

FIFA's RWI - A new approach

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The FIFA Executive Committee approved the Regulations on Working with Intermediaries on 21 March 2014, effective from 1 April 2015. Although the football world has had a year to brace itself for change the legal effects remain uncertain.

The enactment of the new FIFA RWI delegates all power to NAs. Much of this power is unregulated, giving domestic NAs the autonomous legal authority to regulate as they see fit. This unregulated power will lead to a fragmented and asymmetrical regime where unfettered powers in the hands of NAs will unnecessarily complicate transactions of an international dimension. FIFA's choice to delegate this power to National Associations is questionable as football is a global business. •

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FIFA has justified the overhaul on the basis that it is more effective to regulate the actual activity than to control its access²⁹. The irony is that complete deregulation can have the effect of increasing the barriers to entry in some football jurisdictions. Deregulation will lead to an inconsistent set of licensing regulations in different NAs.

Registration of an intermediary must now occur on a transactional basis. Clubs and players are to provide intermediary contracts to the relevant NAs when the employment contract or transfer agreement is registered³⁰. FIFA has no role in this process. NAs bear the total responsibility in regulating this industry.

This process is the only registration requirement mandated by the FIFA RWI. FIFA has granted federations the ability to enact rules that go beyond these minimum standard requirements. As the wording of the FIFA RWI is broad enough to give NAs the ability to impose any type of registration system over and above the minimum transactional requirement, NAs are not prohibited from imposing differing licensing systems and access standards at a national level.

In this sense, NAs have the ability to require intermediaries to register on an ongoing and yearly basis whether or not a transaction is concluded as the validity period of a license is left unregulated. Because registration fees are a source of income there is

clearly an incentive for NAs to require intermediaries to register, and pay, on a yearly basis.

In order to determine exact registration requirements it is necessary to review the regulations of the relevant federation. In cases of an international transfer involving federations that require the registration of the intermediary whether or not a contract is consummated, it will be necessary to register as an intermediary with the federation of the player's current club, in order to negotiate the release of the player, as well as that of the player's potential prospective club.

A review of intermediary regulations in several jurisdictions reveals that the rules are not consistent. The English FA requires intermediaries to be registered on an ongoing basis³¹. It is also necessary to register each representation agreement within 10 days of its execution³². Foreign nationals without English residency are allowed to be registered as "FA Intermediaries."

A literal interpretation of the English FA regulations would require all intermediaries to register their representation agreements with foreign players playing outside of England with the English FA within 10 days of its execution whether or not the player actually plays in England, if the player will be later transferred to an English team. Failure to do so, where the intermediary later attempts to negotiate an unforeseen transfer to England, will be offside the regulations as the representation agreement was not registered within 10 days of its inception. Italy's new rules have a similar clause and impose the added result that failure

²⁹ FIFA Executive Committee approves Regulations on Working with Intermediaries. FIFA. 21 March 2014: www.fifa.com/aboutfifa/organisation/administration/news/newsid=2301236/

³⁰ RWI, Art. 3 and 6(2)

³¹ England FA Regulations on Working with Intermediaries, Appendix II, Art. 1 and 2

³² England FA Regulations on Working with Intermediaries, rule B(3)

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to register the representation agreement results in the intermediary's inefficacy to represent the player³³. As per FIFA RWI the effect of an intermediary provision cannot impede the validity of an employment contract or transfer agreement³⁴.

It is important to note that the English rules stipulate that the registration must occur *"in any event no later than at the time of the registration of a transaction."* This could be interpreted as an exception extending the deadline to the date that the transaction is consummated however it does not excuse the wording *"must be lodged within 10 days."*

NAs also have the legal authority to enact rules that can prohibit the registration of intermediaries who are foreign nationals. It appears that the French Football Federation (FFF), for the time being, will not change its existing licensing system. The French system distinguishes between French nationals, European member state nationals and non-European member state nationals. All non-French nationals must demonstrate a proficiency to communicate in French. European member state nationals can either apply for (i) a permanent license if they wish to conduct business from France so long as they are previously registered in their home country³⁵; or (ii) for permission to temporarily negotiate on behalf of their clients³⁶. The FFF prohibits foreign agents from non-European member states and explicitly requires them to engage a French intermediary for French dealings³⁷.

