01, Case 12.051, Maria Da Penha Maia Fernandes (Brazil), Annual Report of the IACHR 2001, ¶ 3, 37-44.

⁹⁵ *Lenahan et. Al. v. United States*, Case 12.626 (2011).

⁹⁶ See, e.g., United Nations, *Declaration on the Elimination of Violence against Women*, General Assembly resolution 48/104, December 20, 1993, A/RES/48/104, February 23, 1994, articles 3 and 4.

⁹⁷ *Id.*

⁹⁸ A. J. Veal, *Leisure and human rights special interest group*, 64(3) World Leis. J. 306 (2022).

⁹⁹ *Lenahan et. Al. v. United States*, Case 12.626 (2011).

¹⁰⁰ *Id.*

¹⁰¹ See Guiding Principles on Business and Human Rights: Implementing the United Nations, *supra* note 79, at 11.

¹⁰² *Id.*

¹⁰³ U.S. Dep't of State, Bureau of Economic and Business Affairs, *Responsible Business Conduct: First National Action Plan for the United States of America* (Dec. 16, 2016).

¹⁰⁴ *Mutu and Pechstein v. Switzerland*, App. Nos. 40575/10, 67474/10, ¶¶ 62-67 (Oct. 2, 2018), available at <https://hudoc.echr.coe.int/eng/#%22itemid%22:%22002-12113%22>}; *Ali Riza and Others v. Turkey*, App. 30226/10, ¶ 181 (Jan. 28, 2020), available at <https://hudoc.echr.coe.int/eng/#%22itemid%22:%22001-200548%22>}; see also *Platini v. Switzerland*, App. No. 526/18 (Feb. 11, 2020).

¹⁰⁵ See *Mutu*, 40575/10 at ¶ 62.

¹⁰⁶ See *Ali Riza*, 30226/10 at ¶ 181.

¹⁰⁷ David Brooks, *What Life Asks of Us*, N.Y. Times (Jan. 26, 2009), available at <https://www.nytimes.com/2009/01/27/opinion/27brooks.html>. (NFL Players Association (“NFLPA”) Executive member Scott Fujita, “Athletes often have “a deep reverence for those who came before and built up the rules that [they have] temporarily taken delivery of” and “see themselves as debtors who owe something, not creditors to whom something is owed.”).

¹⁰⁸ Karin Larsen, *Former Canucks Enforcer Tweets about ‘Insane’ Amount of Toradol and Ambien He Was Given in NHL*, CBC, (Oct. 4, 2021), available at <https://www.cbc.ca/news/canada/british-columbia/former-canucks-enforcer-tweets-about-insane-amount-of-toradol-and-ambien-he-was-given-in-nhl-1.6199507>.

¹⁰⁹ Guiding Principles on Business and Human Rights: Implementing the United Nations, *supra* note 79.

¹¹⁰ *A Guide for Integrating Human Rights into Business Management*, BLIHR, 2006, available at <https://www.ohchr.org/sites/default/files/Documents/Publications/GuideHRBusinessen.pdf>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ U.S. Dep't of State, Bureau of Economic and Business Affairs, *supra* note 103.

¹¹⁶ Sean Gregory, *‘For Me, It’s Personal.’ NFL Fans Boycott Football As Colin Kaepernick Goes Unemployed*, Time Magazine (Sep.1, 2017, 11:29AM), available at <https://time.com/4924420/colin-kaepernick-nfl-football-boycott/>.

¹¹⁷ Adidas, *Human Rights; Adidas recognizes its corporate responsibility to respect human rights* (2022), available at <https://www.adidas-group.com/en/sustainability/social-impacts/human-rights/#/human-rights/>.

¹¹⁸ *Id.*

¹¹⁹ Nike, *FY22 Statement on Forced Labor* (2021), available at <https://about.nike.com/en/newsroom/statements/statement-on-forced-labor>; see also Jill Martin & Aya Elamroussi, *Nike suspends relationship with Kyrie Irving* (Nov. 4, 2022, 10:15PM), <https://www.cnn.com/2022/11/04/business/kyrie-irving-nike-suspends>.

