

Spain:

# Legal, practical and taxation issues of buy-out clauses in professional football contracts

BY JUAN DE DIOS CRESPO PÉREZ AND PAOLO TORCHETTI<sup>1</sup>

## Introduction

The professional football world has seen the proliferation of player acquisition costs increase over the course of the past 20 years.

The perceived need for top professional teams to keep up with rivals has been an upward driver of acquisition costs where clubs attempt to lure top talent by outspending their competitors.

The summer transfer window of 2017 proved to be the most lucrative yet where “Big 5” European clubs spent a total of € 5.1 billion, representing an increase of 38% in comparison to total transfer fees incurred during the 2016 transfer period.<sup>2</sup> This figure includes amounts incurred in relation to the exercise of buy-out clauses that are inserted into professional football employment contracts.

The most prolific example of the use of buy-out clauses is the legal regime applicable to professional football players in Spain. The authors refer to the Spanish regime as prolific, because the most ever spent to acquire the employment rights of a player was not the negotiation and payment of a transfer fee, but the exercise of a buy-out clause where Paris Saint-Germain acquired Neymar’s services from Barcelona for € 222 million during the 2017 summer transfer window.

This particular situation was notorious because of how the events unfolded. Spanish regulations require that amounts paid to Spanish clubs from foreign clubs are deposited with LaLiga, which acts as a clearing house.

<sup>1</sup> Ruiz-Huerta & Crespo, Sports Lawyers, Valencia, Spain: [www.ruizcrespo.com](http://www.ruizcrespo.com) (accessed 30 November 2018).

<sup>2</sup> Drs. Raffaele Poli, Loïc Ravenel and Roger Besson, *Transfer market analysis: tracking the money* (2010-2017). CIES Football Observatory Monthly Report, Issue 27 – September 2017, available at [www.football-observatory.com/IMG/sites/mr/mr27/en](http://www.football-observatory.com/IMG/sites/mr/mr27/en) (accessed 30 November 2018). This figure includes amounts incurred for player loans with an option to buy, and amounts in relation to the exercise of buy-out clauses, that are not technically transfer fees further to CAS jurisprudence.

Neymar’s representatives flew to Madrid to physically deposit the amount with LaLiga in accordance with these regulations. Javier Tebas, the President of LaLiga, without legal authority, refused to accept the payment made by the French club. Within hours Neymar’s representatives travelled to FC Barcelona’s offices to pay the amount directly to the Catalan club. In the end the amount was accepted, and Neymar plies his trade in France’s Ligue 1.

Just one year later, during the 2018 summer transfer window, Chelsea broke another record, paying the most in history for a goalkeeper, exercising the € 80 million buy-out clause for Kepa Arrizabalaga, from Athletic Club (Bilbao).

The result is that the payment of buy-out clauses forms an ever-increasing portion of costs spent on the acquisition of the right to hire a football player as an employee. Therefore, the decision to exercise a buy-out clause is not only a sporting decision but also a financial one.

The purpose of this article is to analyse the underlying legal basis of the buy-out clause and to identify some of the practical and taxation issues that arise. Although these considerations are equally applicable to the payment of transfer and loan fees and player salaries, the authors present this discussion within the specific context of compensatory amounts payable for the exercise of buy-out clauses.

## The legal fundamentals of buy-out clauses

A buy-out clause is, generally speaking, an amount that the player and the club agree to, inserted in the contract, where the player can pay this pre-determined amount to the club in exchange for the employment contract being dissolved.

Buy-out clauses are permissible under the FIFA Regulations on the Status and Transfer of Players (“FIFA RSTP”). Although the FIFA RSTP itself does not identify buy-out clauses by name art. 13 allows for professional football employment contracts to be terminated by mutual agreement. The commentary on the FIFA RSTP explains that:

*“The parties may, however, stipulate in the contract the amount that the player shall pay to the club as compensation in order to unilaterally terminate the contract (a so-called*

*buyout clause). The advantage of this clause is that the parties mutually agree on the amount at the very beginning and fix this in the contract. By paying this amount to the club, the player is entitled to unilaterally terminate the employment contract. With this buyout clause, the parties agree to give the player the opportunity to cancel the contract at any moment and without a valid reason, i.e. also during the protected period, and as such, no sporting sanctions may be imposed on the player as a result of the premature termination."*

The existence of the Spanish buy-out clause, or "*cláusula de rescisión*", is established by *Real Decreto 1006/1985* on the Special Labour Relationship of Players, where art. 16 determines that where a player unilaterally terminates a contract the pre-existing club will be owed compensation. The *Real Decreto* goes on to say that, in cases where compensation is not established, then the ordinary Spanish labour courts shall retain jurisdiction in order to impose a quantum payable to the previous club.

