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THE NEW FA FOOTBALL INTERMEDIARIES REGULATIONS AND THE DISPUTES LIKELY TO ARISE [1]

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I. Introduction

1. The FA Regulations on working with Intermediaries ('FA Intermediaries Regulations') come into force on 1 April 2015. They put into force FIFA's Intermediaries Regulations, with some important variations and, with them, apparently signal the abolition of the licensed football agent.

2. Agency activity, now to be called Intermediary Activity, shall continue. Both the FA and FIFA shall continue to regulate that activity, but the de-licensing of football agents represents a substantial de-regulatory shift in the focus of that regulation. There are some important differences between the FIFA Intermediaries Regulations and the FA Intermediaries Regulations, the latter generally providing for a higher minimum standard. Indeed, taken as a whole, the FA Intermediaries Regulations might be viewed as a system of 'soft licensing' replacing what many regarded as an effective licensing regime.

3. Exactly how the FA Intermediaries Regulations shall work in practice, and the extent to which the FA shall continue to apply significant resources to regulating the activity, and indeed regulating Intermediaries themselves, remains to be seen.

[1] This paper was originally written to accompany a presentation by the author at the University of Westminster Centre for Law Society and Popular Culture half-day seminar on the New Regulations on Working with Intermediaries on 26 March 2015, but also intended for wider publication and use thereafter.

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There are, however, a number issues and potential conflicts that might arise that are the subject of this paper.

4. In short, the author's view is that there is likely to be a significant increase in legal disputes arising within the sector as a result of the new FA Intermediaries Regulations; both civil disputes (which are most likely to be arbitral) between the various parties involved (football Clubs, Players and Intermediaries) and regulatory disputes under the auspices of the FA. This paper seeks to highlight the areas in which these disputes are most likely to arise, suggesting why, and where possible, what the outcome might or should be.

II. Regulation of and jurisdiction over Intermediaries

5. The first central issue is the extent to which Intermediaries themselves shall be regulated by the FA. The FIFA Intermediaries Regulations essentially shift the regulation of Intermediary Activity from regulating all three parties to that activity to only the Clubs and Players. Control of Agents, and their licenses, is abolished. Whilst the FA have put much of this into force, and have of course abolished licensing, it appears as if Intermediaries shall still themselves be directly regulated by the FA.

6. Intermediaries shall have to be registered with the FA, for a start. The FIFA and FA standards for registration are relatively low, and just about anyone ought to be able to become registered. One substantial difference with the former Agents Regulations is that now companies shall be able to register as Intermediaries. This itself is likely to cause some confusion. Part B of the FA Intermediaries Regulations provides for Representation Contracts between Intermediaries and parties. A company, engaging a number of Intermediaries, can now enter a Representation Contract with a Player – before there had to be a designated individual. It would appear that a number of different people, so long as they are all themselves registered Intermediaries, and are all carrying out that activity on the behalf of the company, will be able to carry out Intermediary Activity at the same or different stages of the same transactions. A Player would apparently

only have the right to representation by the company, not necessarily a right to a particular designated individual actually looking after him. This difference with the previous Regulations is likely to lead to disputes between Clubs and Players on the one side, and Intermediaries on the other, as well as an increased risk of conflicts of interest arising for Intermediaries themselves.

7. Registration shall take place every year. Whilst the FA Intermediaries Regulations do not themselves provide for a disciplinary framework where the FA shall have the power to suspend or withdrawal an Intermediaries' Registration for regulatory breaches, early indications suggest this is precisely what shall happen. First, Regulation F.1 makes "*any breach*" of the FA Intermediaries Regulations misconduct for the purposes of FA Rules. This does not itself expressly confer jurisdiction over Intermediaries, taken with the other points discussed below it is most likely such jurisdiction shall exist. The FA looks set to seek a further change in its Rules so as to make Intermediaries "Participants" which would mean they come under the FA's jurisdiction and can then be disciplined for breaching the Regulations. Indeed, already, before the FA Intermediaries Regulations even came into effect, an FA Regulatory Commission has purported to exercise a power to suspend two Agents' registrations to act as Intermediaries in the future.[3]

