Liability of football clubs for supporters' misconduct. A study into the interaction between disciplinary regulations of sports organisations and civil law

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PREVIEW

1 Introduction and context

1.1 INTRODUCTION

November 24, 2013, OGC Nice – AS Saint-Etienne[1]
Before and during the French *Ligue 1* match between OGC Nice and AS Saint Etienne violent clashes erupted between supporters of both clubs. During the match several dozen supporters of AS Saint-Etienne threw stones and seats in the direction of supporters of OGC Nice and attempted to invade the other section before riot police moved in to restore order.
Damage: 8 injured, 200 broken seats.
Sanction OGC Nice: EUR 15,000 fine; sanction AS Saint-Etienne: two matches without spectators, one of which conditionally.[2]

April 20, 2014 Dutch Cup Final PEC Zwolle – FC Ajax
The 2014 Dutch Cup Final between PEC Zwolle and FC Ajax took place in the stadium of FC Feyenoord, FC Ajax' arch rival. During the opening minutes of the match, underdog PEC Zwolle scored, after which Ajax fans threw fireworks and smoke bombs on the pitch causing damage to the pitch and an advertising sign to catch fire. The match had to be suspended for 30 minutes and again for 20 minutes after PEC scored a second goal.
Damage: EUR 70,000 in property damage.[3]
Sanction: withholding of damage from premiums.

April 21, 2014 Swiss Cup Final FC Basel – FC Zürich
The following day, the day of the Swiss Cup Final between FC Basel and FC Zürich, fans of the latter took to rioting in the city centre of Bern while marching to the national stadium. During the march, fans smashed windows, urinated in the streets, and threw stones and fireworks in the direction of police officers.

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1 <http://www.nicematin.com/nice/videos-incidents-a-lallianz-riviera-8-blesses-250-stephanois-evacues.1522860.html>.
2 <http://www.lfp.fr/corporate/article/les-decisions-du-30-janvier-2014.htm>.
3 RTV Rijnmond, dated 12 June 2014, *Schade bekerfinale is vergoed aan Stadion Feijenoord*, <http://www.rijnmond.nl/sport/12-06-2014/schade-bekerfinale-vergoed-aan-stadion-feijenoord> accessed 21 September 2015.

Damage: 5 police officers injured, material damage estimated at CHF 40,000.[4]
Sanction: unreported.

March 15, 2015, FC Union II – BFC Dynamo[5]
During the fourth league match between Berlin rivals FC Union II and BFC Dynamo home fans wanted to storm the fan block of the guests. The match at Union's East Berlin ground was interrupted for 18 minutes as 300 home fans tried to enter the away end. Stewards and police were attacked by the fans, who were driven back with pepper spray and batons.
Damage: 112 officers injured.
Sanction FC Union Berlin: EUR 2,500 fine; sanction BFC Dynamo: EUR 3,500 fine.[6]

Football supporters' misconduct is a phenomenon that occurs often and is widely reported on in the media.[7] The four examples above are mere illustrations. Only in the Netherlands 787 incidents occurred during the 2013/2014 season of which 471 inside the stadium site and 316 outside.[8] The matches in the first league *Eredivisie* even saw an increase of 26% compared to the previous season. In 2015 UEFA reported over 200 incidents during its European club competitions.[9] Although the total of damages that results from these incidents is not monitored, it is clear that they amount to significant numbers.

Much has been done in the attempt to combat the problem of football supporters' misconduct or 'football hooliganism'.[10] Across Europe new legislation has been developed to prosecute individual supporters and impose measures to prevent them from causing future trouble.[11]

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4 Neue Zürcher Zeitung Online, dated 22 April 2014: "*FCZ gibt Krawalltouristen Schuld*", <http://www.nzz.ch/aktuell/zuerich/uebersicht/fcz-macht-krawalltouristen-fuer-ausschreitungen-verantwortlich-1.18288271>; accessed on 21 September 2015.

5 Der Tagesspiegel dated 15 March 2015, *Tumulte bei Viertligaspiel in Berlin*, <http://www.tagesspiegel.de/sport/1-fc-union-ii-gegen-bfc-dynamo-tumulte-bei-viertligaspiel-in-berlin/11507206.html>, accessed 21 September 2015.

6 FuPa.net dated 27 April 2015, *Geldstrafen für BFC Dynamo und 1. FC Union nach Derby-Ausschreitungen*,<http://www.fupa.net/berichte/geldstrafen-fuer-bfc-dynamo-und-1-fc-union-288482.html>, accessed 21 September 2015.

7 Both in the form of physical violence and discriminatory expressions.

8 Centraal Informatiepunt Voetbalvandalisme, *CIV Jaaroverzicht 2013-2014*, via: <http://www.civ-voetbal.com/jaarverslagen>, accessed 21 September 2015.

9 UEFA incidents include both crowd disturbances and the setting off /throwing of fireworks and/or other objects. Numbers were obtained from UEFA's Disciplinary and Integrity Unit.

10 On the difficulty to define this phenomenon see, Anastassia Tsoukala, 'Football Supporters' Rights: A Lost Cause?', *International Sports Law Journal* 2008/3-4, pp. 89-91; and Martin Alsiö and Peter Coenen, 'A Definition of Football Hooliganism', *Recht und Gesellschaft.*, Zürich: Schulthess 2014, pp. 327-341.

11 See for example, the Football Acts in England, first enacted in 1989 and revised and supplemented in 2000 and 2006; the Swiss *loi fédérale instituant des mesures visant au maintien de la sûreté intérieure (LMSI)*, enacted in 2007. On the international level both the Council of Europe and European Union have enacted incentives as well: 1985 European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football

At the same time, national and international football governing bodies have created specific rules that hold clubs liable for the behaviour of their fan base. Based on these rules, they can impose sanctions, with the aim of preventing misconduct. This idea, on the basis of which football clubs can be held liable for the behaviour of their supporters, is the main topic of this research.

1.2 RESEARCH QUESTION AND SCOPE

The rules created by national and international football organisations hold clubs liable for their supporters' behaviour regardless of the question of culpable conduct or culpable oversight. Since their implementation, these rules have been the subject of cases before both arbitral tribunals and state courts across Europe.

In the majority of cases that deal with the liability of clubs for supporters' misconduct the main point of dispute is the validity of these liability rules as a basis for disciplinary sanctions. Coincidentally it was two Dutch clubs, *PSV Eindhoven* and *Feyenoord*, which took to challenging sanctions imposed by UEFA before the Court of Arbitration for Sport (CAS). *PSV* was held responsible for the racist behaviour of its supporters directed towards players of the opposing team, *Arsenal F.C.*, in a match in the Champions League tournament. In 2006, *Feyenoord* supporters were involved in one of the bigger riots in European football, before and during a second round UEFA Cup match against *AS Nancy-Lorraine*. In both cases the CAS recognised the legality of the strict liability rule laid down in the Disciplinary Regulations of UEFA which, at the time, provided that:

> (1) member associations and clubs are responsible for the conduct of their players, officials, members, supporters and any other persons exercising a function at a match on behalf of the association or club; and that (2) the host associations or clubs are responsible for order and security both inside and around the stadium before, during and after the match.[12]

The doctrinal debate in different jurisdictions on the legality of this and similar liability rules has remained focused on the disciplinary liability with the issue of the compensation of the damage caused before, during and after football matches taking a backseat. Nevertheless, there have been cases in which the civil liability of football clubs related to supporters' misconduct has been addressed by national courts. An example is the *Fuster* case, in which *Olympique Lyonnais* was brought before the court after a young man died after

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Matches; EU Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension.

12 See for the current rules, Chapter 4 below.

having sustained injuries from fireworks during a match against *Olympique Marseille*.[13] The club was held liable for breaching its contractual obligation of safety as it failed to provide appropriate security measures to avoid the occurrence of incidents. Against the backdrop of the two types of cases that address the liability of football clubs for their supporters' misconduct – disciplinary and civil – a number of questions arise.

Are the judgments in these two types of cases in line with each other, with respect to the appreciation of the applicable rules and sanctions? Are the same types of rules applied in both situations? Can disciplinary rules be applied in civil-law cases? Is the same behaviour evaluated differently in cases of disciplinary liability and civil liability? Is there room for the national court to assess the civil liability of football clubs after a sanction has been imposed? When assessing the civil liability of clubs, do national courts refer to relevant rules in sports regulations? And if not, should they?

To summarise, the underlying focus of this research is

> *the interaction between the disciplinary regulations of national and international football associations and civil law regarding the liability of clubs for supporter's misconduct.*

The topic of liability of football clubs for supporters' misconduct touches many areas of civil law, including association law, arbitration law, contract law and tort law. In addition, the phenomenon of supporters' misconduct as such raises many questions in relation to the liability of the individual supporters, including the causes of such behaviour as well as effects of measures.

The extent of the research topic thus makes it necessary to limit its scope. This limitation is primarily guided by the research question defined above. As a result, more sociological questions related to the causes of supporters' misconduct have been excluded, as have questions related to the effects of preventative and repressive measures. As the topic is limited to the liability of clubs, questions related to the liability of the individual supporters have also been excluded. The same holds for issues of criminal law.[14]

In order for the subject matter to stay manageable, it was further decided to exclude any questions in relation to compensation, as well as insurance matters and joint liability of different actors involved. Although both are

13 TGI Lyon 25.06.1986 (Consorts Fuster c. L'Olympique Lyonnais et autre.), *Recueil Dalloz* 1986, p. 617 note Gérard Sousi; La semaine juridique 1990 II, no. 21510, note Pierre Collomb. Appeal from Olympique Lyonnais rejected: Cass. Civ. 112.06.1990, n° 89-11.815, via: <http://www.legifrance.gouv.fr>.

14 For a criminal-law perspective on the topic, see Aude Bichovsky, *Prévention de la violence commise par les spectateurs lors de manifestations sportives. Études des mesures préventives et de la responsabilité de l'organisateur à la lumière du droit comparé, du droit suisse et du droit associatif* (diss. Lausanne), Basel: Helbing Lichtenhahn 2009.

interesting and relevant matters, elaboration on these topics would go far beyond what is needed to answer the research question.

In addition, it is necessary to provide an introduction to the relevant concepts of foreign law as in any research with a comparative component. However, an exhaustive examination of foreign law is neither feasible nor desirable. The discussion on foreign law has therefore been restricted to those components relevant to answering the main research question.

1.3 Methodology and definitions

Reflections of the author

February 2012 – I first became acquainted with the methods of legal research during my Master courses in philosophy of science and research methods for lawyers. Or rather, we extensively discussed articles on the scientific nature of legal research and took classes with several staff members of the university who discussed their own research. After about three full-time months into my dissertation research the question resurfaced. However, more reading on the topic only complicated matters further.

According to the 'Tilburg theory', there are three minimum requirements for a methodologically sound justification: a clear-cut and justified research problem, careful utilisation of resources and the consistent presentation of the results.[15]

In short, I was forced to ask myself: what exactly am I doing? I am well aware that my method is referred to as traditional legal analysis.[16] But what does that mean? There is no clear description of this method. According to Westerman and Wissink, academic legal research consists of identifying relevant legislation and case law, historical research into their development, reflecting upon applied arguments and presenting one's own arguments.[17] This explanation is quite accurate; I identify, reflect and write. However, I suspect that this is not a method that NWO (the Netherlands Organization for Scientific Research) has in mind under the heading 'research methods' in its funding application forms. In his thesis on the justification of methodological choices in legal dissertations, Tijssen, too, has trouble figuring it out.

15 R. van Gestel en J. Vranken, 'Rechtswetenschappelijke artikelen. Naar criteria voor methodologische verantwoording', *NJB* 2007, pp. 1448-1461.

16 In Dutch the term '*juridische dogmatiek*' is used. J.B.M. Vranken, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel*****, Kluwer 2014.

17 P.C. Westerman en M.J. Wissink, 'Rechtsgeleerdheid als rechtswetenschap', *NJB* 2008, p. 507.

> "Binnen elk vakgebied en zelfs binnen de hele discipline is bekend hoe juridische teksten worden geanalyseerd en wordt de motivering van uit de analyse voortvloeiende 'juridische' keuzes bepaald door de sterkst naar voren gebrachte argumenten. (…) Toetsingskaders worden gebruikt, maar nooit geoperationaliseerd."[18]

As a result of my reflection from February 2012 – which was revisited a number of times over the course of the project – the explanation of the research methodology in this section only answers the question: what have I done and why?

Justification of methodological choices

To answer the research questions outlined it was decided to take a comparative and transnational approach.[19] The reasons for this choice are as follows. First, the issue of supporters' misconduct including its related legal implications is prevalent all over Europe. By limiting the research to one jurisdiction, there is a risk that the solutions of this research will be equally limited. In addition, the availability of materials and case law on the main research topic is limited. By combining the findings from different jurisdictions, a more comprehensive overview of the problem emerges, ultimately allowing for a stronger foundation of the outcomes.

However, the goal of this research is not to provide a comparative overview, but rather to allow for a transnational approach which is inspired by the outcomes of the comparison between the laws of different countries.

This research includes comparison of the law in England, France, Germany, the Netherlands and Switzerland. The selection of these jurisdictions was determined by the following reasons.[20] Both Germany and France were chosen because of the existing case law on the liability of football clubs in these countries. In addition, the scarce legal discourse in relation to the main subject has primarily been conducted by German and French authors. Switzerland has been chosen because of its practical importance. Most international sports federations, including the International Olympic Committee, UEFA and FIFA, are seated there, which results in the applicability of Swiss law to virtually all decisions made by international federations, including the imposition of disciplinary sanctions. As a result of this practical importance, the legal discourse on sports law has been well developed in Switzerland. England, as

18 "In all fields and even across the whole discipline it is known how legal texts are analysed and how the reasoning resulting from 'legal' choices is determined by the strongest arguments put forward. (…) Testing frameworks are used, but never operationalised." Hervé Tijssen, *De juridische dissertatie onder de loep* (diss. Tilburg), Boom Juridische uitgevers 2009, p. 184.

19 "Transnational law may refer to any law that transcends nation states". Mathias Siems, *Comparative Law,* Cambridge: Cambridge University Press 2014, p. 249.

20 Naturally, the selection was also partly influenced by the linguistic abilities of the author.

a common-law jurisdiction, was chosen as a contrast to the civil-law jurisdictions. The fact that England has played a profound role in the development of organised sports in general and football in particular was an additional reason for inclusion. Finally, the Netherlands was included as it is the jurisdiction of the author's primary legal training. In addition, the fact that two landmark cases before the CAS include Dutch clubs could be a coincidence, but is also a testament to the extent of the problem of supporters' misconduct in the Netherlands.

