

RESCISSION CLAUSES IN SPAIN: AN UNSETTLED CAS DEBATE

The author summarizes how CAS jurisprudence treats some of the main contractual provisions intended to allow for the premature unilateral termination of an employment contract or to regulate its consequences (such as “buy-out clauses,” “release clauses,” “penalty clauses,” “liquidated damages clauses” or “indemnity clauses”). After referring to the most common clauses of this kind, the article intends to draw the reader’s attention to the fact that CAS has not yet had the opportunity to determine whether the unilateral termination of an employment contract effected by a player through the application of a “rescission clause” contractually established in accordance with the Spanish Royal Decree 1006/1985 entitles his former clubs to claim the solidarity mechanism and training compensation envisaged by the FIFA RSTP. As it stands CAS has not had a final say on the matter.

All football stakeholders are aware that contracts between football players and clubs shall be respected and that, as a general rule, they have to be duly fulfilled until the end of the contract’s agreed term. Indeed, as it happens in other fields of law, the famous legal principle *pacta sunt servanda* also rules sporting contracts. In any other case, in accordance with art. 17 of the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP) the unilateral termination of the contract will have legal consequences for the breaching party (the payment of compensation and/or the imposition of sporting sanctions, as the case may be), if it is found that the contract was terminated without just cause. Nothing new under the sun, yet.

However, experience reveals that this strict principle is quite often modulated as a consequence of the contractual provisions agreed by the parties in the sport contract. In particular, we are referring to a set of provisions of a different nature that are commonly known as “buy-out clauses,” “release clauses,” “penalty clauses,” “liquidated damages clauses” or even “indemnity clauses.” In this regard, these kind of provisions can be clearly divided into two main groups. The first group is comprised of those clauses in which the parties to the contract establish in advance the amount of compensation to be paid by either of them in case of a unilateral and premature termination of the contract without just cause. With regard to this type of clauses, it does not matter what the parties to the contract call them because, ultimately, *“such clauses correspond therefore to liquidated damages provisions, at least so far as the real will of the parties to foresee in such clause the amount to be paid by the breaching party in the event of a breach and/or of unilateral, premature termination of the employment contract is*



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established” ([CAS 2008/A/1519-1520 FC Shakhtar Donetsk VS. Matuzalem & Real Zaragoza SAD & FIFA](#)).

The second group refers to those provisions that, with greater or lesser intensity, are intended to conventionally confer the parties their right to unilaterally and prematurely terminate the contract, provided that some conditions are met. These provisions can be implemented in the form of “release clauses” or “buy-out clauses,” depending on how the specific clause has been configured by the parties.

On the one hand, a “*release clause*” is a provision by virtue of which a club commits itself to release a player should another club make an offer for his transfer over a certain pre-established amount and, in some cases, provided that some further conditions are met (for example, the club’s failure to qualify for international competitions). Therefore, by means of these provisions the parties establish the conditions under which the employer club will be obliged to transfer the player to another club. On the other hand, such type of provisions can be also implemented in the form of a “*buy-out clause*” (even called “*escape clause*”), which enables a player to acquire the right to terminate the contract by paying the club a certain amount of money (usually far beyond the market value he had at the time of signing the contract). In other words, quoting the definition given by CAS jurisprudence, buy-out provisions are “*clauses that determine in advance the amount to be paid by a party in order to terminate prematurely the employment relationship*” ([CAS 2007/A/1358 FC Pyunik Yerevan v. L., AFC Rapid Bucuresti & FIFA](#)). As one can see, the essence of both types of provisions is that the club will ultimately release the player (transferring him to a new club) or, alternatively, accept the early termination of the contract against the receipt of a certain pre-established payment, either from the player or from his new club (and thus the contract will be terminated and the player will sign a new contract with his new club).

