

## Does a club control its players?

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The “club versus country” issue is one that has dogged rugby union since it embraced professionalism in 1995. Nowhere has the debate generated quite as much heat as in England where the sport features the largest numbers of registered players in the world. This has culminated in a dispute between clubs and the Rugby Football Union (“RFU”), the sport’s governing body in England, over compensation to clubs for players’ participation in last summer’s British & Irish Lions tour to New Zealand.

The dispute features two protagonists: Premier Rugby (representing the twelve leading English club sides all of whom compete in the Guinness Premiership) and the RFU. The RFU is withholding compensation to three of the Premiership clubs who have apparently breached the so-called Long Form Agreement of 2001 that required players who had appeared on an international tour in a full game to be rested at least 11 weeks following the conclusion of the tour. The Lions agreed to pay the clubs £15,000 for each player selected to tour New Zealand during the summer. That money, a total of £300,000 for the 20 English players involved, was sent to the RFU to disperse. It has withheld £120,000 that would otherwise have been payable to Wasps, Sale and Leicester on the basis of their failure to rest their Lions’ representatives the full eleven weeks. The clubs argue that the Long Form Agreement does not cover Lions tours.

The RFU’s frustration with the clubs has been evident elsewhere: recent press reports (subsequently denied) suggest that it plans to purchase controlling shareholdings in leading English clubs in an effort to obtain a more direct means of exerting control over the clubs. For their part, the clubs’ resistance is borne out of the huge investment that had to be made following the abrupt decision to open the game to professionalism in 1995. Substantial wage bills had to be met and there is an understandable reluctance on their part to part with their prize assets for what they consider to be more time than is strictly necessary. What has ensued is no less than a struggle for power within the game.

What many in the game wanting more direct control of players from the centre are calling for is the introduction of so-called “central contracts”. This would ensure that the increasingly heavy club fixture lists do not prejudice the England coach’s ability to allocate sufficient preparation and training time in advance of an international test. It would also mean that the balance of power would tip away from the clubs to the RFU.

Central contracts have been introduced in rugby union in other countries, such as Australia, South Africa, Scotland and Ireland. And in Wales a hybrid system is in operation in that the significant equity stakes held by the WRU in the companies behind the club and regional sides means that it can exert similar levels of control as that which might exist in a central contract system.

Proponents of central contracts within rugby union have often pointed to cricket as a healthy precedent where the system was introduced by the England and Wales Cricket Board (“ECB”) in 2000 and has coincided with a revival in the fortunes of the England team. There are two principal varieties of contract into which players enter under this system:

- (i) The ECB awards 12-month central contracts at the end of the season for the year from 1 October to those players that it and the selectors are confident will figure in the England squad in the ensuing year. These players have their salaries paid by ECB and are available to their county sides on a free-of-charge basis when the ECB permits them to play county cricket.
- (ii) Summer central contracts (at the start of the home season) and pro rata summer contracts (in mid-season) are awarded to those players not on 12-month central contracts who have performed particularly well during the course of the year and convinced the selectors and ECB that they have a key part to play during the remainder of the year to 1 October. Players on these forms of central contract continue to be paid by their counties and receive a salary increment from ECB. As with all other England players not on 12-month central contracts, their counties are compensated by ECB for each county match the player misses whilst on international duty.

The arguments in favour of central contracts have varied slightly from sport to sport. When the issue arose in relation to rugby league a few years ago its proponents maintained that such a mechanism was a necessary means of financing the packages that were needed to avoid a continued drain of talent to rugby union. Cricket’s move to central contracts was motivated more by the simple need to ensure that the England coaching staff were able to enjoy unrestricted access to its top players for a Test series encompassing sometimes seven five-day matches (along with limited-over one-day games). During the course of a summer the extensive Test match programme leaves little room for appearances for county sides. Moreover, the system prevents player fatigue by insufficient rest; reduces the risks of injuries and builds team relations.