It is important to note, however, that there is not one method of practising comparative law. The ultimate method depends on the research question to be answered.[21] As briefly mentioned above, that ultimate method used to carry out this research is traditional legal analysis.[22] In other words, legal analysis of laws, regulations, literature and case law, directly or indirectly related to the research topic. This analysis has been used to identify and describe the existing law in relation to the liability of football clubs for supporters' misconduct as well as to reflect on the normative question of what ought to be the law. To identify relevant arguments for and against the different possible outcomes, the comparative method was used.[23]

With regard to the literature, sources consulted included general literature on disciplinary law, sports arbitration law, and literature on the requirements of liability in contract law and tort law. Authors whose reference works were useful in the comprehension of foreign law include Van Dam, Le Tourneau, Werro and Palmer, and the many authors of the various commentary works in Germany and Switzerland.[24] In regard to the liability of football clubs, this study was inspired by and builds on reflections of Haas and Jansen, Haslinger, and Walker *et al*.[25] Other works that were often consulted and which inspired the issue of the application of private regulations in civil law are the monographies of Giesen on alternative forms of regulations and Vranken on the legal practitioner's reasoning in civil law.[26]

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21 Jan M. Smits, 'Rethinking methods in European private law', in: Maurice Adams and Jacco Bomhoff (eds.), *Practice and Theory in Comparative Law*, Cambridge: Cambridge University Press 2012, p. 184.

22 See above for reflections on this method.

23 Compare Jan M. Smits, 'Rethinking methods in European private law', in: Maurice Adams and Jacco Bomhoff (eds.), *Practice and Theory in Comparative Law*, Cambridge: Cambridge University Press 2012, p. 178.

24 Including the Staudinger Kommentar, Münchener Kommentar, Berner Kommentar and Commentaire Romand.

25 On the basis of the contributions of these authors, the remaining gaps in the research on the civil liability of football clubs for supporters' misconduct became apparent.

26 I. Giesen, *Alternatieve regelgeving en privaatrecht*, Deventer: Kluwer 2007; J.B.M. Vranken, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel****, Kluwer 2005.

With regard to case law, a sincere attempt has been made to find and analyse all cases in which the liability of football clubs for supporters' misconduct has been evaluated by a court. Consulted in this effort were handbooks on sports law, sports law journals (most importantly *Causa Sport*, *Zeitschrift für Sport und Recht*, *Cahiers de droit du sport*, *International Sports Law Journal*), case law databases (Beck online, dejure.com, Dalloz, ArianeWeb, Legifrance, Legal Intelligence, rechtspraak.nl, Westlaw UK, Swisslex), as well as other scholars to confirm findings or lack thereof.

The materials themselves have been consulted in a variety of places, including the libraries of Leiden University, the Centre Internationale d'Études de Sport (CIES) in Neuchâtel, the Peace Palace Library The Hague, and the Swiss Institute of Comparative Law in Lausanne. The majority of materials was to be found in German, French and English. Translations are mine, unless otherwise indicated.

Furthermore, in the same way as legislature and the judiciary have to take into account practical arguments, this holds for conducting research in law. Therefore, informal correspondence with certain stakeholders was sought in order to gain more insight into the effects of the current regulations in practice.[27] This constituted a personal check only without the pretention of obtaining any empirical findings. Furthermore, as all correspondence was confidential, it was not given any further importance in the research.

Definition of terms

A number of terminological choices have been made throughout this research. First, this study uses the descriptive terms 'supporter' and 'fan' interchangeably. The term 'misconduct' was chosen as a catch-all to include all forms of physical and verbal violence. Secondly, the terms 'organising club' and 'visiting club' were selected to distinguish between two opposing clubs. These terms are interchangeable with the terms 'home club' and 'away club' which appear in some referenced materials. When referring to tort law, both the terms fault liability and negligence are used. Express mention is made when this latter term refers to the tort of negligence in English law.

1.4 Structure of the thesis

This thesis is divided into two parts.

Part I aims to introduce the research topic and answer some preliminary questions. International and national sports organisations have created extens-

27 Including UEFA, a national federation, the owner of a large stadium, and a first-league club.

ive regulatory frameworks to govern their activities. Associated athletes and clubs are required to comply with the rules set by these organisations. If they do not abide by the rules, a disciplinary sanction can be imposed. The two chapters in this part examine; (1) in what way the regulation of sports is organised on the international level as well as the status of disciplinary regulations according to the laws of various European countries; and (2) the options that are available to clubs and athletes to have a disciplinary sanctions imposed by sports federations be reviewed.

The research presented in these chapters was published previously in two separate articles in peer-reviewed journals.[28] As a result, the research on these chapters was closed at an earlier date. In the absence of major developments since the research on the chapters was closed, there was no need to process many additional materials. Only in Chapter 3 was one case added to provide an exhaustive picture.[29] However, in the two chapters the word 'article' has been replaced by 'chapter' in order to facilitate reading of the complete research. Furthermore, a single paragraph – which explained the research method – has been omitted from both chapters.

Part II analyses and develops the grounds on which football clubs can be held liable for damage resulting from their supporters' misconduct. The role of disciplinary regulations of national and international football organisations in relation to this liability plays an important role. The question that this part aims to answer is: can football clubs be held liable for improper behaviour of their supporters according to national civil law? And what roles do disciplinary regulations of football associations play in this regard? In Chapter 4, a case study is performed to gain insight into the disciplinary liability of clubs. In order to establish whether the strict liability rule, as it is used in disciplinary matters, is also equipped to deal with the handling of damages, it is important to deconstruct the application of the rule in practice as well as analyse the criticism it has spurred. This will provide insight into the potential issues regarding the liability for supporters' misconduct in civil law. Chapter 5 focuses on the various possible grounds for civil liability of football clubs for supporters' misconduct. Civil liability, whether based on contract or tort, generally requires the club to have breached the standard of care. Case law will be analysed in order to determine this standard for a number of different situations, including misconduct inside the stadium, misconduct of the visiting team, damage outside the stadium and misconduct in the form of racist acts. In Chapter 6 the focus shifts to the interaction between the two forms of

28 Rosmarijn van Kleef, 'The legal status of disciplinary regulations in sport', *The International Sports Law Journal*, 2014/1-2, pp. 24-45, published online 18 December 2013, DOI 10.1007/s40318-013-0035-z; Rosmarijn van Kleef, 'Reviewing Disciplinary Sanctions in Sports', *Cambridge Journal of International and Comparative Law* 2015 Vol. 4 Issue 1, pp. 3-28, DOI:10.7574/cjicl.04.01.3.

29 See Chapter 3.3.2.3.

liability. The main underlying question is whether the standard that is set in the private disciplinary regulation – the strict liability rule – can be transposed to civil law. Hereto, it will be analysed what role private regulations in general play in the determination of the standard of care. With regard to the potential application of a strict liability rule, it is also necessary to investigate the potential of such a concept in the current legal framework.

To conclude, Chapter 7 consists of a synthesis of the research findings and some recommendations to the legislature, judiciary, clubs and football's governing bodies.

As mentioned above, the different parts of the research were conducted at different times. The research on Chapters 2 and 3 was concluded in December 2013 and February 2015. This research on Chapters 4 to 6 was concluded on 1 October 2015. Developments after these dates have only been included in exceptional cases.

1.5 Added value and objective of the research

This thesis is a complement to existing research. Previous research has been conducted regarding the disciplinary liability of clubs in France, Germany and Switzerland.[30] This research will compile the cases from multiple jurisdictions, adding a conceptual approach by taking the interaction of legal systems as a perspective.

With regard to the civil liability of football clubs for supporters' misconduct, existing research is scarce and always nationally oriented.[31] Although it is clear that individual supporters could be held liable, there is a great risk they cannot be identified or are insolvent. This research will clarify whether and under what circumstances those that have suffered damage as a result

30 In France this research is limited to case notes following a number of judicial decisions: Mathieu Maisonneuve, 'Violence des supporters et responsabilité disciplinaire des clubs, note sous CE 29 octobre 2007', *Recueil Dalloz* 2008, pp. 1381-1385; Mikaël Benillouche and Julien Zylberstein, 'La responsabilité des clubs de football du fait de leurs supporters: une occasion manquée', *Gazette du Palais* mai-juin 2007, pp. 1545-1546. Germany and Switzerland: Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauerausschreitungen im Fussball', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 129-159; Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011.

31 Germany: Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen: am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Kovač 2011. Switzerland: Jacques Bondallaz, *La responsabilité pour les préjudices causés dans les stades lors de compétitions sportives* diss. Fribourg), Bern: Stämpfli 1996; Benoit Chappuis, Franz Werro and Béatrice Hurni, 'La responsabilité du club sportif pour les actes de ses supporteurs', in: Pierre-André Wessner *et al.*, *"Pour un droit équitable, engagé et chaleureux." Mélanges en l'honneur de Pierre Wessner*, Basel: Helbing Lichtenhahn 2011, pp. 65-110. András Gurovitz, 'Die zivilrechtliche Haftung für Zuschauerverhalten', *Causa Sport* 2014, pp. 267-276.

of supporters' misconduct can turn to the football club for compensation. In addition, this research is the first research to provide a comprehensive transnational overview in the English language on sports disciplinary regulations in general and the liability of football clubs for supporters' misconduct in particular in connection with civil law.

Furthermore, this research provides new insights into the position and interaction of private regulations of sports organisations – such as disciplinary liability rules – and their application in civil law. The interaction between private regulations and national civil law is not only relevant in the field of sports, but in many sectors of society. It is hoped that this research will provide understanding of and new insights into how the different rules interact, allowing for responsible decision-making regarding the enforcement of the existing rules or the creation of new rules in regard to the liability of football clubs for supporters' misconduct.

FIRST HALF

Disciplinary regulations in sport and their connections to civil law

2 The Legal Status of Disciplinary Regulations in Sports*

2.1 INTRODUCTION

International sports organisations, such as the International Olympic Committee, UEFA and FIFA, have created extensive regulatory frameworks in order to govern their activities. In these frameworks, a prominent place is reserved for disciplinary regulations; rules regarding the behaviour of the different actors involved. Disciplinary regulations in sports started with regulating the game.[1] Over time, however, more and more aspects have become the subject of regulation, including doping, player transfers, stadium safety and, connected with the last-mentioned item, the liability of clubs for their supporters' conduct. If athletes or clubs do not comply with the rules, a disciplinary sanction can be imposed.

However, regulating sports is not an easy exercise. Due to the many different actors involved, legal issues are numerous and complex. This point is illustrated by the following situation. A football player is a member of his local club. Both the player and the club are members of the national football federation, which in turn is a member of both UEFA and FIFA. In what way are the player and the club bound by the regulations of the different organisations? Both have a legal relationship with the national federation, but not with UEFA or FIFA. Are the player and the club nevertheless directly bound by UEFA's and FIFA's rules, even if there is no direct relationship? Furthermore, the national federation's regulations contain a provision which obliges its adhered members to comply with the regulations of UEFA and FIFA. What happens when these rules change? Are the player and club bound to these changed rules? If they do not comply with the rules and the national federation wishes to impose a disciplinary sanction, what requirements must then be met?

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1 See on the development of rules in sports: Wray Vamplew, Playing with the Rules: Influences on the Development of Regulation in Sport, *The International Journal of the History of Sport*, Vol. 24, No. 7, 2007, pp. 843-871.

In this chapter these questions will be answered according to Dutch, English, French, German and Swiss law. In doing so, this chapter will provide a comparative and transnational overview of the main legal framework in which national and international sports organisations operate. By its nature, sport is not a national affair. The best athletes and clubs compete on an international level or aspire to do so. When a disciplinary sanction is imposed, this can have effects on international competition. Therefore, this chapter intends to determine whether a 'level playing field' exists in European organised sports with regard to the legal status of disciplinary regulations. In other words, which similarities and differences exist between the chosen jurisdictions and can common denominators be identified?

The structure of this chapter is as follows. First an outline of the legal framework in which sports organisations create and apply their rules will be provided (2), including the limitations of the regulatory power of these organisations (3). Then the focus turns to the main issue of how the different actors involved are bound by the disciplinary rules of sports organisations; the binding character of the rules upon members (4) will be followed by discussing the possibility to bind so-called indirect members (5) as well as the question of what happens when the rules change (6). Following on from there, the enforcement of disciplinary regulations in the form of a sanction (7) and the requirements for application (8) will be discussed in brief. Finally, some evaluative and concluding remarks will be made (9).

2.2 The regulatory framework of sports organisations

The Pyramid

Professional and amateur sports are organised in a pyramid structure. The local sports clubs are at the base of the pyramid. Here people come together to practise their sport, recreationally and competitively. The clubs are usually associated with a national federation[2] which is responsible for the organisation of a certain sport at the national level. In their turn, the national federations are part of the international federation which manages the sport at the international level. In certain sports a continental federation is positioned between the national and international federations, the UEFA, *Union des Associations Européennes de Football*, probably being the most renowned.

2 A federation is generally defined as an association of associations. See Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 8; Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 209.

An important feature of the pyramidal structure is the so-called *Ein-Platz-Prinzip*. This principle entails that only one federation on the national and international level can represent a certain sport.[3] It ensures the uniform development of the sport; that the game is played by the same rules and that only the strongest athletes or teams take on each other in national and international championships. The pyramidal structure thus creates a monopoly position of the international federation, allowing it to organise the sport in conformity with its own discretion. The monopoly position of national and international federations has multiple legal implications and will prove to be a recurring issue throughout this chapter.

The Association: the cornerstone of organised sports

In all five jurisdictions, the primary legal form of sports clubs and national federations is the (incorporated) association. The choice of the association as an organisational form is prompted by the relatively lenient laws regulating this legal entity. As a result, ample room is left for associations to create and enforce the rules that are deemed necessary for an adequate functioning of the sport.

In the Netherlands, most sports clubs and almost all national federations, including the Royal Dutch Football Association (KNVB), take on the form of an association (*vereniging*).[4] Association law is governed by art. 1-52 of Book 2 of the Dutch Civil Code (*Burgerlijk Wetboek;* BW).[5] An association is defined as a legal person with members aimed at pursuing a specific object.[6] It is formed by a multilateral legal act and possesses legal personality.[7] The increasingly commercialised nature of sports activities has led to certain organisations opting for the incorporation of a company. For example, in Dutch football many clubs are set up in the form of a company, e.g. a private company with limited liability (*BV*) or a company limited by shares (*NV*). However, the shares are usually owned by a foundation with no or little financial interest.[8]

Dutch association law only provides a minimal legal framework. For example, only a few provisions are mandatory for incorporation into the

3 See for application of this principle in German case law: BGH 23.11.1998 – II ZR 54/98 – BGHZ 140,74; BGH 02.12.1974 – II ZR 78/72, BGHZ 63, 282.

4 Art. 11 of the *Statuten* of the NOC*NSF (the Dutch umbrella organisation for all sports) only allows associations as ordinary members.

5 The Dutch BW is comprised of multiple Books. Book 2 governs legal entity law and precedes the general part of the law of obligations which is governed by Book 3.