CAS has already had the opportunity to analyse all these types of provisions. Most of the CAS awards refer to or analyse the punitive nature of some of these kinds of clauses, mostly in connection with their eventual nullity in accordance with arts. 19 and 20 of the Swiss Code of Obligations - “SCO” – (i.a. [CAS 2009/A/1834, FK Baník Sokolov, a.s. v. FC Hradec Králové](#)) or moderation on the grounds of their excessiveness (i.a. [CAS 2013/A/3419 Marítimo da Madeira – Futebol SAD v. Club Atlético Mineiro](#)), in accordance with art. 163.3 of the SCO. Furthermore, some noted CAS awards have also addressed the issue of whether the enforcement of a release clause or a buy-out clause shall be understood as a transfer or movement in the terms of the FIFA RSTP provisions or if, on the contrary, it is a mere termination of the contract unilaterally effected by the Player without the cooperation of the former club and the new club that cannot be qualified as a transfer. This is not a trivial issue as the exercise of certain rights (training compensation and the solidarity mechanism) may depend on it.

This issue was specifically dealt with by CAS as a result of the dispute between the Italian club SS Lazio SpA and the Argentinean club CA Vélez Sarsfield due to the latter’s claim for solidarity contribution. Vélez Sarsfield considered Lazio owed them solidarity compensation once they signed the player Mauro Matías Zárate, a signing that was only possible after the enforcement of a contractual buy-out clause ([CAS 2011/A/2356 SS Lazio S.p.A. v. CA Vélez Sarsfield & FIFA](#)). In that case, the Panel considered that such a transaction was to be considered as a transfer in the sense of Art. 21 and Article 1 Annex 5 of the FIFA RSTP because, even though it was not identical to the typical pattern of a transfer (in which the will and consent of all the parties involved are declared simultaneously in the transfer agreement), it had all the essential elements that constitute a transfer. In general terms, this position is consistent with that of the FIFA Players’ Status Committee (“FIFA PSC”), which considers that all these situations are similar and have the same characteristics of a transfer agreement, with the sole exception that in



cases of termination of a contract on the grounds of a release clause or a buy-out clause, the “transfer amount” is set bilaterally by the employer club and the player and, hence, it is not negotiated with the player’s new club, although it nevertheless subsequently freely accepts and pays the relevant amount.

In particular, in the previously referenced CAS case the Panel considered that *“the elements identifying a transfer of a player between clubs for the purposes of the solidarity contribution mechanism are (i) the consent of the club of origin to the early termination of its contract with the player, (ii) the willingness and consent of the club of destiny to acquire the player’s rights, (iii) the consent of the player to move from one club to the other, and (iv) the price or value of the transaction”* ([CAS 2011/A/2356](#), para. 74).

Notwithstanding the above, the situation may be different with other types of provisions enabling the premature termination of the contract that are not grounded on the “free will” of the contractual parties, but on a mandate derived from the relevant statutory law, in respect to which CAS has still not said its last word. In particular we shall refer to the specific particularities existing in Spain in this regard with the famous *“cláusulas de rescisión”*.

As it is widely known, in Spain most players’ labour contracts include a so-called *“rescission clause”* in the terms envisaged by the Spanish Royal Decree 1006/1985, of 26 June, governing the special labour relationship of professional sportsmen (*“RD 1006”*). In particular, art. 13 of the RD 1006 provides for the termination of the employment relationship existing between a club and a football player *“at the will of the professional sportsman.”* In this case, pursuant to article 16.1 of the RD 1006, *“The termination of the contract due to the sportsman’s will without cause attributable to the club, shall entitle the latter, where appropriate, to a compensation that in the absence of mutual agreement will be determined by the labour jurisdiction in accordance with the sporting circumstances, the damages caused to the entity, the reasons for the rupture and the rest of the elements that the judge deems appropriate [...]”*. In addition, article 2.2 of the Fifth Book of the General Regulations of the Spanish Football League establishes that the registration of a football player with a club can be cancelled by means of the unilateral termination of the contract by the player, so long as the player deposits the requisite compensation for unilateral termination established in the contract he intends to terminate with the League.

As declared by CAS in the case [CAS 2010/A/2098 Sevilla v. Lens](#), *“The Real Decreto 1006/1985, in fact, provides, at Article 13(i), for the absolute right of a player to put an end, on the basis of his sole will and irrespective of the existence of any clause justifying it (“ad nutum”) to the employment relationship binding him to a club, and obliges the player, by Article 16.1 (together with the club to which the player may have transferred), to pay an indemnification to the old club. That indemnification can be defined in a specific contract clause or by a labour court”* (para. 80). As a result, in Spain a player can lawfully and prematurely terminate his employment contract by his sole will against the payment of compensation that the parties could have previously agreed upon in the labour contract (as it is the common and long-standing practice in Spain) or that would be determined by the Spanish labour courts, in accordance with the criteria envisaged by art. 16.1 of the RD 1006.