- ¹²⁰ Amer Sports, *Amer Sports Ethical Policy* (2022), available at [https://www.amersports.com/sustainability/sustainability/ethics-and-compliance/sustainable-procurement/#:~:text=Amer%20Sports%20Ethical%20Policy&text=The%20Policy%20is%20based%20on,Universal%20Declaration%20on%20Human%20Rights](https://www.amersports.com/sustainability/sustainability/ethics-and-compliance/sustainable-procurement/#:~:text=Amer%20Sports%20Ethical%20Policy&text=The%20Policy%20is%20based%20on,Universal%20Declaration%20on%20Human%20Rights;);
- ¹²¹ *Id.*
- ¹²² Sportradar, *Code of Conduct for Suppliers: Version 2* (Jul. 28, 2021), available at <https://investors.sportradar.com/static-files/562c4034-b139-4a72-acbb-b5255e3a7eff>.
- ¹²³ *Id.*
- ¹²⁴ Walter Kälin & Jörg Künzli, *The Law of International Human Rights Protection*, 96-97 (2d ed. 2009).
- ¹²⁵ *supra* note 79.
- ¹²⁶ International Commission of Jurists, *The Right to A Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide*, (2018), available at <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.
- ¹²⁷ *supra* note 79.
- ¹²⁸ Claire Methven O'Brien et al., *EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims*, European Parliament's Subcommittee on Human Rights 1, 7 (2020).
- ¹²⁹ UNHRC Twenty Sixth Regular Session 10–27 June 2014, 'International Expert Workshop (Toronto): "Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience"' (5 May 2014); A/HRC/26/25/Add.3 (Toronto Meeting), ¶28.
- ¹³⁰ *Id.*
- ¹³¹ *Id.*
- ¹³² *Id.*
- ¹³³ G.A. Res. 48/10, *supra* note 15.
- ¹³⁴ *Id.*
- ¹³⁵ UN Doc. A/RES/60/147, at ¶ 11.
- ¹³⁶ *Id.*
- ¹³⁷ G.A. Res. 48/10, *supra* note 15.
- ¹³⁸ UN Doc. A/RES/60/147, *supra* note 135, at ¶ 12.
- ¹³⁹ *See* G.A. Res. 47/38, ¶ 24(e), UN Doc. A/47/38 (1992); *See also* Hum. Rts. Comm., General Comment No. 32 on the Right to Equality Before Courts and Tribunal and Fair Trial, ¶ 10, UN Doc. CCPR/C/GC/32 (2007).
- ¹⁴⁰ UN Doc. A/RES/60/147, *supra* note 135.
- ¹⁴¹ *Id.*, at ¶ 15.
- ¹⁴² O'Brien et al., *supra* note 128.
- ¹⁴³ *Doran v Ireland*, 42 Eur. Ct. H.R. at 13 (2006).
- ¹⁴⁴ UN Doc. A/RES/60/147, *supra* note 135, at ¶ 16-17.
- ¹⁴⁵ Guiding Principles on Business and Human Rights, *supra* note 79, at 33-35.
- ¹⁴⁶ Benjamin Thompson, *Determining Criteria to Evaluate Outcomes of Businesses' Provision of Remedy: Applying a Human Rights-Based Approach*, 2 Bus. & Hum. R. J. 55, 60 (2017).
- ¹⁴⁷ UN Doc. A/RES/60/147, *supra* note 135.
- ¹⁴⁸ *Id.*