6 Art. 2:26 BW.

7 Art. 2:26 BW and art. 2:3 BW.

8 Tim Verdoes, Jan Adriaanse and Niels van de Ven, 'Naar een financieel gezond betaald voetbal', *Economisch Statistische Berichten* (95) 2010, pp. 247-249, p. 248.

articles of association (*statuten*).[9] Barring the few rules of imperative law, an association is free to organise itself as it wishes.[10] It follows that whoever is given authorisation to certain acts based on the association's structure, is autonomous in the exercise of that power.[11] This autonomy is an elaboration of the freedom of association, i.e. the civil right to create and adhere to an association.[12] According to art. 2:27 (4) BW and 2:34a BW, obligations of members must have a basis in the association's articles.[13] Among these obligations fall the compliance with the behavioural rules set forth by the association – for instance to treat others with respect and refrain from verbal and physical violence[14] – and the submission to its disciplinary jurisdiction. It is generally accepted that disciplinary rules may be laid down in secondary regulations as long as these have a basis in the articles of association.[15]

In England, the unincorporated association has traditionally been the most common structure used by the majority of sports clubs and governing bodies.[16] An unincorporated association is comprised by a group of individuals that are contractually bound together by the constitution or rules of the club. As these entities are not recognised as having legal personality, the members may be personally liable for the debts of the club if these debts cannot be met from the assets of the club or under an insurance policy. For this reason, many sports organisations prefer the structure of an incorporated

9 According to art. 2:27 (4) BW, these include the name and seat of the association, its object, the obligations put on the members or the manner in which those obligations may be imposed, the manner of convening general meetings, the appointment and removal of the officers and the allocation of the surplus upon winding up.

10 W.C.L. van der Grinten en Y. Scholten, *De rechtspersoon: enkele vragen betreffende de regeling van de rechtspersoon in het nieuwe Burgerlijk Wetboek: praeadviezen ter behandeling in de algemene vergadering van de Broederschap der Candidaat-Notarissen te Valkenburg op 15 juni 1956*, pp. 25-26; F.J.W. Löwensteyn, *Wezen en bevoegdheid van het bestuur van de vereniging en de naamloze vennootschap*, (diss. Amsterdam UVA) 1959, pp. 22-23; P.A.L.M. van der Velden, *De vereniging-rechtspersoon en haar leden* (diss. Nijmegen), Deventer: Kluwer 1969, p. 56; J.M.M. Maeijer, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-II, De rechtspersoon*, Kluwer 1997, p. 10.

11 Compare: P.A.L.M. van der Velden, *De vereniging-rechtspersoon en haar leden* (diss. Nijmegen), Deventer: Kluwer 1969, p. 51.

12 This fundamental right is laid down in Art. 8 of the Dutch Constitution.

13 For the subtle difference of the notion of obligation in the two articles see: G.J.C. Rensen, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-III*, Overige rechtspersonen*, Kluwer 2012, no. 51.

14 Rule 1 of the Gedragscode (model code of conduct) of the Dutch Football Association (KNVB).

15 See F.C. Kollen, *De vereniging in de praktijk*, Deventer: Kluwer 2007, p. 210 and implicitly also G.J.C. Rensen, *Extra-verplichtingen van leden en aandeelhouders: een wetenschappelijke proeve op het gebied van de rechtsgeleerdheid* (diss. Nijmegen), Deventer: Kluwer 2005, pp. 84-85.

16 Michael J. Beloff, 'Pitch, pool, rink, … court? Judicial review in the sporting world', *Public Law* 1989, pp. 95-110, p. 96 and Simon Gardiner *et al*., *Sports Law*, Routledge 2012, p. 105.

association in the form of a company.[17] There are multiple types of companies. The governing body for football in England, the Football Association (FA), the Premier League and most professional football clubs are structured as companies limited either by shares or by guarantee. When a company is limited by shares, members invest their capital by purchasing shares. By contrast, members of a company limited by guarantee cannot buy shares; instead they give a guarantee. This means that their liability is limited to the amount the members undertake to contribute to the assets of the company in the event of its being wound up (usually of £1).[18]

The regulations for the company are laid down in the articles of association.[19] The tradition of English company law has been to give members considerable freedom regarding the internal organisation of the company. The articles of association regulate all those matters that are not subject to rules laid down in legislation or common law.[20] The Companies Act provides model articles that apply by default unless the company decides otherwise.[21] The articles of association take effect as a 'vertical' contract between the members and the company.[22] All members are bound by virtue of this contract to observe the company's rules.[23]

In Germany, the standard organisational structure is the registered association (*eingetragene Verein*) which is regulated in § 21-79 of the German *Bürgerliches Gesetzbuch* (BGB). An association whose objective is not commercial business operations, such as sport clubs and their national federations, acquires legal personality by entry in the register of associations of the competent local court (*Amtsgericht*).[24] The freedom for an association to organise itself as it wishes (*Vereinsautonomie*) derives from the constitutional right to form associations.[25] The *Vereinsautonomie* is implicitly addressed by § 25 BGB, which states that an association's constitution is determined by the articles of association. As the German BGB only provides a minimal legal framework, the articles of association can deviate from most statutory provisions given that only few are of imperative law.[26] The minimal legal requirements of the articles of

17 According to Davies a company is "an organisational form, provided by the law, through which the suppliers of the various inputs necessary to achieve a certain objective can come together and coordinate their activities". Paul Davies, *Introduction to Company Law*, Oxford University Press 2010, p. 2.

18 Section 3 Companies Act 2006. See also David Ashton and Paul Reid, *Ashton & Reid on Clubs and Associations*, Bristol: Jordan Publishing Ltd 2011, pp. 19-20.

19 Section 18 of the Companies Act 2006.

20 Paul Davies, *Introduction to Company Law*, Oxford University Press 2010, p. 14.

21 Section 20 of the Companies Act 2006 and explanatory note 70.

22 Michael J. Beloff, Tim Kerr and Marie Demetriou, *Sports Law*, Oxford: Hart Publishing 1999, p. 25, no. 2.26.

23 Section 33 Companies Act 2006 and explanatory note 108.

24 § 21 BGB.

25 Art. 9, section 1 German Basic Law.

26 § 40 BGB.

association include the object, the name and the seat of the association and the indication that the association is to be registered.[27] Furthermore, the law stipulates that the articles contain provisions regarding membership, the composition of the board and the general meeting. The relationship between the association and its members is thus governed by the applicable provisions of the BGB and the articles of association.[28] Membership obligations are varied – they include for instance administrating duties and (monetary) contributions – and must generally have a basis in the association's articles.[29] Hereto, a general provision suffices; disciplinary rules may be specified in secondary regulations.[30] Besides the primary membership obligations expressed in the articles, there is the so-called duty of loyalty (*Treuepflicht*).[31] This duty goes beyond the general principle of good faith in accordance with § 242 BGB.[32] Its content and scope depend *inter alia* on the nature of the association's object, the internal unity of the association, the degree of personal commitment and the person-centeredness of the membership relationship.[33]

In Switzerland, too, the chosen legal form of most sports organisations is the association.[34] An association is a group of natural or legal persons organised as a corporate body and is governed by art. 52-79 of the Swiss Civil Code. According to art. 60 CC, associations formed for political, religious, scientific, artistic, charitable, social or other non-economic purposes acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association.[35] The association is the most liberal of legal entities in Switzerland. It is subject to fewer legal requirements than the other corporations in terms of both the constitution and in the internal and external organisation. An explanation can be sought in the fact that since the possibility to exercise economic activities as a principal and important

27 § 57 BGB.

28 Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Keulen: Verlag Dr. Otto Schmidt 2012, Rn. 201.

29 E. Sauter, G. Schweyer and W. Waldner, *Der eingetragene Verein*, Verlag C.H. Beck 2010, Rn. 347. Regarding forced exclusion and other disciplinary sanctions consistent case law requires that these are regulated in the articles of association: BGHZ 13, 5; BGHZ 21, 370; BGHZ 28, 131; BGHZ 29, 352; BGHZ 36, 105; BGHZ 47, 172; BGHZ 105, 306.

30 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012 § 25, Rn. 10; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25, Rn. 3 and 23; Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Keulen: Verlag Dr. Otto Schmidt 2012, Rn. 984.

31 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 38, Rn. 44; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 35, Rn. 7.

32 BGH 12.03.1990 – II ZR 179/89 – *NJW* 1990, 2877.

33 E. Sauter, G. Schweyer and W. Waldner, *Der eingetragene Verein*, Verlag C.H. Beck 2010, Rn. 348. See also BGHZ 129, 136.

34 In German: 'Verein', in French: 'association'.

35 Deviation from art. 52 CC, which states that other corporate and independent bodies acquire legal personality upon being entered in the commercial register.

purpose is excluded, the legislature deemed it unnecessary to provide a more stringent structure or control mechanism to safeguard the interests of the members and third parties.[36] With regard to professional sports, the company is gaining ground as organisational structure for clubs. Nowadays, many professional teams in both ice hockey and football are organised as a company limited by shares pursuant to art. 620 – 763 of the Swiss Code of Obligations.[37] However, all national and international federations seated in Switzerland are organised as associations.[38]

One of the fundamental principles of Swiss private law is the freedom of the parties in the design of their legal relationships.[39] In association law this principle is embodied by the notion of freedom of association, or in German: *Vereinsautonomie*.[40] According to Heini, "Kerngedachte der Vereinsautonomie ist, dass die Verbandsperson in den Schranken des Gesetzes und der guten Sitten ihre Belange ohne Einmischung des Staates oder Dritten selber regeln darf".[41] This view is reflected in the provisions of Swiss association law on organisation and membership, which are predominantly dispositive and only apply when no specific rules are established in the articles of association.[42] Consequently, the right to freely organise one's association does not only entail the composition of the articles but rather the design of the entire regulatory system.[43] Furthermore, according to doctrinal views the term *Autonomie* entails

36 Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, p. 121ff; Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 25.

37 In French: société anonyme (S.A.): in German: Aktiengesellschaft (AG).

38 Lucien W. Valloni and Thilo Pachmann, 'Switzerland. Part I. Organization of Sport', nr 23, p. 40, in: Franck Hendrickx *et al*. (eds.), *International Encylopaedia for Sports Law*, Kluwer Law International 2010, p. 40.

39 Article 19 (1) of the Swiss Code of Obligations (CO) provides that the terms of a contract can be freely determined as long as it resides within the limits of the law. This provision is applicable by analogy to association law according to art. 7 of the Swiss Civil Code (CC), which provides: "The general provisions of the Code of Obligations concerning the formation, performance and termination of contracts also apply to other civil-law matters".

40 The term *Vereinsautonomie* is dominantly used in both case law and doctrine. See: BGE/ATF 70 II 63; BGE/ATF 73 II 2; BGE/ATF 97 II 108; August Egger, *Kommentar zum Schweizerischen Zivilgesetzbuch (Zürcher Kommentar), I. Band: Einleitung und Personenrecht, 2nd edition*, Zürich: Schulthess & Co 1930, p. 410; Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 20; Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 21ff. Riemer, however, speaks of '*privatrechtliche Vereinsfreiheit*': Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, p. 102ff.

41 Anton Heini, 'Die gerichtliche Überprüfung von Vereinsstrafen', in: Peter Forstmoser and Walter R. Schlüp (eds.), *Freiheit und Verantwortung im Recht: Festschrift zum 60. Geburtstag von Arthur Meier-Hayoz,* Bern: Stämpfli Verlag SA 1982, pp. 223-234, p. 229.

42 Art. 63 (I) CC.

43 Compare Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 21.

not only the creation of rules but also their application and enforcement.[44] The Swiss Federal Supreme Court also seems to support this outlook.[45] Another general observation is the particular form in which the principle manifests itself. Freedom of association appears through decisions, realised by a majority of votes.[46] Or in the words of Egger: "Für das korporative Leben bedeutet die Vereinsautonomie privatrechtliche Majoritätsherrschaft, die Gestaltung der Vereinsordnung und des Vereinslebens nach dem Willen der Mehrheit".[47] Under Swiss law the freedom of association thus comprises the creation, application and enforcement of rules. This broad conception of *Vereinsautonomie* and its liberal application in Swiss association law is generally considered the main reason why most international sports federations have chosen this country as their seat.[48] As a result, the practical importance of Swiss law on organised sports cannot be underestimated.

In France, the promotion and development of sport is recognised as a matter of public interest, which results in the French state taking up a much more prominent role in the organisation of sports compared to the other countries.[49] This is exemplified by article L.100-2 of the French *Code du*

44 August Egger, *Kommentar zum Schweizerischen Zivilgesetzbuch (Zürcher Kommentar), I. Band: Einleitung und Personenrecht, 2nd edition*, Zürich: Schulthess & Co 1930, p. 410; Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, p. 405; Hans Bodmer, *Vereinsstrafe und Verbandsgerichtbarkeit: dargestellt am Beispiel des Schweizerischen Fussballverbandes* (diss. St. Gallen), Bern: Verlag Paul Haupt 1989, pp. 39 and 43; Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, p. 38; Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 22ff. Fenners speaks of sanctions instead of the more common doctrinal term of enforcement (*Durchsetzung*). In contrast, apart from the creation, application and enforcement of rules Philipp distinguishes also: the freedom to found, the freedom of design and content, the freedom of choice in choosing partners, the freedom to exclude members (art. 72 CC), the freedom of organisation and the freedom of dissolution: Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 22ff.

45 BGE/ATF 97 II 108, cons. 3: "Die Autonomie bedingt daher auch, dass die freie Willensbildung grundsätzlich gewährleistet sein muss. Es hätte keinen Sinn, dem Verein die Freiheit der innern Gestaltung zuzugestehen, gleichzeitig aber grundlegende Beschränkungen der freien Willensbildung zuzulassen".

46 Art. 67 (2) CC.

47 August Egger, *Kommentar zum Schweizerischen Zivilgesetzbuch (Zürcher Kommentar), I. Band: Einleitung und Personenrecht, 2nd edition*, Zürich: Schulthess & Co 1930, p. 410.

48 Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 33; Hans-Michael Riemer, 'Sportrechts-Weltmacht Schweiz Internationale Sportverbände und schweizerisches Recht', *Causa Sport* 2004, pp. 106-107, p. 106.

49 Other countries where the state plays a major role in organised sports are Italy and Spain, among others.

sport,[50] which sets out that the state, local authorities and their groups, associations, sports federations, businesses and social institutions contribute to the promotion and development of sport and physical activity. As in the other countries, the general organisational form of clubs and governing bodies is the association, governed by the French law of 1 July 1901 relating to the contract of association. However, when sports associations obtain 1.2 million in annual revenues from the organisation of paying sports events or a total of 800,000 in annual remunerations, they have the legal obligation to manage these activities in a corporation subject to the *Code de commerce*.[51] In France too, the articles of association are subject to both the freedom of contract and association and can be freely determined.[52] According to the *Cour de Cassation*, "*les statuts font la loi des parties*".[53] While the French law of 1 July 1901 relating to the contract of association contains no provisions relating to the internal organisation of associations, views in literature strongly suggest the incorporation of additional provisions regarding e.g. access to the association, its organs and their powers and member obligations.[54]

In the organisational structure of sports in France a pivotal role is played by the sports federations. As in most other jurisdictions, the federations are associations and serve to organise the practice of one or several sports disciplines.[55] The French state recognises different levels of national federations: certified federations and delegated federations.[56] Certified federations participate in the execution of a public service and therefore are eligible for state support in the form of funding or personnel. In order to be certified by the Minister for Sport, a federation must adopt certain mandatory provisions in its articles of association as well as standard disciplinary rules.[57] Delegated federations are certified federations that enjoy a monopoly position in their respective disciplines to organise competitions resulting in international, national, regional or departmental titles. Additionally, these federations carry out the selection procedures for national teams and are responsible for enacting technical rules and other regulations relating to competitions.[58] With regard

50 The *Code du Sport* entered into force in 2006 and replaced several other Acts, resulting in the consolidation of all laws and ordinances applicable to sport in a single document.

