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Limiting intermediaries' fees and enhancing fiduciary duty

In this article, Juan de Dios Crespo Pérez and Paolo Torchetti, of Ruiz-Huerta & Crespo Sport Lawyers, examine the practical concerns with the current system enforced by the FIFA Regulations on Working with Intermediaries ('RWI'), and how these issues enable some intermediaries to inflate their fees within the context of a player transfer with an international dimension. Juan and Paolo provide several examples of situations which could lead to increased intermediary fees, before analysing the role of intermediaries and their obligations to their clients, and concluding with a discussion on how regulations could be strengthened to enhance intermediaries' fiduciary duty to their clients.

Many in the football world claim that the proliferation of transfer amounts and the increase in players' salaries is disproportionately ending up in intermediaries' pockets. The most recent transfer window closed with a series of late moves where some intermediaries were publicly accused of negotiating exorbitant fees, such as the alleged €7,800,000 for Ross Barkley's move to Chelsea and the €17,000,000 that allegedly was paid to Alexis Sánchez's agent for his Manchester United transfer¹.

Needless to say intermediaries have attracted severe criticism due to the sheer magnitude of these alleged payments. Gianni Infantino, the FIFA President, was quoted as saying that he is "very concerned about the huge amount of money flowing out of the football industry" where "the commissions paid to intermediaries continue to rise while at the same time the money redistributed through the game and spent on training young players is falling²." Clearly the prevailing view is that intermediaries are either not part of the 'football family' or that they are undeserving of such high levels of remuneration.

The result is that both UEFA and FIFA have formed working groups to explore ways to place a cap on intermediaries' fees, as did the EU Sectoral Social Dialogue Committee for Professional

Football, composed of UEFA, FIFPro, the European Club Association and the European Professional Football Leagues, which released a policy paper on the matter in November 2017. It appears that some of the ideas that are being proposed include requiring football associations ('FAs') to impose a hard cap on intermediaries' fees or to have some limitations administered through the financial fair play and licensing process.

These objectives may be laudable, however there is some risk that a hard cap may violate European law. Part and parcel of the problem is that the decentralised system created by FIFA has enabled intermediaries to act in a manner that is contrary to their client's best interest. Because FAs are responsible for implementing intermediary regulations, and there are examples of some federations not complying with the FIFA Regulations on Working with Intermediaries ('RWI'), intermediaries are able to represent both clubs and the player in an international transfer. Worse still, some intermediaries may take a payment from the purchasing club without the knowledge of the player.

Although such a payment is in clear violation of the FIFA RWI, some intermediaries continue to rely on the justification that they have convinced the player to the satisfaction of the

club's request. Players are particularly vulnerable as they often rely on the legal advice provided from the same lawyer that represents their intermediary.

The core of this work is that a way to limit intermediaries' fees without imposing a hard cap would be to enhance the fiduciary duty owed to the player or the club by requiring players as a rule to seek independent legal advice separate and apart from an intermediary's in-house counsel. Such a rule would have the effect of limiting the ability of intermediaries to be paid by multiple parties in a transfer and would also limit the risk that any such regulation on the matter could be subject to a complaint before the European Commission, as it would not seek a hard cap on fees.

The football business problem

The enactment of the FIFA RWI delegated all the power to the FAs. Although the FIFA RWI imposes minimum standards that FA intermediary regulations must abide by, domestic FAs are granted autonomous legal authority to regulate the matter as they see fit. This unregulated power has led to a fragmented and asymmetrical regime which has complicated transactions of an international dimension by enabling intermediaries to act against their client's best interests without detection. There are three particular problems

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under the current regime in this respect: (i) the suggestion to limit fees to 3% of the income of the transfer fee does nothing to deal with the different ways intermediaries can be remunerated in the football industry as a practical matter; (ii) all three parties to an international transfer could end up paying intermediary fees where the minimum standard registration regulations are permissive; and (iii) although generally prohibited, many intermediaries will take secret payments from purchasing clubs unknown to the player.

The suggested 3% cap and the football industry

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'³ while intermediaries may be paid by lump sum⁴. The suggested limit to these amounts is 3%⁵. Several problems could arise in the application of this new rule, as fees paid to intermediaries can range from 3% to as high as 20%.