- ¹⁴⁹ *Id.* at ¶ 15.
- ¹⁵⁰ *Id.* at ¶ 24.
- ¹⁵¹ *supra* note 79.
- ¹⁵² *Id.*; See *Mutu* and *Ali Riza supra* note 104.
- ¹⁵³ Legal Aid At Work, *Arbitration at Work*, <https://legalaidatwork.org/factsheet/arbitration-at-work/>.
- ¹⁵⁴ Krūmiņš, T. *Arbitration and Human Rights*, 35-92, Springer, Cham., 13th August 2020, https://doi.org/10.1007/978-3-030-54237-5_3.
- ¹⁵⁵ MLB CBA *supra* note 48; NFL CBA *supra* note 61; NBA CBA *supra* note 63; MLS CBA *supra* note 64; NHL CBA *supra* note 65.
- ¹⁵⁶ *Id.*
- ¹⁵⁷ *Id.*
- ¹⁵⁸ Hilary. A Findlay, *Rules of a Sports- Specific Arbitration process as an Instrument of Policy Making*, 16 *Marquette Sports L.J.* 73, 75 (2005), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1340&context=sportslaw> (specific arbitrator chosen based on expertise in field).
- ¹⁵⁹ Adam Epstein, *Sports Law* 260 (2003).
- ¹⁶⁰ *Mutu supra* note 104.
- ¹⁶¹ SAC Attorney's LLP, *The Advantages and Disadvantages of Arbitration*, SAC Attorney's LLP, <https://www.sacattorneys.com/the-advantages-and-disadvantages-of-arbitration.html>; Find Law, *Another look at remedies in Arbitration* (Apr. 29 2016), <https://corporate.findlaw.com/litigation-disputes/another-look-at-remedies-in-arbitration.html#:~:text=An%20arbitration%20agreement%20may%20expressly,arbitrator%20is%20empowered%20to%20award.>
- ¹⁶² MLB CBA *supra* note 48, at art. V.
- ¹⁶³ NFL CBA *supra* note 61, at art. 16 § 1 and art. 26 § 4.
- ¹⁶⁴ NBA CBA *supra* note 63, at Art. XXXI(7)(a-b).
- ¹⁶⁵ MLS CBA *supra* note 64.
- ¹⁶⁶ NHL CBA *supra* note 65, at art. 12.1-12.9(d).
- ¹⁶⁷ MLB CBA *supra* note 48, at art. XI(a-b).
- ¹⁶⁸ NFL CBA *supra* note 61, at art. 15.
- ¹⁶⁹ NBA CBA *supra* note 63, at art. XXXI § (1)(a)(7), (15)(g).
- ¹⁷⁰ MLS CBA *supra* note 64, at art. 21.1-21.6.
- ¹⁷¹ NHL CBA *supra* note 65, at art. 17.1-17.13.
- ¹⁷² MLB CBA *supra* note 48, at art. VI(E), XI – XII.
- ¹⁷³ NFL CBA *supra* note 61.
- ¹⁷⁴ NBA CBA *supra* note 63.
- ¹⁷⁵ MLS CBA *supra* note 64.
- ¹⁷⁶ NHL CBA *supra* note 65.
- ¹⁷⁷ *Id.* at 34.
- ¹⁷⁸ *Mutu supra* note 104; See Cathérine Van de Graaf, *Mutu v Pechstein Switzerland: Strasbourg's Assessment of the Right to a Fair Hearing in Sport Arbitration*, Strasbourg Observers (2018), <https://strasbourgobservers.com/2018/11/30/mutu-and-pechstein-v-switzerland-strasbourgs-assessment-of-the-right-to-a-fair-hearing-in-sports-arbitration/>.

¹⁷⁹ *Ali Riza supra* note 106; See Despina Mavromati, *Ali Riza et al v. Tukey – European court of Human Rights Judgement of January 2020*, Sport Legis (Jan. 31, 2020), <https://www.sportlegis.com/2020/01/31/turkish-football>; See also European Court of Human Rights, *Sport and the European Convention on Human Rights*, European Court of Human Rights (January 2022) (press unit – factsheet), https://www.echr.coe.int/Documents/FS_Sport_ENG.pdf.

¹⁸⁰ Krūmiņš, T. *Arbitration and Human Rights*, 35-92, Springer, Cham., 13th August 2020, https://doi.org/10.1007/978-3-030-54237-5_3.

¹⁸¹ Elliot Geisinger and Elena Trabaldo de Estral, *Sports Arbitration: A coach for other players?* 59-95 (2014) (a PDF of the applicable chapter of this book is accessible at <https://lk-k.com/wp-content/uploads/2015/10/RIGOZZI-ROBERT-TISSOT-in-ASA-Special-Series-41-Sports-Arb.-A-Coach-for-Other-Players-2015-Consent-in-Sports-Arb.-Its-Multiple-Aspects-pp.-59-94.pdf>).

¹⁸² International Covenant on Civil and Political Rights *supra* note 87, at art. 14.

¹⁸³ Anthony Castrovince, *The real story of MJ's baseball career*, MLB (2022), <https://www.mlb.com/news/featured/michael-jordan-the-real-story-of-his-baseball-career>.

¹⁸⁴ Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 Marquette Sports L.J. 65, [https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1142&context=sportslaw&httpsredir=1&referer=.](https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1142&context=sportslaw&httpsredir=1&referer=)

¹⁸⁵ *supra* note 79.