51 Art. L.122-2 of the *Code du sport* in conjunction with art. R122-2 of the decree. The company created must take one of the legal forms listed in the *Code du sport*.

52 Art. 5 French law of 1 July 1901 relating to the contract of association. Minimum legal requirements to include are the title and purpose of the association, the seat of its institutions and information on those who are responsible for its administration.

53 Cass. Civ.1 25.10.2002, *Recueil Dalloz* 2002, 2359, note Y. Chartier.

54 Frédéric Buy *et al*., *Droit du sport*, L.G.D.J. 2009, no. 389; Bernard Teyssié, *Droit civil. Les personnes*, Paris: LexisNexis, Litec 2010, no. 839 and 854.

55 Art. L.131-1 and L.131-2 of the *Code du sport*.

56 In French: *fédérations agréés* and *fédérations délégataires*.

57 Art. L.131-8ff. of the *Code du sport*. See also the landmark case CE 22.11.1974, n°89828, *RecueilDalloz* 1975, p. 739, note J.-F. Lachaume.

58 Art. L.131-15 and L.131-6 of the *Code du sport*.

to the creation and enforcement of disciplinary rules, the distinction between 'normal' associations, such as clubs on the one hand and certified and delegated federations on the other, is essential. According to French case law and doctrinal views, every association or federation by its nature enjoys disciplinary power over its members; this is inherent in the organisation of any association.[59] Moreover, certified and delegated sports federations exercise disciplinary power over their members also by virtue of the *Code du sport*, according to which they must adopt the standard disciplinary regulations.[60]

In summary, it is clear that great similarities exist in the way sport is organised and regulated in all five countries. The large majority of clubs and national governing bodies are legally organised as an association. Except for in France, where national sport federations have to adhere to additional rules, this legal entity provides the room to regulate internal matters with great autonomy.

2.3 LIMITS

Despite the high degree of discretion regarding the self-organisation of associations, there are certain limits. Associations cannot escape compliance with both national law as well as with their self-created internal regulations.

National law

In all civil-law jurisdictions, it is provided by law that the articles of association are not to violate the law, public policy and morality.[61] It must be noted that, in the jurisdictions that are member states of the European Union, 'the law' nowadays also entails provisions and regulations of European law.[62] Consistent case law of the European Court of Justice holds that sport is subject to European Union law insofar as it constitutes an economic activity.[63]

Some jurisdictions present certain additional statutory limits worth noting. For example, in Dutch law a further limitation is the statutory duty of article 2:8 BW. According to this provision the relationships between the legal entity

59 CE 19.12.1988, n°79962, *Recueil Dalloz* 1990, p. 280, obs. C. Dudognon. See also J.-P. Karaquillo, Le pouvoir disciplinaire dans l'association sportive, *Recueil Dalloz* 1980, pp. 115-124, p. 115; Frédéric Buy *et al.*, *Droit du sport*, L.G.D.J. 2009, no. 226; Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 256.

60 Art. L.131-8 of the *Code du sport* in conjunction with the annex to the decree n°2004-22.

61 The Netherlands: Art. 3:40 BW. France: Art. 6 CC; Germany: § 134 BGB and § 138 BGB; Switzerland: art. 19 and 20 CO in conjunction with art. 7 CC.

62 Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25, Rn. 19, referring to the Bosman case.

63 ECJ 12.12.1974, C-36-74 (Walrave/Koch); ECJ 15.12.1995, C-415/93 (UEFA/Bosman); ECJ 16.03.2010, C-325/08 (Olympique Lyonnais/Bernard).

and those involved in its organisation, and between the latter, are partly determined by standards of reasonableness and fairness.[64] Moreover, in Swiss law, the freedom to create and enforce rules is also limited by two provisions in the Civil Code that constitute the application of human rights between private persons. These provisions maintain the prohibition not to violate personality rights.[65]

In England, as befits a common-law country, the regulatory power of sports organisations is limited by a number of core principles that have been developed in case law.[66] First, it has been held that sports federations act unlawfully if they take into account irrelevant factors, or fail to consider relevant factors, when making decisions such as determining a sanction.[67] Second, the conduct of sports federations is subjected to the general principle of proportionality.[68] Third, in *Enderby Town Football Club Ltd v The Football Association Ltd* it was held that the decisions of sports federations are subject to the requirements of natural justice.[69] There are two main rules of natural justice: the rule against bias and the right to a fair hearing.[70] Despite being a public-law feature in origin, the principles of natural justice have infiltrated the contractual relationships of private entities, such as sports federations.[71] In the context of a sports disciplinary sanction, the right to a fair hearing includes *inter alia* prior notice of a decision, an oral hearing, legal representation and a requirement to give reasons for the decision.[72] Moreover, participants in sport can also rely upon the restraint of trade doctrine. This doctrine purports that a contract in unreasonable restraint of trade is void. In the sporting context the doctrine has been

64 Art. 2:8 BW. This specific duty to act in conformity with standards of reasonableness and fairness is also found in Dutch contract law (art. 6:2 BW and 6:248 BW) Swiss, French and German law also feature statutory obligations to act in good faith (art. 2 Swiss CC; art. 1134 CC and art. 242 BGB), although they are not specifically aimed at legal entities.

65 Art. 27 and 28 CC. The term personality rights refers to fundamental rights of an individual that are intrinsic to his being: the right to life, physical integrity, religion, privacy, honour and also to freely choose one's profession – for instance to be a professional athlete. See further section 3.2.4. and the *Matuzalem* case in 3.3.2.3.

66 Simon Gardiner *et al*., *Sports Law*, Routledge 2012, p. 117.

67 See *Bradley* in first instance and *Fallon v Horseracing Regulatory Authority* 2006 [EWHC] 2030.

68 *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB), para 43.

69 *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] 1 Ch. 591, following *Russel v Duke of Norfolk* [1949] 1 All ER 109.

70 See for applications of these rules regarding sports organisations: *McInnes v Onslow-Fane* [1978] 1 WLR 1520*; Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192; *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA 1117. See for extensive overview of the rules of natural justice William Wade and C.F. Forsyth, *Administrative Law*, Oxford University Press 2009, pp. 371-470.

71 According to Morris and Little this is in order to achieve procedural fairness similar to that in public law. Philip Morris and Gavin Little, Challenging Sports Bodies' Determinations', *Civil Justice Quarterly* (17) 1998, pp. 131-132.

72 See also in more detail: Simon Gardiner, UK Sports Law. Part I. Organization of Sport, p. 49, in Franck Hendrickx *et al.* (eds.), *International Encylopaedia for Sports Law*, Kluwer Law International 2008, p. 128.

applied in roughly three areas: transfer systems, participation in competition and challenges to the reasonableness of disciplinary measures.[73] The doctrine is primarily concerned with the effect of the challenged provision upon the ability to trade and less preoccupied with the 'special position' of sports regulating bodies. The content of rules can be called into question and tested for reasonableness. However, as long as their aims and objects are legitimate and reasonable, sports federations are free to act.[74]

In France, the normative power of certified and delegated federations is supervised by the minister of sports. Any modification of the articles of association, procedural rules, the disciplinary regulations or financial regulations has to be notified. If the modifications are inconsistent with the certification granted to the federation, the minister will demand the necessary corrections.[75] Regulations and the decision taken by delegated federations are, as administrative acts, subject to the principle of administrative legality which requires compliance with all hierarchically superior rules.[76] First, these include the *Code du sport* and its regulations, including the standard disciplinary regulations. The requirement of legality was first laid down by the *Conseil d'État* and meanwhile has been adopted by the *Code du sport*.[77] For instance, art. L.131-33 of the *Code du sport* expressly prohibits federations from imposing rules regarding the *équipement sportif* that are dictated by business imperatives.[78] Besides, the law requires the set rules to be necessary for the execution of the delegation or for the application of regulations of the international federation as long as these are compatible with French law. Furthermore, the rules must be proportionate to the demands of the sport, include reasonable timeframes for compliance and have to be published in the federation's bulletin.[79] Aside from the general principles of law, French sports federations must comply with the principles of equal access to sport and equal treatment.[80]

Moreover, in all five jurisdictions, the freedom to create and enforce rules is also limited by general principles of law, which include *inter alia*: the principle of equal treatment, rights arising from the right to be heard if a member

73 Simon Gardiner, 'UK Sports Law. Part I. Organization of Sport', p. 49, in Franck Hendrickx *et al*. (eds.), *International Encylopaedia for Sports Law*, Kluwer Law International 2008, p. 49. See also: Simon Gardiner *et al*., *Sports Law*, Routledge 2012, p. 120-126.

74 Simon Gardiner *et al*., *Sports Law*, Routledge 2012, p. 126.

75 Art. R.131-8 of the Code du sport.

76 Frédéric Buy *et al*., *Droit du sport*, L.G.D.J. 2009, no. 296, citing G. Simon, 'Valeur juridique des normes sportives', *Lamy Droit du Sport,* mai 2003, n°112-10.

77 CE 20.11.2003, n°369474, *Les Cahiers de Droit du Sport* (2) 2005, p. 49, note J.-M. Duval. See also Frédéric Buy *et al*., *Droit du sport*, L.G.D.J. 2009, no. 296.

78 Such as setting the number of places and spaces used for public reception or determination devices and facilities for the sole purpose of enabling the audio-visual broadcast of competitions. Also, it is prohibited to impose the choice of a trademark for a material or a given material.

79 Art. R.131-34 of the *Code du sport.*

80 CE 16.03.1984, n°50878 (Broadie), *Recueil Dalloz* 1984, p. 317, note M. Genevois.

is concerned by a decision of the association, the principle of legality and the principle of proportionality.[81]

Internal regulations

In addition to the various limits deriving from rules of national law, an association is bound by the specific object for which it was created and by its own articles of association and secondary regulations.

Under Dutch law a provision in a regulation that is contrary to the law or the articles of association is not binding.[82] In addition, a decision (*besluit*) can be challenged if it is contrary to the law, the articles of association, an internal regulation or if it conflicts with the standards of reasonableness and fairness.[83] The association's organs thus have to adhere to the boundaries set by law and the articles of association.[84] Furthermore, legal acts transgressing the specific object for which the association was created can be voided.[85] It must be noted that only the legal entity is entitled to claim voidance on this ground. Voidance of legal acts that conflict with the object of the corporation is a rarity in practice.[86]

In England, it was first held that sports governing bodies are limited by their own regulatory framework as well as by the general object of the organisation in 1954.[87] This view was affirmed in *Davis v. Carew Pole* only two years later. The court held that "if the powers of the quasi-judicial body are set out in a code of rules to which the party aggrieved is in the circumstances subject, the quasi-judicial body is also bound by its own rules and can only mete out punishment in strict accordance with such rules".[88]

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81 Germany: Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25, Rn. 19; France: Frédéric Buy *et al.*, *Droit du sport*, L.G.D.J. 2009, no. 296; Switzerland: Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 108ff; Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, p. 402ff. and 666ff.

82 Compare: J.M.M. Maeijer, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-II, De rechtspersoon*, Kluwer 1997, no. 35 and G.J.C. Rensen, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-III*, Overige rechtspersonen*, Kluwer 2012, no. 41; F.C. Kollen, *De vereniging in de praktijk*, Deventer: Kluwer 2007, p. 123.

83 Art. 2:14 and 2:15 BW.

84 For the general assembly, this was established in case law: HR 21.01.1945, *NJ* 1959, 43 (Forumbank).

85 Art. 2:7 BW. In answering the question whether a particular act exceeds the object of the corporation all circumstances must be taken into account. The object defined in the articles of association need not be solely decisive. HR 16.10.1992, *NJ* 1993, 98 (Westland/Utrecht Hypotheekbank) with note Ma.

86 J.M.M. Maeijer, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-II, De rechtspersoon*, Kluwer 1997, no. 76.

87 *Baker v. Jones* [1954] 2 All ER 553.

88 *Davis v Carew-Pole* [1956] WLR, p. 838.

Also in French case law, it has been acknowledged that associations and federations must comply with their own regulations.[89] However, there is quite an interesting exception to this general rule. Rules set by the international federation do not have a direct effect. Decisions breaching these rules do not entail a breach of *excès de pouvoir*.[90] Furthermore as in the other jurisdictions, French associations and federations are also bound by their object.[91] The prohibition of a legal person to exceed the limits of its object as defined in the articles of association is also known as the principle of speciality.[92]

In Germany, it is postulated that the autonomy of the association inherently entails that it finds its limit in the articles of association. In the words of Sauter *et al*., "Allerdings kann die Vereinsautonomie gerade auch in der Weise ausgeübt werden, daß das Selbstverwaltungsrecht des Vereins satzungsmäßig beschränkt wird; auch eine solche Beschränkung stellt die Ausübung von Autonomie dar."[93] This dogmatic thesis has been affirmed in case law, according to which an association is not allowed to violate its articles or the object for which the association was founded.[94]

As in Dutch law, in Switzerland the law explicitly provides that a decision infringing the articles of association or regulations can be challenged.[95] Furthermore, with regard to an association's object, several authors noted that the pursuance of this object is the sole reason of existence of the association.[96] As a result, all acts and rules by the association must be covered by its object.[97]

As is the case for the regulatory framework of sports organisations in general, the rules of both national law and internal regulations that limit the power of associations are largely similar across the five countries. Except in

89 CE 12.05.1989, n°97144, *Recueil Dalloz* 1990, p. 276, note J.-F. Lachaume.

90 CE 02.02.2006, n°289701 available at:<www.conseil-etat.fr>; CE 08.11.2006, *Recueil Dalloz* 2007, p. 924, note Sophie Dion. This position is contested by Latty, who supports the direct applicability of the rules of international federations. Franck Latty, *La lex sportiva. Recherche sur le droit transnational* (diss. Parix X), Martinus Nijhoff Publishers 2007, pp. 128-130.

91 J.-P. Karaquillo, 'Le pouvoir disciplinaire dans l'association sportive', *Recueil Dalloz* 1980 pp. 115-124, p. 119; Gaylor Rabu, *L'organisation de sport par le contrat: essai sur la notion d'ordre juridique sportif* (diss. Aix-Marseille III), Presses universitaires d'Aix-Marseille 2010, p. 71.

92 Bernard Teyssié, *Droit civil. Les personnes*, Paris: LexisNexis, Litec 2010, no. 855. Alfred Légal and Jean Brethe de la Gressaye, *Le pouvoir disciplinaire dans les institutions privées*, Sirey 1938, pp. 135, 347.

93 E. Sauter, G. Schweyer and W. Waldner, *Der eingetragene Verein*, Verlag C.H. Beck 2010, no. 39a.

94 BGH 30-05.1983 – II-ZR 138/82, BGHZ 87, 337, p. 343.

95 Art. 75 CC.

96 According to some authors, the association's object is to some extent, the *causa* of the membership. Anton Heini, *Das schweizerische Vereinsrecht*, Basel/Frankfurt am Main: Helbing & Lichtenhahn 1988, p. 28; Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 43.

97 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 110.

France, where more detailed regulations exist, associations are virtually only bound by very fundamental rules of private law, including the law, their articles of association and secondary regulations, and general principles of law.

