

THE IMPLEMENTATION OF THE FIFA REGULATIONS IN THE NETHERLANDS

by *Dennis Koolaard**

1. *Introduction*

Following the implementation of FIFA's Regulations on Working With Intermediaries (hereinafter: the "FIFA RWWI"), all national football federations affiliated to FIFA were required to implement their own set of regulations for intermediaries¹ in their respective jurisdictions based on the minimum requirements established in the FIFA RWWI. Consequently, instead of monitoring the intermediaries, FIFA now monitors its members in implementing these minimum standards.

In the Netherlands, by decree of the board of the Royal Dutch Football Association (*Koninklijke Nederlandse Voetbal Bond* - hereinafter: the "KNVB"), the Regulations for Intermediaries (hereinafter: the "KNVB RI") were implemented on 30 March 2015.

In comparison with regulations implemented by other national football federations, the KNVB RI contain some interesting distinguishing features, the most notable arguably being that FIFA's recommendation to implement a cap on the remuneration to be received by intermediaries was not followed and the attempt to establish a licensing system for organisations of intermediaries.

2. *Relevant national law*

First of all, the Dutch Civil Code and more specifically the Dutch Code of Obligations

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¹ This chapter consistently refers to intermediaries, this term however is intended to comprise the activities of players' agents, as intermediaries were referred to under the FIFA Players' Agents Regulations, *i.e.* the former set of regulations governing the activities of intermediaries that is now replaced by the FIFA RWWI.

are relevant, particularly since any *lacuna* in the KNVB RI would normally have to be filled by subsidiary application of Dutch law.

As to laws that are specifically relevant for intermediaries subjected to the application of the KNVB RI, the Placement of Personnel by Intermediaries Act (*Wet allocatie arbeidskrachten door intermediairs* – hereinafter: the “WAADI”) is relevant. However, throughout the KNVB RI, reference is made to the WAADI only once. Article 8(5) of the KNVB RI determines that if a club has concluded an employment contract with a player following employment mediation within the meaning of the WAADI by the player’s intermediary, the club must remunerate the intermediary for such employment mediation and not the player. This feature, which is in line with article 7 of the ILO Treaty on Private Employment Agencies, entails that players are not permitted to pay for the services of an intermediary after successful negotiations, but that the club with which the employment contract was concluded shall bear these costs. Although article 5(1)(g) of the KNVB RI, the section of the KNVB RI dealing with the obligations of intermediaries, does not refer to the WAADI specifically, it is understood that the reference to “*legislation with regard to employment mediation*” is intended to refer to the WAADI. As such, compliance with the WAADI is mandatory for KNVB-registered intermediaries.

In order for interested parties (*i.e.* clubs, players and intermediaries) to know whether the services provided by an intermediary in one specific transaction are governed by the WAADI, one needs to resort to the definition of employment mediation in the WAADI. Article 1(1)(d) of the WAADI defines employment mediation as follows (freely translated into English): “*services in the exercise of profession or business for an employer, a job seeker, or both, meaning the assistance in finding employees or work respectively, whereby the conclusion of a contract of employment in accordance with civil law or the assignment of a civil servant is intended*”.² This definition is fairly wide and consequently nearly all successful employment mediations conducted by intermediaries in Dutch football will be subject to this exception. Should the services not fall under the definition in the WAADI, these services will solely be governed by the KNVB RI.

Should an intermediary have concluded a representation agreement with a player and the player subsequently signs an employment contract with a club in the Netherlands with the assistance of an intermediary, one may wonder whether the representation fee agreed upon between the player and the intermediary is binding upon the club, since, pursuant to the general legal principle of *res inter alios acta*, a third party (*i.e.* the club) is normally not bound by contractual arrangements entered into by the contractual parties (*i.e.* the player and the intermediary).

² In Dutch: “*dienstverlening in de uitoefening van beroep of be drijf ten behoeve van een werkgever, een werkzoekende, dan wel beiden, inhoudende het behulpzaam zijn bij het zoeken van arbeidskrachten onderscheidenlijk arbeidsgelegenheid, waarbij de totstandkoming van een arbeidsovereenkomst naar burgerlijk recht dan wel een aanstelling tot ambtenaar wordt beoogd*”.

In comparison with other countries, the implication of national law on the KNVB RI may be considered fairly limited. For example, in Switzerland the consequence of being qualified as an intermediary in accordance with the Federal Act on Employment Services and the Hiring of Services (AVG) and its ordinances are more far-reaching in that it entails that the commission paid by the job seeker to the agent shall not exceed 5% of the first annual gross wage of the job seeker.³

A second aspect where Dutch law may be of relevance in the application of the KNVB RI is in respect of the requirements for issuance of a Certificate of Conduct by the Dutch State Secretary for Security and Justice, which is one of the requirements for being registered as an intermediary with the KNVB. The issuance of the Certificate of Conduct is dealt with in the section concerning the required impeccable reputation of intermediaries below.