¹⁸⁶ G.A. Res. 48/10, *supra* note 15.

¹⁸⁷ International Covenant on Civil and Political Rights *supra* note 87, at art. 14.

¹⁸⁸ *supra* note 79.

¹⁸⁹ *Ali Riza supra* note 106.

¹⁹⁰ Major League Baseball, *2017 – 2021 Basic Agreement*, Art. XI § A(9), https://www.mlbplayers.com/_files/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf; National Basketball Association, *Collective Bargaining Agreement January 19, 2017*, Art. XXXI § (1)(a)(7), (15)(g) <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> (although impartial is never used to describe Grievance Arbitrators in § 1, the comment in § 15(g) makes this assumption compelling); National Hockey League, *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players Association*, Art. 18.4, <https://www.nhlpa.com/the-pa/cba>; National Football League, *Collective Bargaining Agreement 2020*, Art. 16, https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf; Major League Soccer, *COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE SOCCER And MAJOR LEAGUE SOCCER PLAYERS UNION* February 1, 2015 – January 31, 2020, Art. 21.6, https://pennstatelaw.psu.edu/sites/default/files/documents/Sports-Law/MLS_CBA_2015-2020.pdf.

¹⁹¹ NBA CBA *supra* note 63, at art. XXXI § (9)(a).

¹⁹² NHL Constitution *supra* note 52, at § 6.3(j)(3).

¹⁹³ MLS CBA *supra* note 64, at art. 21.4.

¹⁹⁴ NHL CBA *supra* note 65, at art. 18.13(a).

¹⁹⁵ Esq, Sheryl Ring. *“The Kris Bryant Ruling Shows MLB’s ‘Impartial’ Arbitration*

Is a Farce.” Beyond the Box Score, 30 Jan. 2020, www.beyondtheboxscore.com/2020/1/30/21113517/mlb-chicago-cubs-kris-bryant-ruling-cba-grievance-manfred-arbitrator. Accessed 22 Nov. 2021.

¹⁹⁶ *Id.*; Associated Press, *APNewsBreak: Mark Irvings hired as baseball’s arbitrator*, USA Today (June 15, 2017), <https://www.usatoday.com/story/sports/mlb/2017/06/15/apnewsbreak-mark-irvings-hired-as-baseballs-arbitrator/102901622/>.

¹⁹⁷ Esq, Sheryl Ring *supra* note 195.

¹⁹⁸ *Id.*

¹⁹⁹ Howard Fendrich, *Capitals’ Tom Wilson Suspended 20 games by NHL for blindside hit* (Oct. 3, 2018), <https://www.cbc.ca/sports/hockey/nhl/capitals-tom-wilson-suspended-20-games-for-blindside-hit-1.4849316>.

²⁰⁰ The Associated Press, *Gary Bettman upholds Tom Wilson’s 20-game suspension for illegal check* (Oct. 25, 2018), <https://www.cbc.ca/sports/hockey/nhl/gary-bettman-upholds-tom-wilson-s-20-game-suspension-1.4878552>; See also The National Hockey League, *Commissioner Bettman Upholds 20-game suspension for Capitals’ Tom Wilson* (Oct. 25, 2018), <https://media.nhl.com/public/news/12342&sf94143451=1>.

²⁰¹ Stephen Whyno, CBC Sports, *Arbitrator trims Tom Wilson’s NHL suspension to 14 games for check to head* (Nov. 13, 2018), <https://www.cbc.ca/sports/hockey/nhl/tom-wilson-suspension-reduced-arbitrator-1.4903298>.

²⁰² OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018).

²⁰³ MLB CBA *supra* note 48, at art. XI(A)(1)(b) (Commissioner’s role in grievance proceedings); NHL CBA *supra* note 65, at art. 17.6 (Impartial arbitrator selection procedure for grievances).

²⁰⁴ International Commission of Jurists, *The Right to A Remedy and Reparation for Gross Human Rights Violations: A Practitioners’ Guide*, 288 (2018), <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf> (quoting the International Covenant on Civil and Political Rights, Article 2.3).

²⁰⁵ *Case of BEG S.P.A. v. Italy no 5312/11 (ECtHR, 20 August, 2021)*; See Gordon Nardell, *The ECtHR Judgment in BEG SpA v Italy: A Human Right to a Conflict-Free Arbitrator? Part I*, Kluwer Arbitration Blog (2021), <http://arbitrationblog.kluwerarbitration.com/2021/07/29/the-ecthr-judgment-in-beg-spa-v-italy-a-human-right-to-a-conflict-free-arbitrator-part-i/>.