2.4 THE BINDING NATURE OF DISCIPLINARY RULES

Rules exist for a reason. It is obvious that governing a certain sport, whether at club, national or international level, would not be possible without rules and the possibility to enforce them by means of disciplinary sanctions. In all the jurisdictions researched the qualification of the relationship between members and the association they adhere to has been the subject of legal literature and sometimes of case law. The debate in Germany and Switzerland best illustrates the qualification issue. Therefore, these countries will be addressed first.

Germany and Switzerland

The binding nature of disciplinary regulations has been the subject of a long-standing debate in both German and Swiss legal literature. As the regulations have their basis in the articles of association, the debate is closely connected to the nature or qualification of the articles of association *an sich*.[98]

The *Vertragstheorie* (contractual theory), is primarily based on the contractual nature of the relationship between a member and the association, not only at the initial stage but also throughout the duration of the membership. Authors supporting this theory regard the articles of association as a: "von den Gründern des Vereins geschlossener Vertrag, das heißt ein mehrseitiges Rechtsgeschäft, das durch den wechselseitigen Zugang der übereinstimmenden Willenserklärungen zustande kommt."[99] Proponents of this theory base their argument on the particular contractual relationship between the association

98 Steffen Krieger, *Vereinsstrafen im deutschen, englischen, französischen und schweizerischen Recht. Inbesondere im Hinblick auf die Sanktionsbefugnisse von Sportverbänden*, Berlin: Duncker & Humblot GmbH 2003, p. 50.

99 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 25, Rn. 17; Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, p. 20; Walther Hadding, 'Korporationsrechtliche oder rechtsgeschäftliche Grundlagen des Vereinsrecht', in: *Festschrift für Robert Fischer*, Berlin: Walter de Gruyter 1979, pp. 165-196, p. 188ff.

and its members at the time of the founding act. With regard to new acceding members, it is argued that the members voluntarily join the association.[100]

According to the *Normentheorie*, the articles of association are an 'objective law' based on the freedom of association which the members are subjected to as of their accession.[101] The influential *Münchener Kommentar* champions this theory, arguing that the articles of association are not – unlike a contract – the result of negotiations between individuals who coordinate their interests and compromise with one another. Rather, they attempt to establish an order of social life that ensures the achievement of a super-individual purpose.[102] In connection with association law this object is generally the association's reason for existence, for example to play sports together with others or to advocate certain issues.

The prevailing view in Germany, which is adopted in case law, keeps a middle course between the two. According to the so-called *modifizierte Normentheorie*, the articles of association are of a contractual nature while the association is still being formed. As soon as the association is established, the articles lose their contractual nature and apply to the members by virtue of 'corporate law' as the members have subjected themselves to it.[103] With regard to the nature of the disciplinary sanction, the *Bundesgerichtshof* (*BGH*) took a stand in 1956. In its landmark case regarding the nature and review of a disciplinary sanction the *BGH* considered that [s]anctions provided by association law that ensure compliance with membership obligations are not contractual sanctions, because, unlike contractual sanctions, they are not based on contract, but on the submission of the members to the articles of association.[104] Despite critic-

100 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 25, Rn. 17; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 102, 106ff.; Walther Hadding and Frank van Look, 'Zur Ausschließung aus Vereinen des bürgerlichen Rechts', *Zeitschrift für Unternehmens und Gesellschaftsrecht* 2/1988, p. 275.

101 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 25, Rn. 17.

102 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, §25, Rn. 18.

103 BGH 04.10.1956 –II ZR 121/55 – BGHZ 21, 370, p. 373: "Denn sobald der nichtrechtsfähiges Verein ins Leben getreten ist, gilt seine Satzung nicht mehr als Vertrag, sondern als seine Verfassung, der sich die Mitglieder unterworfen haben und die für sie kraft Korporationsrechts gilt." See also: BGH 06.03.1967 – II ZR 231/64 – BGHZ 47, 172, p. 179.

104 BGHZ 21/370, p. 373: "Vereinsrechtlich vorgesehene Strafen, die die Einhaltung mitgliedschaftlicher Pflichten sichern, sind keine Vertragsstrafen, da sie anders als die Vertragsstrafen nicht auf Vertrag, sondern auf der Unterwerfung der Mitglieder unter die Satzung beruhen."

ism in literature,[105] the *BGH* affirmed its position in later cases and even extended its application to cooperatives.[106]

As in Germany, the majority of the Swiss doctrinal views rejects the contractual theory and qualifies the disciplinary sanction as a legal institution *sui generis* of association law.[107] The main argument cited in favour of this theory is the existence of a relationship of subordination between an association and its members, which is deemed closer to a normative relationship than to a contract. As Corbat states, 'the source of disciplinary power of the association is the free and voluntary subordination of the individual autonomy of the association to adopt a regulatory system, which includes the power of the association to provide for sanctions'.[108] Nevertheless, support for the contractual theory remains existent.[109]

The binding nature according to the Swiss Federal Supreme Court

In its early case law regarding the qualification of disciplinary sanctions, the Swiss Federal Supreme Court implicitly defined the relationship between a federation and an athlete (the same holds for clubs) as a contract, the sanction being defined as a contractual sanction.[110] Later a distinction was made between pecuniary sanctions, described as contractual and consequently subject to the Code of Obligations, and other social sanctions.[111]

However, in the *Gundel* case in 1993 the Court took a different approach. It had to decide on the appeal against a sentence of the Court of Arbitration for Sport (CAS) concerning disciplinary sanctions imposed on an athlete who was a member of a German horse riding club, but not a member of either the German or the international federation (*Fédération Équestre International*). The

105 Criticism: See Walther Hadding, 'Korporationsrechtliche oder rechtsgeschäftliche Grundlagen des Vereinsrecht', in: *Festschrift für Robert Fischer*, Berlin: Walter de Gruyter 1979, pp. 165-196.

106 BGHZ 47, 172; BGHZ 47, 381; BGH 2.12.2002 – II ZR 1/02 – published in the online database of the BGH. For a critical review of this last case see: Frank van Look, 'Vereinsstrafen in der Genossenschaft', in: Franz Haüser *et al.*, *Festschrifte für Walther Hadding zum 70. Geburtstag am 8. Mai 2004*, Berlin: De Gruyter Recht 2004, pp. 539-560.

107 Hans Bodmer, *Vereinsstrafe und Verbandsgerichtbarkeit: dargestellt am Beispiel des Schweizerischen Fussballverbandes* (diss. St. Gallen), Bern: Verlag Paul Haupt 1989, p. 78; Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 224; Jérôme Jaquier, *La qualification juridique des règles autonomes des organisations sportives* (diss. Lausanne), Berne: Staempfli Editions SA 2004, p. 48; Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, pp. 23-24.

108 Claude Corbat, *Les peines statutaires*, Fribourg: Imprimerie St-Paul 1974, pp. 60, 70ff.

109 Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, p. 45; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 106ff.

110 BGE/ATF 57 I 204.

111 BGE/ATF 80 II 123, cons. 3b.

Court stated that the withdrawal of cash prizes related to the disqualification as well as the suspension from international competitions imposed by the international federation, go well beyond mere sanctions to ensure the correct execution of a game and constitute *véritables peines statutaires*.[112] Regrettably, the Court omitted further explanation of this legal qualification. However, in a non-published paragraph (5a) in the Gundel judgment the Court states: "il est généralement admis que la peine statutaire représente l'une des formes de la peine conventionnelle."[113] This statement has resulted in different interpretations of the Gundel case.[114]

The Court seems to have definitely abandoned the notion of the contractual sanction in the *Grossen* case in 1995, in which it decided that a member of a regional wrestling club – the club being a member of the national federation – was not in a contractual relationship with the national federation.[115] In two more cases the court reaffirmed its view without further explanation using only a sole reference to the Gundel case.[116] It was not until 2007 before the Court mentioned the nature of the disciplinary sanction again in the *Rayo* case.

Rayo Vallencano Madrid SAD (FC Rayo), a second-division football club and a member of the Spanish Football Federation, which itself is a member of FIFA, appealed a disciplinary sanction imposed by the Disciplinary Committee of FIFA. As a result of not paying a transfer sum to a Brazilian club, FC Rayo was sentenced to a fine of CHF 25,000 and a conditional sanction of the withdrawal of points or relegation. The payment was not made within time, causing FC Rayo to lose points in the championship of the second division in Spain. After an unsuccessful appeal to the CAS, FC Rayo appealed to the Swiss Federal Supreme Court arguing that the sanctions that had been imposed had occurred in the context of a purely contractual dispute and that the disciplinary regulations of FIFA, providing fines and other coercive measures such as the withdrawal of points, contained rules of private enforcement.[117] According to the club, FIFA's actions thus contain a prerogative that is reserved to the state, making its decision contrary to public policy.[118] The Court rejected the appeal and held that the question whether a breach of the public debt enforcement

112 BGE/ATF 119 II 271.

113 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 222.

114 Jérôme Jaquier, *La qualification juridique des règles autonome des organisations sportives* (diss. Lausanne), Berne: Staempfli Editions SA 2004, p. 50; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, pp. 98-99.

115 BGE/ATF 121 III 350.

116 BGE/ATF 120 II 369 and Swiss Federal Supreme Court 31.03.1999, 5P.83/1999 (Lu Na Wang et al. v. FINA).

117 The Swiss public debt enforcement monopoly includes the prohibition of private debt enforcement.

118 The sole substantive ground to quash an arbitral award, art. 190 Swiss PILA.

monopoly was indeed enough to constitute a breach of Swiss public policy could remain unanswered since the award that was challenged did not concern debt enforcement as such but rather sanction enforcement. The connected question that thus needed answering was if a sports federation as powerful as FIFA was allowed to impose sanctions on its members. According to the Court, the sanctions against the appellant are not enforcement measures, *but sanctions based on association law*. When enacting regulations to achieve its objects and to which its members are subject, an association may validly provide for a system of sanctions intended to compel recalcitrant behaviour. This subjection to the regulatory system is considered voluntary, even if the association concerned has a dominant position. Finally, the fact that this possibility of sanctioning has similar effects to enforcement measures does not entail that these are in conflict with the public debt enforcement monopoly. This is illustrated by the fact that monetary sanctions can only be enforced with the assistance of state authorities, so that the measures provided by FIFA are contrary to the prohibition of private debt enforcement.[119] Although the Court expressly noted that sanctions are based on association law, the complex facts of the case ask for restraint when drawing conclusions from this statement. Nevertheless, even without a more explicit confirmation of the standpoint that the Court took in the *Grossen* case, there is general consensus in Switzerland that the source of disciplinary power of associations over their members is rooted in association law.[120]

The Netherlands

In the old Dutch Civil Code (BW) the association was part of contract law. The historical conception of the contractual nature of legal entity law (*rechtspersonenrecht*) was gradually replaced by the institutional doctrine by the 1950s.[121] In 1940, Scholten already advocated the idea that an association's articles are of an abstract nature comparable to the relationship between a state and its citizens and contrary to a contract, which only creates specific legal relationships.[122] The membership relationship between an association and its members is now generally qualified as an 'institutional relationship' – or relation-

119 Swiss Federal Supreme Court 5 January 2007, 4P.240/2006 (no. 4.2).

120 In the recent CAS decision in CAS 2013/A/3365 (*Juventus FC v. Chelsea FC*) and CAS 2013/A/3366 (A.S. Livorno Calcio S.p.A. v. Chelsea FC), the arbitral tribuna followed this doctrine when it considered in par. 131 that "there is no contractual relationship between an indirect member (the clubs) and a sport federation (FIFA)". See further on indirect membership Section 2.5 below.

121 J.M. de Jongh, 'Redelijkheid en billijkheid en het evenredigheidsbeginsel in de verhouding van aandeelhouder tot het bestuur', *Ondernemingsrecht* 2011/124, par. 2.2.1.; P.A.L.M. van der Velden, *De vereniging-rechtspersoon en haar leden* (diss. Nijmegen), Deventer: Kluwer 1969, p. 37.

122 Paul Scholten, *Mr. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 1-II, Vertegenwoordiging en rechtspersoon*, Zwolle: Tjeenk Willink 1940, p. 135.

ship *sui generis* – as opposed to a contractual one.[123] This relationship is not governed by what parties agree, but instead by association law – comprising both internal (articles of association, regulations and decisions) and external (the law and unwritten law) norms.[124] Association law is laid down in Book 2 BW and precedes the provisions on the law of obligations, thus emphasising its institutional nature.

The legal acts of constitution of an association and accession to one are subject to the general law of obligations.[125] Accordingly, these acts can be voidable when entered into on the basis of threat, fraud or abuse of circumstances and error.[126] However, in contrast with a contract, which is constantly dependent on the will of the parties, the obligation to comply with the association's rules is independent of the member's will.[127] Through adherence to an association, a member becomes obliged to comply with the rules and regulations. If an association's resolution restricts rights or increases obligations, members are free to terminate their membership.[128]

England

The general view in English law regarding the binding nature of the rules of a club or sports federation is that it is based on contract. This does not alter the fact that submission to the rules of sports associations is mandatory. This 'adhesionary nature' – as Gardiner *et al.* call it – of the rules and regulations of sports federations has been recognised in court.[129] However, the existence of a contract was by no means uncontroversial; it has even been labelled a legal fiction:

123 J.M.M. Maeijer, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-II, De rechtspersoon*, Kluwer 1997, no. 269; G.J.C. Rensen, *Extra-verplichtingen van leden en aandeelhouders: een wetenschappelijke proeve op het gebied van de rechtsgeleerdheid* (diss. Nijmegen), Deventer: Kluwer 2005, p. 268; P.L. Dijk en T.J. van der Ploeg, *Van vereniging en stichting, coöperatie en onderlinge waarborgmaatschappij*, Deventer: Kluwer 2007, p. 131.

124 G.J.C. Rensen, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-III*, Overige rechtspersonen*, Kluwer 2012, nos. 14 and 58.

125 J.D.A. den Tonkelaar, *Vrijheid en gebondenheid in het verenigingsrecht: de gewone vereniging onder boek 2 B.W.* (diss. Leiden), Warmond: the author 1979, pp. 206-207; G.J.C. Rensen, *Extra-verplichtingen van leden en aandeelhouders: een wetenschappelijke proeve op het gebied van de rechtsgeleerdheid* (diss. Nijmegen), Deventer: Kluwer 2005, p. 268-269; C.H.C. Overes, *Groene Serie Rechtspersonen*, Kluwer 2009, art. 26 BW, aant. 3 and art. 33 BW, aant. 2. The same holds for private companies with limited liability (*BV*) and companies limited by shares (*NV*), see G. van Solinge and M. Nieuwe Weme, *Mr. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-II*, De naamloze en besloten vennootschap*, Deventer: Kluwer 2009, no. 42.

126 Art 3:44 BW and art. 6:228 BW in conjunction with 6:216 BW.

127 Compare: P.A.L.M. van der Velden, *De vereniging-rechtspersoon en haar leden* (diss. Nijmegen), Deventer: Kluwer 1969, p. 63.