8. It therefore seems likely the FA shall continue to regulate Intermediaries even though the FIFA Intermediaries Regulations do not expressly require them to do so. So long as this is done in a fair and even-handed way, this is to be welcomed. If the FA does not regulate Intermediaries then the risk of abuse and corruption is bound to be greater. It would also place a disproportionate burden on Clubs and Players to be sanctioned for breaches by Intermediaries in transactions they are concerned with when the Intermediary him or herself is free from any sanction. From a practical point of view it would make it harder for Clubs and

[3] See, the decision of the FA Regulatory Commission in *The Football Association v Matthew Kleinman, Alex Levack & Ors* (16 February 2015 – available from the FA website at: http://www.thefa.com/news/governance/2015/feb/brighton-charged-agents-250215), currently under appeal. The appeal also involves various other issues and is being conducted by the author of this paper – an update on the outcome of the appeal shall be published on the Blackstone Chambers Sports Law Bulletin when the appeal has been determined and the decision published.

Players to defend themselves from disciplinary proceedings where the Intermediary was not charged with them or before the same hearing because he or she did not fall under the disciplinary jurisdiction of the FA.

9. However, if the FA is to regulate Intermediaries in this way then one has to question whether its Regulations really do abolish the licensing system. Whilst the license exam will no longer take place, and Intermediaries shall not hold a formal license, in order for any Intermediary to become involved in a transaction and, importantly, to be paid with respect to any commission, he or she must hold a valid Registration with the FA and it is likely to be condition of such Registration that he or she submits to the Regulations and to the jurisdiction of the FA to sanction him or her if he or she breaches the Regulations. Such power to sanction would include the power to suspend or withdraw the Registration, and thus temporarily or permanently exclude the Intermediary from conducting Intermediary activity in the future. This would be, for all intents and purposes, a soft licensing system.

10. In this context it is important to note that with such a 'soft licensing' system imparting obligations on Registered Intermediaries, there must also be rights. The suspension or withdrawal of an Intermediaries' registration, for example, shall only be permissible following a fair process. The legal principles established in the seminal Court of Appeal decision in the *McInnes v Onslow Fane* [4] case – creating a threefold categorization of the rights that arise in forfeiture, expectation and application types cases – shall apply. It shall not be permissible for the FA to arbitrarily refuse an applicant a license to be an Intermediary; and an Intermediary shall have a right to a fair hearing before the FA suspends or withdraws his or her license.

11. In addition, as the FA is likely to make Intermediaries "Participants" for the purposes of the FA's Rules then the arbitration clause in Rule K of the FA Rules shall apply – disputes between Intermediaries and other Participants (whether

[4] [1978] 1 WLR 1520

Clubs, Players or other Intermediaries) shall have to be determined by Rule K arbitration and not in the courts.

12. These points demonstrate that the regulation of Intermediaries by the FA, and the rights and obligations arising from Registration, is unlikely to differ significantly from the previous system of regulation of licensed Agents. Unless and until Intermediaries are formally made Participants under the FA Rules, there may be jurisdictional issues and some confusion about whether or not the arbitration clause applies. The FA shall be required to deal fairly with applications for Intermediaries and is likely to continue to investigate and discipline breaches of the Regulations, but with new inexperienced Intermediaries acting, and potential conflicts arising where companies act as Intermediaries, there is quite likely to be an increase in regulatory disputes.

III. Price Fixing – the 3% recommended cap

13. One of the most controversial aspects of the FIFA Intermediaries Regulations is the "recommendation" that there be a "benchmark" for Intermediaries remuneration of no more than 3% of the Player's basic wage (Regulation 7(3) of the FIFA Intermediaries Regulations). Currently there is no cap on agents' fees, and whilst 5% is a common norm where the parties have not negotiated more, commission can be for whatever the parties agree and there is no standard sum. In any event, it would be rare for an agent to agree to provide his services for 3% or less.