²⁰⁶ ECtHR, *Guide on Article 6 of the European Convention of Human Rights [–] Right to a fair trial (civil limb) § IIIc3bi.* (2022), https://www.echr.coe.int/documents/guide_art_6_eng.pdf.

²⁰⁷ *Case of San Leonard Band Club v. Malta no 77562/01, (ECtHR, 29 October 2004) para. 63-64; Case of Toziczka v. Poland no 29995/08, (ECtHR, 24 October 2012) para 43-46.*

²⁰⁸ MLB Constitution *supra* note 48, at art. II § 2(b); NFL Constitution *supra* note 49, at art. VIII § 8.6; NBA Constitution *supra* note 50, at art. 24(1); Mot. To Compel Arbitration and Dismiss or, in the alternative, Stay the Proceedings, 57, *Mike Petke v. Utah Soccer, LLC, d/b/a/ Real Salt Lake, a Utah Limited Liability Company*, Civil No. 190907265 (Dist. Ct. 3d. Salt Lake City, Utah), <https://ksltv.com/wp-content/>

uploads/2019/10/2019_10_15_Memorandum_in_itration_and_Dismiss.pdf (while the MLS Governing Documents are private, a public court filing by the MLS cited multiple sections of these documents); NHL Constitution *supra* note 52, at art. VI § 6.1.

²⁰⁹ *Id.* at Art. II § 2(a); *Id.* at Art. 24(a); *Id.*; *Id.* at Art. VIII; *Id.*

²¹⁰ *Id.*

²¹¹ MLB Constitution *supra* note 48, at art. II § 2(b).

²¹² NHL Constitution *supra* note 52, at art. VI § 6.1.

²¹³ National Basketball Association, *Constitution and By-Laws of the National Basketball Association*, Art. 35(d).

²¹⁴ Mot. To Compel Arbitration and Dismiss or, in the alternative, Stay the Proceedings, 57, *Mike Petke v. Utah Soccer, LLC, d/b/a/ Real Salt Lake, a Utah Limited Liability Company*, Civil No. 190907265 (Dist. Ct. 3d. Salt Lake City, Utah).

²¹⁵ *Supra* note 208.

²¹⁶ Major League Soccer Constitution, *supra* note 175 at 58.

²¹⁷ National Football League, *Constitution and Bylaws of the National Football League*, Art. VII § 8.3.

²¹⁸ National Hockey League, *supra* note 52 at § 6.3(j)(3).

²¹⁹ *Id.* at § 6.3(b).

²²⁰ *Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs*, Inter-Am. Ct. H.R. (ser. C) No. 130 ¶ 191, 240 (Sept 8, 2005).

²²¹ Alden Gonzalez, *MLB moving 2021 All-Star Game from Atlanta over Georgia voting law*, ESPN (Apr. 2, 2021) https://www.espn.com/mlb/story/_/id/31183822/mlb-moving-all-star-game-atlanta-georgia-voting-law.

²²² Mark Maske & Adam Kilgore, *NFL says it was wrong in handling of protests over racial injustice, encourages players to speak out*, WASHINGTON POST (June 5, 2020), <https://www.washingtonpost.com/sports/2020/06/05/roger-goodell-says-nfl-was-wrong-encourages-players-speak-out-peacefully-protest/>.

²²³ *Nets' Kevin Durant Fined \$50,000 by NBA for 'Derogatory Language'*, The Guardian (Apr. 2, 2021) <https://www.theguardian.com/sport/2021/apr/02/nets-kevin-durant-fined-50000-by-nba-for-derogatory-language>; Will Leitch, *The Weird Dwight Howard Saga Shows the NBA Still Has a Problem with the Closet*, INTELLIGENCER (Nov. 27, 2018) <https://nymag.com/intelligencer/2018/11/the-dwight-howard-saga-and-the-nbas-problem-with-the-closet.html>.

²²⁴ National Basketball Association, *Constitution*, *supra* note 192.