128 Art. 2:36 (3) BW.

129 Simon Gardiner *et al.*, *Sports Law*, Routledge 2012, p. 97.

> "The rules of a body like this are often said to be a contract. So they are in legal theory. But it is a fiction – a fiction created by the lawyers so as to give the courts jurisdiction. (..) Putting the fiction aside, the truth is that the rules are nothing more nor less than a legislative code – a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such regulations, though said to be a contract, are subject to the control of the courts."[130]

Similarly, certain authors have expressed concern stating that the relationship between a powerful global international sporting federation, exercising a monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced that the legal form of the relationship should not be contractual.[131] After all, if athletes wish to continue their careers, they have no choice. As Pannick notes, in any effective system of self-regulation, the power of the regulator leaves the subject no practical choice but to comply.[132] This issue was addressed in *R v Football Association Ltd ex p Football League*. Rose J held that, despite the virtually monopolistic powers of the Football Association and the importance of its decisions to many members of the public, it is a domestic body whose powers were solely derived from private law and therefore not susceptible to judicial review.[133] Nevertheless Rose J followed Lord Denning's view in *Enderby* stating that, "the FA rules, though in contractual form, are effectively a legislative code".[134] Regardless of how powerful their licensing and disciplinary powers may be, it appears that in English law the use of contract, legal fiction or not, is regarded as the most appropriate way to regulate the relationship between sports associations and their members.[135]

130 *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591, p. 606, per Denning LJ. See also Ken Foster, 'Is There a Global Sports Law?', *Entertainment Law*. Vol. 2, No.1, 2003, pp. 1-18, p. 15.

131 Ken Foster, 'Is There a Global Sports Law?, *Entertainment Law*', Vol.2, No.1, 2003, pp. 1-18, p. 16. See also: Michael J. Beloff and Tim Kerr, 'Why Aga Kahn was wrong', *Judicial Review* (1) 1996, pp. 31-32 and David Pannick QC, 'Judicial Review of Sports Bodies', *Judicial Review* (2) 1997, pp. 150-153, p. 152.

132 David Pannick QC, 'Judicial Review of Sports Bodies', *Judicial Review* (2) 1997, pp. 150-153, p. 152.

133 *R v Football Association Ltd ex p Football League* [1993] 2 All ER 833, p. 848.

134 *R v Football Association Ltd ex p Football League* [1993] 2 All ER 833, p. 841.

135 William Wade and C.F. Forsyth, *Administrative Law*, Oxford University Press 2009, p. 573; Simon Gardiner, 'UK Sports Law. Part I. Organization of Sport', p. 49, in Franck Hendrickx *et al*. (eds.), *International Encylopaedia for Sports Law*, Kluwer Law International 2008, p. 48 (no. 42).

France

Whereas in the Netherlands and England, the binding nature of the rules is barely disputed, in France it has been debated by various scholars supporting either the institutional theory or the contractual theory.

The institutional theory was developed by the famous French constitutional lawyer Maurice Hauriou in the early 20th century.[136] According to Hauriou,

> "une institution est une idée d'œuvre ou d'entreprise qui se réalise et dure juridiquement dans un milieu social. Pour la réalisation de cette idée, un pouvoir s'organise qui lui procure des organes. D'autre part, entre les membres du groupe social intéressé à la réalisation de l'idée, il se produit des manifestations de communion dirigées par les organes du pouvoir et réglées par des procédures".[137]

In short, an institution is a group of people who have joined together to achieve a certain objective. In order to fulfil this objective and to resolve difficulties within the group, laws are enacted and power is established. An institution by definition possesses the right to *se faire justice à soi-même*.[138] It is thus the institution which is "the source of disciplinary law".[139]

The main argument posed by authors in favour of the contractual theory is that an association is founded on a contract.[140] After all, art. 1 of the French law of 1 July 1901 relating to the *contract* of association explicitly sets out that, 'the association is an agreement by which two or more people share, permanently, their knowledge or activity for an object other than sharing profits and that it is governed as to its validity by the general principles of law applicable to contracts and obligations'. A member is a party to the contract of association and thus contractually bound to the regulatory framework of the association.

However, in the assessment of the contractual theory as the basis for disciplinary power, French scholars have identified the same flaws that have

136 His theory was developed in different works, none of which exhaustive or definitive. See Eric Millard, 'Hauriou et la théorie de l'institution', *Droit et Société* 1995, pp. 381-412. See for a summary of the theory in English: Albert Broderick, "Institutional" Theory and a New Private "Club": Court Enforcement of Union Fines, *Nebraska law Review* (47) 1968, pp. 492-527.

137 Maurice Hauriou, La théorie de l'institution et de la fondation. Essai de vitalisme social (1925), reprinted in: Aux sources du droit: le pouvoir, l'ordre et la liberté, *Cahiers de la Nouvelle Journée*, n°23 1933, p. 96.

138 Alfred Légal and Jean Brethe de la Gressaye, *Le pouvoir disciplinaire dans les institutions privées*, Sirey 1938, p. 448.

139 Maurice Hauriou, 'L'institution et le droit statutaire', *Rec. de l.Acad. de legisl. de Toulouse*, 1906, pp. 134-182, p. 136.

140 Gaylor Rabu, *L'organisation de sport par le contrat: essai sur la notion d'ordre juridique sportif* (diss. Aix-Marseille III), Presses universitaires d'Aix-Marseille 2010, p. 37 (quoting Jean-Marc Duval, *Le droit public du sport*, Presses universitaires d'Aix-Marseille 2002, p. 69).

been put forward in the other jurisdictions researched. In short, the fact that an athlete or club has no choice but to accept to subordinate himself to the regulations of the sports association if he wishes to participate in competition contravenes the requirement of consent.[141] According to Simon, the contractual analysis leads to denying the institutional reality that characterises the relationships in sports.[142] Although it is recognised that an extensive notion of contract can include the *contrat d'adhésion*, among specialist authors the institutional theory seems to be prevailing as better equipped to explain the complex relationship between an association and its members.[143]

As mentioned earlier, one of the main characteristics of the organisation of sport in France is the interference of the State. This public aspect also affects the legal nature of disciplinary power of delegated federations.[144] Although delegated federations are associations, their disciplinary power is not solely rooted in private law. In contrast, it is the exercise of a public service. As a result, a disciplinary sanction imposed by a delegated federation is qualified as an administrative act.[145] Despite this legal reality, many authors have disagreed with this contention. In their view, the disciplinary power of a federation should not be qualified as the delegation of a public service.[146] The monopoly of national sports organisations to organise competitions and regulate their discipline on the national territory already existed before the French state intervened. The state in fact delegated a competence that it did not develop nor ever exercised.[147] However, in doctrine it has been argued that the state's interference is justified by the monopoly position of the federations. In the words of Simon, "although the administrative nature of disciplin-

141 Alfred Légal and Jean Brethe de la Gressaye, *Le pouvoir disciplinaire dans les institutions privées*, Sirey 1938, pp. 42-43; Mathieu Maisonneuve, *L'arbitrage des litiges sportifs* (diss. Paris I), L.G.D.J. 2011, pp. 154-160.

142 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 8.

143 "Membres n'adhèrent pas à un quelconque contrat social mais à l'idée de l'institution", Mathieu Maisonneuve, *L'arbitrage des litiges sportifs* (diss. Paris I), L.G.D.J. 2011, p. 185; Franck Latty, *La lex sportiva. Recherche sur le droit transnational* (diss. Parix X), Martinus Nijhoff Publishers 2007, p. 116.

144 This does not hold for certified federations as the certification confers no monopoly position and thus constitutes no '*puissance publique*'. CE 10.12.1988, n°79962, *Recueil Dalloz* 1990, p. 280, obs. C. Dudognon.

145 Landmark case: CE 22.11.1974, n°89828, *Recueil Dalloz* 1975, p. 739, note J.-F. Lachaume; affirmed by CE 12.05.1989, *Recueil Dalloz* 1990, p. 276, note J.-F. Lachaume.

146 Instead, they defend the view that the disciplinary power derives from the right to self-regulation inherent to all institutions. J.-P. Karaquillo, 'Le pouvoir disciplinaire dans l'association sportive', *Recueil Dalloz* 1980 pp. 115-124, p. 120ff. and Jean-Pierre Karaquillo, *Le droit du sport*, Dalloz 2011, p. 127; Mathieu Maisonneuve, *L'arbitrage des litiges sportifs* (diss. Paris I), L.G.D.J. 2011, pp. 161-168. See also Rabu, who defends the application of the contractual theory. Gaylor Rabu, *L'organisation de sport par le contrat: essai sur la notion d'ordre juridique sportif* (diss. Aix-Marseille III), Presses universitaires d'Aix-Marseille 2010, pp. 80-81.

147 Mathieu Maisonneuve, *L'arbitrage des litiges sportifs* (diss. Paris I), L.G.D.J. 2011, pp. 161-168. See also Jean-Pierre Karaquillo, *Le droit du sport*, Dalloz 2011, pp. 33-34.

ary power of federation is based on the fiction that this power is held by the state, it is merited by the 'exorbitant' nature of this power".[148] Considering the similarity of this statement to that of LLJ Denning, it can be suggested that there exists an almost uniform 'European' understanding of the relationship between a sports organisation and its members.

2.5 INDIRECT MEMBERSHIP

A distinctive feature of the organisational structure of sport is the 'membership chain'. An athlete or club is only a member of an umbrella federation when its articles of association allow for this. However, in most cases an athlete is only a member of his club, in some cases also of his national federation, but not a member of the international federation. The same holds for clubs. In the above-mentioned *FC Rayo* case, the club is a member of the Royal Spanish Football Federation which in turn is a member of both UEFA and FIFA. FC Rayo is thus not a direct member of the international federation, but rather a so-called indirect member. In connection with the imposition of sanctions, the question arises how athletes or clubs are bound to the regulations of a federation of which they are not a member. After all, without membership no enforcement power exists.[149]

Generally, there are two grounds on which an indirect member can be bound. First, by means of a licence. A licence, generally granting access to competitions, is issued by the sports federation after the athlete or club agrees to the terms. Secondly, it might be possible for indirect members to be bound on the basis of the indirect legal relationship.

In the Netherlands, the subordination of indirect members of sports federations has not received much, if any, attention. Dutch authors Dijk and Van der Ploeg only noted that a federation cannot directly enforce compliance upon the members of its members. According to them, only the member-association has this power.[150] However, in other sectors it is not uncommon that rules that have been created between two parties become binding upon individuals that are members of those parties. For instance, in the Netherlands collective labour agreements are negotiated between representatives of employers'

148 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, pp. 152, 181 and 244.

149 Compare BGHZ 128/93, p. 99.

150 P.L. Dijk en T.J. van der Ploeg, *Van vereniging en stichting, coöperatie en onderlinge waarborgmaatschappij*, Deventer: Kluwer 2007, p. 299.

associations and trade unions respectively. The collective agreement becomes directly binding on all members of the contracting organisations.[151]

In England, the membership relationship is governed by contract. Indirect members might be bound by an express contract in the form of a licence.[152] Additionally, if no express contract can be identified, the indirect member might be bound by an implied contract. This last issue, whether the nature of the relationship between an athlete and her national sports federation was contractual, has been addressed in the *Modahl* case. The claim that a contract existed was based on the argument that there are three bases on which a contract can be construed or a combination of the three: 'the club basis', 'the participation basis' and 'the submission basis'. The first one was based on the athlete's membership of her athletics club, whose rules specifically required her to adhere to the rules of the governing federation. Secondly, the participation basis means that by participating in competitions overseas the athlete submitted herself to the jurisdiction of the federation, whose disciplinary function could only sensibly be exercised within the structure of a contract. Thirdly, the submission basis holds that a contract is to be implied when the athlete submitted herself to the federation's disciplinary process. There was a disagreement within the Court of Appeal over how to handle this key issue. While both Latham and Mance LLJ found that overall it was appropriate to find the existence of a contract – although arriving there in a different way – Parker LJ was not. Finally it was held that, although there was no express contract, one could be implied from the athlete's submission to the federation's rules.

> "The necessary implication from the claimant's conduct in joining a club, in competing at national and international level on the basis stated in the rules and in submitting herself to doping tests both in and out of competition was that she became party to a contract with the defendant subject to the relevant terms of the rules."[153]

A cautious conclusion from *Modahl* is that where such an indirect legal relation exists – in the form of participation in competition or submission to the rules – an implied contract is easily deemed to exist.

In France, individual athletes are tied to their national (delegated) federations by virtue of the licensing system. A sports licence is issued by a delegated

151 Art. 12 and 13 Collective Labour Agreements Act (Wet CAO). Provisions of these agreements can be further extended upon non-members by being declared generally binding by decree of the Minister of Social Affairs. Art. 2 Collective Agreements (Declaration of Universally Binding and Non-Binding Status) Act (Wet AVV).

152 Adam Lewis and Jonathan Taylor, *Sport: law and practice*, Haywards Heath, West Sussex: Tottel 2008, p. 228.

153 *Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192, p. 1193.

sports federation and entitles an athlete to participate in sports activities.[154] The relationship between a licensed athlete and the federation is quite complex. On the one hand, the licence is an administrative act granting the right to participate in competitions.[155] On the other, the licence is only granted if certain conditions are met, the most important condition being subordination to the federation's disciplinary power.[156] For this reason some equate the licence to a contract, arguing that the athlete consents to this subordination.[157] Others attribute the licence with a double nature.[158] In this view the licence is both an administrative act and a *convention d'adhésion associative*. Regardless of the academic debate regarding the nature of the licence, the acquisition of a licence can be characterised equivalent to subordination to the disciplinary regulations. So far, the possibility of subordination of athletes or clubs to the regulatory framework of an international federation other than through a licence has received no attention in case law or doctrine.[159]

In German law it is recognised that an indirect member can be bound through contractual acceptance (subordination) of the regulations which can take on the form of an individual agreement, a licence or a competition agreement; hereby extending the disciplinary power of a sports association to non-members.[160] In 1994, the famous *Reitsport* case overturned earlier case law in which the *BGH* considered the enforcement of disciplinary measures upon non-members inadmissible.[161] In order for a non-member to be bound, it is now required that he has subjected himself to the rules and regulations of the respective umbrella association. This submission can only derive from a *rechtsgeschäftlichen Einzelakt*. Apart from an individual agreement, this can be attained by participating in a competition organised by the sports association

154 Art. L.131-3 in conjunction with L.131-6 of the *Code du sport.*

155 CE 31.05.1989, n°99901, *Recueil Dalloz* 1990, p. 394, obs. J.-F. Lachaume. According to Simon, this ruling confirms the difference in nature between the licence on the one hand and adherence to an association on the other. Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 111.

156 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, pp. 110-112.

157 Gaylor Rabu, *L'organisation de sport par le contrat: essai sur la notion d'ordre juridique sportif* (diss. Aix-Marseille III), Presses universitaires d'Aix-Marseille 2010, p. 96.

158 Frédéric Buy *et al*., *Droit du sport*, L.G.D.J. 2009, no. 820.

159 Referring to Swiss doctrine, only Latty has argued in favour of direct application of the rules of international federations via the membership chain. Franck Latty, *La lex sportiva. Recherche sur le droit transnational* (diss. Parix X), Martinus Nijhoff Publishers 2007, p. 128.