14. The 3% recommended cap has been criticized by many, including the English Association of Football Agents ("the AFA") which represents all the main football agents in the UK. It is seen as an infringement on competition, an attempt to drive down the commission available to agents, and a measure that shall also cause detriment to Players. After all, the point of Players having experienced and professional agents of their choice is to assist them in achieving the highest possible remuneration in what is often a very short career. As FIFA

itself argued in the *Piau* case before the European Court of Justice,[5] regulation of Agents was justified "*to raise the professional and ethical standards for the occupation of players' agent in order to protect players, who have a short career*"

15. FIFA's recommended 3% cap is currently the subject of a complaint brought by the AFA before the European Commission on grounds that it infringes competition law being a measure akin to price fixing. As the author of this paper, along with Lord Pannick QC and Tom Richards also of Blackstone Chambers, is acting for the AFA in that complaint it is not discussed further here, other than to note the complaint remains alive and pending.

16. The English FA have included within their Regulations, at Regulation C.11, the same "*recommendation*". It is understood they feel constrained to do so because of the FIFA Regulation. However there are signs that the English FA shall not actively promote this recommendation and, in particular, not encourage Clubs or Players to adopt it. It may be, as a consequence, that the recommendation has a muted reception in England. However, to the extent that either the FA, or Clubs in combination, start actively pressurizing Intermediaries to accept standard contracts with a 3% cap there are likely to be national challenges to such price fixing by English Intermediaries.

IV. Length of Representation Contracts and Young Players

17. The FIFA Intermediaries Regulations do not provide for any maximum duration of the Representation Contract between Player and Intermediary. This is most likely to create contentious disputes.

18. The nature of the Player/Intermediary relationship is precisely the kind of relationship where regulatory measures are sensible to protect young or inexperienced players and avoid litigation. The previous rule, that no Representation Contract could continue for any term beyond two years, unless the parties agreed a new contract, was a reasonable measure to avoid such

[5] ECJ Case T-193/02, *Piau v Commission of the European Communities*

conflict. Young and inexperienced players, in particular, might enter into Representation Contracts with Intermediaries in order to obtain their first professional contract, or their first "big" professional contract or transfer, only to substantially increase their value and thus bargaining power over the following two years. If they are bound to an Intermediary on terms they could substantially improve on if free to negotiate a new contract, or bound to an Intermediary not able to take their career forward, for a more prolonged period of time then it is inevitable conflicts shall arise. Two years is a relatively long time for a professional footballer, but it is has a reasonable relationship to the average length of a playing contact. To bind a Player for a substantially longer period to an Intermediary may seriously frustrate his career, and Players bound in such a way will be tempted to just walk out and breach their Representation Contracts or to find ways of claiming the Intermediary is in breach thus allowing them to be released from the Contract. Either way there is likely to be an increase in contentious disputes and litigation.

19. The risk of conflict is increased under the FIFA Intermediaries Regulations because it is possible for an Intermediary to enter into a Representation Contract with a "*minor*" (any player who has not reached the age of 18 under FIFA Regulations), so long as it is signed also by his legal guardian (Regulation 5(2)), and no payments are made to the Intermediary whilst the Player remains a minor (Regulation 7(8)). Theoretically, Intermediaries shall be able to sign Representation Contracts with promising schoolboy players for extended periods of time under the FIFA Regulations in some countries. The Intermediary would not be paid until the Player turned 18, and might decide to sign large numbers of promising school boy players to long Representation Contracts in the hope that just a few might turn out to be gifted players with a lucrative professional future. But if the contract is longer than 10 years, for example, then once the Player has turned 18 and is able to command large transfer fees and salaries, the Intermediary can have a return for his investment. Restraint of trade issues are most likely to arise here.

20. It is particularly ironic that just as FIFA have decided to prohibit third party ownership of players ("TPO", the prohibition of which is itself controversial and not properly thought through), it has created the circumstances for what could be a far more pernicious situation. Intermediaries in countries where they are able to sign long agreements with minors would not only have an investment in the player (as with TPO) that they can only obtain a return for when negotiating employment contracts and transfers (also similar to TPO), but in this situation Intermediaries shall have a direct influence over the Player, in that they are negotiating the Player's contracts and advising him on his moves. It is precisely this kind of influence which was prohibited (i.e. third party influence) by FIFA rules even when TPO was permitted, and such influence is widely regarded as the real vice of TPO.