²²⁵ See Karleigh Webb, *To NBA, A Fine Is Just Fine as Kevin Durant Returns to the Nets*, OUTSPORTS (Apr. 19, 2021), <https://www.outsports.com/2021/4/7/22370922/nba-nets-durant-homophobia-fines-rapaport-lgbtq-basketball-social-media>.

²²⁶ Sam Westmoreland, *Joakim Noah Gay Slur: Why His Fine Should Be Harsher Than Kobe Bryant*, Bleacher Report (May 23, 2011), <https://bleacherreport.com/articles/709610-joakim-noah-gay-slur-why-his-fine-should-be-harsher-than-kobe-bryant> (this article does not discuss Rajon Rondo); Jason Kirk, *Joakim Noah's Gay Slur Fine Half Kobe Bryant's Due To Target Not Being Referee*, SBNATION (May 23, 2011), <https://www.sbnation.com/nba/2011/5/23/2186427/joakim-noah-kobe-bryant-fine-gay-slur>.

²²⁷ Terrance F. Ross, *Rajon Rondo's homophobic slur shows how prejudice runs deep*, The Guardian (Dec. 15, 2015), <https://www.theguardian.com/sport/2015/dec/15/rajon-rondo-gay-slur-nba>.

²²⁸ Zack Cox, *New Report Reveals Explosive Details on NFL's Deflategate Handling*, NES, <https://nesn.com/2022/02/new-report-reveals-explosive-details-on-nfls-deflategate-handling/>

²²⁹ Michael A McCann, *The Oxford Handbook of American Sports Law*, p.13, 2018.

²³⁰ Brendan Schwab, *Protect, Respect and Remedy: Global Sports and Human rights*, *Sweet & Maxwells International Sports Law Review*, (2019), https://uniglobalunion.org/wp-content/uploads/protect_respect_and_remedy_full_article.pdf (citing CSHR, *Sporting Chance Principles* (2018), principle 3, <https://www.sporhumanrights.org/en/about/principles> [Accessed 16 June 2019]) (the original link is citation is broken, but the correct document can now be found here: https://www.sporhumanrights.org/media/orobjif/sc_principles_final.pdf).

²³¹ Ian Linton, *What Is a Stakeholder in Sports?*, Chron., <https://smallbusiness.chron.com/stakeholder-sports-54584.html>

²³² MLB CBA *supra* note 48, at art. V, XI(a-b); MLB, *Salary Arbitration Definition* (2022), <https://www.mlb.com/glossary/transactions/salary-arbitration>.

²³³ NFL: Preamble and article 2 section 2 of the CBA; see also NBA: Section 13 of the CBA; see also MLB article 1 and 2 of the CBA.

²³⁴ Andrew Brandt & Sol Weiss, *NFL Concussion Litigation Resolved: Inside the Settlement with Plaintiff's Co-Lead Counsel*, Sol Weiss, 21 JEFFREY S. MOORAD SPORTS L. J. 1, 3-4, 7 (2014).

²³⁵ Karleigh Webb *supra* note 225.

²³⁶ MLB CBA *supra* note 48, at art. VI(E), XI – XII.

²³⁷ NBA CBA *supra* note 63, at art. XXXI § 9(a).

²³⁸ *Case of Luchaninova v. Ukraine* no. 16347/02 (ECtHR, 9 September 2011) ¶ 47-50.

²³⁹ NHL Constitution *supra* note 52, at art. VI § 6.3(j).

²⁴⁰ "Guiding Principle 31." *National Action Plans on Business and Human Rights*, November 27, 2017. <https://globalnaps.org/ungp/guiding-principle-31/>.

²⁴¹ *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 554 (2d Cir. 2016)

²⁴² *National Football Leagues Association on its own behalf and on behalf of Ezekiel Elliot v. NFL and NFL Management Council*, 4:17-CV-00615, US. District Court, (2017) <https://law.justia.com/cases/federal/district-courts/texas/txedce/4:2017cv00615/178114/28/>

²⁴³ *Id.*

²⁴⁴ *Trey Range, Lessons From the Ezekiel Elliot arbitration*, Baker Donelson, September 15 2017,

<https://www.bakerdonelson.com/lessons-from-the-ezekiel-elliott-arbitration#:~:text=The%20NFL%20conducted%20an%20investigation,issued%20the%20six%2Dgame%20suspension.>

²⁴⁵ *Major League Soccer Collective Bargaining Agreement* *supra* note 216 at § 20.2(i).