The FIFA RWI grants absolute discretion to FAs, which can result in inconsistent regulations. As the FIFA RWIs are only base regulations, domestic FAs are empowered to limit remuneration to intermediaries to less than 3% of the gross amount of the contract. National FAs can also refuse to impose any remuneration limits as the 3% threshold is only a guideline and not an absolute requirement⁶.

Because associations have broad discretion in regulating remuneration, intermediaries could stand to receive higher fees in some jurisdictions and lower fees in others. Again, the FIFA RWIs fail to adequately regulate transfers of an international dimension. This potential remuneration imbalance can provide 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 to

profit while disregarding the financial or sporting interests of the player. This presents an intermediary with a clear conflict of interest and perhaps would be a violation of their fiduciary duty to their client, which will be discussed below.

FIFA's refusal to set an absolute standardised cap on intermediaries' fees in all jurisdictions has indeed led to differential fees in different jurisdictions. UEFA's Club Licensing Benchmarking Report: Financial Year 2016 determined that French, Israeli and Spanish clubs reported the lowest commission rates of 8% to 9% between 2013 and 2016, with Danish, Polish and Swiss clubs reporting the highest average commission rates of 19% to 21%⁷. Not only do fees vary across countries but they also depend on the value of the transfer. In the same Benchmarking Report UEFA found that:

- 769 deals involved agents' fees of less than 10%, 576 involved fees of 10 to 20% and 646 involved fees of more than 20%⁸;
- commissions of more than 100% of the transfer fee are rare in large transfer deals (32 occasions, 3% of total) but are relatively more common in smaller transfer deals (230 occasions, 25% of total)⁹;
- commissions equal to more than 25% of the transfer fee were recorded on 140 occasions in large deals (13%) and on 370 occasions in smaller deals (40%)¹⁰;
- transfers of less than €100,000 are subject to the highest commission, with an average rate of 40%¹¹; and
- transfers between €1 and €1 million result in an average intermediary commission of 20%¹².

The indisputable trend is that smaller transfer fees command higher intermediary fees as a percentage. Although it could be justified that there is a minimum amount of work to be completed and a fixed amount of expenses that are incurred by the

intermediary, this trend is nonetheless concerning. Clubs often have fixed budgets when acquiring players. Where fees take a larger proportion of the budget the player is often paid less. This creates an inherent conflict of interest on the part of the intermediary that is inconsistent with their fiduciary duty owed to the player. This problem is exacerbated when smaller transfers command larger fees.

Ultimately the wide latitude granted to the FAs by the FIFA RWI across all jurisdictions has led to the predictable result that intermediaries' fees vary widely. This situation can create conflicts of interest on behalf of the intermediary where (i) the player may be encouraged to go to a country where fees are higher; and (ii) the player could be encouraged to receive a lower salary so that the intermediary's commission is inflated.

Intermediaries paid by all three parties in an international transfer

The minimum standard imposed by the FIFA RWI is that intermediary registration must occur on a transactional basis. Clubs and players are to provide intermediary contracts to the relevant FAs when the employment contract or transfer agreement is registered¹³. FIFA has no role in this process. The FAs bear total responsibility.

FAs however retain the ability to enact rules that go beyond these minimum standard requirements as FAs are not prohibited from imposing differing licensing systems and access standards at the national level. The result is that some FAs require intermediaries to be registered on an ongoing basis and others only require intermediaries to appear in the contract that they negotiate.

A review of the intermediary regulations in several jurisdictions reveals that the rules are inconsistent. The English FA requires intermediaries to be

registered on an ongoing basis¹⁴. It is also necessary to register each representation agreement within ten days of its execution¹⁵. Other FAs, such as the Turkish Federation, do not require registration of an intermediary where they lurk in the background, or where they are representing players but in reality are working on behalf of clubs.

In any event there is a problem in the sense that each FA operates independently from one another and where there is no practical ability to impose the obligation on intermediaries to disclose their representation arrangements in other countries. Therefore it is entirely acceptable under the current regime that an intermediary act for the player and the selling club in a transfer with an international dimension. What is worse is that because the intermediary represents the player in the destination country it is entirely possible that at the time of the consummation of the transfer the purchasing club does not know about the intermediary's representation of the selling club, and agrees to pay the intermediary's fee.