21. The FA Intermediaries Regulations, on the other hand, go beyond the FIFA Regulations and provide (as did the previous FA Agents Regulations) that the Representation Contract shall only be for a maximum duration of two years (see, Regulation B.10). Whilst this is sensible, issues may still arise where foreign Intermediaries with much longer Representation Contracts with Players do business with English Clubs. Potentially the difference in the regulations puts such foreign Intermediaries at an advantage as compared to Intermediaries in the UK.

22. The FA Intermediaries Regulations further differ from the FIFA Regulations in that they do not allow an Intermediary to enter into any Representation Contract with a minor, or indeed even approach him or conduct any activity on his behalf, until the 1st day of January for the year of the Player's 16th birthday (see, Regulation B.8).

23. Whilst this may be a reasonable measure to protect very young players from Intermediaries, what is far less sensible is the fact, no doubt as a consequence of the FIFA Regulations, that an Intermediary cannot be paid any sum with respect to activity carried out in respect of a minor until he has reached his 18th birthday. So, for example, if a 17-year old player has the chance of entering a lucrative

contract with a Premier League football Club, the Player is unable to have the benefit of an Intermediary negotiating the terms of such a contract on his behalf unless the Intermediary is prepared to do so for no commission at all. This makes little sense. A 17-year old Player is allowed to sign a full professional playing contract with a Club and is able to enter a Representation Contract with an Intermediary to assist him in signing such a playing contract and negotiating his terms; but the Intermediary is unable to charge any commission for such work. Such a provision does not appear to be in the interest of either the Player or the Intermediary, and could be viewed as putting Clubs at an unfair advantage in negotiating terms with young Players. The provision is open to potential challenge on restraint of trade and/or competition law grounds.

24. It is suggested that a more sensible rule would, (i) allow Intermediaries to enter Representation Contracts with 16-18 year old players, so long as there is parental/guardian consent, but not (as FIFA does) allow such contracts to be entered before the player is 16; (ii) allow the Intermediary to charge commission for any services provided during such a contract (as neither the FA nor FIFA allow) and (iii) limit the term of the Representation Contract to a two-year period (as the FA does but FIFA does not). Such a provision would strike a proper balance between protecting the interests of young players whilst at the same time incentivizing Intermediaries to advance those interests by assisting in negotiating contracts.

25. As well as the potential for an attack on the legality *per se* of the rules restricting payment to Intermediaries for negotiating a contract for a 17-year old Player, legal issues are likely to arise where Players, Clubs and Intermediaries seek to subvert the rules and make allowance for some commission, inevitably by some concealed route, to help facilitate the signing of a promising young player.

26. Other issues may arise where a foreign young Player who has entered into a Representation Contract with a foreign Intermediary before the age of 16, for a period in excess of two years, is signed by an English football Club. It is unclear what would happen after his 18th birthday when he agrees his contract terms

with the Club and an Intermediary could be paid. Under a strict (and it is submitted a proper) reading of the FA Intermediaries Regulations an Intermediary would have to register a Representation Contract with the Player that conforms with the FA rules – even if he already had a long term Contract with him. What happens if the Player refuses to sign a new FA compliant Representation Contract with his existing Intermediary and instead enters a valid Representation Contract with an English Intermediary? The foreign Intermediary is likely to sue the Player (or the other Intermediary) for his commission, which he could validly do under the contract he has entered into even though the Player was not obliged to enter a new contract with the foreign Intermediary that was necessary to facilitate the payment of commission in England.

