

Part II Professional Player Contracts: The Framework for Player Contracts

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In this edition, we had intended to address the obligations owed by the employing club to a player, but the actions of Mr Suarez at the FIFA World Cup 2014, have added an extra dimension. We identify not only the employer's obligations, but also the potential impact of a player's conduct on the relationship with the employing club.

Club/Employer Obligations to the Player

The "Player Contract" as a hybrid commercial and employment arrangement, must give the employer a substantial degree of protection and place significant obligations on the player.

Opportunities can arise for players to take advantage of their commercial value and the employing club will want to ensure adherence to its contractual obligations to minimize the risk of disputes which might ultimately lead to the loss of their asset.

The club has a number of obligations (non-exhaustive examples below).

- **Remuneration:** The key term for many players is the remuneration package they will receive. Optimizing incentives is common practice, and the club must be clear as to the circumstances in which potentially lucrative elements of the package arise (for example, a "win bonus" or a "clean-sheet bonus"). It may be advisable in some circumstances for the contract to have a lower base salary but to reward the athlete with generous bonuses. Certainty is essential to avoid potentially costly disputes. A player's image rights are now also a lucrative element of the contractual relationship. For example, it is not unusual for a player transfer to stall at the last minute because of a dispute over the percentage of income receivable by the player in respect of shirt sales. It should also be noted that there is no "implied" right to withhold remuneration from a player (for example, in a case of misconduct) unless the contract expressly makes such a provision.
- **Medical and similar care:** The club will normally be required to provide timely medical examinations and treatment at its expense. However, this will usually expressly exclude any injury arising out of activities prohibited under the contract. Many governing body standard or approved contracts will have clear criteria for determining the period for which an injured player is entitled to receive any continuing remuneration. They will also identify the circumstances in which the Player contract may be terminated on grounds of incapacity after lengthy absence through injury.
- **Indemnification of the Player:** Although there is a recognised principle of vicarious liability in Common Law jurisdictions (whereby the employer is liable for the acts or omissions of its employee in the course of performance of his duties under the contract), it is usual for a player to require an express indemnity from the employing club in respect of any damages or compensation to an injured third party (including legal fees). However, one might question to what extent a club will indemnify a player for a claim arising from a violent incident beyond the ordinary performance of a professional footballer.
- **Health & Safety:** It is implicit (see Implied Terms below) that an employer will maintain an appropriate Health & Safety policy. However, it is usual to see this expressly stated in the contract. Any breach of the provision would therefore lead to a potential breach of contract claim rather than a claim based solely in

reliance upon principles of negligence.

- Insurance: Insurance against losses flowing from an injury is not an implied club obligation. Thus this must be expressly stated in the contract.

Release the Player for representative duty: This is a key term in a professional sports contract for those who aspire to play at the highest level. This is not “implied” because the primary focus of the contract is the performance of the player for and on behalf of the club (for which he is remunerated). The Suarez affair also highlights the risks for a club which has no control over the on-field behaviour of a player away on international/representative duty.

The club will also have a number of negative obligations which will usually be subject to the consent of the player. For example, it is usual for the club to essentially undertake that it will not take or permit photographs of the player to be used for any purpose(s) other than those expressly agreed under the contract. Likewise, the club would usually expressly state that it will not make public any medical reports or records without player consent (save where it is required under the Rules of the governing body or as a matter of law).

However, even the most comprehensive express terms cannot cover every eventuality.

Implied Terms

Certain terms may be implied into the performance of the contract. There will be a common expectation of minimum standards of behaviour and that certain types of conduct are unacceptable.

The employer typically has a number of non-exhaustive implied duties towards the player.

- To act in good faith and in a reasonable manner towards the player: This mirrors the employee’s duty to act in good faith towards the employer. This mutual obligation underpins all employment relationships and this principle is broadly recognised impliedly or expressly in legislative provisions.
- The right to work: A professional sportsman cannot have a legitimate expectation to be selected for every fixture and a manager may properly rotate his squad and select those who are more suitable for a particular fixture. Form, physical condition, discipline and team selection dynamics may determine whether or not a particular player is selected. This is implied into the relationship and generally no express term would be required to cover this aspect. Yet a point may come where the player asserts that he has an implied right to work if he has unreasonably been prevented from displaying his talents. Selection disputes may be avoided or mitigated by a suitable provision in the contract identifying relevant regulations or procedures which address such matters. The club may have its own selection panel and set out clear criteria for the selection or non-selection of a player.
- A Duty of Care: This is no different from the duty owed in an ordinary employment relationship. However, the commercial considerations are such that the standard expected may be high. For example, the professional player would reasonably expect that the employing club would have access to appropriate medical professionals to correctly diagnose and treat an injury in a timely manner. The playing surface and other equipment supplied by the club must be suitable and free from defects which might cause harm to the player.

The Consequences of Player Misconduct

Depending on the sport at issue, the impact of player misconduct upon the employer is not often considered. Instead, there can be a shrugging acceptance that a player with behavioural misconduct issues will ultimately end up on the transfer market (a result sometimes engineered by the player’s agent) and the club will realise some meaningful cash for its now “damaged goods”. If a potential purchaser offers the right price, it can be difficult for a club to steadfastly insist upon an unenthusiastic player’s performance of his contract. The commercial value of a player is often referable to the unexpired term of his contract. In most circumstances a player who sees out his contract is ultimately a free-agent. Hence, clubs are rarely forced to the transfer table if they are intent on refusing a transfer.

Given that Mr. Suarez's move to Barcelona has now been concluded, the comments below remain hypothetical, but they serve to illustrate the potential issues for the employing club (Liverpool FC) in the face of the player's conduct.

Suarez' contract included a release clause which could be triggered by an offer of £75m. However, the reportedly higher offers on the table pre World Cup could have been susceptible to reduction in the wake of Suarez' biting offence and subsequent ban. An expensive and productive "asset" would be unavailable for several weeks of the English Premier League campaign. Far better that someone else absorb the period of non-productivity and that Liverpool have the cash to acquire a replacement for their potentially depreciating asset (and one which might be devalued further in the event of another substantial ban). In that latter eventuality, theoretically it would have been open to Liverpool FC to adopt a similar approach to Chelsea FC in the "Mutu" case (Law Update issue 269, May 2014) where the player was dismissed and was successfully sued for substantial damages.

There might indeed be an argument that Liverpool FC could recover the loss in value by seeking damages from the player. However, the employer has a commercial choice to sell or not and to accept or reject a bad bargain. Where Liverpool FC were not compelled to sell Suarez, they would be accepting the return on their investment; even if that devaluation flowed from the player acting in a manner far removed from an acceptable and "natural incidence" of the professional game.

Where an employing club can properly show that it has accepted a fundamental and repudiatory breach by the player it will be far easier to support a damages claim as in the case where Chelsea FC dismissed Adrian Mutu for drug offences. The theory is that where the misconduct is sufficiently serious as to amount to a repudiatory breach by the player, the employer may accept that breach and terminate the contract. Inevitably, commercial considerations are likely to weigh heavily on any employer considering such a course of action.

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