²⁴⁶ *Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs*, 357 F.3d 272, 287-89 (3d Cir. 2004) (although this case is regarding the MLB and not the MLS, the discussion of the “arbitrary and capricious” standard is still applicable).

²⁴⁷ Code of Sports – related Arbitration § R57 (2022), https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2022__EN_.pdf.

²⁴⁸ MLS CBA *supra* note 64 at §21.8.

²⁴⁹ National Hockey League Collective Bargaining Agreement *supra* note 65.

²⁵⁰ *Id.* at § 18.14(a).

²⁵¹ *Id.* at § 18.13(c) (emphasis added).

²⁵² For example, National Hockey League Collective Bargaining Agreement *supra* note 65 at § 17.12; Major League Baseball, *2017 – 2021 Basic Agreement*, Attachment 14.

²⁵³ Marcel Louis-Jacques, *Brian Flores sues NFL, three teams as former Miami Dolphins coach alleges racism in hiring practices*, ESPN (Feb. 1, 2022), https://www.espn.com/nfl/story/_/id/33194862/brian-flores-sues-nfl-others-former-miami-dolphins-coach-alleges-racism-hiring-practices; *Flores v. NFL*, No. 22-CV-0871 (VEC), 2022 U.S. Dist. LEXIS 139132, at *2 (S.D.N.Y. 2022).

²⁵⁴ *Id.*

²⁵⁵ *Flores*, No. 22-CV-0871 (VEC) at *12.

²⁵⁶ Associated Press, Judge: Lawyers for Brian Flores, others may not gather more evidence before decision on whether lawsuit will be sent to arbitration, ESPN (Aug. 4, 2022), https://www.espn.com/nfl/story/_/id/34346741/lawyers-brian-flores-steve-wilks-ray-horton-gather-more-evidence-decision-arbitration.

²⁵⁷ Amy Schmitz, *Practicalities of Privacy and Secrecy in Arbitration*, Arbitrate.com (Feb. 9, 2022), <https://arbitrate.com/practicalities-of-privacy-and-secrecy-in-arbitration/>.

²⁵⁸ Chris Bumbaca, *Former Blackhawks player Kyle Beach: NHL ‘let me down and they’ve let others down’*, USA Today, (Oct. 27, 2021), <https://www.usatoday.com/story/sports/nhl/blackhawks/2021/10/27/kyle-beach-gary-bettman-joel-quenneville-comments/8575587002/>.

²⁵⁹ Kimberlee Speakman, *Kyle Beach Reveals He Filed Sexual Assault Lawsuit Against Chicago Blackhawks*, Forbes (Oct. 27, 2021), <https://www.forbes.com/sites/kimberleespeakman/2021/10/27/kyle-beach-reveals-he-filed-lawsuit-against-chicago-blackhawks-over-handling-of-sexual-assault-allegations/?sh=750abde94441>.

²⁶⁰ Chris Bumbaca, *‘Some things are bigger than winning’: How hockey culture failed Kyle Beach, and what can be done now*, USA Today (Nov. 6, 2021) (citation URL continued on the following page), <https://www.usatoday.com/story/sports/nhl/blackhawks/2021/11/06/blackhawks-scandal-kyle-beach-hockey-culture/6275370001/>.

²⁶¹ ESPN News Service, *Kyle Beach, Chicago Blackhawks agrees to mediation in hopes of settling sexual assault lawsuit*, (Nov. 23, 2021), https://www.espn.com/nhl/story/_/id/32700445/kyle-beach-chicago-blackhawks-agree-mediation-hopes-settling-sexual-assault-lawsuit.

²⁶² ESPN Staff, *Chicago Blackhawks Sexual Assault Case: Latest updates, what we know and what’s next* (Oct. 29, 2021), https://www.espn.com/nhl/story/_/id/32502466/chicago-blackhawks-sexual-assault-case-latest-updates-know-next.

²⁶³ Nancy Armour, *Opinion: NHL Commissioner Gary Bettman is handling Blackhawks*

scandal like a lawyer, not a commissioner, (Nov. 1, 2021), <https://www.usatoday.com/story/sports/columnist/nancy-armour/2021/11/01/nhl-commissioner-gary-bettman-not-handling-blackhawks-scandal-well/6241045001/>.