3. *Principles*

The key principles in the KNVB RI are similar to the principles underlying the FIFA RWWI. As will be explored in more detail below, the main principles underlying the FIFA RWWI may be summarised as follows:⁴

1. Clubs and players are now to a certain extent responsible for intermediaries.
2. The licensing system is abandoned and is replaced by a system of registration.
3. Intermediaries do not have a contractual relationship with FIFA, the leagues, associations or federations, but only with clubs and/or players.
4. Dual representation is only permitted subject to explicit written consent.
5. All details regarding the remuneration received by intermediaries need to be disclosed.
6. It is recommended by FIFA that the national federations implement a cap on the remuneration to be received by intermediaries from clubs and players.
7. Intermediaries shall not be remunerated for services provided to or concerning minors.
8. FIFA no longer has direct disciplinary authority over intermediaries; instead this responsibility is shifted to the national federations.

As alluded to above, the only of the above-mentioned principles underlying the FIFA RWWI that is not implemented in the KNVB RI is the recommended cap of 3% on the remuneration to be received by intermediaries.

One of the key principles appears to be the pursuit of a high level of transparency on the market of intermediaries. The main feature to achieve this is

³ STOCKER, FIFA's new Regulations on Working with Intermediaries, National Implementations – Switzerland, Football Legal # 3, June 2015, 84.

⁴ The basis of this summary derives from LYNAM / ELLIS / LEWIS, *Players' Agents*, in LEWIS / TAYLOR (Eds.), *Sport: Law and Practice*, 3rd ed., 2014, 1444-1445. The original summary of these scholars was however based on a draft of the FIFA RWWI and not on the final version, therefore certain amendments have been made by the author, most notably regarding the cap on remuneration of intermediaries, which was originally planned to be a mandatory cap but finally turned out to be a recommended cap.

that the KNVB will annually disclose information about the remuneration received by KNVB-registered intermediaries,⁵ as is required by FIFA.⁶ In order to be able to do so, the intermediary agreement must document the arrangements with regard to any fee payable to an intermediary by the club.⁷

An agreement between an intermediary and a club or a player is referred to as an intermediary agreement. This intermediary agreement must be laid down in writing and must be presented to the professional football board for registration in the form of an appendix to the player contract⁸ and will be registered once the applicable legislation, the Article of Association and/or the regulations of the KNVB, UEFA and/or FIFA and/or decisions by one or more of these bodies have been complied with.⁹ The intermediary is notified in writing of the registration of the intermediary agreement.¹⁰

The names of all intermediaries registered with the KNVB in the year immediately preceding that year are announced annually before 31 March by means of a medium of publication chosen by the KNVB, including the player contracts and/or agreements for the transfer of players with regard to which these intermediaries were involved in the negotiations for the conclusion thereof.¹¹ The KNVB will also publish the total sum paid to KNVB-registered intermediaries by each KNVB-affiliated club in the aforementioned period for the negotiations on the conclusion of player contracts and/or agreements with regard to the transfer of players.¹² Remuneration received by KNVB-registered intermediaries from clubs not affiliated to the KNVB may be published by the respective national association, but this is dependent on the regulations implemented by such national association.

4. Definitions

Four definitions are given in the KNVB RI:

“Intermediary: a natural person who or a legal entity which, at a fee or otherwise, represents or wishes to represent players and/or clubs during negotiations with regard to the conclusion of player contracts and/or agreements with regard to the transfer of players registered as such with the KNVB, in accordance with these regulations.

⁵ Article 3(2) of the KNVB RI.

⁶ Article 6(3) of the FIFA RWWI.

⁷ Article 8(1) of the KNVB RI.

⁸ Article 6(1) of the KNVB RI.

⁹ Article 6(4) of the KNVB RI.

¹⁰ Article 6(5) of the KNVB RI.

¹¹ Article 3(1) of the KNVB RI.

¹² Article 3(2) of the KNVB RI.

- Intermediary statement:* the statement adopted by the board, as referred to in article 2.3.a of these regulations in connection with the option of being registered as an intermediary.
- Player:* a player who is a member of the KNVB as referred to in article 6.2.d of the Articles of Association.
- Intermediary agreement:* every written agreement between an intermediary on the one hand and a player or club on the other, which provides for the representation by the intermediary, at a fee or otherwise, of the player or club during negotiations on the conclusion of player contracts and/or agreements with regard to the transfer of players”.

The definition of an intermediary provided for under the KNVB RI is slightly wider than the definition of an intermediary under the FIFA RWWI.¹³ For example, whereas the KNVB already regards a natural person who *wishes* to represent a player in negotiations concerning the conclusion of an employment contract as an intermediary, FIFA does not. It is submitted that this difference is negligible and it is not clear to the author why such deviation was deemed necessary, since the mere wish of someone to act as an intermediary can hardly be deemed sufficient for the KNVB to exercise regulatory or disciplinary powers over such person.

In practice, the activities of intermediaries are however not limited to negotiating contracts. Intermediaries also perform tasks around the periphery of this activity, including the sourcing of endorsement deals and the provision of legal advice, as well as providing advice on financial planning, image rights exploitation and tax (not to mention some of the ‘hand-holding’ activities related to a move to a new club or country, such as assisting with house moves and advising on where to send the children to school).¹⁴ It is submitted that these activities, even if performed by a KNVB-registered intermediary, are not necessarily governed by the KNVB RI or the FIFA RWWI, but this may be subject of debate.

