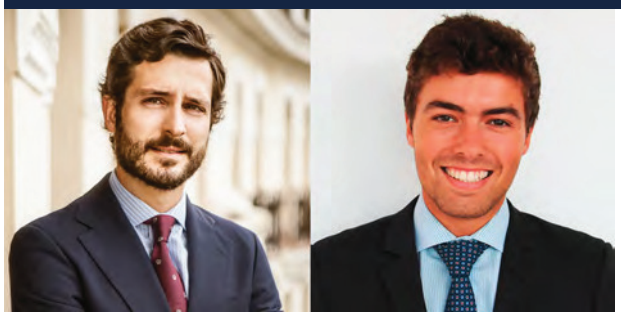
The legal nature of buy-out clauses in Spain revisited



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→ ***Buy-out clause – Sell-on clause – National law – Court of Arbitration for Sport (CAS) – Player contract – Player transfer – Transfer fee – Penalty clause – Liquidated damages clause – Breach of contract***

There is a misconception that buy-out clauses are mandatory in Spain. As a result of recent decisions both at the national and international levels, their content has been subject to interpretation, making clear their origin, legal nature and practical effects.

Spanish Royal Decree no. 1006/1985 (Royal Decree),[1] which provides for the special relationship of professional athletes in Spain, contains up to a total of nine grounds for terminating employment relationships subjected to this regulation. Among them, Article 16 par. 1 regulates the most famous (and problematic) one: the termination of the employment contract at the athlete's will, mistakenly known as "*cláusulas de rescission*" (buy-out clauses) when inserted in employment contracts.

The abovementioned article of the Royal Decree provides as follows (free translation):

> "*One.- The termination of the contract by the professional athlete, through no fault attributable to the club itself, shall give the club the right, where appropriate, to compensation for which the amount, in the absence of an agreement in this regard, shall be established by a body with jurisdiction in labour matters depending on the circumstances of the sport, the damage caused to the organisation, the grounds for termination and any other aspects that the court may deem significant.*"

Non-obligatory nature

The first idea is that the Royal Decree does not impose or mandate the insertion of these buy-out clauses in employment contracts - rather, clubs (as the main employers in these circumstances) may elect to insert such clauses in employment contracts in agreement (*pacta sunt servanda*) with the player (the employee), for example, when they wish to have certainty as to the sum payable should the athlete elect to transfer to another club (*i.e.* without the need to refer to the Spanish Labour Court), what would also imply a delay on the procedure. The Royal Decree clearly establishes that "*in the absence of an agreement in this regard, it shall be established by a body with jurisdiction in labour matters…*". Thus, the Royal Decree admits the possibility of an employment contract being valid too without this clause.

Exercise of a right or breach of contract?

Further to the above, it seems to be essential for dealing with the legal issues raised by this type of agreement to determine whether the athlete terminating the employment contract unilaterally is exercising a right of termination or, on the contrary, he is in breach of his main obligations (*i.e.* to provide his services until the end of the period stipulated in the employment contract). In order to be in a position to answer said question, one should previously refer to the general set of labour regulations applicable in Spain, mainly the "*Estatuto de los Trabajadores*" (ET).[2] In this regard, according to Article 49 par. d) of the ET, the employment contract shall be terminated "*by the resignation of the employee, with the notice required by collective agreements or local custom.*" Furthermore,

1 BOE.es - BOE-A-1985-12313 Real Decreto 1006/1985, de 26 de junio, por el que se regula la relación laboral especial de los deportistas profesionales

2 BOE.es - BOE-A-2015-11430 Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores

the justification of said resignation or withdrawal of the employee is based on the professional freedom recognised by the Spanish Constitution in Article 35 par. 1, when it states that "*all Spaniards have the duty to work and the right to work, to the free choice of profession or trade, to promotion through work.*"

For the above reasons, it must be concluded that the athlete does not breach his employment contract when he terminates it of his own free will and without cause attributable to his employer. With this action, the most that is done is to fulfil, albeit in a different way, the performance (compensating for the damage caused), while at the same time exercising a right recognised both specifically in the labour regulations and in general by the Spanish Constitution itself, such as the right to resign from the job.

In general terms, it can be affirmed that the formula provided for in Article 16 par. 1 of the Royal Decree constitutes the maximum guarantee for the professional athlete as an employee, as it is the response to the right of retention that for so many years has been the basis of their relationship with clubs or sports entities[3] (which permitted clubs to keep the players in the club's structure indefinitely in exchange for a 10% salary increase), at the same time as protecting the right of the employing club to receive, "*where appropriate*", compensation for the ante tempus termination of the employment contract.

