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Players' Agents' Role in Football Transfer Market: Evaluating the Need of Improving FIFA Regulations

Introduction

The profession of sport agent gained significance in Europe in 1990s – in contrast to United States, where due to earlier commercialization of sports, the bloom of agents' activity can be dated to the 1960s¹. What contributed to the change of mind of players and managers in Europe was a great increase in the number and complexity of transfers of players between teams. The conservative European environment had to give ground to professional agents, which soon affected international regulations of FIFA (Fédération Internationale de Football Association). It is clear that although FIFA legal documents generally use a term “player’s agent”, a licensed player’s agent can actually represent not only players, but also clubs². It says, “an agent is a person authorized to act for another when dealing with third parties... an intermediary insuring the supply and demand for labor within sport is met”³. Given the specificity of the football transfer market, which covers practically all countries all over the world, the regulations concerning agents must be drafted and implemented carefully. This paper is an assessment of current regulations in view of impact the professional agents' activity has on turnover and other participants of the market. Part 1 provides a necessary introduction to the FIFA legal system, explains the structure of agent-related

¹ Ronnie-V. van der Meij, *Players' Agents and the Regulatory Framework on Corruption in International Sports Law*, 1-2 THE INTERNATIONAL SPORTS LAW JOURNAL 43,43 (2009).

² Art. 2 of FIFA Players Agents Regulation, Available at: http://www.fifa.com/mm/document/affederation/administration/51/55/18/players_agents_regulations_2008.pdf

³ Richard Parrish, *Regulating Players' Agents: A Global Perspective*, 1-2 THE INTERNATIONAL SPORTS LAW JOURNAL, 38, 38 (2007).

regulations and summarizes the requirements needed to become a licensed agent. Part 2 is an analysis of relevant agent activity, such as agent relationships with the players and clubs, roles in transfers and sustaining contractual stability, as well as agents' responsibility for professional misconduct. Finally, Part 3 deals with the controversies arising from the agents' influence on the transfer market, regarding players' interest in player – agent relations and the problem of unlicensed agents. Part 3 also presents proposals to improve the system.

Part 1. Basics of professional football agency

1.1 Preliminary remarks on FIFA structure

In order properly to understand the substance and main issues regarding player's agent profession, it is necessary to briefly introduce elementary concepts underlying the functioning of FIFA. It is particularly important to understand the relations between FIFA and its members in terms of jurisdiction and professional responsibility. Moreover, most of the rules regarding dispute resolution system are applicable to the disputes arising from the agents' activity.

FIFA is an international body governing football, futsal and beach football. It is a private association, not an arm of any state. FIFA Members are national associations admitted into membership of FIFA by the Congress (FIFA supreme and legislative body, comprising of the current Members). The core regulation of FIFA legal system are FIFA Statutes⁴ which beside FIFA objectives⁵ contain numerous, complex provisions for e.g. structure and organization of FIFA and its bodies. Bearing in mind the topic of this paper, the relevant issues which require explanation are FIFA's judicial and dispute resolution system and the relation between FIFA and licensed

⁴ Available at: <http://www.fifa.com/mm/document/affederation/generic/01/66/54/21/fifastatutes2012e.pdf>

⁵ Art. 2 the FIFA Statutes:

The objectives of FIFA are:

- a) to improve the game of football constantly and promote it globally in the light of its unifying, educational, cultural and humanitarian values, particularly through youth and development programmes;
- b) to organise its own international competitions;
- c) to draw up regulations and provisions and ensure their enforcement;
- d) to control every type of Association Football by taking appropriate steps to prevent infringements of the Statutes, regulations or decisions of FIFA or of the Laws of the Game;
- e) to prevent all methods or practices which might jeopardise the integrity of matches or competitions or give rise to abuse of Association Football.

agents, players and clubs. Moreover, valuable resources of legal regulations regarding transferring and players are FIFA Regulations on the Status and Transfer of Players⁶.

According to art. 61 of FIFA Statutes, FIFA judicial bodies are the Disciplinary Committee, the Ethics Committee and the Appeal Committee. The first two bodies may impose sanctions regarding disciplinary and ethics matters, whereas the Appeal Committee is an appeal body for both of them. Furthermore, matters regarding transfers and status of players are dealt by FIFA Dispute Resolution Chamber as provided in art. 54.2 of FIFA Statutes and art. 24 of Regulations on the Status and Transfer of Players.

One needs to understand the specifics governing aforementioned bodies' jurisdiction in cases regarding agents, players and clubs. The said jurisdiction arises from two dimensions of legal regulations: international (FIFA regulations) and national (member associations' regulations). First of all, FIFA Statutes explicitly regulate scope of effectiveness of its bodies' decisions. Art. 62.2 of FIFA Statutes provides that "the Disciplinary Committee may pronounce the sanctions described in these Statutes and the FIFA Disciplinary Code on Members, clubs, Officials, Players and match and players' agents". The similar provision regarding the Ethics Committee contains art. 63.2 of FIFA Statutes. Regulations on the Status and Transfer of Players provide the enumeration of disputes within FIFA (Player's Status Committee and Dispute Resolution Chamber) competence⁷. Enforcement of those provisions is guaranteed in art. 69 of FIFA Statutes:

⁶Available at:

http://www.fifa.com/mm/document/affederation/administration/01/95/83/85/regulationsstatusandtransfer_e.pdf

⁷Such disputes are (Art. 22 of Regulations of Status and Transfer of Players):

"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:

- a) disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract;
- b) employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement;
- c) employment-related disputes between a club or an association and a coach of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists at national level;
- d) disputes relating to training compensation (article 20) and the solidarity mechanism (article 21) between clubs belonging to different associations;

“1. The Confederations, Members and Leagues shall agree to comply fully with any decisions passed by the relevant FIFA bodies which, according to these Statutes, are final and not subject to appeal.

2. They shall take every precaution necessary to ensure that their own members, Players and Officials comply with these decisions.

3. The same obligation applies to licensed match and players’ agents.”

It is an extremely important clause, which binds together all the above participants of the transfer market as subjects of FIFA jurisdiction. It also combines the two previously mentioned levels of jurisdiction: international and national. E.g.: Polish Football Association (hereinafter as: “PFA”) is a FIFA Member since 1923⁸. In a course of implementation of art. 69 of the FIFA Statutes, PFA included in its own Statute⁹ a provision of art. 6 § 2, which states that all members of the PFA, football leagues, PFA bodies, players, coaches, instructors, players’ agents, referees, licensed match agents, football officials and persons employed in the game of football are obliged to observe the provisions of the statutes, regulations, directives and decisions of FIFA, UEFA and PFA as well as the Code of Ethics of FIFA while performing their functions, whereas art. 6 § 4 includes a note on enforcement of organizational, disciplinary and regulatory liability of the above-mentioned entities by the PFA. Consequently, decisions of FIFA bodies are enforceable both on international and national level, as far as a subject of infringement is somehow connected with FIFA – directly, on indirectly, through the affiliates as PFA. In case of players’ agents, such relationship and therefore substantial control is obtained by the licensing system, which will be described in further paragraphs.

Finally, art. 66.1 of FIFA Statutes contain arbitration clause, which recognizes Court of Arbitration for Sport (hereinafter as: “CAS”) in Lausanne, Switzerland, to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players’ agents. CAS functions mainly as the highest

e) disputes relating to the solidarity mechanism (article 21) between clubs belonging to the same association provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations;

f) disputes between clubs belonging to different associations that do not fall within the cases provided for in a), d) and e).”

⁸ <http://www.pzpn.pl/index.php/eng/Association/History-of-Polish-FA>

⁹ Available at: <http://www.pzpn.pl/index.php/Federacja/Dokumenty>

appeal instance. For example, the decisions of the Appeal Committee are subject to appeals lodged with CAS the (art. 64.3 of FIFA Statutes), similarly to decisions of FIFA Dispute Resolution Chamber, which can also be appealed before CAS¹⁰. Such arbitration clause, as in art. 66.1, is significantly different from the usual arbitration clauses, which are generally concluded in a contract. A contractual arbitration clause binds only the sides of the contract and is therefore strictly connected with the contract itself. In case of FIFA arbitration clause, the range of bound entities is incomparably wider. Disregarding if it goes to player's agent or an official, if they seek to benefit from associating with FIFA, they must pursue the provisions of its Statutes and therefore the aforementioned arbitration clause and rules of jurisdiction.