5. Registration

The KNVB keeps register of intermediaries,¹⁵ which register is publicly available on the website of the KNVB.¹⁶ Only natural persons and legal entities may be

¹³ Under the FIFA RWWI an intermediary is defined as follows: “A natural or legal person who, for a fee or free of charge, represents players and/or clubs in negotiations with a view to concluding an employment contract or represents clubs in negotiations with a view to concluding a transfer agreement”.

¹⁴ LYNAM / ELLIS / LEWIS, *Players’ Agents*, in LEWIS / TAYLOR (Eds.), *Sport: Law and Practice*, 3rd ed., 2014, 1419.

¹⁵ Article 2(1) of the KNVB RI.

¹⁶ This list was lastly updated on 11 September 2015: <http://downloadcentrum.knvb.nl/sportlink/knvb/>

registered as intermediaries by the KNVB.¹⁷

The registration automatically expires on 31 March of each season¹⁸ but is subject to renewal at any time.¹⁹ Upon registration, the intermediary receives proof of registration and is entitled to call himself KNVB-Registered Intermediary; he may however not use the logo's of the KNVB.²⁰ Upon expiration or termination of the registration, the intermediary must immediately return his proof of registration to the KNVB.²¹ The KNVB implemented a system whereby intermediaries can register only once per year, instead of registering for every individual transaction as is the case in other countries.²²

The registration of an intermediary may be terminated if:²³

- a. An intermediary fails to observe the Article of Association and/or the regulations of the KNVB, UEFA and/or FIFA and/or decisions by one or more of their bodies;
- b. An intermediary has been convicted without appeal by a disciplinary body of the KNVB, an association affiliated with FIFA, the UEFA and/or FIFA for violating legislation;
- c. An intermediary is placed under guardianship or under protective guardianship;
- d. An intermediary has been granted an irrevocable suspension of payment;
- e. An intermediary has been declared bankrupt under an irrevocable court judgment;
- f. The statutory debt management scheme has been declared applicable to the intermediary; and/or
- g. The intermediary has been convicted without appeal under criminal law for committing a crime.

It is submitted that, should an intermediary violate the obligations set out in article 5(1) of the KNVB RI, *i.e.* the provision in the KNVB RI setting out the obligations of an intermediary (see para. 9 below), this may also result in the termination of the registration since article 2(9)(a) of the KNVB RI determines that an intermediary should observe the regulations of the KNVB, including the KNVB RI.

6. *Requirements and conditions for registration*

The main minimum standard under the FIFA RWVI in respect of registration of

document/lijst%20geregistreerde%20intermediairs.pdf?id=196, last accessed: 15 September 2015).

¹⁷ Article 1(2) of the KNVB RI.

¹⁸ Article 2(6) of the KNVB RI.

¹⁹ Article 2(7) of the KNVB RI.

²⁰ Article 2(4) of the KNVB RI.

²¹ Article 2(11) of the KNVB RI.

²² BRANCO MARTINS, FIFA's new Regulations on Working with Intermediaries – Agents' perspective, *Football Legal* #3, June 2015, 50.

²³ Article 2(9) of the KNVB RI.

intermediaries is that the national associations will at least have to be satisfied that the intermediary involved has an impeccable reputation,²⁴ or in case of a legal person, that the individuals representing the legal entity have an impeccable reputation.²⁵ An intermediary may not have contractual relationships with leagues, associations, confederations or FIFA that could lead to a potential conflict of interest.²⁶ These requirements are considered to be complied with if the national association has obtained a duly signed Intermediary Declaration.²⁷

By signing the Intermediary Declaration of the KNVB, intermediaries declare, *inter alia*, that they fall under the jurisdiction of the bodies of the KNVB, including the disciplinary bodies and the arbitral tribunal of the KNVB, that they have an “*unblemished reputation*” and that the KNVB receives all information about all payments, of whatever nature, made to them by a club for the representation in the capacity as intermediary.²⁸

This latter provision is interesting and may be subject to discussion. As set out above, the services of intermediaries in football are not always related to the conclusion of an employment contract or a transfer agreement, *i.e.* not all services provided by an intermediary are services performed in their capacity as an intermediary. One may wonder whether intermediaries that are remunerated for services outside the scope of intermediary services need to inform the KNVB about these payments. From a strict literal interpretation of clause 10 of the Intermediary Declaration for natural persons of the KNVB one may conclude that intermediaries are not required to disclose information about such payments since this remuneration is not received in the capacity as an intermediary. Although article 8(1) of the KNVB RI determines that the intermediary agreement must document the agreements with regard to any fee payable to an intermediary by the club, no similar provision has been adopted for agreements between intermediaries and players. Since article 6(3) of the FIFA RWWI determines that “*associations shall also publish the total amount of remunerations or payments actually made to intermediaries by their registered players and by each of their affiliated clubs*”, it appears the KNVB will not be able to fully comply with its obligations towards FIFA if intermediaries are not obliged to inform the KNVB of any fees received from players. One may therefore wonder whether the addition of the words “*in the capacity as intermediary*” in clause 10 of the Intermediary Declaration form does not unnecessarily complicate things, both in view of the KNVB’s obligations towards FIFA as well as in respect of the pursuit of a high level of transparency on the market of intermediaries.