Is it a penalty clause or a liquidated damages clause?

In spite of the conclusions reached by some tribunals in Spain long ago, it cannot be interpreted that we are dealing with a penalty clause since this is nothing more than a stipulation added to the main obligation, consisting of the payment of an economical sum in favour of the creditor in the event of non-performance or defective performance of the debtor (something which does not happen in the described scenario). Moreover, bearing in mind that the compensation foreseen for these cases arises as a consequence of the termination of the employment contract and not of its non-performance, in no case can this type of clauses be interpreted as penalty clauses. However, this does not prevent the judge in question, in case of a dispute between employer and the employee, from modulating the amount inserted in the corresponding employment contract, if he considers that there has been a manifest abuse of rights and, therefore, an imbalance of the bargaining position when signing the aforesaid contract.

3 *E. A. García Silvero, "La extinción de la relación laboral de los deportistas profesionales"*, Thomson, p. 248.

Thus, notwithstanding the doctrinal discussion in our country and the similar consequences regardless of their exact nature, it seems that the liquidated damages approach tends to be most appropriate.

Are employers always entitled to damages?

Another issue that has been subjected to debate for so long is the club's entitlement to compensation under any circumstances. In this regard, the wording of the rule leaves no room for interpretation, as it establishes that the unilateral termination of the employment contract "*shall give the right, **where appropriate**, to compensation…*" (emphasis added).

The use of the expression "*where appropriate*" by the labour regulations implies that it is not a rule that presumes the existence of damages for the athlete's termination (*i.e.* said termination will not always arise a right for compensation in favour of the club or sports entity). Therefore, the ultimate basis for this compensation is to be found in the civil law doctrine of liability for damages, but not in all cases the sports club or entity will be entitled to compensation. The wording of the Royal Decree itself leads to this important qualification, since the compensation provided here "*is not essential and absolute, since it may be the case that there is no compensation at all.*"[4] As such, the club "*has to prove (…) the existence of damages and its calculation, in order for this claim to be admitted.*"[5]

The above justifies cases where the voluntary termination of the athlete is caused, for instance, by the voluntary abandonment of the sport or, less frequently, by the transfer of the athlete to another sport in which the employing club does not participate.

In any case, in those (unlikely) cases in which the Labour Court is required to calculate the amount of compensation in the absence of an agreement, the circumstances of the sport (they are not the same amounts in football as in other sports, and the Royal Decree applies to them too), the damage caused to the organisation (again, if there is no proved damage, then there would be no compensation), the grounds for termination and any other aspects that the court may deem significant (age of the player, the moment of the season, number of seasons left as per the employment contract, etc.) will be taken into consideration.

4 *A. Palomar Olmeda, "Análisis de los diferentes aspectos que plantea la resolución del contrato de trabajo de los deportistas profesionales"*, Revista española de derecho del trabajo, no. 30, 1987, p. 278.

5 *L. F. Ragel Sánchez*, Derecho Civil II: Obligaciones y Contratos, p. 285.

Use of this provision in practice

In spite of the non-obligatory nature of this clause, in practice, there is probably no employment contract of a professional football player in Spain that does not contain one, mainly in order to dissuade and prevent third parties from trying to acquire the corresponding player (as there are no restrictions in the amount put in place). However, notwithstanding the legislator's presumed intention to simply reinforce the athlete's right to withdraw from his contract (as established in the Spanish Constitution), the use of this provision in practice has been historically bound to an anticipation of the payment of the transfer fee instead of a real damages clause.

As such, and as it will be analysed below, insertion of buy-out clauses in employment contracts has been used as a further way of transfer of the economic and federative rights of professional football players, in particular, alternative to the temporary or permanent transfer by way of a transfer agreement. After all, the buy-out clause is equivalent to an agreement and, therefore, to the manifestation of the club's consent that the player may terminate his employment contract prior to the expiry of the agreed term, by means of the payment of a certain economic amount which, in practice, is made by the club acquiring the rights and not by the player himself, but whose consequences are exactly the same as those in a "*conventional*" transfer of a player (the rights of said player are transferred from one club to another).