1.2 Overview of rules regulating player's agent activity

Rules constituting and regulating the players' agents' profession are scattered throughout the whole legal system of modern professional football. Similarly as in the matter of jurisdiction, also those rules can be distinguished to international and national.

The very foundation of player's agent profession is art. 4 of FIFA Statute, which states that "Players may use the services of agents to negotiate transfers". The wording of this provision has its own purpose. It clearly indicates the certain priority in a player-agent relationship. Such a relationship can be described as a representation of player's (and not agent's) interest in the process of transferring a player. This thesis will return in the further discussion.

Moreover, the important regulations for agent's activity are FIFA Regulations on the Status and Transfer of Players. Although these rules do not address agents directly, they are regulating the major part of every agent's activity; e.g. transferring, contracting and contractual stability. Nevertheless, in FIFA Regulations on the Status and Transfer of Players there are two provisions regarding player's agents. Art. 17.5 imposes disciplinary sanctions on agents in relation with certain contractual breaches and art. 18.1 an obligation to include in a contract a name of an agent who was

¹⁰ Art. 23 and art. 24 of Regulations on the Status and Transfer of Players introduce distinction between cases adjudicated by Player's Status Committee and Dispute Resolution Chamber. Decisions of both can be appealed before CAS.

involved in negotiating the contract. Both provisions are of great importance to, inter alia, players' interests and FIFA's monitoring of the agents' activity.

The main set of rules, which regulate the player's agent occupation on an international level, are FIFA Players' Agents Regulations ("FIFA PAR"). It is a very complex piece of FIFA rulemaking, addressing various relevant issues, such as admissibility of agents, licensing system, agent's rights and obligations, etc. The FIFA Regulations correlates with similar regulations on the national level. Each national football association is obliged by art. 40.2 of FIFA PAR to implement the said regulations to their legal system. To be more specific, the first sentence of the said article obliges associations to enforce the new provisions of the whole FIFA Regulations, whereas the second requires associations to implement only the Chapter III, which describes the licensing system (including the examination procedure).

In practice of the associations two types of implementation can be observed. In some cases, such resolutions consist of literal translation of the most significant provisions of FIFA PAR, with some additional provisions specific to the particular association. It is generally based on a legislative action like a resolution or another act, which is binding in the jurisdiction of particular association and therefore directly enforceable by it. This is also the case of PFA's Regulation, i.e. Resolution No. 1/7 of PFA's Management Board¹¹, which in a very detailed way, step by step, follows the FIFA Regulations¹². On the other hand, some associations are not so eager to comply with implementing the whole agency system on their national level, most probably because they find the international regulation sufficient. They tend to stop on implementing "the licensing" part of FIFA Regulations¹³, which apparently also FIFA finds more important. To such conclusion may lead the wording of art. 40.2 of FIFA PAR, which stresses faster implementation of licensing provisions by the associations.

¹¹ Available at:

<http://www.pzpn.pl/index.php/content/download/898922/7282309/file/Uchwa%C5%82a%20nr%20I%20licencje%20mened%C5%BCerskie%2017122010.pdf>

¹² As another example of a thorough regulation can be indicated England Football Association's Agents Regulations:

<http://www.thefa.com/~media/Files/TheFAPortal/governance-docs/agents/agents-regulations/agents-regulations-from-4-july-2009.ashx>

¹³ For example, the US Soccer Association, which introduced a licensing system according to art. 40.2 in fine of the FIFA Players' Agents Regulation. See:

<http://www.ussoccer.com/about/federation-services/~media/4778651AEE5647179E2556BBA0E485A9.ashx>;

Compare also a licensing regulation of Spanish Football Association:

[http://www.rfef.es/FCkeditor/UserFiles/File/PROCEDIMIENTO%20PARA%20LA%20OBTENCION%20DE%20LA%20LICENCIA%20DE%20AGENTES%20DE%20JUGADORES\(1\).pdf](http://www.rfef.es/FCkeditor/UserFiles/File/PROCEDIMIENTO%20PARA%20LA%20OBTENCION%20DE%20LA%20LICENCIA%20DE%20AGENTES%20DE%20JUGADORES(1).pdf)

1.3 Definition of an Agent

According to the definition included in FIFA PAR, “Players’ agent is a natural person who, for a fee, introduces players to clubs with a view to negotiating or renegotiating an employment contract or introduces two clubs to one another with a view to concluding a transfer agreement, in compliance with the provisions set forth in these regulations.”¹⁴ The components of agent’s profession, as introduced by the foregoing definition, are then specified in further chapters of FIFA PAR and are subject of analysis in this paper.

An agent therefore can be only a natural person, not a company, who can represent both players and clubs in certain interactions regarding turnover on transfer market to receive remuneration. It is thus excluded for an agent to represent a player or a club free of charge. The subject matter of agent’s activity is enclosed in two major actions: introducing players to clubs with a view to negotiating or renegotiating an employment contract and introducing two clubs to one another with a view to concluding a transfer agreement. As it is shown in the following sections, the scope of agent’s activity shall be interpreted broadly, including all actions that can accompany the above two main transfer relationships.

As a part of the introduction, it is yet important to present the basic personal prerequisites, which has to be satisfied to perform agent’s activities.

1.4 Admissibility of Agents

The rules deciding on who can perform agent activity are included in FIFA PAR and are therefore binding in jurisdictions of the affiliated associations. There are two ways of performing an agent’s activity: as a licensed players’ agent (**1.3.1**) or as an exempt individual (**1.3.2**). Either of those requires certain prerequisites.

1.4.1 Licensed players’ agent

Agents acting on the license issued by a national association are the most common form of performing agents’ activity. The main premise for obtaining the license is established in and art. 3.1 of FIFA PAR (as well as its above-mentioned Definitions),

¹⁴ FIFA PAR, „Definitions”.

which states that only a natural person can obtain a license from the relevant association. Significantly, an agent may organize his work in a form of business only under condition, that his employees perform only administrative work; only a licensed agent himself can represent and promote the interests of players and clubs (art. 3.2). Some national regulations, e.g. PFA's, even require agents to organize their activity in a form of business. What needs to be stressed is that the above provisions do not contradict the possibility for an agent to be employed by a company offering agency services as well as to act and conclude contracts in the name of such company. Although in any event, according to CAS, when an agent concluded a contract with a player or a club in the name of the company, it is a company which can file and pursue a claim before FIFA in disputes regarding remuneration from such contract¹⁵.

The process of issuing a license is regulated in art. 5 and following in FIFA PAR. For reasons of good understanding this paper's topic, only some remarks on it are needed.

As to the rule, the licenses are issued by a relevant association which an applicant is a national of¹⁶. If the applicant resides two years or more in a country he's not a national, only association of this country is responsible for issuing a license¹⁷. The application can be lodged by a natural person of impeccable reputation, who, in order to avoid possible conflict of interest, under no circumstances can hold a position as an official or employee in FIFA, a confederation, an association, a league, a club or any other organization, connected anyhow with such organizations and entities¹⁸. After passing the written examination, concluding the professional liability insurance (or providing a bank guarantee) and agreeing to comply with the Code of Professional Conduct, the license is issued. According to art. 17 of FIFA PAR, the license is valid for five years. Before the expiration of this period, an agent needs to send a written application to the relevant association and resit the exam.

1.4.2 Exempt individuals

¹⁵ CAS 2007/A/1260.

¹⁶ Art. 5.1 of FIFA PAR.

¹⁷ According to art. 5.2 of FIFA PAR, the prerequisite of two-years-residency does not apply if an applicant is a national of an EU country with domicile in another EU country. An applicant can send his application to the country of domicile disregarding the two-year period.