As a hypothetical scenario, let us consider a situation where an intermediary registered with the Dutch FA represents a French player playing for an Italian club. The Federazione Italiana Giuoco Calcio ('FIGC') rules require that a procuratore sportivo (the sports agent) 'legally reside' in Italy and that those with Italian residence are registered on an ongoing basis¹⁶. The Dutch agent, however, can negotiate the player's contract in Italy as an intermediary so long as the intermediary is registered with a FIFA affiliated FA¹⁷. Therefore, the Dutch intermediary negotiates the French player's contract with the Italian club.

After several successful years both the Italian club and the French player wish for the player to be transferred to, hypothetically, an English club. The Italian club desires the transfer to

raise revenue and the player to have a new sporting opportunity. When the intermediary approaches the Italian club it is agreed that the intermediary will represent the Italian club for the purposes of finding a destination English club. At that moment, as required by the FIGC rules, that representation contract between the intermediary and the Italian club is registered only with the FIGC.

In addition the French player agrees to this dual representation, as it is likely that the intermediary will pay him a portion of the additional fee paid by the Italian club. The intermediary then approaches an English club as the French player's intermediary and does not disclose that he is also representing the Italian club. The intermediary then proposes that the English club pay a commission fee on the transfer to the intermediary. Again, the French player agrees to this arrangement as required by the regulations because they are most likely receiving a financial incentive. Unsurprisingly the player is transferred from the Italian club to an English club.

The result is that the intermediary is being paid by their original client, the French player, the old team, the Italian club, and the destination club in England. Although the English FA RWI imposes a general duty that intermediaries 'must not so arrange matters as to conceal or misrepresent the reality and/or substance of any matters¹⁸,' such behaviour could go undetected at the time of the transfer. It is correct to say that the intermediary cannot be hired by the English club for the purposes of acquiring talent because of the conflict of interest rules in the English FA RWI, where Article E1 is written in a manner that applies to 'all parties' to a transaction which is broad enough to include foreign clubs¹⁹. The practical situation is that the English club has no idea as to the arrangement outside of England because there is no way to ensure that the pre-existing representation

contract with the Italian club is disclosed by the intermediary. Such a failure to disclose the representation contract with the Italian club would be a clear violation of Article E2 of the English FA RWI²⁰, however it is entirely contingent on the intermediary to do so²¹.

As mentioned above, the intermediary is paid by all three parties to the transfer, which inflates the amounts paid. Under the current FIFA RWI, all FAs act independently. If FIFA was competent in its attempt to limit intermediary fees it would not have relinquished the responsibility for regulating a major aspect of the global game and allowed the creation of transitory regulations between FAs.

Purchasing clubs paying player representatives

Although it is a clear contravention of the regulations, sometimes intermediaries will demand a separate payment from the destination club in a transfer in order to 'convince' the player. When such a payment is unknown to the player it presents a special problem in the sense that it creates a clear conflict of interest where there is less in the club budget to pay the player in salary.

Compounding the problem and rendering the player particularly vulnerable is that most players do not retain counsel separate and apart from the lawyer hired by the intermediary. Usually an intermediary will have counsel on retainer who will draft and manage representation, employment and transfer contracts. As we will see below it is absolutely necessary for players to engage their own counsel to review such situations where counsel are able to ask appropriate questions of all parties involved thus enhancing the fiduciary duty owed to the player.

Analysis and review of an intermediary's role

Generally speaking, a football

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intermediary is defined as a person 'who, for a fee or free of charge, represents players and/or clubs in negotiations with a view to concluding an employment contract or represents clubs in negotiations with a view to concluding a transfer agreement'²².

In this regard intermediaries have a positive obligation to act in their clients' best interests. In common law jurisdictions the fiduciary nature of the relationship, where one party is caring for the other's interests, a duty of care is owed to the client. The result is that the intermediary must put their client's interests before their own. This perspective was explicitly recognised in the English Court of Appeal case *Imageview Management Ltd v. Kelvin Jack*²³, where the agent (which was what intermediaries were called at the time) accepted a payment from the prospective club to procure a work permit for the player. The player brought an action once he found out.

