

The Effects of Kolpak and Brexit upon Cricket and Rugby – What happens next

It has finally happened: the issue that has dominated the front pages of our national newspapers for what seems an eternity: Brexit. As various sectors of the economy brace themselves for severe disruption, the further permutations of Brexit are starting to affect the sporting world, if they haven't already. The focus of this article is Kolpak cricketers based in England and Wales, what effect Brexit will have on their status in the county game and what the future holds for professional cricket in the UK. This article also looks at rugby union and the effects of Kolpak upon another premier sport that has been so reliant upon Kolpak players over the last decade. **Yasin Patel** looks at an area of law that has been so central to sports and clubs in terms of player recruitment, retention, forward planning and club development.

What is a Kolpak Player?

In order to answer this question, we must turn to two key judgments of the European Court of Justice (“ECJ”); one in 1995 and one in 2003.

*Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman*¹

Jean-Marc Bosman was a player for Royal Football Club de Liège (“RFCL”) in Belgium, competing in the first division. He intended to transfer to Dunkerque, a French team once his contract had expired with RFCL in 1990. Dunkerque refused to pay the transfer fee for Bosman that RFCL demanded and therefore refused to release him. He was placed on lower wages, excluded from 1st team competition and training leading to him suing the Belgium Football governing body.

The grounds on which he relied on were that the clubs had restrained the ability for trade, under article 17 of the FIFA rules. The Court held that, as an EU citizen, Bosman was entitled to free movement and work under the relevant European Union (“EU”) treaty at the time. As a result, clubs would have to allow a free transfer of a player from one EU country to another once the

¹ [1995] C-415/93

contract for that player had expired in order to conform with their obligations to facilitate free movement of workers. These transfers are commonly known as “Bosman Transfers.”

The effect of the Bosman ruling was to place the control back into the hands of their players rather than the club they played for when seeking new clubs at the end of their contracts. It also facilitated transfers around the EU given the new ease at which it could be achieved. It was important to note that only member states, and their citizens, of the European Union would be entitled to these benefits. Therefore, players coming from the United States, Australia and South Africa would not have the same benefit of freedom of movement bestowed upon them.

*Deutscher Handballbund eV v Maros Kolpak*²

In 2000, Maros Kolpak was ejected from his German handball team due to the German Handball Association stipulating that teams could not field more than two non-EU citizens at any given time. Kolpak’s club had already filled their two non-EU spots. Kolpak was a Slovak national, and Slovakia at the time was not a member of the EU, and therefore did not benefit from the protection afforded to players laid down in the *Bosman* ruling.

Kolpak challenged the regulations of the German Handball association, stating that, although Slovakia was not a member of the EU, it did have a European Union Association Agreement (“EUAA”). The ECJ had to determine if this agreement was enough to provide people who lived and worked in the EU legally were entitled to the protection afforded to EU Citizens.

The Court held that the agreement was enough to qualify Kolpak with the protection afforded to EU citizens. Therefore, if countries have a EUAA with the EU then their workers will count as EU-players, rather than non-EU players for the purposes of quota systems.

In order for the ruling to apply, the worker must have the following conditions met:

- a. An applicable AAEU;
- b. Lawfully be working within that country;
- c. Have equal rights to work as an EU citizen;
- d. There be no quota system in place.

² C-438/00

Cricket's use of Kolpak Players

English Cricket has long been a bastion of home-grown talent, resisting the influx of foreign players in favour of locals. Cricket is truly unique to other sports in that only a handful of countries play the game at the elite test level, and very few to a standard of English first-class cricket. As a result, the pool of overseas players that are available is very limited. The England and Wales Cricket Board (“ECB”) therefore introduced a quota system whereby County Cricket teams were only entitled to have a certain number of “overseas” players. The current iteration of this rule for the completed season 2020 is as follows:

“**3.6.6** A club shall play no more than one Category 3 player (as that term is defined in the relevant ECB guidance) who is registered for that club by their League (an “Overseas Player”) per ECB Club Cup Competition match.”

In practice, English Counties have selected specialist international players for each competition they compete in. This means it is very common for counties to have 3 overseas players: one for Twenty20, one for One-Day Cup competitions and one for the traditional county championships.

A loophole was created in the wake of the Kolpak ruling which fundamentally altered the number of overseas players that could play in English cricket competitions. The Contonou Agreement, which came into force in 2003, the same year as the Kolpak ruling from the ECJ. The agreement, of which 78 countries were signatories, was an EUAA, which entitled these countries’ workers to enjoy the same rights as EU workers. Most importantly, they would be classed as EU workers themselves, rather than overseas players in respect to regulations of the ECB.

From a cricket perspective, some of the most competitive and successful cricket playing nations were part of the Contonou agreement, including many of the islands in the Caribbean and South Africa. The Kolpak ruling now entitled them to play for English County sides without effecting those counties overseas player quota.

Some of the best cricketers of the last decade have taken advantage of the Kolpak rule and played domestic cricket in England. The South African fast bowler, Morné Morkel played for Surrey in 2018. The unique West Indian batsman, Shivnarine Chanderpaul, played for Lancashire in 2017. Fidel Edwards has played for Hampshire from 2015. All were international veterans, proud of their home countries, yet played in England as non-overseas players. Simon Harmer has undoubtedly been the standout spin bowler in English domestic cricket since 2016: until the 31st December, he was a Kolpak player with Essex for 4 years. The players who are signed as Kolpak players are almost always International cricketers.