160 BGH 28.11.1994 – II ZR 11/94 – *NJW* 1995, 583 = BGHZ 128, 93; BGH 13.07.1972 – II ZR 138/69 – *WM* 1972, 1249; Affirmed by OLG München 28.03.1996 – NJW 1996, 2382. See Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Köln: Verlag Dr. Otto Schmidt 2012, Rn: 975-976; Peter. W. Heermann, 'Die Geltung von Verbandssatzungen gegenüber mittelbaren Mitgliedern und Nichtmitgliedern', *NZG* 1999, p. 325-333; Jan. F. Orth, *Vereins- und Verbandsstrafen am Beispiel des Fußballsports* (diss. Köln), Frankfurt am Main: Peter Lang GmbH 2009, pp. 182-183.

161 BGH 26.02.1959 – II ZR 137/57, BGZH 29, 352, p. 359.

or by acquiring a general competition licence, for which one must accept and recognise the relevant rules and regulations of the association. In both situations, the non-member must have a reasonable possibility of taking cognisance of the content of these rules, i.e. they must be published.[162] According to the *BGH* this relationship is *Mitgliedschaftsähnlich*. Despite the contractual nature of the relationship between federations and non-members, the regulations of sports federations cannot be qualified as standard contract terms, resulting in the inapplicability of the provisions regarding standard contract terms (§ 305-310 BGB).[163] The Court reasoned that the judicial review (*Inhaltskontrolle)* of sanctions imposed upon non-members should be the same as when the sanction is imposed on a member, via § 242 BGB.[164] It is reasoned that the safeguards for indirect members should not lag behind those of members.[165]

In Switzerland it is agreed in both legal literature and case law that the disciplinary force of federations upon indirect members can be constructed through contractual subordination.[166] The Swiss Federal Supreme Court has ruled that an athlete or club can be subordinated to an association's regulatory framework through a 'certificate of obligation'[167] or through participating in competition.[168] In line with the German view, Fenners qualifies the relationship as *Mitgliedschaftsähnlich*.[169] However, unlike in German law, most Swiss doctrinal views argue that these contracts must be reviewed in connection with the rulings based on the principles of the standard contract terms.[170] This approach is for the most part due to the monopoly position

162 BGHZ 128, 93, p. 105. See also: Peter. W. Heermann, 'Die Geltung von Verbandssatzungen gegenüber mittelbaren Mitgliedern und Nichtmitgliedern', *NZG* 1999, p. 325-333, p. 329 and Peter W. Heermann, 'Bindung an die Satzung übergeordneter Verbände durch dynamische Verweisungsklauseln', *ZHR* 174/2010, pp. 250-292, p. 282.

163 BGHZ 128/93, pp. 101-103. See affirmative: Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Keulen: Verlag Dr. Otto Schmidt 2012, Rn. 977; Jan. F. Orth, *Vereins- und Verbandsstrafen am Beispiel des Fußballsports* (diss. Köln), Frankfurt am Main: Peter Lang GmbH 2009, pp. 185-186. See critically: Peter W. Heermann, 'Bindung an die Satzung übergeordneter Verbände durch dynamische Verweisungsklauseln', *ZHR* 174/2010, pp. 250-292, p. 283ff.

164 BGH 13.07.1972 – II ZR 138/69 – *WM* 1972, 1249; BGHZ 128, 93.

165 Peter W. Heermann, 'Bindung an die Satzung übergeordneter Verbände durch dynamische Verweisungsklauseln', *ZHR* 174/2010, p. 250-292, p. 282.

166 Margareta Baddeley, 'Unterwerfungserklärungen von Athleten – ein Anwendungsfall allgemeiner Geschäftsbedingungen', *ZBJV* 144/2008, pp. 357-391; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 146.

167 BGE/ATF 80 I 336, cons. 5.

168 BGE/ATF 134 III 193, cons. 4.2.

169 Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, pp. 52-53.

170 Margareta Baddeley, 'Unterwerfungserklärungen von Athleten – ein Anwendungsfall allgemeiner Geschäftsbedingungen', *ZBJV* 144/2008, pp. 357-391, p. 367; Jérôme Jaquier, *La qualification juridique des règles autonome des organisations sportives* (diss. Lausanne), Berne: Staempfli Editions SA 2004, p. 101; Peter Philipp, *Rechtliche Schranken der Vereinsautonomie*

of the governing bodies. The primary review is whether the athlete or club has had the possibility to take note of the terms. Additionally, the *Ungewöhnlichkeitsregel* entails that provisions which the consenting party did not expect and objectively did not have to expect, are not binding.[171]

Furthermore, some also acknowledge a direct enforcement power of the national federation upon indirect members.[172] According to Steiner, the acceptance of such a power is consistent with the approach taken by the Federal Supreme Court. He argues that, even though the Court has not taken the opportunity to define or develop the notion of indirect membership, its case law simply affirms that indirect members are subordinate to the disciplinary power of their federations. This approach has been firmly criticised by Aguet in his reaction to the *Rayo* case.[173] He argues that applying the regulations of the federation on this relationship (i.e. FIFA with non-members) divests art. 60ff. of the Swiss Civil Code of its purpose and constitutes "*fraude à la loi*".[174] According to Aguet, the foundation of the disciplinary sanction can only be the *contrat d'adhésion* between the member and the federation in question.[175] Nevertheless, according to the Court, it is indisputable that clubs

und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 116.

171 BGE/ATF 77 II 154, p. 156; BGE/ATF 109 II 213, cons. 2a; BGE/ATF 119 II 443, cons. 1b. With regard to doping provisions, it is noted that these are no longer to be regarded as unexpected. See Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 116, f.n. 502 and Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 153.

172 Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 142. See also Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 18; Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, p. 221, no. 511.

173 Aguet argues that the assertion that the relationship between a club or a player and FIFA has its source in association law is fundamentally problematic as the club or the player has no real opportunity to influence the formation of social will that is imposed. Cédric Aguet, 'La sanction disciplinaire infligée par une fédération internationale à l'encontre d'un non-membre a-t-elle une source de droit de l'association? – Réflexions à la lumière de l'arrêt du Tribunal fédéral N° 4P.240/2006', *Jusletter 16 April 2007*, available at: <http://www.weblaw.ch>, no. 47.

174 Cédric Aguet, 'La sanction disciplinaire infligée par une fédération internationale à l'encontre d'un non-membre a-t-elle une source de droit de l'association? – Réflexions à la lumière de l'arrêt du Tribunal fédéral N° 4P.240/2006', *Jusletter 16 April 2007*, available at: <http://www. weblaw.ch>, no. 50.

175 Cédric Aguet, 'La sanction disciplinaire infligée par une fédération internationale à l'encontre d'un non-membre a-t-elle une source de droit de l'association? – Réflexions à la lumière de l'arrêt du Tribunal fédéral N° 4P.240/2006', *Jusletter 16 April 2007*, available at: <http://www. weblaw.ch>, no. 54.

and players are subject to all rules and decisions of FIFA, even if they are not members of the latter.[176]

To sum up, in all countries individual athletes and clubs who are not members of a federation can be bound to its regulations, either through an indirect relationship based on the 'membership chain' or through a licensing contract.

2.6 Changing rules and dynamic reference

In order to be able to implement a national or international uniform sports discipline, the respective federation relies on rules that ought to be directly enforceable at all levels. The rules must be the same everywhere. This is complicated by the fact that international federations generally have only national federations as their members. Therefore, FIFA, UEFA and many other international federations oblige their members to follow the rules set by them, but also to implement them in their own articles of association so that they are also binding on the members of the national federations.[177] This implementation can be attained in two manners. First, a club or national federation can change its own regulations every time the federation changes his. This is called static reference. Another option is dynamic reference. Dynamic reference means that a provision cited is always taken to be the provision with any amendments. In other words: it is not a certain edition of the articles of association and regulations that is in force on a specific date, but always the current version that is applicable. Changes in the federation's rules must be enforced immediately.

The practical importance of the choice between static and dynamic reference becomes eminent in the following example. In the fight against doping it is crucial to ensure that all athletes are being treated equally and comply with the same rules. If associations have to change their articles of association every time the Prohibited List is modified in order to comply with it, enforcement of the rules will be impossible. It is undesirable that in the same competition two athletes of different nationalities both test positive on the same banned substance, but only one of them suffers consequences because his or her national federation changed its regulations and the other one did not. The same holds when rules of the game are changed. If every change of competition,

176 BGE/ATF 5.01.2007, 4P.240/2006 (FC Rayo), Sachsverhalt A; BGE/ATF 9.01.2009, 4A_460/2008 (Dodo), cons. 6.2.

177 Art. 13 FIFA Statutes and Art. 7bis UEFA Statutes. See for an example art. 4 I of the Swiss Football Association's articles of association: "Die Statuten, Reglemente und Beschlüsse der FIFA und der UEFA, des Verbandes, seiner zuständigen Organe und ständigen Kommissionen sind für alle Klubs und deren Mitglieder, Spieler und Funktionäre, für alle Abteilungen, ihre Organe und anerkannte Unterorganisationen verbindlich."

selection or other rules needs to be implemented first, uniform application will be jeopardised.

The question whether or not dynamic reference is acceptable has been extensively discussed in Germany and Switzerland. By contrast, this concept has not received much attention in the other researched jurisdictions.[178] In the Netherlands, only Rensen has noted the possibility to refer to rules of a federation higher up in the pyramid. In his view, a simple reference is insufficient; an association can only oblige its members to comply with the regulations of an umbrella organisation if the provisions in question are cognisable from the association's articles.[179] Nonetheless, in other legal relations it is not uncommon to incorporate a reference to rules that are drafted by third parties. Commercial contracts for instance often refer to general contract terms drafted by trade organisations.[180] Such references can either refer to a specific edition or to the current edition of certain general contract terms (dynamic reference). In the Netherlands, references are assessed on the basis of the general rules of contract law. The civil courts mainly check whether the reference is sound and take into consideration the social circles to which the parties belong, the professionalism of the parties and the prevalence of the use of referrals in the industry.[181] Depending on a party's social circle, his profession and/or his level of knowledge about a certain subject, he will be held to a lower or higher standard by the courts. A reference to the rules of the international federation can thus be deemed invalid when an amateur athlete is concerned, but valid in the case of a professional athlete as the latter is held to a higher standard and expected to be familiar with the rules that govern his profession.

In France the *Conseil d'État* held, with regard to implementation of the rules of an international federation, that a national federation is free to replicate rules set by international federations in its own regulations as long as these stay within the boundaries set by national law.[182] However, the dogmatic construction of dynamic reference as such does not seem to be an issue in France. This might be explained by the fact that in France individual athletes are directly subordinated to the regulations of the national federations by virtue of the licensing system and perhaps also by the strong national focus of most research.[183]

178 Especially in England, dynamic reference does not seem to be an issue.

179 G.J.C. Rensen, *Extra-verplichtingen van leden en aandeelhouders: een wetenschappelijke proeve op het gebied van de rechtsgeleerdheid* (diss. Nijmegen), Deventer: Kluwer 2005, pp. 182-183.

180 In the Netherlands, especially in logistics and construction.

181 S. van Gulijk and G.J.S. van der Velden, 'Het gebruik van doorverwijzingen in algemene voorwaarden. Bouw en logistieke dienstverlening vergeleken', *Tijdschrift voor Bouwrecht* 2012, pp. 985-991.

182 CE 20.11.2003, n°369474, *Les Cahiers de droit du sport* 2005/2, p. 49, note J.-M. Duval.

183 Art. L.131-3 of the *Code du sport*. See section 5.

In Germany, a significant number of authors is of the opinion that dynamic reference is not allowed.[184] One cited argument is that dynamic reference is contrary to § 71 BGB, which requires that amendments to the articles of association are to be entered in the register of associations in order to become effective.[185] So far the debate has found little judicial resonance. In 1988 the *BGH* expressly accepted static reference but did not rule on the issue of dynamic reference.[186] In the *Reitsport* case, which concerned the subordination of indirect members to disciplinary regulations of the national federation, the *BGH* acknowledged the practical difficulty/importance for sports federations to enforce the rules on all levels. Although the court expressly referred to the majority opinion which dismisses dynamic reference, it did not take a clear position in the debate.[187] More recently the debate has shifted towards a more nuanced approach. It has been argued that dynamic reference cannot be accepted or rejected on principle; rather the admissibility depends on certain conditions. When these conditions are met, dynamic reference is in principle acceptable.[188] The reference must be clear, unambiguous and transparent. In addition, the referenced regulations must be published.[189]

Unlike in Germany, in Swiss legal doctrine dynamic reference is explicitly accepted by the majority of authors.[190] Riemer, for example, notes that

184 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 21, Rn. 121; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25 Rn. 7; Ulrich Haas and Clemens Prokop, 'Zu den formellen Grenzen der vereinsrechtlichen Disziplinargewalt im Rahmen von Unterwerfungsvereinbarungen', *SpuRt* 1998/1, pp. 15-19, p. 17; Horst Hilpert, *Das Fußballstrafrecht des Deutschen Fußball-Bundes (DFB)*, Berlin: De Gruyter 2009, pp. 7 and 54; Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Köln: Verlag Dr. Otto Schmidt 2012, Rn. 51. See also Jan. F. Orth, *Vereins- und Verbandsstrafen am Beispiel des Fußballsports* (diss. Köln), Frankfurt am Main: Peter Lang GmbH 2009, p. 160ff. for a detailed examination of the different views.

185 See for example: Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25 Rn. 7 and Jochen Kotzenberg, *Die Bindung des Sportlers an private Dopingregeln und private Schiedsgerichte* (diss. Marburg), Baden-Baden: Nomos 2007, p. 41.

186 BGH 10.10.1988 – II ZR 51/81 – available at: www.jurion.de.

187 BGH 28.11.1994 – II ZR 11/94 – *NJW* 1995, 583 = BGHZ 128, 93 (cons. I.2c). This case will be discussed further below regarding indirect membership.

188 Peter W. Heermann, 'Bindung an die Satzung übergeordneter Verbände durch dynamische Verweisungsklauseln', ZHR 174/2010, pp. 250-292, pp. 260 and 264; Jan F. Orth and Patrick Pommerening, 'Zulässigkeit und Wirksamkeit dynamischer Verweisungen im Sportrecht', *SpuRt* 2010/6, pp. 222-224.

189 Jan F. Orth and Patrick Pommerening, 'Zulässigkeit und Wirksamkeit dynamischer Verweisungen im Sportrecht', *SpuRt* 2010/6, pp. 222-224, p. 224.

190 Jérôme Jaquier, *La qualification juridique des règles autonome des organisations sportives* (diss. Lausanne), Berne: Staempfli Editions SA 2004, p. 98; Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 113; Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, no. 508; Marco Steiner, *La soumission des athlètes aux sanctions*

changes in an umbrella federation's articles do not only apply to its own member associations but also to their members; explicit subordination to the federation's rules in the member association's articles is not a prerequisite.[191] Additionally, it has been suggested that as long as the rules are available for consultation, there is nothing against dynamic reference to a federation's articles or regulations.[192] An explanation for the relative absence of a debate can be sought in the fact that Swiss association law contains few legal constraints. As mentioned above, the relative liberal nature of Swiss association law is deemed the primary reason why most international sports federations are seated in Switzerland.[193] Unlike German law, Swiss association law does not require amendments to an association's articles to be publicly registered.[194] Unsurprisingly, the majority of Swiss authors deem the legal form of the association perfectly suitable to enforce rules on all levels.[195]

The Swiss Federal Supreme Court is not opposed to dynamic reference either. Although a principal ruling on the issue has not yet materialised, the Court accepted a dynamic reference in a cantonal statute to technical regulations in 1997.[196] Much earlier, in a case where a woman was a member of both an association and its umbrella federation, the dynamic reference in question was deemed acceptable on the ground that nothing prevents an association from constituting itself as a branch of another association and recognise its articles. According to the Court, a subsequent amendment to these articles has to be binding on the umbrella federation's members – i.e. the

sportives. Étude d'une problématique négligée par le monde juridico-sportif (diss. Lausanne), Lausanne 2010, pp. 140-141. More critical: Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 47.