The Court ruled that the agent violated his fiduciary duty to his client and required the agent to pay back all of the agent's fees to the player and the representation agreement was dissolved where future payments were not owed. In that decision Jacob LJ said²⁴:

"(t)he law imposes on agents high standards. Footballers' agents are not exempt from these. An agent's

own personal interests come entirely second to the interest of his client. If you undertake to act for a man you must act 100%, body and soul, for him. You must act as if you were him. You must not allow your own interest to get in the way without telling him. An undisclosed but realistic possibility of a conflict of interest is a breach of your duty of good faith to your client."

This concept also exists in the civil law tradition. Under Swiss law, as an example, agents are subject to the law of equity where the concept of fiduciary duty is applicable²⁵. Moreover, where the agent is at fault under Swiss law they are subject to a claim of unjust enrichment, which is also an equitable concept²⁶. Despite these obligations, as we have seen in the football industry, intermediaries often do not act in the player's best interest.

Conclusion: the role of legal counsel

Players are particularly vulnerable because they rarely seek independent legal advice. In summary, a player's interests can be compromised in four ways relating to the payment of fees: (i) the player could be counselled to be transferred to a country that pays higher commission to the intermediary; (ii) in football lower transfer fees and salaries sometimes result in higher commissions as a percentage; (iii) in cases where all three parties to a transaction pay

intermediary fees this leaves less room for remuneration for the player; and (iv) secret payments such as the *Imageview Management* case create a clear conflict. All four of these situations lead to increased intermediary fees.

Although it would not combat secret deals, it is possible that the requirement that all players seek independent legal advice could eliminate some of the four issues above, thus reducing intermediary fees. The reason for this is twofold. Firstly, an independent lawyer would not face a conflict of interest and can ask the relevant questions to uncover situations where the player's rights are compromised. In addition lawyers are mostly remunerated in a manner unconnected to the value of the transaction; therefore the incentive to increase fees does not exist.

The authors propose that such a requirement ought to be implemented by either FAs or the players' unions. Although the English FA RWI does mention that players ought to be given the opportunity to seek independent legal advice, it is only the opportunity that is mentioned and not the requirement. Perhaps this requirement should be considered by the football world which would have the corollary consequence of limiting intermediaries' fees without risking a court challenge to an outright ban.

1. David Conn, 'Agents' runaway gravy train set to be derailed in bid to curb excessive fees,' *The Guardian*, 1 February 2018, <https://www.theguardian.com/football/2018/feb/01/agents-gravy-train-curb-excessive-fees>. It is important to note that the intermediaries responsible for these players have denied these reports.

2. Ibid.

3. FIFA Regulations on Working With Intermediaries, Article 7(1).

4. FIFA Regulations on Working With Intermediaries, Article 7(2).

5. FIFA Regulations on Working With Intermediaries, Article 7(3).

6. FIFA Regulations on Working With Intermediaries, Article 7(3).

7. Club Licensing Benchmarking Report: Financial Year 2016, page 48.

8. Club Licensing Benchmarking Report: Financial Year 2016, page 45.

9. Club Licensing Benchmarking Report: Financial Year 2016, page 50.

10. Club Licensing Benchmarking Report: Financial Year 2016, page 50.

11. Club Licensing Benchmarking Report: Financial Year 2016, page 47.

12. Club Licensing Benchmarking Report: Financial Year 2016, page 47.

13. FIFA Regulations on Working with Intermediaries, Article 3 and 6(2).

14. England FA Regulations on Working with Intermediaries, Appendix II, Articles 1 and 2.

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

16. FIGC Regolamento per i Servizi di Procuratore Sportivo, Articles 4.1 and 4.3.

17. FIGC Regolamento per i Servizi di Procuratore Sportivo, Article 4.10.

18. The FA Handbook 2017/2018, FA Regulations on RWI 2017-2018, Article A(3).

19. The FA Handbook 2017/2018, FA Regulations on RWI 2017-2018, Article E(1).

20. The FA Handbook 2017/2018, FA Regulations on RWI 2017-2018, Article E(2).

21. The FA Handbook 2017/2018, FA Regulations on RWI 2017-2018, Article E(8).

22. FIFA Regulations on Working with Intermediaries, preamble and Article 1(1).

23. [2009] EWCA Civ 63.

24. *Imageview Management Ltd v. Kelvin Jack*, [2009] EWCA Civ 63 at paragraph 6.

25. Swiss Code of Obligations, Article 39(2).

26. Swiss Code of Obligations, Article 39(3).