The Italian Football Federation (FIGC) has also enacted discriminatory rules. The FIGC's rules require that a registered *procuratore sportivo* "legally resides" in Italy³⁸. Similar to the French system all intermediaries who wish to negotiate with an Italian club or player registered with the FIGC must engage a registered Italian intermediary. As the rules are new, it is unclear whether the FIGC will liberally interpret "legally reside" to include European member state nationals or Italian nationals living abroad. A literal interpretation of the regulation suggests that one must be physically present in Italy to qualify.

The result is that federations can and have enacted exclusionary regulations to the detriment of foreign football intermediaries. France's language requirement can be perceived to be legitimate in ensuring a quality of service. On the other hand, it has the possibility of excluding otherwise qualified intermediaries from EU member states who are engaged, and more importantly selected to be represented, by their client. At the minimum the French regulations at least attempt to respect European laws regarding the free movement of labour by distinguishing between EU member states and non EU member states.

The FIGC, on the other hand, strictly applies the residency requirement, and hence has made no effort to respect the principle of free movement of labour. Every negotiation involving a player or club registered with the FIGC would require the use of an Italian intermediary resident in Italy. This would imply that a foreign agent under the previous rules, who is now an intermediary of another country with a client playing for an Italian

club, seeking to transfer the player to a team outside Italy, would have to engage an Italian intermediary merely for the simple purpose of negotiating the release of the player.

The FIFA RWI gives license to NAs to enact discriminatory regulations to the detriment of otherwise qualified foreign intermediaries. Rules such as those established by the FIGC and the FFF will prove to be a barrier to entry. Ultimately the delegation of the licensing requirement to national FAs without any limits imposed by the FIFA RWI can create a fragmented and multi-tiered system specific to each country. These protectionist measures clearly shelter local intermediaries granting a monopoly on that market to the exclusion of all foreigners. Foreign intermediaries may be allowed to operate in some countries, and prohibited in others. If national federations choose to exclude foreign intermediaries from their jurisdiction, transfers of an international dimension will become increasingly cumbersome. It would make sense to have consistent world-wide registration standards applicable to professionals working in the same industry. •

³³ FIGC, *Regolamento per i Servizi di Procuratore Sportivo*, Art. 5.5

³⁴ RWI, Art. 1(4).

³⁵ Fédération Française de Football, *Règlement des Agents Sportifs*, Art. 4.2

³⁶ Fédération Française de Football, *Règlement des Agents Sportifs*, Art. 4.3

³⁷ Fédération Française de Football, *Règlement des Agents Sportifs*, Art. 5

³⁸ FIGC, *Regolamento per i Servizi di Procuratore Sportivo*, Art. 4.1 and 4.3

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Under the FIFA RWI, intermediaries' remuneration is now *"calculated on the basis of the player's basic gross income for the entire duration of the contract"*⁴¹, while intermediaries on behalf of clubs are paid by a lump sum⁴². The suggested limit to these amounts is 3%⁴³. Several problems arise in the application of this new rule as fees paid to intermediaries can range from 3% to as high as 20%.

The first is that the FIFA RWI with respect to remuneration present similar difficulties as described above where the absolute discretion delegated to NAs can result in inconsistent regulations. As the FIFA RWI are only base regulations, NAs are empowered to limit remuneration to intermediaries to less than 3% of the gross amount of the contract. NAs can also refuse to impose any remuneration limits as the 3% threshold is only a guideline and not an absolute requirement⁴⁴.

As associations have a wide discretion in regulating remuneration, intermediaries may receive higher fees in some jurisdictions and lower fees in others. Again, the new FIFA RWI fail to adequately regulate transfers of an international dimension. This potential remuneration imbalance provides intermediaries with the self-interested incentive to advise their clients to join clubs in federations that agree to pay higher commission fees. Such advice is motivated by the opportunity of the intermediary to profit while disregarding the financial or sporting interests of the player.