However, even though a number of CAS rulings regarding the legal nature of a transaction with regards to a player executed as a result of a conventional (i.e. not statutory) buy-out or a release clause exist, there is still no consistent jurisprudence with regard to the nature of the transaction(s) executed as a consequence of the enforcement of this statutory right.

In this regard, it is worth mentioning that after a recent ruling (i.e. DGT V3375-16, of 18 July 2016) from the Spanish General Directorate of Taxes (*“DGT”*) clarifying how the payment of the indemnification



envisaged by art. 16.1 of the RD 1006 shall be taxed, the enforcement of rescission clauses in Spain is far more favourable than it used to be, and, hence, it is likely to become more and more common in the immediate future. As a result of this new doctrine (confirmed by further resolutions such as the tax ruling DGT V0687-17, of 16 March 2017) the way the enforcement of a rescission clause is treated from a tax law perspective is certainly advantageous. *Grosso modo*, now it is clear that the payment of the compensation established by a rescission clause is not taxable as personal income to the player. On the contrary, now this amount is considered as a capital gain that is compensated with the corresponding capital loss derived from the payment of the rescission clause; therefore, the tax impact is neutral. As a result, at present the payment of a rescission clause is the most favourable transaction from a tax perspective, as it is not taxed either through the player's Income Tax or with VAT, which is not applicable. For this reason, it is likely that the enforcement of rescissions clauses in Spain will gain a lot of relevance in the near future.

At the same time, this will probably resume the unresolved debate on how these transactions shall be treated for the purposes of the FIFA RSTP, an issue that could have been settled by CAS as a result of the dispute between AS Monaco and Sevilla FC S.A.D. (i.e. [CAS 2015/A/4188 As Monaco v. Sevilla FC](#)) with regard to the payment of solidarity contribution that the French club RC Lens claimed from AS Monaco for hiring the player Geoffrey Kondogbia, who had prematurely terminated his employment contract with Sevilla FC by enforcing a rescission clause agreed in accordance with art. 13 and 16 of the RD 1006. However, the parties to these CAS proceedings did not give the Panel the opportunity to rule on this issue because AS Monaco did not appeal the relevant FIFA Decision *in toto* (a decision that had accepted RC Lens claim ordering AS Monaco to pay the latter the corresponding solidarity contribution), but only the part of the decision that had dismissed AS Monaco's claim to order Sevilla FC to reimburse the payment it had made to RC Lens. For this reason, the Panel could not enter into the discussion regarding whether the player's move to AS Monaco had to be considered as a transfer for the purposes of the solidarity contribution, or not.

We are still waiting for CAS to have the opportunity to hear a case that would require ruling upon this issue. Unfortunately, just like Vladimir and Estragon, our Godot has not arrived yet and it seems that the right case may never come. In any case, taking into consideration the existing CAS precedents, it would be very interesting to see how CAS regards the club's obligation to release a player when the latter terminates the employment contract in accordance with the RD 1006 and, in particular, if the player's release in these circumstances shall be interpreted as the club's "consent" to the early termination of its contract with the player under the terms established by the CAS jurisprudence. In particular, considering that in a previous case CAS has declared that *"the Player's release from the Employment Agreement was not effected by Sevilla, but by operation of the law. Sevilla did not consent to the early termination of the Employment Agreement: it was obliged to "tolerate" it, as imposed by the law. Sevilla, actually, stipulated in the Indemnification Clause the amount to be paid by the Player in the event of exercise of the statutory right of termination. But the claim for such payment would have existed irrespective of the Indemnification Clause, and cannot be regarded to refer to a consideration for the grant of a (termination) right to the Player"* ([CAS 2010/A/2098](#), par. 83).

In any event, it will be for a future Panel to determine whether the exercise of a player's "absolute right" to terminate an employment contract in Spain in the terms envisaged by the RD 1006 and against the payment of compensation that the parties have predetermined in the contract, falls within any of the possible forms of transfer entailing the enforceability of the rights conferred by the FIFA RSTP to the player's former clubs in case of transfer (i.e. the receipt of solidarity mechanism and training compensation).