The KNVB RI determines that natural persons employed by and/or

²⁴ Article 4(1) of the FIFA RWWI.

²⁵ Article 4(2) of the FIFA RWWI.

²⁶ Article 4(3) of the FIFA RWWI.

²⁷ Article 4(4) of the FIFA RWWI.

²⁸ A standard Intermediary Declaration for natural persons can be downloaded from the website of the KNVB.

fulfilling any other position at a club, the KNVB, UEFA and/or FIFA cannot act as intermediaries. The KNVB went somewhat further than it was required to do by FIFA,²⁹ by determining that natural persons who and/or legal entities that can exercise 10% or more of the voting rights at the general meeting of a club cannot be intermediaries either.³⁰

Additionally, in order for a natural person or legal entity to be registered as an intermediary or to apply for an extension of his registration as intermediary,³¹ the following documents need to be submitted, of which only the signed Intermediary Statement is a minimum requirement established by FIFA:

- a. *“A fully completed and signed intermediary statement;*
- b. *A copy of a valid passport and/or valid ID card; and*
- c. *An original certificate of good [sic] conduct (in Dutch: VOG) or, in the event that the natural person and/or legal entity is not listed in the Persons Database of the Dutch government or in the register of the Dutch Chamber of Commerce, a similar document in the country where the natural person and/or legal entity is registered, subject to approval by the board, with this document having been issued:*
 - i. *Not later than six months before registration;*
 - ii. *With a view to representing players and/or clubs”.*³²

The KNVB charges intermediary registration costs for every registration. These registration costs are determined before 1 February of each year and are announced by the board.³³ The current registration costs are EUR 544,50 (EUR 450, excl. 21% VAT).³⁴

Although the KNVB RI go further than strictly necessary in view of the minimum requirements imposed by FIFA, in comparison with regulations implemented by other national federations, the requirements for registration of the KNVB are quite flexible. It is for example not necessary for KNVB-registered intermediaries to have arranged for an adequate insurance,³⁵ it is not necessary to be fluent in the language of the national federation concerned,³⁶ it is not necessary for an intermediary to be legally residing in the country of the national federation concerned³⁷ and it is not necessary to have a personal interview.³⁸ The current

²⁹ Article 4(3) of the FIFA RWWI.

³⁰ Article 1(3) of the KNVB RI.

³¹ Article 2(7) of the KNVB RI determines that these requirements are applicable by analogy in case of a renewal of the registration.

³² Article 2(3) of the KNVB RI.

³³ Article 2(8) of the KNVB RI.

³⁴ General information provided on the website of the KNVB (www.knvb.nl/watdoenwe/organiseren/intermediairs, last accessed: 15 September 2015).

³⁵ Which is a requirement in Portugal (see: CLUNY / ODA, FIFA's new Regulations on Working with Intermediaries, National Implementations – Portugal, Football Legal # 3, June 2015, 80).

³⁶ Which is a requirement in France (see: MOYERSOEN, FIFA's new Regulations on Working with Intermediaries, National Implementations – France, Football Legal # 3, June 2015, 66).

³⁷ Which is a requirement in Italy (see: GALLAVOTTI, FIFA's new Regulations on Working with Intermediaries, National Implementations – Italy, Football Legal # 3, June 2015, 52).

³⁸ Which is a requirement in Spain (see: CRESPO / RIPOLL RODRÍGUEZ, FIFA's new Regulations on

registration costs are also quite moderate in comparison with other countries,³⁹ although it must be noted that the KNVB may amend the registration fee on a yearly basis.

7. *Impeccable reputation*

As mentioned *supra*, in order to be registered as an intermediary with the KNVB, an intermediary needs to provide an original Certificate of Conduct (*Verklaring omtrent Gedrag* - VOG) or, in the event that the natural person and/or legal entity is not listed in the Persons Database of the Dutch government or in the register of the Dutch Chamber of Commerce, a similar document in the country where the natural person and/or legal entity is registered. The latter is only possible subject to the approval of the board of the KNVB, with this document having been issued no later than six months before registration and with a view to representing players and/or clubs.⁴⁰

A Certificate of Conduct is not a certificate of *good* conduct as mistakenly referred to in the KNVB RI. In fact, a Certificate of Conduct could more appropriately be denominated as a certificate of *no bad* conduct. Certificates of Conduct are issued by the Dutch State Secretary for Security and Justice. By issuing a Certificate of Conduct it is declared that the applicant did not commit any criminal offences that are relevant to the performance of his or her duties. For example, a taxi driver who has been convicted several times of drunken driving, or an accountant convicted of fraud are unlikely to be issued with a certificate. Obviously, an accountant who has been convicted of drunken driving may well be granted a certificate.⁴¹

8. *Conflicts of interests*

Pursuant to the KNVB RI, a player cannot be represented by more than one intermediary during the negotiations on the conclusion of a player contract and/or an agreement with regard to the transfer of this player.⁴² However, if, during the negotiations on the conclusion of a player contract and/or agreement with regard to the transfer of a player, the intermediary engages another intermediary and/or collaborates with one or more intermediaries other than those employed by the same legal entity-intermediary for whom the first intermediary works, these agreements must be documented and submitted to the KNVB within the scope of the registration referred to in article 6.1 (*i.e.* the provision determining that an

Working with Intermediaries, National Implementations – Spain, Football Legal # 3, June 2015, 61).
³⁹ England EUR 700, Spain EUR 816, Germany EUR 500, Portugal EUR 1,000 and the United Arab Emirates EUR 5,000.