Although the FIFA RWI attempts to regulate conflicts of interest, the attempts appear to be feeble. The rules apply to those conflicts of interest (that) exist or are likely to exist subject to *"reasonable endeavours."* Whether the determination of the amount of remuneration paid to the intermediary is *"reasonable"* is unclear, because, as it stands, there are no hard and fast rules on remuneration. In addition written consent to the disclosure of *"any actual or potential conflict of interest"* deems that there is no conflict. The wording of the section is watered down as an intermediary can have a player agree to a conflict of interest. Although *"any payment for the services of an intermediary shall be made exclusively by the client"*⁴⁵ and representation agreements must disclose *"the remuneration due to the intermediary"*⁴⁶ there is sufficient latitude as now intermediaries must conclude separate representation agreements for each jurisdiction with different commissioned amounts. This is a problem particularly for transfers of an international dimension.

The second problem relates to commissions calculated as a percentage of a transfer fee. Under the previous system one traditional way agents earned income, particularly in Italy and Spain, was by profiting from such a payment. It may initially appear that the new FIFA RWI prohibit these types of payments to intermediaries engaged by players. Article 7(1) of the RWI requires that the amounts paid to a player's intermediary *"shall be calculated on the basis of the player's basic gross income."* Article 7(3) only contemplates the allowance of payments calculated on the basis of a transfer fee to intermediaries

engaged by clubs without making mention of a player's intermediary.

In any event, the FIFA RWI are written in such a manner that it is arguable that intermediaries engaged by players can continue to be able to earn income on a percentage of a transfer fee. As explained above, the 3% limit is only a suggestive guideline and not a mandatory requirement. NAs are not constrained by that provision.

In addition, FIFA has enacted a general provision that may give NAs the ability to disregard any provision in the FIFA RWI as the entire legislation is *"subject to the mandatory laws and any other mandatory national legislative norms applicable to the associations"*⁴⁷. This specifically means that NAs can be empowered to require agents to be paid commissions calculated as a function of the transfer fee.

Finally it is worth noting that the FIFA RWI suggest that intermediaries engaged by clubs are allowed to receive 3% of an eventual transfer fee⁴⁸. The policy choice to do so but to prohibit similar payments to player intermediaries simply does not make sense. There is a clear loophole around this rule since intermediaries are allowed to act for both a club and a player on the same transaction so long as that conflict is disclosed and accepted. In addition, if FIFA's intent is to keep *"money in the game"* it makes little sense to allow club intermediaries to profit from such transactions as *"players"* and *"officials"* are prohibited from acting as intermediaries. This policy choice borders on the absurd and is a clear demonstration of the fallibility of the new FIFA RWI.

⁴¹ RWI, Art. 7(1)

⁴² RWI, Art. 7(2)

⁴³ RWI, Art. 7(3)

⁴⁴ RWI, Art. 7(3)

⁴⁵ RWI, Art. 7(5)

⁴⁶ RWI, Art. 5(2)

⁴⁷ RWI, Art. 1(2)

⁴⁸ RWI, Art. 7(3)(c)

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Thirdly, the incidence that the RWI allows individual NAs to enact discriminatory registration rules based on residence also has the effect of raising intermediary remuneration from 3% to as much as 20%. Domestic rules that prohibit foreign intermediaries from working in a jurisdiction require them to hire an intermediary if they are not licensed in that jurisdiction. Where an intermediary has an exclusive worldwide representation agreement, the number of intermediaries involved in a transfer of an international dimension can unnecessarily proliferate up to 4 or 5 intermediaries because of these residency requirements.

As mentioned above, the remuneration limit of 3% is only a suggestion. If more intermediaries are involved in a transaction and they have all negotiated a representation agreement receiving 3% of the gross value of the contract negotiated, then it stands that the 3% limit of payment to intermediaries on a transaction has been vitiated. As the FIFA RWI attempts to apply the 3% threshold to the *"total amount of remuneration per transaction due to intermediaries"* it appears that this attempt is also vitiated because of the permissive nature of the rules. •

FIFA's RWI - Comprehensive analysis**Changes to the Dispute Resolution System**

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The new intermediary regulations have drastically changed the dispute resolution system. Under the previous Players' Agents Regulations recourse to national courts was prohibited and the Players' Status Committee (PSC) was granted exclusive jurisdiction. This is no longer the case as FIFA has no involvement in the dispute resolution process. The only jurisdiction it retains is over issues that arise as to whether FAs have complied with the terms of the FIFA RWI⁵³.