¹⁸ As stipulated in art. 6.2 of FIFA PAR. Such impartiality must be continued throughout agent's activity.

Additionally to the primary, licensed manner of activity of an agent, FIFA PAR enables performing the agent-like activity by strictly defined individuals. According to its art. 4, the parents, siblings or spouse of the player may represent him in the negotiation or renegotiation of an employment contract. Moreover, similar authorization may be granted to a practicing lawyer, legally authorized in compliance with the rules in force in his country of domicile, with a possibility of representation scope vested also to the clubs and transfer matters.

Introducing the exemptions to the licensing system should be in general evaluated positively, mainly because it enables the closest family members to help player in the basic contractual issues. It seems especially valuable to young players, who may want to trust somebody more experienced with handling his career, but without paying very often significantly large, licensed agent's remuneration. Secondly, granting professional legal representatives a right to perform the major part of agent's activities makes possible for such lawyers to combine that activity with a solid legal background. That combination may be particularly beneficial to the players, whose interest in transfer and employment issues very often requires from their representative legal knowledge. On the other hand, as explicitly provides art. 4.3 of FIFA PAR, the activity of exempt individuals does not fall under the jurisdiction of FIFA. This raises serious responsibility questions, which will be considered in the foregoing chapters.

1.5 Unlicensed agents

The phenomenon of performing agent's activity without a license is a practice that affects the football community worldwide. It is estimated that only 25 to 30 percent of international transfers are conducted through licensed agents¹⁹. There is no doubt how many threats, especially for the players, the activity of unlicensed "agents" involves, often referred to as "scam agents". Despite the above-mentioned, relatively limited requirements posed in front of prospective licensed agents, passing the written examination certifies of having at least basic idea of the relevant legal regulations. An attempt to represent player's interest without basics of transferring procedure, exposes player to compensation responsibility to the clubs, let alone disciplinary measure.

¹⁹ FIFA's presentation: Reform of FIFA's Players' Agents System – Regulations on working with Intermediaries, http://www.football-law.com/wp-content/uploads/sr_marco_leal.pdf

The obligation of having a valid license to perform agent's activities is a core of professional football agency, stemming directly from art. 3.1 of FIFA PAR and national – level regulations, sanctioned disciplinary on international and national level. Similarly, FIFA PAR provisions address a direct prohibition on players and clubs. Art. 25 and 27 states that a player/club may only engage the services of a licensed players' agent, of course not mentioning the exempt individuals. Furthermore, it is the player's/club's duty to make sure that a players' agent is appropriately licensed prior to signing the relevant representation contract. Similar regulations have been implemented to the regulations of several football associations along with the disciplinary measures imposed on players and clubs for using the services of unlicensed agents. The most onerous sanctions include annulment of a contract concluded with participation of the unlicensed agent or excluding such contract from the legal protection of the relevant football association. That means a player could not benefit from the various amenities offered by the legal regulations of FIFA and associations.

Despite clear regulations aimed in limiting the activity of unlicensed agents, effects in that field are quite insignificant. The possible reasons are low detectability of such practice, lack of an active investigation body²⁰ as well as jurisdiction issues. FIFA and relevant associations can impose disciplinary sanctions only on players, clubs and agents without valid license (i.e. expired license), namely entities subject to its jurisdiction. Beyond the disciplinary responsibility are individuals whose activity may pose the biggest threats, that is agents who never passed the examination and are most likely to involve in illegal or semi-legal operations. One of the most vivid examples are “scam agents” involved in child trafficking from Africa. The estimated number of young African boys living on the European streets after being brought there by an agent and left with no means to live whatsoever varies around 20,000²¹ (sic!). It is undoubtedly a great concern of FIFA, UEFA and EU.

Part 2. Performing the agent's activities

2.1 Representation contract

²⁰ See van der Meij, *supra* note 1, at 48.

²¹ See van der Meij, *supra* note 1, at 48.

Agent's clients can be both players and clubs, contacted with an agent in one of the ways foreseen in art. 22.1 of FIFA PAR:

“Licensed players’ agents have the right to:

- a) contact every player who is not, or is no longer, under an exclusive representation contract with another players’ agent;
- b) represent the interests of any player or club that requests him to negotiate or renegotiate contracts on his/its behalf;
- c) take care of the interests of any player who requests him to do so;
- d) take care of the interests of any club which requests him to do so.”

An indispensable requirement for an agent to perform his professional activity is having a valid contract of representation²² with his client. This is the rule stated in art. 19. 1 of FIFA PAR:

Art. 19.1:

“A players’ agent shall be permitted to represent a player or a club only by concluding the relevant written representation contract with that player or club.”

By introducing an obligatory contract of representation, FIFA managed to formalize and increase control on the profession of a football agent. Agents concluding the representation contract pursuant to provisions of FIFA PAR enable FIFA and associations to monitor the transfer market and better protect the interest of players – in two ways. First, by the obligation to deposit one of the originals of the contract in agent’s and client’s association, such association and therefore FIFA is provided an insight in a market and can control the parties’ compliance with the contract requirements imposed by FIFA rules. Then second – the requirements, which primary objective is a better protection of players’ interest. They can be described as specific provisions of FIFA PAR on such matters as contracts form, time, agent’s remuneration. Additionally, FIFA provided associations with a standard representation

²² A contract of representation between agent and his client has to be distinguished from an employment contract between players and clubs. The first can be concluded only between the agent and the player or the agent and the club and stipulates the elements of agency relationship. The latter is a contract concluded after reaching agreement between a player and a club as to their future employment or service relationship, with or without agent’s participation and optionally (in case of transfers), after concluding the transfer contract between the new and the former club.

contract (by annex 3 of FIFA PAR). The standard contract can be used at discretion of the parties, although according to art 21.1 of FIFA PAR, every players' agent is "advised" to use it. Moreover, the parties may enter into additional agreements to supplement the standard contract, provided that they stay in compliance with the laws applicable in the territory of the association for arranging employment. Nevertheless, the standard contract included in annex 3 of FIFA PAR is no more than a model contract, based on the FIFA PAR provisions. What needs to be noted, is that the art. 19.5 introduces the essential elements, which shall be included in each representation contract. Those elements are the names of the parties, the duration and the remuneration due to the player's agent, the general terms of payment, the date of completion and the signature of the parties.

2.1.1 Form

The requirements of a representation contract are outlined in art. 19 of FIFA PAR. The most basic requirement is a form of such contract. As it was already mentioned, a representation contract should be concluded in writing. Not obliging with this requirement results with a disciplinary responsibility of the parties as well as more practical repercussions, related with proving the existence of contract.

In *Vincenzo Morabito v. Ittihad Club*²³, where CAS upheld the FIFA decision that because the Agent did not present any written contract between him and the Club, it cannot be established that that was any connection between the parties and thus that the Club is not obliged to pay any remuneration:

"In order for the Appellant to succeed in his appeal, he has to substantiate and prove primarily that a contract was concluded between him and the Respondent regarding the transfers. The Appellant admitted that no written contract was entered into and submitted in his Appeal Brief that "An oral agreement ... had clearly been concluded".²⁴

CAS concluded, having regard to the facts of the case, that the Agent had no *legitimatío ad causam*²⁵.

²³ CAS 2007/A/1274.

²⁴ See *supra* note 23, at 8-9.

²⁵ i.e. right to file a case.