⁴⁰ Article 2(3)(c) of the KNVB RI.

⁴¹ General information provided on the website of Justis, the authority responsible for the screening on behalf of the Ministry of Security and Justice (www.justis.nl/producten/vog/certificate-of-conduct, last accessed: 15 September 2015).

⁴² Article 4(1) of the KNVB RI.

agreement between an intermediary and a player or club must be laid down in writing) of the regulations.⁴³

Representing the interests of both a player and club in a single transaction is risky for an intermediary since it is presumed that intermediaries have a fiduciary obligation to act in the best interests of the principal (*i.e.* the player or the club). In *Imageview Management Ltd v Jack*, the English Court of Appeal put it nicely in a dispute concerning a football intermediary:

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

It is submitted that the same fiduciary obligation is presumed in the Netherlands. However, the KNVB RI contains a provision explicitly determining that it is permissible for an intermediary to represent the interest of a player as well as a club in one transaction, as long as both parties have explicitly given their express written consent for such double representation,⁴⁴ which is in line with the FIFA RWWI.⁴⁵

Under the former set of regulations of FIFA governing the activities of intermediaries, the FIFA Players’ Agents Regulations (hereinafter: the “PAR”), CAS determined that the consequence of an intermediary acting with a conflict of interest is not the invalidity of one of the two representation contracts, but rather that disciplinary sanctions shall be imposed on the intermediary.⁴⁶ As such, should a club discover, and be able to prove, that an intermediary acted with a conflict of interest while negotiating a particular contract, this does in general not take away the club’s duty to remunerate the intermediary for his services. This is only different if the club is able to establish that it incurred damages due to the intermediary acting with a conflict of interest, which is normally not easy to prove.

9. Agent’s obligations

The obligations of an intermediary under the KNVB RI are listed in article 5(1) of the KNVB RI:

- a. *“To observe the Articles of Association and/or the regulations of the KNVB, UEFA and/or FIFA and/or decisions by one or more of their bodies;*
- b. *To refrain from conduct that may harm the interests of the KNVB, its bodies and/or football in general;*
- c. *To provide all information requested by the KNVB, UEFA and/or FIFA and/*

⁴³ Article 4(2) of the KNVB RI.

⁴⁴ Article 4(3) of the KNVB RI.

⁴⁵ Article 8(2) of the FIFA RWWI.

⁴⁶ See: CAS 2012/A/2988, §79-84.

- or one or more of their competent bodies;
- d. To refrain from activities and work that concerns players who are younger than 15 years and 6 months;
 - e. To refrain from encouraging a player to prematurely terminate his player contract and/or fail to fulfil his obligations under that contract;
 - f. To ensure that his name and signature or, if the intermediary is a legal entity, the name and signature of a member of staff of the legal entity registered under these regulations, appear in every player contract and/or an agreement with regard to the transfer of the player, concluded through the intermediary's representation;
 - g. To comply with the applicable legislation (including legislation with regard to employment mediation);
 - h. To ensure the player contract and/or the agreement with regard to the transfer of the player states the fee paid to the intermediary for the negotiations on the conclusion of the contract and/or the agreement;
 - i. To refrain from offering and/or granting any consideration of whatever nature, directly or indirectly, to one or more members of the KNVB as referred to in article 6.1 of the Article of Association as a result of or in connection with:
 - The negotiations on the conclusion of player contracts and/or agreements with regard to the transfer of players;
 - Any gain, service, favour and/or any form of preferential treatment of players of a club;
 - Obtaining access to players of a club; and/or
 - Recommending an intermediary to players and/or clubsKNVB members within the meaning of article 6.1 of the Articles of Association are not permitted to accept and/or receive such offers and/or gifts; and/or
 - j. To refrain from offering and/or granting any consideration of whatever nature, directly or indirectly, to a player and/or a family member of that player in relation to the potential representation of that player. Players are not permitted to accept and/or receive such offers and/or any considerations”.

Furthermore, an intermediary is and shall remain at all times responsible and liable for work and activities undertaken or developed for him, on his behalf or on his instructions.⁴⁷

It is not permissible for intermediaries to conclude an intermediary agreement with a term exceeding two years. An extension of the intermediary agreement, for another maximum term of two years, must be recorded in a written agreement. The intermediary agreement may not be renewed tacitly.⁴⁸ Although this obligation is shared with the club and/or player represented by the intermediary, the intermediary shall ensure that his name and signature are laid down in every contract concluded on behalf of the club and/or player.⁴⁹

⁴⁷ Article 5(2) of the KNVB RI.