As a result of this federal labour law, it has since become standard practice for clubs and players to insert such a clause into the employment contract. This gives clubs the certainty of a compensatory amount while it enshrines the fundamental right of an employee to leave his current employer for a new one. It is clear that this standard practice is a reaction to the uncertainty faced when a labour court judge, without specific experience in the football world, could be called upon to assign a value for this compensatory amount.

Although the CAS does not have jurisdiction to review the decisions of domestic Spanish courts, there are a series of CAS decisions that provide some academic guidance as to what constitutes a buy-out clause in an international setting.

Most of these cases involve situations where there is a clause in a football player's employment contract that refers to the ability of the player to be able to leave the club in exchange for a compensatory amount to be paid to the club, however in countries where the right to a buy-out clause is not established in a collective bargaining agreement or labour law. The issue often involves whether art. 17 of the FIFA RSTP is engaged which requires that an additional amount of compensation that ought to be paid over and above the amount identified in the contract as liquidated damages. Naturally the devil is in the details as in these cases the wording of the clause is poorly drafted where it is unclear if it is indeed a buy-out clause.

A good example of such a situation arose in *Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & FIFA* where the CAS Panel recognized that the practice to insert a buy-out clause is authorized by the FIFA RSTP and explained the rationale as follows<sup>3</sup>:

*"[...] one of the parties (ordinarily, the club) accepts in advance that the contract may be terminated: as a result, when the contract is effectively terminated, such termination can be deemed to be based on the parties' (prior) consent. Therefore, no breach occurs, and the party terminating the contract is not liable for any sporting sanction. It is only bound to pay the stipulated amount – which represents the "consideration" (or "price") for the termination."*

The Panel specified, however, such a buy-out clause must grant the player the right to terminate the contract and not set the consequences if the contract is terminated. The Bresciano Panel ruled that the clause did not meet the definition of a buy-out clause because it specifically sets the consequences where it refers to the "damage caused".<sup>4</sup> In the end art. 17 of the FIFA RSTP was applied and the player was required to pay an amount of liquidated damages to his former employer.

Whether the termination of a contract is with or without just cause, where there is some type of vague termination clause, is a hotly contested issue within the football legal community. The competing views are, that from a theoretical perspective, the contract cannot be considered to be terminated without just cause if it is terminated in accordance with the terms and conditions of the contract. On the other hand, it is argued, if the parties have otherwise acted in accordance with the terms and conditions, such as the player playing and the club paying salaries on time, then there is simply no just cause to terminate the contract. Although this may seem like simple semantics, there is a long line of CAS jurisprudence similar to Bresciano interpreting vague clauses and requiring players to pay liquidated damages to their former employers.

These types of cases do not exist in Spain, for the simple reason that the regime supported by federal labour laws clearly defines what constitutes a buy-out clause and the legal form and methodology to execute one. Within this legal regime that supports the existence of the "*cláusula de rescisión*" the typical clause in a Spanish contract is overtly specific in that it states that the compensatory amount is the final amount, that it is not a liquidated damages clause, but a compensation amount that it is in accordance with the FIFA RSTP.

### **The negotiation of a buy-out clause: practical matters**

One of the more interesting aspects in the negotiation of this compensatory amount is the quantum, as there are a host of both common and conflicting interests by all parties involved. This is due to the occurrence that the ability to monetize the right to hire talented football players are among a club's most valued assets, which would otherwise include the right to earn future income based on sponsorship or television agreements and the stadium itself.

<sup>3</sup> CAS 2013/A/3411 *Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & FIFA*, paragraph 85.

<sup>4</sup> CAS 2013/A/3411 *Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & FIFA*, paragraph 86.

It is correct to say that a professional football player provides his services as an employee, as most collective bargaining agreements and labour laws applicable to professional football players define the relationship as such. The player, however, due to the specific nature of the football transfer market, can also provide an economic benefit to a club of an enduring nature where the purchase and sale of the right to enter into employment contracts with top players can be commodified. Simply put, clubs can turn a profit if their transfer policy is effectively managed, and the use of a buy-out clause is no different where it can protect the employer club from prospective clubs poaching talent at less than fair market value.