2.1.2 Duration

Art. 19.3 of FIFA PAR sets a maximum limit of two years for the duration of the representation contract, both in regard to contracts concluded between the agent and the player, and between the agent and the club. It may be extended for another period of two years, with exclusion of a tacit prolongation. The main goal of setting such a threshold is clearly a protection of abuses possibly arising from longer contracts. Although *prima facie* it looks like a protection granted by FIFA to a weaker party to the representation contract (i.e. a player, due to his supposed inexperience in legal and business matters), this is not the only issue. The limit was included in FIFA Regulations to protect equally players' and clubs' interest, which was also stated by CAS in *J. v. Udinese Calcio S.p.A.* case:

“Accordingly, the Panel considers that the time limit ... also applies to a case like the present matter, where the Parties, at the latest with the Amended Contract, started a binding relationship, i.e. a representation contract. Were this not so, there would be great uncertainty regarding the validity of the commitment to engage an agent, when the provision of the mentioned FIFA regulations itself is intended to limit such a situation in terms of time. It cannot be said, as the Agent pleads, that the time limit imposed is merely intended to protect the weak parties in a transaction, i.e. players and not clubs. The two year period is also intended to protect the clubs' interests against possible abuses by their managements, which involve the engagement of agents for long periods... The Agent has pleaded a variety of CAS case law in order to show that the two year time limit only applies to cases in which the party that contracts with the agent is a player. With all due respect, the Panel considers otherwise. The wording of article 12²⁶ of the FIFA players' Agents Regulations does not distinguish between these circumstances and any other interpretation would be *contra legem*.”²⁷.

Violation of the requirement of maximum two-year duration of a contract may result of course in a disciplinary responsibility of the parties and eventual ineffectiveness of the contract's provisions. Nevertheless, compliance with a maximum duration period

²⁶ In the numbering of 2001 FIFA PAR. The exact wording of this provision was slightly different from the one amended in 2008 (“Art. 12.2: Such contract shall be limited to a period of two years but may be renewed in writing at the express request of both parties. It may not be tacitly prolonged.”), but the substance remained the same.

²⁷ CAS 2008/A/1665.

requirement, as well any other stated in FIFA PAR, are meant to be controlled by the obligation to deposit original versions of each contract in the relevant association.

2.1.3 Remuneration

Art. 19.4 obliges the parties to the representation contract to include an explicit provision regarding the basic rules of agent's remuneration. The two elements which are required here are who is responsible for paying the agent's remuneration and in what manner. Obviously, the purpose of such provision is again better protection of interest of both parties to the contract. Clear regulation of the remuneration makes possible eliminating the great amount of risk of conflicts or unfair practices of agents.

The amount of agent's remuneration is to be established on the grounds of art. 20 of FIFA PAR. The main rule is that the amount of remuneration is calculated on the basis of the player's annual basic gross income, including any signing-on fee that the players' agent has negotiated for him in the employment contract. Agent's remuneration is paid in a form of commission payable as a lump sum payment on the beginning of the employment contract the agent has negotiated or as the annual payments on each of the contractual year. If no agreement was reached on the amount of remuneration, art 20.4 establishes a default amount of three percent of the guaranteed annual income of the player. In practice the amounts of agent's remuneration reach usually ten percent of the employment contract.

Significantly, as it is explicitly stated in art. 29 of FIFA PAR, an agent cannot receive any other remuneration in relation to the transfer than the described above. This prohibition particularly covers transfer compensation, training compensation or any solidarity contribution, that is payable in connection with a player's transfer between clubs which includes owning interest in transfer compensation or future transfer value of a player.

The example of such illegal but yet practiced remuneration is a so-called "signature fee". Very often agents condition their client's (in this case a player) consent to sign a contract from large fees to be paid by the club, paid additionally to the agent's commission. The prohibition of art. 29 is usually bypassed by paying a fee to the player who then gives part or all of it to the agent. Such practice should be regarded as detrimental to turnover, as it makes the remuneration rules unclear and allows agents

to create additional fees depending of the club determination to obtain the particular player.

2.2 Transfers

The most important element of a professional agent's activity is involvement in transfers of players between the clubs. The very process of transferring leaves much room for agent's influence, inter alia on player's professional future. Depending on agent's manner of action, i.e. respecting the rules of FIFA and relevant associations or caring for player's interest, that future can be influenced dramatically. Particularly significant is agent's part in sustaining the contractual stability in professional football. In order fully to understand this part, some basics on transfer subject matter should be introduced.

2.2.1 The process

According to art. 1 of FIFA PAR, agents introduce players to clubs with a view to negotiating or renegotiating an employment contract or introduce two clubs to one another with a view to concluding a transfer agreement within one association or from one association to another. An explication of this provision as to the players is art. 25.1, which states that "a player may only engage the services of a licensed players' agent to represent him in the negotiation or renegotiation of an employment contract". Accordingly, art. 27.1 provides that "clubs are entitled to engage the services of licensed players' agents to represent them in negotiations relating to player transfers or employment contracts".

An agent therefore acts as a proxy between the clubs and players, a sort of a field representative, who pairs the parties of a future contract. It is indispensable for an agent to have a significant net of contacts and more importantly, to be well informed on transfer market situation. If employed by a player, an agent monitors player's career and situation in his current club, including the sport competition on the player's position. Given that there are other, better players in a team on the player's position, agent offers his client to find a club with better possibilities for regular appearances, thus increasing his value on the market. By using his contacts and professional experience, an agent presents his client to the clubs and then eventually assists him in negotiating the contract. Accordingly, an agent employed by the club, after receiving

information from the club management on the need for a specific player, begins a search through other teams, which includes monitoring when the players' contract are due to terminate.

The aforementioned examples are just few from the innumerable conjunctions of activities of players, clubs and agents on the transfer market. From the agent's perspective the most important moment is conclusion of the new player's contract.

2.2.2 Concluding the contract

Signing the contract by the player and club's representatives, often preceded by negotiations, is the main goal for every agent. The very moment of conclusion is also important for our considerations, and it is for two main reasons. First, because it is by law connected with agent's right to remuneration (i), and second, for the obligation to indicate agent's name in the contract (ii).

2.2.2.i Triggering agent's right to remuneration

It was already mentioned, that the amount and some basic rules governing agent's remuneration should be included in the representation contract. What still needs to be explained, is the triggering of agent's right to receive the remuneration.

None of FIFA provisions expressly establishes the moment, in which agent's commission from transfer becomes payable. A landmark case deciding on this matter is *Mujdat Gorel v. Alpay Ozalan*²⁸. The dispute involved a claim of an agent who concluded with a player an exclusive representation contract and then presented the player to a certain club. The player decided to conclude the employment contract on his own and denied to pay an agent the remuneration. Agent did not agree, claiming that his right to remuneration emerged after he introduced the player to his future employer. CAS panel clearly stated that the moment when the agent's remuneration for transfer becomes payable is the actual conclusion of the employment contract:

"Players' agents frequently consider that they are entitled to commission when they introduce to the player a party i.e. a club which shows interest in contracting for the player's services. However, this is not sufficient because in law even where such an

²⁸ CAS 2006/A/1019.

introduction may lead to a contract, the introduction itself does not create a contract between the player and the club. The contract is not made until the parties go through the negotiation part and eventually sign the contract. Therefore, a commission is not payable on the introduction of the player but only when the contract is actually concluded... It is an accepted legal principle that subject to any express terms to the contrary, where the agency contract provides that the agent earns his remuneration upon bringing about a certain transaction, he/she is not entitled to such a remuneration unless he/she is the effective cause of the transaction being brought about.”²⁹.

The second issue regarding right to remuneration that was considered by CAS in *Mujdat Gorel v. Alpay Ozalan*, was the nature of an exclusive representation contract. The panel decided that the “exclusivity” of the contract does not prevent a player from contracting by his own, without obligation pay the commission to his exclusive agent:

“In the absence of an agreement to the contrary, the fact that the Player placed his “placement rights” exclusively with the Agent does not prevent the Player from contracting himself and having done so before the Agent concluded any contract (which he did not), he is under no liability to pay any commission. If the Player had appointed the Agent as a “sole agent” the Player could not employ any other agent but if he contracted himself he could not be liable to the Agent to pay commission or damages.”³⁰

The aforementioned conclusions of CAS entail some beneficial effects for the practice. Setting the moment in which the agent’s commission becomes payable on actual conclusion of the employment contract, along with stressing the player’s contractual independence ensured the proper commitment of agents until their job is complete.