⁴⁸ Article 6(2) of the KNVB RI.

⁴⁹ Article 7(1) and (2) of the KNVB RI.

As mention *supra*, a failure to respect any of the above-mentioned obligations may lead to disciplinary proceedings and/or termination of the intermediary's registration with the KNVB. Although a violation of any of these obligations may formally lead to the termination of an intermediary's registration with the KNVB, it is submitted that such harsh measure would not always be appropriate.

Although article 5 of the KNVB RI is titled "*Obligations of the intermediary*", it contains some obligations in disguise for clubs and players that should not be overlooked. For example, although it is prohibited for an intermediary to offer "*any consideration*" in relation to the potential representation of a player, such player also has the obligation to refrain from accepting and/or receiving such offers. Accepting such offers may therefore lead to disciplinary measures being imposed on the player. Another obligation for clubs and players deriving from the KNVB RI is that players and clubs must ensure that the intermediaries representing them have signed the intermediary statement and the intermediary agreement.⁵⁰

10. Remuneration

As to the remuneration due to intermediaries, a distinction is to be made between services provided by intermediaries to players and services provided to clubs.

10.1 Services provided to players

Article 8(2) of the KNVB RI determines that the amount of the fee payable to an intermediary who represents a player is calculated on the basis of the agreed gross annual salary, including a *pro rata* signing-on fee, excluding guaranteed or non-guaranteed premiums and/or bonuses of the player for the full term of the player contract.

The KNVB opted to stay loyal to the rule under the FIFA PAR, according to which an intermediary would be remunerated with 3% of the annual gross basic salary if a club and an intermediary failed to reach an agreement about the amount of fee payable to the intermediary.⁵¹ This provision however only refers to the situation where a club and an intermediary failed to reach an agreement regarding the remuneration. Such provision may possibly be applied by analogy to the situation where a player and an intermediary have failed to reach an agreement regarding the intermediary's remuneration.

The KNVB also implemented FIFA's minimum standard that intermediaries cannot be remunerated should the representation relate to negotiations on the conclusion of a player contract and/or the agreement with regard to the transfer of a minor player.⁵²

⁵⁰ Article 7(3) of the KNVB RI.

⁵¹ Article 8(6) of the KNVB RI.

⁵² Article 8(7) of the KNVB RI.

Since the FIFA RWWI determines that the remuneration due to intermediaries for a player or a club in order to conclude an employment contract should not exceed 3% of the player's eventual basic gross income for the entire duration of the relevant employment contract,⁵³ the KNVB RI deviate from the FIFA RWWI in this respect.

It is noteworthy that the FIFA RWWI refers to “*the player's eventual basic gross income for the entire duration of the relevant employment contract*”, whereas the KNVB RI refers to a calculation “*on the basis of the agreed gross annual salary*”. A critical remark that has been expressed in respect of the implemented FIFA RWWI is that the 3% in the FIFA PAR served as a *minimum* guarantee for intermediaries, has been transposed into the FIFA RWWI, but with the intention to serve as a *maximum*.⁵⁴ However, one should be aware that the 3% under the FIFA PAR is not the same 3% as under the FIFA RWWI, since 3% over a player's basic gross salary over the *entire duration* of the relevant employment contract, e.g. a period of four years, is four times higher than 3% over a player's *annual* basic gross salary.

Furthermore, the 3% referred to in the FIFA RWWI is only a recommendation and does not, as such, serve directly as a cap. However, when implemented by the national federations, the remuneration of intermediaries might indeed be capped directly. Such direct or indirect cap may constitute a violation of EU competition law. To be justifiable, the proposed cap must have a legitimate objective, the anti-competitive effects must be inherent in the pursuit of that objective and the restriction must be proportionate in light of that objective. It has been argued that setting a fixed cap on the amount that an intermediary may earn from a transaction, irrespective of the services provided by an intermediary, may not be deemed the least restrictive way to prevent excessive fees for intermediaries.⁵⁵ In its complaint to the European Commission, the Association of English Football Agents (hereinafter: the “AFA”) contends that the 3% benchmark cap infringes article 101(1) and 102 of the Treaty on the Functioning of the European Union.⁵⁶

Not only the FIFA RWWI are currently being challenged, also the regulations implemented by national football federations are currently subjected to legal scrutiny.⁵⁷ Since the KNVB chose not to adopt such recommendation in the KNVB RI, the KNVB RI will most likely escape legal challenges from intermediaries for violation on the basis of competition law on the short term.

Finally, it is submitted that the recommended cap of 3% of the player's

⁵³ Article 7(3)(a) and (b) of the FIFA RWWI.

⁵⁴ KUMAR PARMAR / TARMUREAN, Payment to intermediaries, Football Legal # 3, June 2015, 39.

⁵⁵ TURNER, FIFA's proposed player agents reforms: analysis, World Sports Law Report, August 2014, 12.

⁵⁶ MEHRZAD / ONWERE, FIFA Regulations on Working With Intermediaries: analysis, World Sports Law Report, November 2014, 12.