ECB Reaction

The Home Office did not allow carte blanche entry to all cricketers who wish to come and earn their wage via the country cricket system. A four-year work permit is required or a minimum number of international appearances in order to sign a Kolpak agreement.

Although the ECB could not restrict the number of “Kolpak Players” that played for English Counties, they could incentivise teams not to recruit these players. They did so by paying counties less when they fielded a Kolpak player: £1,100 less to a county for each County Championship game and £275 less for each One Day match per Kolpak player who plays instead of a domestic cricketer.

In addition, the ECB rules made it clear that a Kolpak contracted player could not participate in international competitions. This resulted in many players giving up their international careers in return of the higher pay offered at English counties. Sean Abbott gave up playing international cricket for South Africa soon after putting in some of his best performances for them. Many others have done likewise. The effect of Kolpak upon the cricketing world was to allow English county teams to be stronger and rob international teams of some of their best playing talent. South Africa, the West Indies and Zimbabwe have suffered in particular.

The Effect of Brexit

Until the last days of December, it was uncertain which of the two paths of leaving the EU, (with a deal or without a deal) the UK would take. Having agreed upon a deal, the position in

relation to Kolpak players was rubber-stamped although indications that the Kolpak system was at an end had been given by the ECB months earlier. Given the growth of English cricket in recent years, coupled with the delayed launch of the controversial “the Hundred” next year, the status of international players and their specific role hangs in the balance in either case.

Boris Johnson’s deal

Under the deal that Boris Johnson and his government have agreed, Kolpak players cease to exist now that the transition period has ended. It has long been a claim from pro-leave campaigners that Britain should be able to determine who is and isn’t allowed into the country rather than be subject to the rule regarding freedom of movement and work, and the Kolpak rules fall within these abolitions which have been implemented. Now that the UK has left the EU, players who were under contract on Kolpak terms are no longer permitted to remain at their current clubs under those terms. In fact, the ECB have said that “*all Kolpak players will have their registration cancelled by the ECB with effect from 1 January 2021.*”³

In addition, as the ECB have stressed to several international cricket boards, “*no further applications by any Kolpak player for registration will be accepted,*” (even those that have been pending or awaiting clearance) and it “*will apply regardless of whether*” the player “*is able to obtain an ancestral or family visa giving them the right to work in the UK.*”

The Current Position

What is the position in 2021 now that Brexit has been completed? Counties will be under an obligation to ensure that their players are eligible under the overseas player rules to play. The ECB rule change has determined that each county will be permitted up to two overseas players per competition at any one time. The likes of Kyle Abbott, who has a contract with Hampshire, is understood to have already agreed to stay at the County as an overseas player. However, there are many players this summer who will find themselves without a contract due to the changes following Brexit. As one county player (who wishes to remain anonymous) said of Brexit, “*For English lads, and particularly the young ones, there will be lots more opportunities. But some of my teammates gave up international careers because they were*

³ Letter from ECB to Cricket South Africa

promised regular county cricket, wages and potentially an England International future if they naturalised. They moved their families, homes and built new lives here. With Brexit, that promise is gone and the loss of their careers back in their homeland: it seems unfair. They have sacrificed a lot. Some of them don't even know what they are going to do come April."

With the newest competition, "the Hundred", it is understood that the number of overseas players to be permitted to play for each franchise will remain at three. Franchises have signed some of the biggest names in international cricket to come and play for them in order to attract the crowds, promote the game and make it the format that brings cricket to new audiences. One wonders why the same number of overseas players are not permitted in the other formats of the game such as the County Championship, Twenty20 and one-day competitions? Until the change in the Kolpak rule, many counties were playing at least 3 players that were not English qualified. This was certainly not effecting the England Cricket team and it may be argued that those players coming into the national side were better equipped due to playing with International players in their counties. England won the cricket World Cup despite the county game having up to 25 Kolpak players alone. In addition, if it is deemed that 3 overseas players are permitted to play for franchises in "the Hundred", and they will have a significant promotional effect upon the newest format, why not allow or permit it in the other formats of the game?

How are other Sports coping with this?

The other major sport that took advantage of Kolpak contracts is Rugby Union. In the Gallagher Premiership, in the 2019-2020 season, there were around 110 players who were contracted under the Kolpak rules, the vast majority of them South African. The number of Kolpak players in some clubs was staggering: Worcester had 12, London Irish 10, Sale 9, Harlequins 8 with Northampton and Bristol having 7 Kolpak players. With the Covid pandemic, and the crippling of the majority of rugby clubs' budgets, many clubs have had to re-consider their financial positions and a significant number of players have found their contracts ended. Like the ECB, the Rugby Football Union ("RFU") have left it to the clubs to resolve the position of the Kolpak players and whether clubs sign them as overseas players or release them. There has certainly not been any protection from the governing bodies of the players, and in particular those who have such a great deal to lose.

Conclusion

The Government has promised that new trade deals will be struck with many nations now that the UK are not tied to the EU and the single market agreements. One does not expect such deals to be struck with Commonwealth countries so that the players there may enjoy the same rights as English qualified players. It seems that the days where fans and spectators could enjoy watching a plethora of overseas international players performing for their cricket county or rugby sides are long gone. Unless the RFU or ECB allow for more overseas players to play for the clubs, then many of the ex-Kolpak stars will either have to ply their trade elsewhere or see what new opportunity lies on the horizon outside playing their beloved games professionally.

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