2.2.2.ii Signature

FIFA introduced a complex regulation in regard of associating agents with their particular clients. A general obligation is stated in art. 18.1 of FIFA Regulations on the Status and Transfer of Players, according to which “if an agent is involved in the negotiation of a contract, he shall be named in that contract”. For clarification of this general obligation we must take a look again into FIFA PAR, where it is distinguished

²⁹ CAS 2006/A/1019.

³⁰ *Id.*

to a duty of agents, players and clubs. Thus, art. 22.3 obliges agents to ensure that his name, signature and the name of his client appear in any contracts resulting from transactions in which he is involved. Respectively, articles 26 and 28 define similarly the duty of players and the clubs, which is that any contract concluded as a result of negotiations conducted by a licensed players' agent who was engaged by the player/club concerned shall specify the players' agent's name. As we can see, the obligation imposed on agents is wider and more specific. It most probably arises from the fact that it is in the agent's best interest to care for including his name and signature in the contract. An agent should first look into those details, as it greatly simplifies his situation in the event of future remuneration dispute.

Furthermore, even if an agent did not take any part in concluding the contract, this fact shall also be stated in the contract. FIFA Regulations introduce that rule of course only regarding players and clubs. According to art. 26.2 and 28.2, if the player/club does not use the services of a players' agent, this fact shall also be explicitly mentioned in the relevant employment or transfer contract.

The main purpose of the foregoing regulations, in connection with clubs obligation to deposit one original version of the contract in the relevant association, is enabling FIFA and the associations to control the activity of the licensed agents. Such control includes their compliance with FIFA and general law regulations as it goes to contracting the player. It is a good precaution, particularly bearing in mind the growing occurrence of unlicensed agents. Additionally, it helps to eliminate the great number of remuneration disputes, including agents, players and clubs. FIFA commentary on the Regulations for the Status and Transfer of Players indicates that in such disputes, if the name of the agent does not appear on the contract, the burden of proof rests with the party claiming that the agent participated in the negotiations³¹.

2.2.3 Contractual stability

Having no regard if the agent is bound by the representation contract with player or the club, there are certain limitations imposed on agents connected with approaching a player.

³¹ Commentary on the FIFA Regulations for the Status and Transfer of Players at 52. Available at: http://www.fifa.com/mm/document/affederation/administration/51/56/07/transfer_commentary_06_en_1843.pdf

In order to decrease the number of players terminating their contracts unlawfully and simultaneously agents' involvement in such dealings, FIFA introduced a set of provisions to improve contractual stability. First, there is a major limitation imposed on agents, arising from art. 22.2 of FIFA PAR, which forbids agents to make contact (approach) a player who still has a valid contract with his club, with the aim of persuading him to terminate his contract prematurely or to violate any obligations stipulated in the employment contract. All major association's regulations contain a similar, corresponding provision, *vide* art. 19.3 of Resolution No. 1/7 of PFA's Management Board or G.6 and 7 of FA Football Agents Regulation. This prohibition should be although interpreted jointly with other regulations in FIFA legal system, which makes possible to proper establish the scope of its application. Therefore, the second sentence of art. 18.3 of FIFA Regulations on the Status and Transfer of Players states that a professional player can conclude a contract with another club if the contract with his current club expired or is due to expire within six months. There is no doubt, that if a player can conclude a contract with a new club in this six month period, he can also enter into negotiation with a new club. It is a conclusion arising from an argument *a maiore ad minus*³² as well as the first sentence of art. 18.3 of FIFA Regulations on the Status and Transfer of Players, which explicitly allows negotiations with a player still remaining under a valid contract. Saying that, there are no legal constraints for an agent to approach a player in the said six month period (providing that he is not under an exclusive representation contract with another agent) and represent his interest is search and negotiations with the new club. Of course, bearing in mind the previous remarks, such contact cannot be made with purpose do persuade a player to breach a still binding contract.

Bearing in mind the significant number of players' agents licensed by various associations and the worldwide popularity of concluding the transfers through agents, it is a justified conclusion, that agents' compliance with FIFA and national regulations has a major impact for sustaining contractual stability in professional football globally. The main consequence of agents' in compliance with the prohibition of persuading players to premature terminate the contract or to breach the contract in other way (which can be understood as any other action, leading to premature termination of the contract because of the fault of the player or the sport cause) might be a destabilization

³² From Latin: "from the greater scale to the lesser".

of contractual relations to the detriment of the club and player, which is a negation of the very idea of sports agency. The reason of such actions are of course mainly financial, arising from the opportunity to transfer a player to the club offering higher salary. Additionally, because of the fact that an agent receives his remuneration mostly as a commission from the transfer, it is likely that agents could interfere in contractual relationship to receive commission from a transfer.

What needs further attention is the situation of a player persuaded by an agent to terminate prematurely or in other way breach the binding contract with the club. Such player is then exposed to the disciplinary measures imposed by the relevant association, as well as club's claims for compensation as one of the consequences for terminating the contract without just cause, outlined in art. 17 of FIFA Regulations on the Status and Transfer of Players.

Without any doubt, in most of such cases the player is not fully aware of the gravity of his actions, as influenced by his agent. That is why the FIFA regulations provide a protection for the players by introducing a presumption in art. 22.2. According to the wording of this provision, it shall be presumed, unless established to the contrary, that any players' agent involved in a contractual breach committed by the player without just cause has induced such breach of contract. It is a good solution, which can to some extent effectively protect players' interest. It is particularly significant while taking into consideration the specific relation between a player and an agent, which indicates a player as a weaker party. A professional player has no duty whatsoever to know the basics of FIFA and general legal system, which a dishonest agent can easily take advantage from. Therefore the regulations such as art. 22.2 of FIFA PAR, which protect a player as a weaker party to the representation contract, should be assessed positively.

2.3 Agent's responsibility

It is not the point of this paper to describe in details the rules governing agent's responsibility and FIFA disciplinary system. What is important though is what can be done to eliminate, or at least reduce the detrimental effects of agent's activity on the transfer market and its participants. FIFA introduced several legal mechanisms, from which it is advisable to introduce the following.

2.3.1 Insurance

Such mechanism, set specifically to protect rights of the agents' contractors, is an obligation imposed on agents to conclude professional liability insurance. It was regulated in art. 9 and further of FIFA PAR as an unconditional prerequisite for obtaining the agent's license; the insurance³³ shall be concluded after passing the written examination and shall adequately cover any risks that may arise from the players' agent's activity – it shall also cover any damages that may be incurred after the termination of the players' agent's activity but that were caused by that activity. All the details regarding the insurance are stipulated in Annexe 2 to FIFA PAR. Making the choice of the most relevant provisions, the following shall be noticed.

The Annexe 2 clearly states what is the purpose of the insurance, namely to cover any possible risk and any claim for compensation from “a player, a club or another players' agent arising from the players' agent's activity which, in the opinion of the association and/or FIFA, contravenes the principles of these regulations and/or the relevant association's regulations”. It is a very vast scope of regulation, making the policy amount “available” to almost any dispute concerning agent's malpractice, covering also claims made after expiry of the policy for events that occurred during the period of the policy.

The amount covered by the insurance is strictly connected to agent's business. It shall be set on the basis of agent's turnover, but at no time can be less than 100,000 CHF. The mechanism of an obligatory professional responsibility insurance, imposed on agents with licenses from all the associations through the FIFA regulations seems to be an effective protection from the agent's malpractice. Particularly because it is not rare that the adjudication of compensation is just the beginning of claimant's efforts to recover the money lost by agent's doing. Quite on contrary, such agents are most

³³ The alternative for the insurance policy can be a bank guarantee, issued in accordance with art. 10 of FIFA PAR: “Instead of the professional liability insurance policy referred to in article 9 above, the applicant may provide a bank guarantee from a Swiss bank for a minimum amount of CHF 100,000 under the limitations set out in Annexe 2. The bank guarantee shall be issued by a Swiss bank and accompanied by an irrevocable statement that the guaranteed amount shall be paid out unconditionally if a judgment is passed by a court, a tribunal and/or by the relevant football authorities in favour of a player, a club or another players' agent who has suffered damages as a result of the players' agent's activity.” In order to avoid confusion and bearing in mind that the functioning of those two mechanisms are the same, the further analysis will cover only the insurance policy.

likely to be insolvent. Insurance policy greatly simplifies such situations, by providing the amount of the insurance up to the adjudicated compensation.