⁵⁷ MISIC, The new FIFA Intermediary Regulations under EU Fire in Germany, Asser International Sports Law Blog, 12 August 2015 (www.asser.nl/SportsLaw/Blog/post/the-new-fifa-intermediaries-regulations-under-eu-law-fire-in-germany-by-tine-misic#continue, last accessed: 15 September 2015).

basic gross income for the entire duration of the relevant employment contract only concerns the total amount of remuneration due *per transaction*. It is understood that the recommended cap only concerns the activities performed by an intermediary that are regarded as intermediary activities. As mentioned *supra*, intermediaries however provide a wide array of services to players that are not strictly speaking intermediary activities. As such, *e.g.* services provided by an intermediary to a player in respect of the purchase of a house may arguably be remunerated separately and are not subjected to the cap.

10.2 *Services provided to clubs*

Article 8(3) of the KNVB RI determines that clubs that are represented by an intermediary must, if a fee has been agreed upon, remunerate the intermediary by payment of a fixed amount that is agreed upon prior to the negotiations on the conclusion of the player contract and/or the relevant agreement with regard to the transfer of a player. This payment can be made in instalments subject to the written consent of the club and the intermediary.

As mentioned *supra*, should a club and an intermediary have failed to reach an agreement regarding the intermediary's remuneration, the intermediary will be remunerated with 3% of the annual gross basic salary of the player.⁵⁸

The provision determining that intermediaries cannot be remunerated should the representation be related to negotiations on the conclusion of a player contract and/or the agreement with regard to the transfer of a minor is also applicable to clubs.⁵⁹

Under the KNVB RI, a club is not permitted to pay an intermediary or to have an intermediary pay all and/or part of a fee payable to another club, including a fee with regard to the transfer of a player, training fee and/or solidarity contribution.⁶⁰ An intermediary is also not permitted to have an interest in future fees, including training compensation or solidarity contribution.⁶¹

11. *Disciplinary powers and sanctions*

Different from FIFA, the KNVB remains directly competent to exercise direct disciplinary powers over registered intermediaries. The competence of the disciplinary bodies of the KNVB derives from article 1 of the Intermediary Declaration intermediaries are required to sign in order to be registered as an intermediary with the KNVB. Although FIFA no longer has direct disciplinary competence over intermediaries, FIFA still exercises indirect disciplinary competence over intermediaries since the FIFA Disciplinary Committee may extend disciplinary

⁵⁸ Article 8(6) of the KNVB RI.

⁵⁹ Article 8(7) of the KNVB RI.

⁶⁰ Article 8(8) of the KNVB RI.

⁶¹ Article 8(9) of the KNVB RI.

sanctions imposed on intermediaries by national associations to have worldwide effect.⁶²

First of all, the KNVB may terminate the registration of an intermediary in a limited number of circumstances. Should the KNVB proceed with the termination of a registration, the intermediary is not permitted to register again as an intermediary with the KNVB from the moment of termination for a maximum period of five years, at the discretion of the board.⁶³

Registration may be terminated most notably if an intermediary fails to observe the Articles of Association and/or the regulations of the KNVB, UEFA and/or FIFA and/or decisions by one or more of their bodies. Article 2(9)(a) of the KNVB RI determines that a termination on this basis does not affect the powers of the competent disciplinary bodies. On a critical note, it should be mentioned that the application of such provision appears difficult in practice since the disciplinary bodies of the KNVB would no longer have competence over the intermediary upon termination of his registration, as a consequence of which the intermediary would arguably no longer have standing to be sued in subsequent disciplinary proceedings. However, this ambiguity will most likely remain without consequences as the registration will usually be terminated as a direct consequence of a disciplinary procedure itself (as is indeed provided for in article 9(b) of the KNVB RI). A situation where disciplinary proceedings will be instigated against an intermediary only after termination of the registration appears improbable.

The wording of article 9(b) of the KNVB RI is interesting in the sense that it refers to being “convicted without appeal”,⁶⁴ since a literal interpretation would result in the undesirable conclusion that the registration of an intermediary who is convicted in first instance, but lodged an appeal against such decision, may not be terminated, regardless of whether the appeal is upheld or not. This may be problematic in view of the general legal principle of *in dubio contra stipulatorem*, according to which an unclear clause should be interpreted against the party who drafted it, which is arguably all the more true in disciplinary proceedings. It is suggested that this reference be replaced in the future with wording such as “upon the conviction having become final and binding”.

12. Dispute Resolution

One of the main criticisms concerning the implementation of the FIFA RWWI is that intermediaries no longer have an international forum where they can bring their disputes now that they are no longer part of the “football family” and that this will lead to chaos and a lack of legal certainty.⁶⁵ Instead, under the FIFA RWWI,

⁶² Article 9(2) of the FIFA RWWI.

⁶³ Article 2(10) of the KNVB RI.

⁶⁴ Article 2(9) heading and under (b) of the KNVB RI: The board is entitled to terminate the registration of an intermediary if an intermediary has been convicted without appeal by a disciplinary body of the KNVB, an association affiliated with FIFA, the UEFA and/or FIFA for violating legislation.