When determining the appropriate dispute resolution mechanism the correct starting point would be to review the relevant domestic intermediary regulations. There are three potential dispute resolution mechanisms available under the new FIFA RWI.

The first possibility is that the National Associations (NA) may require that disputes arising out of an intermediary relationship under its jurisdiction be resolved by the national dispute resolution chamber. Whether such a decision can be appealed to the Court of arbitration for Sport (CAS) would also be subject to the rules of the particular NA.

The English FA's rules provide the football world with a relevant example. The registration declaration to be submitted to the FA requires English intermediaries "to be bound by the Rules and Regulations of The FA (in particular The FA Regulations on Working with Intermediaries and

Rule K (Arbitration)."

Rule K of the Rules of the Football Association refers disputes to the English FA Tribunal. Although intermediaries are not yet defined as "participants" to rule K, the submission of this declaration would bind English intermediaries to the FA tribunal system. Representation contracts, particularly with foreign players seeking a transfer to an English club, must be drafted with great care to avoid any potential conflict, particularly when considering that powers of ordinary courts are excluded in some circumstances.⁵⁴ An arbitration clause in an English representation contract referring the dispute to the CAS may be void, subject to conflicting arbitration or litigation in other countries.

The second scenario arises in cases where the FA does not refer disputes to a particular national football dispute resolution chamber and the representation agreement contains an arbitration clause referring potential disputes to a chamber of the parties' choice. Disputes referred to the CAS would be classified as an "ordinary arbitration proceeding." Such an approach would be consistent with previous CAS jurisprudence in the recognition of an arbitral clause in a representation agreement.⁵⁵

Seeking to resolve an intermediary dispute before the CAS would alleviate many of the problems that are associated with ordinary state court litigation. Although there are some costs associated with CAS arbitration it is inexpensive compared to procedures before domestic courts as the cost of the procedure is predictable and the length and complexity of such a process is streamlined. Parties to an intermediary contract with a CAS

arbitration clause can also rely on the arbitrator's expertise specific to sport and the consistent and predictable application of *lex sportiva*. From a general policy perspective, such a process is desirable as it promotes a consistency of results as similarly situated sporting jurists will have the opportunity to apply an existing body of case law. One of the problems inherent in such a course of action, however, is the predictability of enforcement of a CAS award by a NA. As the rules are new there are likely to be some growing pains.

The third situation occurs where the local FA regulations do not mandate an arbitration procedure and there is no arbitral clause in the representation contract. Here the parties would be obligated to seek judicial recourse to a national court. Such a case may be unnecessarily complicated. In selecting jurisdiction it would be necessary to observe principles of private international law and the rules of procedure of the relevant domestic court. Where a club or a player has a representation agreement with a foreign intermediary who does not reside in the country where the club or player is registered, it is possible that the club or player would have to bring legal proceedings in the intermediary's country. If the intermediary is bringing the action against a club or player he would have to do so in the jurisdiction that the club or player resides.

Under such circumstances the appellant seeking legal recourse would most likely have to engage a lawyer in the defendant's jurisdiction. Unfortunately this course of action reverses all of the positive strides that FIFA has made in the area of sports arbitration with respect to agents' contracts. Domestic courts have proven to be time consuming and costly in comparison to sports arbitration

⁵⁴ Rules of the Football Association, rule K(1)(e)

⁵⁵ CAS 2008/A/1726 *Pinhas Zahavi & Gol International v. Club Besiktas AS & FIFA*

⁵³ RWI, Art. 10

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procedures. In addition domestic courts may be bound by domestic contract law. Parties to an intermediary dispute in such a case would not be able to avail themselves to the existing body of *lex sportiva*.

As is the case with the deregulation of the system regarding inconsistent licensing processes described above, the decentralization of the dispute resolution system can lead to inconsistent standards and results regarding similar intermediary contracts. Again, this unravels the gains that have been made under the previous system. It would be advisable to ensure that, when able, representation agreements contain arbitration clauses referring disputes to a competent sporting judicial body. •