2.3.2 Dispute resolution

Any participant of the transfer market can enforce his rights in disputes against agents. If it is a claim for payment related to various business issues or claim for compensation, FIFA members can use the well-developed FIFA dispute resolution system, which was in general outlined in paragraph 2. FIFA PAR in art. 30 provides *lex specialis* in that matter.

The disputes concerning players' agents are distinguished to domestic and international. Domestic disputes are between the members of one association, whereas international includes some "foreign factor", i.e. at least two of the parties are subject to jurisdiction of different associations. In general, the domestic disputes can be freely solved on the relevant association's rules and procedure. The only demand stated in FIFA PAR (art. 30.1) is that the associations shall in last resort refer disputes concerning player's agents to "an independent, duly constituted and impartial court of arbitration". For example, PFA as such court recognized the Arbitration Tribunal for Sport at the Polish Olympic Committee in Warsaw.

As far as international disputes related with the activity of player's agents are concerned, art 30.2 provides one additional regulation, i.e. introducing in such disputes possibility to lodge a request for arbitration to the FIFA Players' Status Committee. If the Player's Status Committee decides that the case raises disciplinary issue, it shall request for the commencement of disciplinary proceedings.

Furthermore, a regulation specific for players' agent's disputes is an expiration provision of art. 30.5, which states that the Players' Status Committee shall not hear any case if more than two years have elapsed from the event giving rise to the dispute or more than six months since the players' agent has terminated his activity.

2.3.3 Disciplinary measures

In his professional conduct agent is obliged to comply with FIFA legal regulations, including Agent's Code of Professional Conduct, which is an Annexe 2 of FIFA PAR. In case of disobeying any of those rules, the sanctions may be imposed by the bodies

mentioned in par. 2.1, in accordance with procedure regulated in FIFA Disciplinary Code³⁴. The sanctions imposed on agents separately or in combination may be (art. 33 of FIFA PAR):

- a reprimand or a warning;
- a fine of at least CHF 5,000;
- a suspension of licence for up to 12 months;
- a licence withdrawal;
- a ban on taking part in any football-related activity.

In some cases, the sanctions are regulated more specifically. For instance, the presumption from art. 22.2 of FIFA PAR is followed by a sanctioning provision, i.e. art. 17.5 of FIFA Regulations on the Status and Transfer of Players, which states that any person subject to the FIFA Statutes and regulations who acts in a manner designed to induce a breach of contract between a professional and a club in order to facilitate the transfer of the player shall be sanctioned. According to the previous analysis as well as the Commentary on the FIFA Regulations for the Status and Transfer of Players, sanctions may be also imposed on agents³⁵.

FIFA disciplinary system in regard of sanctioning players' agents *prima facie* seems to deal correctly with the agents' misconduct problems. There are yet two restraints, which make this system practically ineffective in significant number of cases, both of them concerning unlicensed agents. First, FIFA can only impose sanctions within its jurisdiction, which excludes unlicensed agents, as they have no legal connection with FIFA. The only possible sanction in relation to unlicensed agents may be imposed on players and clubs for using the services of unlicensed agents³⁶. Therefore unlicensed individuals are practically untouchable by FIFA for their misconduct, e.g. inducing premature breaches of contract by player or violating the prohibition of dual representation. Second, even sanctioning players and clubs for using the services of unlicensed agents is not effective due to the low detectability of such violation, which as mentioned in section regarding unlicensed agents, is inherently connected with lack of any investigation body within FIFA structure. It seems that under current

³⁴ Available at: <http://www.fifa.com/mm/Document/AFFederation/Administration/50/02/75/DisCoInhalte.pdf>

³⁵ See Commentary, *supra* note 31, at 49.

³⁶ Art. 2 of FIFA PAR: "Subject to articles 4.1 and 4.2 [exempt individuals], players and clubs are forbidden from using the services of a unlicensed players' agent."

regulation, responsibility of those individuals may be possible only on the grounds of generally binding law, which can arise from the domestic regulations in matters of agency contracts or compensation responsibility. An example of such situation is a financial, demonstrable damage suffered by the player, and filing a claim for compensation against an agent.

Part 3. Controversies and possible remedies to improve current regulations

3.1 Players' interest

The very idea of agency is facilitation of concluding contracts between the parties with use of an intermediary, who through his activity searches for new contracting opportunities for his principal. When it comes to agency relationship between the professional player and players' agent, such cooperation is vulnerable to certain modifications. Due to player's position of a less experienced party to the representation contract, agents tend to overtake the role of "principal" and strongly influence player's choices and career path – both in legal and illegal way. If such virtual change of positions can be accepted, it is vital that agent's activity remains within the provisions of FIFA and that it centers on player's interest – in the meaning of financial and sport aspect of player's career. Subsection 1 presents the significance of agent's participation in the development of young player's career and how it may be abused on the professional level. Subsection 2 covers more serious side of such abuses, concerning child trafficking from Africa to Europe by ill-willed agents. Subsection 3 is an analysis of current prerequisites to be met by a prospective agent in regard of education and qualifications, in view of complexity of player's needs. Subsection 4 deals with the problem of dual representation and conflict of interests connected with agents representing more than one party of a contract at a time.

3.1.1 Player's career

Professional success of a football player consists of a number of elements. Talent, hard work, a professional help in directing one's career and just pure luck. Professional representation is particularly important for the young players. The first patrons in young player's career, which are almost always the parents, should limit their involvement in a moment of first contract offer from the professional club. In most of

the cases the player or the family members are entering the football circles and are not familiar with rules governing the professional football turnover. Therefore despite the best intentions, it is extremely difficult to choose a proper club, fitting the player's progress, which applies either to search for a new employer or choice from numerous contract offers. It is the first stage, when a young player should be guided by a professional, a licensed players' agent, who ought to be able to offer experience, knowledge and contacts in the business, indispensable for his profession. An agent should advise a player in such manner as to a choice of a club or a type and length of contract. When a player is already under binding contract, agents should observe if due to sport reasons a transfer is desirable.

Agent's choice of the club's offer cannot be thus limited only to the financial aspect of the transfer. It comes down to striking the proper balance between player's sport and economic interests.

Basing on several examples from the players' agents' practice, achieving such balance seems unreal. Frequently agents are concerned only of the economic aspect of their own activity, treating players, very often young ones, as means to earn money. Although against the Code of Professional Conduct (that states that the players' agent is required to perform his activities conscientiously, which means also with respect of the client's interest), such dealings are hard to eliminate. One of the best examples is transferring a young, talented player from one of the weaker leagues to strong club, in most cases in a foreign country. While sometimes it is better for a prospective player to gain experience on a lower level, the agents are urging a prompt transfer, then choosing usually the club offering the highest salary, with no regard to the benefits for player's career³⁷. It can be of course acceptable, as both agent and player perform their profession with a view for financial profit, but to some extent, namely without losing the sport value. It is a problem that cannot be dealt with on a legislative level. FIFA Regulations provide a fair number of provisions which are meant to shape and induce

³⁷ Compare with Mark Smienk, *Regulation in the Market of Sports Agents. Or No Regulation at All?*, 3-4 THE INTERNATIONAL SPORTS LAW JOURNAL, 70,78 (2009). The author stresses the role of the clubs in the corrosion of relationship between the parties to the representation contract: "The profit maximizing actors are resulting in the conflict of interest between a sports agent and an athlete. For example, a sports agent can make a quick deal with a club, which is more beneficial for him than for the player. To overcome the agency problems, arising from the relationship between a sports agent and an athlete, the athlete has to give the right incentives to the sports agent. As we sketched it above, it seems like a two-way relationship, but in reality there is a three-way relationship. The third party is the club."

the best business practices among agents and other participants of the turnover. Actors incompliant with those provisions can be subject to disciplinary measures, which are not sufficient to eliminate the phenomenon in question, particularly due to its hard-to-determine subject matter.