²⁶⁴ Ryan Lake, *The Effects of Fighting In Ice Hockey: An Overview Of The Ongoing NHL Concussion litigation* (Apr. 19, 2016), <https://www.lawinsport.com/blogs/item/the-effects-of-fighting-in-ice-hockey-an-overview-of-the-ongoing-nhl-concussion-litigation>; Michael McCann, *The Wins and Losses of the NHL's Tentative Concussion Lawsuit Settlement* (Nov. 12, 2018), <https://www.si.com/nhl/2018/11/13/nhl-concussion-lawsuit-settlement-wins-losses-former-players>; Andrew Brandt & Sol Weiss, *NFL Concussion Litigation Resolved: Inside the Settlement with Plaintiff's Co-Lead Counsel*, Sol Weiss, 21 JEFFREY S. MOORAD SPORTS L. J. 1, 3-4 (2014).

²⁶⁵ American Bar Association, *How Courts Work* (Sep. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases_settling/ (“Relatively few lawsuits ever go through the full range of procedures and all the way to trial. Most civil cases are settled by mutual agreement between the parties.”).

²⁶⁶ Federal Arbitration Act, 9 U.S.C. § 9.

²⁶⁷ *Id.* § 10.

²⁶⁸ *See Id.* at § 10(a)(4).

²⁶⁹ *See Id.* at § 11(c).

²⁷⁰ *Id.* at § 10(a)(1).

²⁷¹ S. Tyler Owens, *The NFL Commissioner as Judge, Jury, & Executioner: Discretion Detrimental to the Integrity of Arbitration*, 11 LIBERTY U. L. REV. 238, 246 (Sept. 2016).

²⁷² Green & Carney, *Can NFL Players Obtain Judicial Review of Arbitration Decisions on the Merits when a Typical Hourly Union Worker Cannot Obtain This Unusual Court Access?*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 403, 431 n.198 (Sept. 2017).

²⁷³ *Matter of WN Partner, LLC v. Balt. Orioles Ltd. P'ship*, 2019 NY Slip Op 08383, ¶ 2, 179 A.D.3d 14, 17, 112 N.Y.S.3d 68, 70 (App. Div.) (2019) (quoting *Henry Schein, Inc. v Archer & White Sales, Inc.*, 586 US ___, 139 S Ct 524, 529, 202 L Ed 2d 480 [2019]).

²⁷⁴ *Id.*

²⁷⁵ *NHL v. NHL Players' Ass'n*, 2017 U.S. Dist. LEXIS 37546, at *2-*3 (S.D.N.Y. 2017).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at *22-*23.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at *26-*27.

²⁸¹ *Id.* at *40-*41.

²⁸² *See generally Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898, 20 Ohio L. Rep. 211 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64 (1953); *Flood v. Kuhn*, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972).

²⁸³ *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 690 (9th Cir. 2015) (quoting *Toolson*, 346 U.S. at 357).

²⁸⁴ *Id.* at 691 (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 102, 109 S.Ct. 1661,

104 L.Ed.2d 86 (1989)).

²⁸⁵ *Major League Baseball v. Crist*, 331 F.3d 1177, 1186 (11th Cir. 2003).

²⁸⁶ *Flood v. Kuhn*, 407 U.S. 258, 282, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972).

²⁸⁷ *Id.* at 283–84, 92 S.Ct. at 2112.

²⁸⁸ Curt Flood Act, 15 U.S.C. § 26b (2002).

²⁸⁹ *Wyckoff v. Office of the Comm’r of Baseball*, 211 F. Supp. 3d 615, 622–23 (S.D.N.Y. 2016), *aff’d sub nom. Wyckoff v. Office of Comm’r of Baseball*, 705 Fed. Appx. 26 (2d Cir. 2017).

²⁹⁰ *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 505-08, 121 S. Ct. 1724, 1726, 149 L. Ed. 2d 740 (2001).

²⁹¹ *Id.* at 512-13.

²⁹² *Salerno v. Am. League of Profl Baseball Clubs*, 429 F.2d 1003, 1004 (2d Cir. 1970).

²⁹³ *McCoy v. Major League Baseball*, 911 F. Supp. 454 (W.D. Wash. 1995).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 455.

²⁹⁶ *Miranda v. Selig*, 860 F.3d 1237, 1238 (9th Cir. 2017).

²⁹⁷ *Id.* at 1243-44.



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