In this sense, there is a widely held legal view that, within the context of the “specificity of sport”, players are considered to be an “asset” of football clubs. This is because the world football transfer market and the value attributed to players represented in player acquisition costs is an inherent feature of modern football.<sup>5</sup> The CAS has specifically reasoned that<sup>6</sup>:

“In particular, a panel may consider that in the world of football, Players are the main asset of a club, both in terms of their sporting value in the service for the teams for which they play, but also from a rather economic view, like for instance in relation of their valuation in the balance sheet of a certain club, if any, their value for merchandising activities or the possible gain which can be made in the event of their transfer to another club.”

Assets, theoretically, are either capital assets or current assets. A capital asset is one that retains an enduring benefit while a current asset, depending on the business, relates to a current business expense in the current accounting period whereby the activity relates to an adventure in the nature of trade. Initial acquisition costs for the right to employ a player, as employment contracts last several years, are commonly treated as capital assets. The cost of a player’s salary however, is a current expense.

This is important within the context of the discussion of buy-out clauses. The club may wish to set the compensatory amount exceedingly high in order to protect its “asset”. An exceedingly high and prohibitive amount would provide a disincentive for prospective clubs from poaching talent. In this sense, it is necessary to note that the dissolution of a professional football player’s employment contract is perceived as a fundamental right and the club does not have the legal ability to refuse to honour such a clause. In addition to the value of the compensatory amount being proportional to the player’s market value, an effective buy-out clause would also be drafted in a way that is

<sup>5</sup> CAS 2007/A/1358, *FC Pyunik Yerevan v. Carl Lombe, AFC Rapid Bucuresti & FIFA*, N 104-105; 2007/A/1359, *FC Pyunik Yerevan v. Edel Apoula Edima Bete, AFC Rapid Bucuresti & FIFA*, N 107-108; confirmed in CAS 2008/A/1568.

<sup>6</sup> CAS 2008/A/1568 *M. & Football Club Wil 1900 v. FIFA & Club PFC Naftex AC Bourgas* at paragraphs 47 and 48.

proportional to the length of time left on the player’s contract. FIFA regulations impose a maximum length of five years for professional player employment contracts. Depending on the circumstances, such as the age of the player, clubs and players have a common interest to agree to the full five-year period. The club sees it as an advantage so that it can have the player for several years, and yet still control his movement by negotiating a transfer during the latter years of the contract. The player’s interest in agreeing to a five-year contract is guaranteed income in case he is injured. To have a compensatory amount that is the same in the first year of the contract as the last year of the contract would only provide prospective clubs, who are interested in the player, an incentive to wait until the contract has expired to sign the player on a Bosman leaving the previous club without the ability to gain a return on its asset. Such a clause may not effectively protect the first club and buy-out clauses should be drafted with this dynamic in mind where the quantum of the amount would reduce proportionally with each passing year.

In any event, an overvalued compensatory amount can be a starting point for potential negotiations between two football clubs. The payment of an amount less than stated in the employment contract, as agreed to by both clubs and the player, would technically be a transfer. This is because the “*cláusula de rescisión*” would not have been exercised.

This view is confirmed as demonstrated in the exercise of the buy-out clause by FC Barcelona of the player Keita from Sevilla FC.<sup>7</sup> In that case, Sevilla employed the services of the Malian midfielder whose contract had a clear buy-out clause under the Real Decreto for € 14 million. Without even negotiating with Sevilla, FC Barcelona paid the amount, on behalf of the player, in order to release him from his obligations, which Sevilla had no other option but to agree to. Within the context of determining whether Sevilla owed amounts to Keita’s previous employer, RC Lens, for a sell-on clause negotiated in the transfer of Keita from the French club to Sevilla, the CAS ruled that the execution of a buy-out clause is categorically not a transfer because of the nature of the transactions, as a buy-out clause is not a negotiated agreement, but the consent relates to the pre-existing condition in the contract.

A competing interest to the club’s is the player’s interest in ensuring that the compensatory amount is not too high so that if he wishes to leave his existing employer the amount would not be prohibitive. This, naturally, is obvious.