⁶⁵ BRANCO MARTINS, FIFA’s new Regulations on Working with Intermediaries – Agents’ perspective,

intermediaries will have to revert to national arbitration committees, if available, established by the national football federations or possibly to the Court of Arbitration for Sport, either as an ordinary arbitration or as an appeal arbitration and alternatively to national ordinary courts.

Most national football association do not have a national arbitration committee compliant with the minimum standards established by FIFA. Should this be the case, the alternative to litigating before ordinary national courts is to integrate an arbitration clause in the contracts determining that the Court of Arbitration for Sport is competent in case of any possible future disputes arising out or in connection with the contract.

As such, whereas all disputes concerning intermediaries used to be submitted to the Players' Status Committee of FIFA, the FIFA RWWI causes a decentralisation of the dispute resolution system. Besides the fact that litigation before ordinary courts may be more time consuming and costly in comparison with sports arbitration, it may also lead to inconsistent standards and results regarding similar intermediary contracts, due to the fact that domestic courts are bound by domestic legislation or otherwise.⁶⁶

The situation in the Netherlands however appears to be that an arbitration clause in favour of the Court of Arbitration for Sport would be void in light of the mandatory jurisdiction clause in favour of the arbitration committee of the KNVB adopted in the Intermediary Declaration and in the KNVB RI.⁶⁷ As a consequence, e.g. an Uruguayan intermediary representing an Uruguayan player in the conclusion of an employment contract with a Dutch club would have to start proceedings before the arbitration committee of the KNVB in case a dispute arises.

It may be clear that it does not become easier for intermediaries to obtain the remuneration they are entitled to should a club or a player fail to comply with its/his contractual obligations. In this sense, the loss of the Players' Status Committee of FIFA as the international forum for contractual disputes with clubs and players might indeed lead to a lack of legal certainty and coherence.

13. Certification

A final topic that is currently being discussed between the main stakeholders in Dutch football is the implementation of a certification for organisations of intermediaries. The idea is not that individual intermediaries will be certified, but that the organisation to which they are affiliated will be. The rationale behind this system of certification is obviously to ensure the quality and reliability of intermediaries, since the warranties that were previously in place, such as the mandatory insurance policy and the need to pass a test in order to be licensed as an

Football Legal #3, June 2015, 50.

⁶⁶ CRESPO / TORCHETTI, FIFA's new Regulations on Working with Intermediaries – Changes to the Dispute Resolution System, Football Legal #3, June 2015, 44-45.

⁶⁷ Article 9 of the KNVB RI.

intermediary, were abandoned with the implementation of the FIFA RWWI.

A working group with representatives of the KNVB, ProAgent (the union representing the interests of intermediaries in Dutch football), VVCS and ProProf (the unions representing the interests of players in Dutch football) was created to discuss the requirements that would be necessary for certification.

Although no final decision has currently been reached, during a meeting held on 9 June 2015, the working group found some common ground regarding the following requirements:

1. *Permanent education.* The relevant organisation would have to require its affiliated intermediaries to participate in permanent education.
2. *Insurance.* The relevant organisation would have to make sure that each of its affiliated intermediaries has an insurance policy in place similar to the insurance policy that was mandatory under the previous regulations.
3. *Legal assistance.* The organisation needs to provide legal advice / support to its affiliated intermediaries.
4. *Code of conduct.* The organisation needs to have a code of conduct in place that is applicable to all its affiliated intermediaries.
5. *Pre-registration.* The organisation may only allow intermediaries to join the organisation if they are registered as intermediaries with the KNVB.
6. *Minimum number of members.* The organisation would need to have at least 50 members or is an officially recognised union.
7. *Independent assessment committee.* The organisation would need to have an independent assessment committee in place in order to assess compliance of its affiliated members with the code of conduct, with the authority to suspend membership.
8. *Financial transparency.* Certain minimum requirements regarding financial transparency of the organisation may be added.

It remains to be seen how such certification system will finally be implemented, but the initiative is certainly to be applauded since it would undoubtedly provide clubs and players with more warranties regarding the quality and reliability of intermediaries as the system currently in place.

14. Conclusion

The implementation of the KNVB RI appears to be the consequence of a solid consultation process with all relevant stakeholders in football in the Netherlands. The core principles of the FIFA RWWI have indeed been implemented, except for the cap on the remuneration of intermediaries.

The impact of national law on the activities of intermediaries is fairly limited in comparison with the regulations that have been implemented in other countries and so are the requirements for being registered as an intermediary by the KNVB.

The future will tell whether the diversification of obligations and

requirements imposed on intermediaries by the different national football federations will lead to major regulatory problems. However, since the KNVB has established a national arbitral tribunal that appears to comply with the minimum standards imposed by FIFA and since the KNVB RI contains an arbitration clause in favour of this tribunal, it appears that KNVB-registered intermediaries can at least indirectly use the effective private enforcement mechanism in football, by which clubs and players may be sanctioned for failing to comply with decisions of the KNVB.

The developments regarding the implementation of a system of certification for organisations of intermediaries are interesting and the result might set an interesting precedent for other countries.