But the commercial vehicle of the game is driven very much by the Test sides and the ECB; the county game unable to accrue anything like the revenues of international Tests. Therefore the loss suffered by the absence of certain players from their county sides is not nearly so great as it would be in other sports such as football where the club game is a rich source of revenues. However, the system also encourages clubs to fill the gaps left by those players on central contracts with overseas players who may be unable to obtain a contract in their home country. This has an obvious negative impact on the ability of promising young players to use the club game to further their international prospects.

In terms of rugby union's regulatory regime, the scope for conflict is not immediately clear. Regulation 9.1 of International Rugby Board ("IRB") Regulations is quite clear:

*"A Union has first and last call upon the availability of a Player for selection and appearances for a National Representative Team or National Squad of that Union and all attendances associated therewith, including training sessions."*

But the issue has always been concerned less with the construction of regulations and more with the financial consequences of Regulation 9.1. The Leicester coach, Pat Howard recently said, *"There's no debate about being involved in international matches - that's a given - but there's a debate about rest periods, week before and the Six Nations period."*

The issue has begun to surface in football too, but again, the context is different. Article 37 of the FIFA Regulations for the Status and Transfer of Players:

*"Any club which releases a player pursuant to Art 36 (i.e. Release of Players for National Association Representative Matches) shall not be entitled to financial compensation except that compensation agreed upon in the case of an extended period of release (Art 36 para 5)."*

FIFA Article 36, paragraph 5 details the compulsory release dates for respective international fixtures as:

- *Friendlies* - 48 hours
- *Qualifiers* - 4 days (including day of match), 5 days (if on different continent)
- *Finals* - 14 days before first match of tournament

The G14<sup>1</sup> pressure group of top European soccer clubs has recently<sup>2</sup> joined proceedings against FIFA, over this issue of compensation for top players when they are away from their clubs representing their national teams. The claim had originally been made by the top-tier Belgian club RSC Charleroi over a potentially career-ending injury sustained by its Moroccan international midfielder Abdelmajid Oulmers when playing in a friendly match for his national team.

What FIFA will be concerned by is the possibility not just of an adverse finding in the Oulmers case, but the spectre of its arrangements being subjected to scrutiny by national and pan-European competition law authorities on the basis that Articles 36 and 37 could be construed as the exercise of an abuse of a dominant market position.

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1 The G14 group - actually now 18 clubs - comprises: Spain's Real Madrid, Barcelona and Valencia; Italy's AC Milan, Juventus and Internazionale; England's Liverpool, Manchester United and Arsenal; France's Olympique Lyonnais, Olympique de Marseille and Paris St Germain; Germany's Bayer Leverkusen, Borussia Dortmund and Bayern Munich; the Netherlands' PSV Eindhoven and Ajax; and Portugal's Porto.

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Ultimately, the key consideration in assessing such an arrangement is the state of the relevant market. And what opponents of central contracts for rugby union have repeatedly argued is that their sport – and hence the market for that sport’s services – is entirely different to those of other sports. In many respects their arguments are persuasive in that the commercial clout of cricket’s county sides is far less than the comparable power of rugby union’s club sides. And the football market is different too because it is not the national authorities that are in dispute with the clubs: rather it is the world governing body, FIFA that is locked in combat with the clubs. By contrast, rugby union’s counterpart, the IRB, is little more than a bystander in the unfolding drama that is being played out in that sport. It is therefore difficult to apply conclusions to rugby union drawn from other sports.

Clear predictions are difficult to make as to the likely future direction of the issue. But the limited impact of Regulation 9.1 does tend to suggest that this is a conflict that is commercial, rather than legal, in nature. Moreover, the solution is likely to be commercial too. Although many in the sport may secretly wish to turn the clock back to 1995 and steer the transition to professionalism in a different direction, the issue will remain the same - compensation to clubs – as that which has triggered the current dispute over the Lions tour. And it is the state of the sport and its commercial fortunes that will determine how much compensation is due.

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