V. Duty of disclosure and conflicts of interest

27. Both the FIFA and the FA Intermediaries Regulations provide for a far more comprehensive duty of disclosure and publication of payments to Intermediaries than previously existed under Agents Regulations. As Daniel Lowen points out in his helpful review of the FA Intermediaries Regulations,[6] "*The focus on transparency in the [FA Intermediaries Regulations] is far greater than in the [previous Agents Regulations]*". The FA may publish a full list of Intermediaries and the payments they have received. The policing of conflicts of interests has been largely shifted to a duty on the Intermediary to disclose any conflict (see Regulations E.8 -10).

28. The most likely issues to arise in this regard are related to non-disclosure and potential conflicts of interest. So, for example, where there is a potential, but perhaps not proof of any actual, conflict of interest, but there has been non disclosure by an Intermediary, the FA may decide to take disciplinary action against the Intermediary (or any other non disclosing party) simply for non-disclosure even if there have been no other breaches of the Regulations. Similarly,

[6] See: A Guide To The FA's Regulations on Working with Intermediaries by Daniel Lowen, Law in Sport, 17 February 2015 - http://www.lawinsport.com/articles/item/a-guide-to-the-fa-s-regulations-on-working-with-intermediaries.

Clubs or Players may allege such non-disclosure amounts to a material breach of the Representation Contract itself entitling them to repudiate the contract, or alternatively a breach of the Intermediary's fiduciary duties to his or her principal.[7]

VI. Tapping up and poaching

29. A further potential for disputes is with regard to "*tapping up*" – approaching Players under contract to a Club in an attempt to induce them to leave the Club and join another. This activity was prohibited by the Agents Regulations which contained a presumption that an Agent of a Player who unlawfully terminated his playing contract had induced a breach of contract.

30. In addition, unlike the previous Agents Regulations, the FA Intermediaries Regulations do not prohibit an Intermediary approaching a Player already under a Representation Contract with another Intermediary. In the past, attempts by Agents to poach the clients of other Agents could sometimes be swiftly rebuffed by making it clear to the poaching Agent that he could not do so without breaching the Agents Regulations (and thus risk suspension of his license by the FA) whilst the Player already had a valid Representation Contract. This opportunity to protect their clients will be lost to Intermediaries.

31. The relaxing of both the tapping up and poaching provision is bound to be a recipe for conflict. In particular, as individuals new to the business are likely to register as Intermediaries, without having passed an exam or obtained a license, and shall often have no existing clients or business, there is a real danger they shall seek to poach Players from other Intermediaries and/or encourage Players at Clubs to move to other Clubs where the Intermediary thinks he or she can

[7] As to which see, in particular, the very important Court of Appeal case of *Imageview Management Ltd v Jack* [2009] EWCA Civ 63 in which the breach of fiduciary duties and earning of a Secret Profit by a football Agent not only entitled a Player to a claim for an account of the profit his Agent earned at his expense but also meant the Agent forfeited his right to past and future commission payments under the Representation Contract. The principle in *Jack* shall continue to apply to Intermediaries as it applied to Agents; simply because the FA has changed the label from Agent to Intermediary does not undermine the essential agency/fiduciary relationship a Representation Contract creates.

charge a commission as a result. It is unfortunate that there is no regulatory provision to deter this sort of behavior, however, that does not of course mean it is legitimate behavior. Normal principles of law continue to apply, and if an Intermediary encourages a Player to breach his contract with a club or with another Intermediary, then the club or Intermediary suffering the breach shall have a claim not only against the Player but also against the Intermediary tapping up or poaching, regardless of there being no regulatory breach. Such claims shall be brought under normal breach of contract and inducement to breach a contract principles, and the deregulatory effect of the Intermediaries Regulations generally means it is likely such claims shall increase.

VII. Previous Licensed Agents and self-regulation

32. Not surprisingly, one of the most vocal groups critical or FIFA's move to deconstruct the system of licensing and regulating Agents are those who have already developed a successful business as licensed football agents. The de-regulatory approach is a potential threat to their business, as is, of course, the attempts to encourage a 3% cap on remuneration. All is not lost for previous licensed Agents, however, and there are various reasons why the reality is that those previous Agents shall continue to conduct most of the Intermediary business in the future.