With the above in mind, Book V of *LaLiga* General Rules details the mechanic for the cancellation of a license and its corresponding transfer in cases in which a buy-out clause is paid. There is a system called "*LaLiga Manager*" through which *LaLiga* clubs need to fill in certain information and upload some documentation when a player is either acquired or sold. What is more, there is a specific tool by which the clubs need to inform *LaLiga* when a player / a third club makes the payment of a buy-out clause in order to cancel the license of the relevant player. Consequently, there must be active conduct on the selling club, as they allegedly must comply with this requirement by identifying the player, uploading the "*acta de comparecencia*" (document in which the player's will to deposit the corresponding amount is stated), informing of which was the destination club, date in which the buy-out clause was paid, fixed amount, information on intermediaries and exact date of registry.

What is clear is that, in accordance with section 172 of the Spanish FA General Regulations, "*where a professional player has unilaterally terminated his relationship with one club and wishes to register with another, it shall be a condition for obtaining a new license that he deposits the amount of compensation agreed with the club of origin for such a case, for the sole purpose of issuing the new license, and without this obligation constituting a prejudice to any litigation arising from the termination of the contractual relationship*"[6] (*i.e.* if the buy-out amount is not paid, no new license shall be issued, at least, at the national level).[7]

What would happen in case no buy-out clause is inserted in the relevant employment contract?

In those (rare) cases where the parties have not provided for any compensation in the corresponding employment contract, as indicated above, the contract will be cancelled once it has been judicially terminated. The main problems with this variant are (i) the uncertainty it generates for the employing club, which in most cases would receive infinitely less compensation than if agreed beforehand and (ii) the slowness of the procedure, which would significantly harm the player in question, since he would have to wait for the corresponding court to resolve the matter and this would condition his transfer, bearing in mind the speed required in this type of transactions.[8]

Problems arising with sell-on fees and other third party rights

By freely negotiating and agreeing to the buy-out clause in employment contracts, the clubs agree in advance the terms under which it would be acceptable for the corresponding player to voluntarily terminate the employment relationship in the future. In other words, the inclusion of the buy-out clause entails the agreement and acceptance of the club to the future transfer of the player's registration against the payment of the maximum transfer fee the club expected to obtain for the definitive transfer of the player.

6 Reglamento_general_version_septiembre_2020.pdf (rfef.es)

7 In the international context there is always the possibility of requesting the delivery of a provisional International Transfer Certificate (ITC) before the Single Judge of the FIFA Players' Status Committee. However, as per Article 17 of the FIFA RSTP, new clubs employing the corresponding player are jointly and severally liable for payment of compensation for the unilateral termination to the previous club, reason why in most cases new clubs do not want to bear that risk (in Spain, on the contrary, such liability of the new club is just subsidiary).

8 It is relevant to consider the irreparable harm that would mean for a player not to participate in any matches between the moment the termination of the contract was notified by the player and the decision by the labour court was adopted (a decision that of course would be subject to appeal).

When this payment triggers other rights such as the right of a previous club to receive a percentage of the compensation by way of a sell-on fee, training compensation or solidarity payment, or the right of an agent to a specific amount, the selling club's position tends to be that it did not agree to the player's transfer to a third club, because the transfer was as a result of the player exercising the buy-out clause and, therefore, it had not consented the early termination of the contract (and basically it has been obliged to tolerate it, as imposed by law). However, as explained, this reliance is wrong both as a matter of principle and as a matter of law, and there are some recent decisions both at the national and international levels that support this position.

> ***"The inclusion of the buy-out clause entails the agreement and acceptance of the club to the future transfer of the player's registration against the payment of the maximum transfer fee"***

Club A v Club B case

In July 2013, Club A and Club B (both Spanish clubs) reached an agreement for the transfer of a player on a permanent basis. The agreed transfer fee was split into a fixed amount and a variable amount. Said variable amount (the sell-on fee) was payable by applying an agreed percentage to "*the difference between the fixed amount which [Club B] would receive for such a future transfer and the amount which [Club A] would have received from [Club B] at the time of the player's transfer on a permanent basis…*"

In parallel to the conclusion of the said transfer agreement, Club B and the player concluded an employment contract, voluntarily inserting by mutual agreement a buy-out clause amounting to EUR 35 million. Regarding the above, in July 2017, Club C paid the amount reflected in the buy-out clause on behalf of the player. However, Club B refused to pay Club A its sell-on compensation by relying on the argument that the first club had not "*consented*" to the player's move.