A difficulty arises, however, when an agent is negotiating on behalf of the player. Football agents, now referred to as intermediaries, are often paid on a commission basis calculated as a percentage of the amount that is paid for the player’s services. It would appear that the agent is presented with a conflict of interest where it may serve the player best, without considering the financial interests of the agent, to have this compensatory amount set as low as possible. The negotiation of the compensatory amount

<sup>7</sup> CAS 2010/A/12098 *Sevilla FC v. RC Lens*.

presents an interesting dynamic, where often agents will promise to give a portion of the commission back to the player, in order to ensure the player may be able to benefit from the insertion of an excessive compensatory amount.

### Taxation issues for Spanish buy-out clauses

Historically speaking, Spanish tax laws have been ill-equipped, from a policy perspective, in treating similar transactions in an similar manner. When two clubs agree to the transfer of a player, as opposed to the unilateral execution of the buy-out clause, the Spanish tax law would treat this as the purchase of a service. Consequently, the value added tax would apply at a rate of 21%, which of course was passed onto the purchasing club effectively increasing the transfer fee by the same amount.

Conversely, art. 16 of the Real Decreto 1006/1985 explicitly determined that amounts paid in the exercise of a buy-out clause are a benefit in kind received in the hands of the player as an employee. In such a case, the personal income tax rate of 48% applies. As purchasing clubs customarily also pay this amount on behalf of the player, the price of the exercise of a buy-out clause is increased by 48%. This clearly does not achieve equitable tax results where similar transactions in substance are not treated in the same manner. Under such a regime, clubs would often negotiate a transfer and offer an amount greater than the buy-out amount, in order to avoid the higher tax rate. This is precisely what Bayern München did in the transfer of Thiago Alcántara, where the German club negotiated for and paid FC Barcelona 20 million as a transfer fee instead of exercising the unilateral buy-out option for 18 million.

After consulting with LaLiga, the Spanish taxation authorities have clarified the interpretation and application of domestic Spanish tax law to the payment of buy-out clauses. With respect to the value added tax, the Spanish Hacienda (Tax Authority) issued an advance ruling reiterating the application of art. 7.5 of the Spanish VAT Law to the payment of buy-out clauses, that states that amounts paid for “the services provided by physical persons under a system of dependency derived from administrative or labour relations” shall not be subject to the value added tax. As buy-out amounts are paid in relation to the acquisition of the player’s services provided as an employee, VAT is not payable.

The Spanish taxation authorities have also provided clarification through an advance ruling with respect to the treatment of the buy-out amount treated as a benefit in kind in the hands of the player. It must be noted that the parties to an employment contract that establishes a buy-out clause are the player and the employer club. Naturally any prospective clubs are not privy to that contract and the obligation to pay the buy-out amount is solely the player’s, even if the prospective club pays it on behalf of the player.

In this sense, the Spanish Hacienda ruled that the payment of a buy-out clause is a capital payment resulting in a capital benefit in the hands of the player; however, there is a corresponding capital loss resulting in a tax base of nil. The advance ruling applied general taxation principles and reasoned that the payment of a buy-out clause was, in effect, a capital payment, because of the enduring nature of the benefit, namely, the release of the obligation on the player to perform services in the future. In this sense, the advance ruling specifically stated that:

*“The payment to the player of an amount equivalent to the amount of the buy-out clause does not correspond for the purposes of remuneration that could make us understand that we are facing a consideration that derives directly or indirectly from a current or future employment relationship.”*

For greater specificity, the advance ruling applied art. 33.1 of Spain’s Personal Income Tax Law, which determines that “variations in the value of the taxpayer’s assets by any changes in their composition, will be considered capital gains or losses, unless they are classified as income by this law”. As such payments are not income on a current basis but a capital benefit, applying general taxation principles, there is no personal income tax to be paid by the player with respect to the exercise of a buy-out clause.

Simply put, there are no longer any adverse tax consequences under Spanish tax law in the exercise of a buy-out clause.

### Conclusion

Ultimately, although the exercise of a Spanish buy-out clause ought to be relatively straightforward, because it is simply a unilateral act without negotiation, there are certain practical matters that must be considered.

As we have seen, the clause must be specific in the sense that it establishes a right for the player to exercise and not be characterized as a liquidated damages clause.

Fortunately, Spanish labour law is straightforward and has dealt with this pitfall.

Moreover, there are certain details in the amount of the buy-out fee that must be considered at the time of the conclusion of the employment contract.

Finally, and most importantly, Spanish tax law has been clarified to the simplest extent possible for the benefit of all.