3.1.2 Child trafficking

Another activity, related somehow to the above-mentioned, is improper representation of the underage players. Its most extreme form is child trafficking from the poorest countries (particularly African), by the so-called “scam agents” – unlicensed individuals who are seeking to benefit from the young football players³⁸. Unfortunately, it is not only the matter of “scam agents”. Also licensed agents hope to find talented players at low costs, with no care of his interest. In Africa, the chance of making a professional football player career is a dream of thousands young boys and their families and a chance to have a better life. In most cases they are easily eluded by individuals who declare having contacts in Europe and promising a contract deal. Sometimes, such “scam agent” takes all the parents’ savings and disappear in thin air once a child gets to Europe – with no money, documents and perspectives. Licensed or not, the outcome might have been all the same – trafficking young players from the poor countries and eventual abandoning them in Europe after they lose their market value or pay agent all the money they have.

Because FIFA regulations can only affect individuals subject to its jurisdiction, let us concentrate on how FIFA tries to protect the underage players in contacts with the licensed agents.

To eliminate child trafficking, at least that performed or facilitated by licensed agents, FIFA after consultation with UEFA (Union of European Football Associations) and European Commission, introduced in 2001 art. 19 of Regulations on the Status and Transfer of Players, which prohibits international transfers of players under age of 18 (minors), save for three exceptions stipulated in this article:

³⁸ See: Francisco Larios, Exploiting Dreams: Child Trafficking in Football, SPORTS LAW CHAT (Jan. 27, 2013), <http://www.sportslawchat.com/trafficking>

“a) The player’s parents move to the country in which the new club is located for reasons not linked to football;

b) The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfill the following minimum obligations: i) It shall provide the player with an adequate football education and/or training in line with the highest national standards. ii) It shall guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football. iii) It shall make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, appointment of a mentor at the club, etc.). iv) It shall, on registration of such a player, provide the relevant association with proof that it is complying with the aforementioned obligations;

c) The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighbouring association is also within 50km of that border. The maximum distance between the player’s domicile and the club’s headquarters shall be 100km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent.”

Transferring under the three above exceptions is subject to control of FIFA Player’s Status Committee with possible appeal to CAS. The control is very strict; in *Cadiz C.F. v. Carlos Javier Acuña Caballero*³⁹, CAS upheld FIFA decision on not granting the exceptions, because of the facts of the case, according to which, the player’s consent on transfer was formulated before his mother decision to move to the country of the new club.

Additionally, violators are subject to disciplinary measures, imposed by the Player’s Status Committee. Because of the limited scope of exceptions and decent compliance control along with sanctioning system, the mechanism of art. 19 is rather effective. Nevertheless, what again needs to be stressed, it applies only to the entities under FIFA jurisdiction.

³⁹ CAS 2005/A/995&996.

3.1.3 Agents' lack of qualifications/competence

A separate, yet still connected with player's interest notion, is if agents licensed by the relevant associations are properly prepared to represent players in the best possible manner. One should bear in mind that the agent – player relation of “representation” is not exhausted by the sole transferring. The specificity of professional football requires an agent to provide services of broader scope than indicated in art. 1 of FIFA PAR, i.e. introducing players to the clubs and generally speaking, participation in concluding the contracts. Agents activity (as previously noted – in particular the one representing a young player) should cover complex legal and tax services, as well as assistance in matters for which a devoted player simply cannot care on his own. Such matters are education, financial security for time after active career or in case of international transfers, learning the foreign languages.

It is obvious that in prevailing number the agents, being usually the former football players, may not be able to offer the foregoing services. What if agent's knowledge about the transfer market is just not enough to take care of player's interest? The rules governing examination of the future licensees doubtfully guarantee the high level of training before taking the exam. First, there are no obligatory preparation courses, thus the prospective agent has to prepare to the exam on his own. Second, pursuant to art. 8 of FIFA PAR, the material covered by the examination consists only of the basics of legal rules regarding transfers and civil law. As discussed above, agent profession will most definitely require knowledge exceeding such limited scope. Finally, the examination is a multiple choice test of only twenty questions: fifteen on international and five on national regulations. It is a surprising weighting of priorities. Stressing the international matter has its own explanation, related to higher risk for player in international transfers – if agent omits some formalities (e.g. regarding visa or employment in the foreign country), player situation can very easily complicate. Nevertheless, there is an uncountable number of agents who offer their services only in the domestic market. Their knowledge of the domestic legal regulations is examined in only five questions. Taking into account the usual minimum mark to pass the examination (fourteen of twenty possible points), the knowledge of domestic rules may not be even needed for a positive mark.

Of course, usually agents do not run their business alone. They offer their services with assistance of other people, employed by or cooperating with them. Such assistance cannot though extend to the core of the agent's activity, which is caring for player's interest. It stems directly from art. 3.2 of FIFA PAR, pursuant to which "a players' agent may organise his occupation as a business as long as his employees' work is restricted to administrative duties connected with the business activity of a players' agent".

In the current state of regulation, requirements regarding agents' knowledge and preparation for their profession seem seriously insufficient. It is even possible to say that in the minds of FIFA drafter functioned a presumption that a person decided to start a professional agent activity with all its costs is a person related to the football business and therefore having already indispensable knowledge and experience. Now, what about the numbers of agents who pass the examination clearly without having the best preparation, not saying of possessing all the features inevitable for complex agent services as discussed above? Revising the rules governing examination might be one of the solutions to improve the agents' training for the profession.

3.1.4 Conflict of interests and dual representation

In modern football business the attempts of both licensed and unlicensed agents to represent (and accept remuneration from) two parties of the contract happen to be very common. As easy to predict, such practice is detrimental particularly to the players, whose interest cannot be represented properly – an agent acting on behalf of both player and the club cannot for example negotiate player's remuneration without taking into account the position of the club. The outcome, though undoubtedly good for an agent, in no way can be consistent with the interest of the both parties to the contract. Therefore, dual representation is forbidden in FIFA regulations, which is meant to prevent licensed agents from such practice, but also in various national enactments, which makes it possible to sanction such activity of unlicensed individuals.

In FIFA regulations, it is art. 19.8 of FIFA PAR:

"Players' agents shall avoid all conflicts of interest in the course of their activity. A players' agent may only represent the interests of one party per transaction. In particular, a players' agent is forbidden from having a representation contract, a

cooperation agreement or shared interests with one of the other parties or with one of the other parties' players' agents involved in the player's transfer or in the completion of the employment contract.”

From the wording of the foregoing provision, a word “transaction” requires special attention, as it marks the scope of the prohibition. Some writers point out, that in the lack of case law the literal meaning of the word should be taken into consideration – therefore covering more than final negotiations and preventing an agent from switching side if he has taken care of the interest of the player at an earlier stage of the transfer⁴⁰.

On the other side, dual representation performed by an unlicensed agent can be prevented by specific domestic regulations, which all the nationals. For example, French Code du Sport prohibits dual representation, thus it is possible for a French national acting without agent license, to suffer the consequences of his actions. That was the case in *Bruno Heidenscheid v. Franck Ribéry*⁴¹, where CAS decided to resolve the dispute under French law. Although the agent acting both for the club and the player was unlicensed, basing on French Code du Sport, CAS condemned the actions of the agent and annulled the representation contract between the parties.

It seems that despite the clear regulation prohibiting dual representation, it is still an occurring practice. There are known statements of anonymous agents from the *Newcastle United* case, that “... the Club, players and licensed players' agents, it is generally acknowledged that the rules do not always reflect industry practice” or Club's CEO that “it is generally acknowledged throughout the industry that rules cannot accurately reflect the global business we are now operating in”⁴². Despite the obvious invalidity of such arguments, confirmed by the tribunal's statement in that case (“industry practice cannot prevail over regulations, and if practice differs from them it contravenes them”⁴³) the practice remains the same. One possible explanation of such state may be the issue of detectability of those cases. First as a consequence of insufficient control of FIFA and second, stemming from the nature of dual representation – practice acceptable in the business. FIFA is not equipped with an

⁴⁰ See van der Meij, *supra* note 1, at 46.