33. First, there is likely to be an automatic assumption that a licensed Agent will qualify as a registered Intermediary so long as he or she registers with the FA – whilst this is not express in the Regulations it follows from their overall scheme and Regulation G.2 (considered below).

34. Second, Agents with existing Representation Contracts (entered into before 1 April 2015) can conduct Intermediary activity pursuant to those Contracts so long as they are all resubmitted to the FA 10 days after the Intermediary registers with the FA (see, Regulation G.2 – Transitional measures). It is submitted that this latter requirement is an unnecessary administrative hurdle. Some Agents have dozens, if not more, of Representation Contracts with many players and

Clubs, entered into at different times, as well as dual Representation Contracts. To expect the Agent as Intermediary to re-submit each of these within 10 days when, if they are valid, the FA already has copies of them, is pointless. Rather, the Agent ought to be able to register and include with his registration some general form of wording that acts to formally re-submit all of his valid Representation Contracts which the FA has on file. It is likely that this is what many Agents shall actually do in practice, and the FA would be well advised to accept this as complying with its Regulations – there is in any event no discernable prejudice to the FA or to football generally as a consequence of such a practice.

35. Third, there is the question of professional liability insurance. This was a requirement for Agents under the previous regulatory system, but is no longer expressly required by the FA Intermediaries Regulations. However, there are rumours that the FA may consider making the holding of such insurance a requirement of registration in the future, or at least shall otherwise encourage the taking out of such insurance. This is sensible for a number of reasons. A requirement that a person acting as Intermediary holds insurance is a form of regulation that one would hope would weed out some of the most dishonest or disreputable applicants to practice as an Intermediary, but even if it did not do so should provide some comfort to other parties in football who may have to bring claims against such individuals where those individuals would otherwise be unable to meet the claims. In addition, the requirement for insurance would mean there would be some real investment involved by those applying for registration and should further weed out the more speculative applicants with no real prospect of successfully engaging in Intermediary Activity.

36. Fourth, there is the likelihood of some system of self-regulation. This might be in the form of a "*kite mark*" type approach where those with existing Agents licenses, and those that apply on a similar agreed basis, have some kind of recognition that they are qualified and professional Intermediaries. It would likely be a requirement that all of these persons had professional liability insurance. Such a system is likely to be set up by the AFA, with as much co-

operation with the FA itself as is possible. It would mean that Clubs and Players could satisfy themselves that an Intermediary was of a particular standard, even though they would be free to enter Representation Contracts with those who did not conform to such a standard. Such self-regulation would not only be welcome but should be lawful – indeed is likely to be the preferred approach to the Regulation of Intermediary Activity by the European Commission.

37. Finally, and perhaps most important of all, is the practical question of market connections and reputation. Agency, or now Intermediary business in football is dependent on a combination of good connections in football, a knowledge of the game and of Players' abilities and Clubs' needs, and effective negotiation of contracts. Those with an abundance of these skills and connections are often already successful football agents and are recognized for their strengths and their connections. The new FA Intermediaries Regulations will not change any of that. Just as many people in the past without all of the necessary skills, experience or connections may have obtained licenses as football Agents, or registered as lawyers able to conduct Agency Activity, but went on to conduct little or no actual business of agency activity, so too the opening of the doors to wider groups of people and the relaxing of much of the regulation does not mean, in itself, that inexperienced Intermediaries are likely to seriously dent the market of those with established reputations and connections.

VIII. Conclusion

38. What is more likely, however, is an increase in disputes between Intermediaries themselves, between clubs and players on the one hand and Intermediaries on the other, and an increase in disciplinary/regulatory disputes between the FA and Intermediaries (and others). This shall arise for the reasons suggested above, and it is expected largely in the areas identified in this paper. Broadly speaking, it is a consequence of the deregulatory effects of the new Intermediary Regulations, the fact that people without experience, and some without scruples, are likely to try and become involved in the business, and the fact that it will take some time for Clubs, Players, Intermediaries and the FA itself to become familiar with how

the new Regulations actually work in practice, that there will be an inevitable increase in contentious disputes within this important area of business in the future.

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