From the reading of the terms of the transfer agreement, the Arbitration Tribunal considered that its terms were clear and that both Club A and Club B were obliged to comply with its stipulations, no matter the particular type of definitive transfer of rights or to the method of payment. In other words, the Arbitration Tribunal concluded that to interpret that the previous club is not entitled to the reserved percentage when receiving an economic compensation by way of payment of a buy-out clause would lead to an absurd result that the courts cannot support.

This decision has been judicially ratified by the Civil and Criminal Chamber of the High Court of Justice of Madrid (*Sala de lo Civil y Penal del Tribunal Superior de Justicia de Madrid*), which was resolved by Decision no. 30/2019 of 12 September 2019, in which, the alleged unreasonableness of the Arbitral Tribunal's decision was rejected.

Club D v Club E case

Club D agreed to transfer one of its players to Club E (both Spanish clubs) on 14 January 2019. Identically as in the abovementioned case, in consideration for the transfer of the player, Club E also agreed to pay both a fixed fee and a variable one consisting of - in this case - 10% of the price of a hypothetical future transfer of the player.

In parallel to the conclusion of the said transfer agreement, Club E and the player also signed an employment contract, voluntarily inserting a buy-out clause amounting to EUR 6 million. In July 2019, Club F paid said sum on behalf of the player and, again, Club E denied payment of the sell-on compensation to the previous club (*i.e.* Club D).

An important fact that the Arbitral Tribunal highlights (and that also occurs in the abovementioned Club A v Club B case) is that "*the player is 'revalued' by almost four million euros after providing his services in a first division club, while when he was (until January) in [Club D], he was participating in a lower division.*" Therefore, consistent with its decision in the preceding case, the Arbitral Tribunal considered that Club D demonstrated that the common and shared will of both parties was to admit and integrate into the concept of "*definitive transfer*" any form of transfer of economic and definitive rights of the player, without being compressed into one, and at the same time, without excluding that which occurs by payment of the buy-out clause by a third club. Any other interpretation of the relevant clause would be illogical and incoherent.

How have these clauses been recently treated by FIFA & CAS?

FIFA jurisprudence has consistently shown that FIFA considers buy-out clauses to allow clubs to "*set a price*" at which they would be willing to release players from their contractual obligations. Therefore, in substance, FIFA does not consider this to be different from an

interested club approaching the selling club directly with an offer for the player's registration. Instead, the FIFA judicial bodies have consistently held that buy-out clauses, regardless of how they are drafted, constitute *de facto* an anticipated acceptance of a possible future transfer of a player for a predetermined amount.

> ***Buy-out clauses, regardless of how they are drafted, constitute de facto an anticipated acceptance of a possible future transfer of a player for a predetermined amount***

As per this line of jurisprudence, the transaction has the same characteristics as a typical transfer agreement; both constituted a transfer agreed between two clubs and a player for a specific amount for the early termination of a labour relationship. The only difference is that the transfer amount is set bilaterally in the first instance (as between the player and the relevant club), with the selling club latterly (at the time of it agreeing to pay the buy-out clause) freely accepting the transfer of the player for the buy-out sum (paying such sum on behalf of the player). It is just a question of timing.

In one of the latest cases (affecting *FC Barcelona* player *Clément Lenglet*[9]), the PSC rejected the club's argument that, for the sell-on clause to apply, there had to have been a "*signed*" transfer agreement between the club and a third party, noting that "*the real intention of the parties could not be other than to subject the operation of the sell-on clause to a transfer of the player being concluded.*" This position was also supported by the CAS in appeal; the Panel noted that the wording of the sell-on clause was wide enough to cover every kind of transfer, both in a contractual and non-contractual framework.

This point marked a decisive distinction between this case and the dispute decided in the *Keita* case,[10] where the triggering element was not in general terms a "*transfer*", but specifically a "*resale*" (which is not triggered in the event of unilateral termination of the employment contract by payment of the buy-out clause).

Conclusion

Along with wages and performance bonuses, an increasingly key aspect of athlete's employment contracts in Spain (essentially in football) is the addition of buy-out clauses. A proper understanding of their legal nature and purpose, as well as good drafting of the relevant clause (together with ancillary clauses such as those providing for sell-on compensations), would avoid unnecessary discussions in both national and international forums dealing with these disputes. In any case, in the light of the jurisprudence referred to above, what is paramount for decision-makers is to identify what was the intention of the parties when concluding the relevant employment contract and to try to avoid reaching conclusions that are absurd or contrary to business commonsense.

9 CAS 2019/A/6525 Sevilla FC v. AS Nancy Lorraine.
10 CAS 2010/A/2098 Sevilla FC v. RC Lens.