⁴¹ TAS 2007/O/1310.

⁴² See van der Meij, *supra* note 1, at 46.

⁴³ *Id.*

investigation authority, so without actions brought by participants of the transfer market, the possibility of tracing the incidents of dual representation is seriously limited.

3.2 Postulates *de lege ferenda*⁴⁴

Analysis of the foregoing issues regarding agents' influence on football transfer market reveals many flaws on the level of regulation and practice. The main problems are connected with agents' misconduct resulting from imperfect licensing system and FIFA control of agent's activity. The direction chosen by FIFA in a way of eliminating those problems is increasing control over agents' activities.

The way of higher control over agents' is a solution chosen by FIFA in the unofficial draft on possible reform of the players' agents system – Regulations on working with intermediaries (“Regulations”)⁴⁵. FIFA understood perfectly that the current system is not functioning as it should be and controlling agents' partially through players and clubs occurred to be ineffective. Surprisingly, the solution proposed by FIFA is basing on invalidation of the current licensing system in favor of the so-called “intermediaries” system. According to first 2009 reports on the planned reform, “FIFA has sensibly realised that football can only control that which it regulates ... instead of trying to convince all agents that they need a licence, [FIFA] has decided that clubs and players' use of third parties intermediaries during a player transfer will be regulated instead”⁴⁶.

Moving on to the details, FIFA recognized the current problems similarly as it has been presented in the analysis above:

- Only 25 to 30% of the international transfers are concluded through licensed agents;
- Difficult implementation of the system of licensing involving FIFA and the Associations;
- Conflicts between the FIFA regulations and national laws in some countries;

⁴⁴ From Latin: “being on the basis of new law”, “by means of a law to be made”.

⁴⁵ FIFA draft, Regulations on working with intermediaries,
<http://sportslaw.ru/data/files/fifaregulationsonworkingwithintermediaries2011.pdf>

⁴⁶ Andy Brown, *FIFA Will Continue To Regulate Use Of Player Agents*, LAW SPORTS REPORT (Oct. 12 2009),
http://e-comlaw.com/sportslawblog/template_permalink.asp?id=236

- Existence of parallel mechanisms: non-licensed agents;
- Complications for the negotiation of contracts⁴⁷.

According to FIFA, the main issues included in the draft are inter alia:

- Application of regulations to players and clubs that engage the services of intermediaries;
- Intermediaries have no link to FIFA;
- Written contract between intermediaries and clubs/players;
- Conflict of interests;
- Registration system of intermediaries (implemented by the member associations and through the information provided by their affiliated clubs and/or registered players);
- Disclosure and publication of remunerations made to intermediaries;
- Restrictions on payments made to intermediaries;
- Non payment of commission to intermediary if involved player is a minor⁴⁸.

The enlisted outline of principles somehow reveals FIFA's idea of increasing control despite almost deregulating the profession of player's agent. After assessing that effective control over licensed agents in matters of compliance with the legal regulations (e.g. as it goes to conflict of interest) and that FIFA jurisdiction over licensed agents not only does not function well but can be performed over max. 30% of transactions, FIFA decided to shift the responsibility. In the project of new regulations, the complete responsibility of ensuring that the intermediaries comply with the various regulations was put on players and clubs (art. 2.3 of the Regulations). The main tool to increase disciplinary control of players' and clubs' compliance with those obligations, shall be their duty to register an intermediary in a system every time they are involved in a specific transaction (art. 4.1. of Regulations). Specifically, according to art. 4.2, "players and clubs who involve intermediaries in negotiating an employment contract or negotiating the conclusion of a transfer agreement are obliged to inform their respective association of the name, contact details and any other relevant information required by the association, of such intermediaries. Such

⁴⁷ See FIFA's presentation, *supra* note 19.

⁴⁸ *Id.*

notification must be made each time any activity within the scope of art. 1 par. 1⁴⁹ of the present Regulations takes place”.

Although FIFA reasoning can be understandable – the project regulations giving a way of controlling misconduct of present unlicensed agent – in the view of some previous considerations, the idea of removing license system may seem desperate. Instead of increasing licensing control *sensu stricto*, i.e. by imposing higher restrictions on obtaining a license by *inter alia* more complex examinations, FIFA is about to resign from the examination at all. The question is, if imposing higher restrictions for obtaining a license would not have the opposite effect by increasing the activity of unlicensed individuals.

Moreover, another reason of taking such course might have been the previous doubts of FIFA licensing system in regard of EU competition law. In the case of *Laurent Piau v. Commission of the European Communities*, the Court of First Instance considered the application of Mr. Laurent Piau – a player’s agent, who previously lodged a complaint with the Commission in which he challenged FIFA regulations regarding access restrictions to the profession of an agent. According to the Court’s, “[the agent] alleged, first of all, that the regulations were contrary to 'Article [49] et seq. of the [EC] Treaty concerning free competition with regard to services', because of the restrictions on access to the occupation imposed by opaque examination procedures and by the requirement of a guarantee and because of the controls and sanctions provided for. Secondly, he considered that the regulations were likely to give rise to discrimination between citizens of the Member States. Thirdly, he complained that the regulations did not include any legal remedies against decisions or applicable sanctions.”⁵⁰. Although the Court of First Instance has upheld the decision to reject the complaint⁵¹, which was then confirmed in the appeal case before European Court of Justice, the question arises on reception of further restrictions of the access to agent’s profession. Particularly in the view of dissenting opinions in the literature, indicating that the Court in its decision ignored national legislation of at least half of EU

⁴⁹ Negotiating an employment contract between a player and a club – author’s comment.

⁵⁰ Judgment of the Court of First Instance (Fourth Chamber), 26 January 2005, T-193/02.

⁵¹ *Id.* Court stated that “the licence system, which imposes restrictions that are more qualitative than quantitative, seeks to protect players and clubs and takes into consideration, in particular, the risks incurred by players, who have short careers, in the event of poorly negotiated transfers”.

countries which have rules applicable where intermediary services are rendered on the labor market⁵².

It is hard to decide whether FIFA solution will prove to be effective. The draft articles were first presented to FIFA officials in March of 2011 with the view of formal decision before FIFA Congress in 2012 – which as far as it is known has not happened.

Conclusion

The foregoing remarks clearly indicate that the issue of agents' activity is a complex and multithreaded one. The mutual interaction between FIFA and national associations' regulations (addressed to agents, players and clubs) as well as general domestic and international law, decides on its high-leveled legal diversification. Those regulations can generally be evaluated as well-thought and effective, although not without certain flaws. Particularly taking into account that the above analysis proved significant and still rising agent's influence on the transfer market, there are difficulties which require urgent improvements. Access to agent's profession, care for player's interest and finally activity of unlicensed agents all demonstrated certain deficiencies of current regulations. What gives reasons to be optimistic is that FIFA carefully observes the application of the regulations and introduces further amendments. Although not very swiftly, but seeing the problem of unlicensed agents with its almost terrifying numbers, FIFA even apparently decided to resign of the agents' licensing system, which it has endorsed since 1990s. Such conscious reaction is undoubtedly a good sign, although only time will tell if the changes are being headed to the proper direction.

Notwithstanding the legal regulations, very often it is the practice of agents, players and clubs that decides on everyday effectiveness of the transfer agency. Depending on how participants of football transfer market will take into consideration interest not only of their own, but also of the other party of the contract, the further progress and development of football agency will be possible.

⁵² Robert Branco Martins, *The Laurent Piau Case of the ECJ on the Status of Players' Agents*, 1-2 THE INTERNATIONAL SPORTS LAW JOURNAL, 43, 43 (2007).