191 Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, no. 508; referring to BGE/ATF 70 II 63; see below.

192 Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 113.

193 Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 33; Hans-Michael Riemer, 'Sportrechts-Weltmacht Schweiz Internationale Sportverbände und schweizerisches Recht', *Causa Sport* 2004, pp. 106-107, p. 106.

194 See § 71 (1) German BGB. See also Peter W. Heermann, 'Bindung an die Satzung übergeordneter Verbände durch dynamische Verweisungsklauseln', *ZHR* 174/2010, pp. 250-292, p. 275.

195 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 112; Raoul Dias, *Der Verein als herrschendes Unternehmen im Konzern. Unter besonderer Berücksichtigung der Sportvereine und Sportorganisationen in der Schweiz*, Zürich/St. Gallen: Dike Verlag AG 2010, p. 96; Thilo Pachmann, *Sportverbände und Corporate Governance*, Zürich/St. Gallen: Dike Verlag AG 2007, p. 120; Piermarco Zen-Ruffinen, *Droit du Sport*, Zürich/Basel/Geneva: Schultess Médias Juridiques SA 2002, p. 46.

196 BGE/ATF 123 I 112, p. 127ff.

branch associations – as well as on the members of these branch associations.[197] More recently, the Court had the chance to express its view on references in regulations of sports federations. Brazilian football player Dodo appealed an award by the CAS *inter alia* disputing its competence on the grounds that the Brazilian federation's articles did not provide an arbitration clause. An arbitration clause was, however, laid down in the FIFA statutes. The Brazilian federation's articles contained a provision which obliged its adhered athletes to comply with the FIFA regulations. The Swiss Federal Supreme Court held that in line with previous case law this global reference sufficed to establish the competence of the CAS.[198] However, no principal ruling materialised as the Court was very brief in its considerations. In addition, the global reference was not to any behavioural or disciplinary rule, but to an arbitration clause, which results in the application of many other rules. Therefore, as in the *Rayo* case, it is difficult to draw general conclusions from this case other than that the Court still seems to accept dynamic reference, albeit implicitly.

2.7 ENFORCING THE RULES: DEFINITION, PURPOSE, AND JUSTIFICATION OF THE DISCIPLINARY SANCTION

The disciplinary sanction is the instrument which sports organisations can employ to enforce their rules. As a legal notion the disciplinary sanction is not easy to define. Despite the fact that most disciplinary sanctions will be recognised as such, no single legal definition exists to describe this pheno-

197 BGE/ATF 70 II 63. ("Allein nichts hindert einen Verein, sich als Zweigverband eines anderen zu konstituieren und dessen Satzungen anzuerkennen. (..) Auch eine spätere Änderung dieser Statuten muss für die Zweigverbände nicht minder als für die diesen und dem Gesamtverbande zugleich angehörenden Mitglieder verbindlich sein.")

198 BGE/ATF 9.01.2009, 4A_460/2008 (Dodo), cons. 6.2. With references to earlier case law.

menon.[199] Still, the classification, justification and goal(s) of the sanction are discussed in similar fashion in the different jurisdictions.[200]

In the Netherlands, different definitions of disciplinary law and the disciplinary sanction have emerged in literature.[201] However, not much has been written on disciplinary law in associations in general or in sports in particular.[202] According to several authors disciplinary law bears a close resemblance to both penal law and civil law.[203] Nonetheless, it has been classified as a *sui generis* field of law.[204] In contrast, disciplinary law of associations is considered private law (*privaatrechtelijk tuchtrecht*)[205] Regarding the goals of the disciplinary sanction, De Doelder alleges that *normhandhaving*– the enforcement of standards – is the primary goal of every legal system, including disciplinary law.

In France, definitions of the disciplinary sanction vary.[206] On the one hand it has been argued that it is primarily *une mesure répressive*.[207] On the other hand, according to the more traditional approach it is primarily a sanction

199 Not even in Switzerland where one of the first authors to treat and define the subject was Corbat in 1974. "Les peines statutaires sont des désavantages que le membre d'un groupement s'engage à subir s'il n'exécute pas ou exécute imparfaitement ses devoirs envers le groupement ou les autre membres et visent toujours à maintenir l'ordre juridique interne". Claude Corbat, *Les peines statutaires*, Fribourg: Imprimerie St-Paul 1974, p. 70. Steiner's definition specifically envisages the disciplinary sanction imposed by sports associations. "La sanction sportive est une mesure répressive de droit privé prise par une fédération sportive nationale contre un athlète individuel qui vise à maintenir l'ordre social interne de la fédération auquel l'athlète est soumis en vertu d'un ou plusieurs liens statutaires et/ou contractuels". Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 64. Although Steiner limits his definition to individual athletes, teams, clubs and all subordinate federations can also be subject to a disciplinary sanction. The application of disciplinary measures to the latter is governed by the same principles as the sanctioning of an individual athlete.

200 Except in England, where these questions do not seem to be a subject of concern.

201 See for an extensive overview M.J.C. Leijten, *Tuchtrecht getoetst* (diss. Tilburg), Gouda: Quint 1999, pp. 5-44.

202 In contrast, research has been mainly focused on statutory disciplinary law, which includes *inter alia* the military, medical professions and legal professions. Disciplinary law of associations is qualified as non-statutory disciplinary law.

203 H. de Doelder, *Terrein en beginselen van tuchtrecht* (diss. Tilburg), H.D. Tjeenk Willink 1981, p. 33 and the authors cited there; A.H. Santing-Wubs, 'Orde en tucht, tucht in orde?' *Ars Aequi*, 2003/7-8, pp. 552-562, p. 553.

204 See Z.D. Laclé and N.J.H. Huls, 'De rechterlijke betrokkenheid bij tuchtrecht moet transparanter' *TREMA* 2004, 6, pp. 231-237, p. 232 and J.L.S.A.W.B Roes, 'Wat is tuchtrecht?' *WPNR* 2008/6778, pp. 919-927, p. 919 both citing H. de Doelder, *Terrein en beginselen van tuchtrecht* (diss. Tilburg), H.D. Tjeenk Willink 1981, pp. 33-34.

205 M.J.C. Leijten, *Tuchtrecht getoetst* (diss. Tilburg), Gouda: Quint 1999, p. 33.

206 See on this subject Pascal Ancel and Joël Moret-Bailly (eds.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Étienne 2007.

207 Frédéric Laurie, 'La constitutionnalisation du droit disciplinaire', Proceedings of the *VIe congrès français de droit constitutionnel, A.F.D.C., Montpellier, 9-11 juin 2005*, available at: <http://www.droitconstitutionnel.org/congresmtp/textes2/LAURIE.pdf>, p. 3-7.

whose effect is purely moral and preventive.[208] It is a power founded upon the idea the common objective is served by the sanctioning of members who endanger the pursuit of this objective.[209] In this view, inspired by Hauriou's institutional theory, punishment is only secondary.[210] In literature it is recognised that although the disciplinary sanctions approach the penal law regime to some extent – Simon notes for instance the strict application of the principle of *légalité des sanctions*[211] – it must be distinguished.[212] Nevertheless, as a result of the state interference, the disciplinary sanction is qualified as an administrative act.

In Germany, too, the justification of the disciplinary sanction is linked to the rationale of the association. As the possibility to create and enforce disciplinary sanctions derives from the freedom of association and is only permitted because of the voluntary subordination of the members to the associations' regulations.[213] With regard to the goal of the sanction, the *BGH* has stated that the sanction serves to penalise infringements of the membership duties.[214]

As in Germany, in Switzerland it is argued that the primary function of the disciplinary sanction is to punish. However, the sanction must also prevent and dissuade, both through the standards themselves and through its enforcement. It is deemed to encourage the sanctioned member not to reoffend and to prevent other members from similar behaviour.[215] In 1926 the Federal Supreme Court expressed its view of the nature of a disciplinary sanction. According to the Court,

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208 Alfred Légal and Jean Brethe de la Gressaye, *Le pouvoir disciplinaire dans les institutions privées*, Sirey 1938, p. 7.

209 "Un pouvoir juridique ayant pour objet d'imposer aux membres du groupe, par des sanctions déterminées, une règle de conduite en vue de les contraindre à agir conformément au but d'intérêt collectif qui est la raison d'être de ce groupe." Alfred Légal and Jean Brethe de la Gressaye, *Le pouvoir disciplinaire dans les institutions privées*, Sirey 1938, p. 152.

210 Eric Millard, Theories de l'institution et disciplines, in P. Ancel et J. Moret-Bailly (ed.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Etienne 2007, pp. 29-40, p. 34.

211 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 154; Frédéric Buy, 'Pas de responsabilité disciplinaire du fait d'autrui!, note sur T. adm. Paris 16.03.2007 (Paris Saint Germain)', *Les Cahiers de Droit du Sport* 2007/8, pp. 157-160, p. 159.

212 Frédéric Laurie, 'La constitutionnalisation du droit disciplinaire', Proceedings of the *VIe congrès français de droit constitutionnel, A.F.D.C., Montpellier, 9-11 juin 2005*, available at: <http://www.droitconstitutionnel.org/congresmtp/textes2/LAURIE.pdf>, pp. 3-7.

213 BGHZ 29, 352, p. 355. BGHZ 13, 5, p. 11; BGHZ 21, 371, p. 375.

214 BGHZ 21, 370, p. 376: "Eine Vereinsstrafe dient der Ahndung von Verletzungen der Vereinspflichten und hat mit Schadenersatz nichts zu tun."

215 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 219; Hans Bodmer, *Vereinsstrafe und Verbandsgerichtbarkeit: dargestellt am Beispiel des Schweizerischen Fussballverbandes* (diss. St. Gallen), Bern: Verlag Paul Haupt 1989, p. 58.

> "[u]ne décision de cette nature ne peut être assimilée ni à un jugement pénal (…) ni même à une sentence arbitral, puisque celle-ci a pour objet de statuer sur le mérite d'une prétention litigieuse et qu'en matière d'amende, l'association ne devient créancière du sociétaire fautif qu'en vertu de la décision même qui la prononce. Le pouvoir d'infliger des amendes découle uniquement des statuts, autrement dit d'une convention d'ordre privé, et il suit de là nécessairement qu'en cas de contestation sur le bien-fondé de la prétention de l'association le conflit ne peut pas être tranche que par les tribunaux".[216]

Resemblances between penal law and disciplinary law have been acknowledged in literature. However, the purely private-law nature of the disciplinary sanctions is undisputed.[217]

With regard to the fixation of sanctions, it must be noted that there are many different types and forms of disciplinary sanctions. For example, FIFA has laid down 21 different sanctions in its articles of association.[218] The different sanctions can roughly be regrouped into three categories: moral sanctions, pecuniary sanctions and sanctions that take away certain benefits.[219]

Firstly, moral sanctions are disadvantages of a dishonourable nature when a member fails to perform the duties that he owes to the association, to another member or to third parties linked to the association.[220] Examples are: a warning, a reprimand and the publication of the sentence. Secondly, pecuniary sanctions can be defined as the payment of an amount of money when a member fails to perform his or her duties. Fines are an extremely frequent sanction. Often, pecuniary sanctions and other types of sanctions are cumulated. The actual amount of the fine is to be determined by the applicable regulations of the federation: it can be set within a framework or set at a maximum. Thirdly, sanctions that consist of partial or total deprivation of the benefits deriving from the membership. This deprivation can be divided in the deprivation of financial benefits and deprivation of non-financial benefits. For example: a club or an athlete can be sentenced to give back earned rewards or be excluded from participation in certain competitions or tournaments. Depending on the sport, exclusion from participation in a tournament can have

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216 BGE/ATF 52 I 75.

217 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 220; Jérôme Jaquier, *La qualification juridique des règles autonomes des organisations sportives* (diss. Lausanne), Berne: Staempfli Editions SA 2004, p. 46; Anton Heini, 'Die gerichtliche Überprüfung von Vereinsstrafen', in: Peter Forstmoser and Walter R. Schlüp (eds.), *Freiheit und Verantwortung im Recht: Festschrift zum 60. Geburtstag von Arthur Meier-Hayoz*, Bern: Stämpfli Verlag SA 1982, pp. 223-234, pp. 225-226; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 64.

218 See Art. 65 FIFA Statutes (July 2012).

219 Compare Claude Corbat, *Les peines statutaires*, Fribourg: Imprimerie St-Paul 1974, p. 94; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 67.

220 Claude Corbat, *Les peines statutaires*, Fribourg: Imprimerie St-Paul 1974, p. 94.

financial consequences; i.e. missing out on a participation fee or sponsorship bonuses. However, these must be distinguished from the direct deprivation of financial benefits.

2.8 Requirements for application of a disciplinary sanction

As examined in Section 2.3, all created rules and their application are subject to overall limits set forth by the legal system. In short, these are the interdiction to breach the law, public policy, morality, the general principles of law, the articles of association and the specific object for which the association was created. In addition to these general conditions, disciplinary sanctions have to meet a few other requirements in order to be legally applied.

Express mention, equal treatment and proportionality

In three of the five jurisdictions it has been developed in case law that any decision by an association concerning a sanction is required to be based on an express provision in an association's regulatory framework.[221] This implies that if there is no such provision, no disciplinary sanction can be applied. The provision must be in force at the time of the offence.[222] To put it briefly, the imposition of a disciplinary sanction is subject to the principle of legality.

Although so far no Dutch court has decided on this matter, in literature it is assumed that a sanction can be imposed without an express provision.[223] In England, the approach is slightly different as disciplinary rules are terms of the contract between members and associations. As mentioned above, in *Davis v Carew-Pole* it was held that "the quasi-judicial body is bound by its own rules and can only mete out punishment in strict accordance with such rules".[224] It would thus seem that express terms are required. Moreover, in German and Swiss literature it is accepted that a general provision confirming the disciplinary power suffices, the specific disciplinary rules may be specified

221 France: CE 15.05.1991, n°124067 and CE 12.07.1991 (Girondins de Bordeaux) , *Revue français de Droit administratif* 1992, p. 203, note G. Simon. Germany: BGHZ 47, 172, p. 178; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 35, Rn. 36-38. Switzerland: BGE/ATF 52 I 75; See also: Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, pp. 120-121 and the authors cites there.

222 BGHZ 55, 381, p. 385; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 35, Rn. 38.

223 A.H. Santing-Wubs, 'Orde en tucht, tucht in orde?' *Ars Aequi,* 2003/7-8, pp. 552-562, p. 554; H. de Doelder, *Terrein en beginselen van tuchtrecht* (diss. Tilburg), H.D. Tjeenk Willink 1981, pp. 77-79. Soek, however, argues that with regard to doping offences, the principle of legality applies. Janwillem Soek, *The strict liability principle and the human rights of the athlete in doping cases* (diss. Rotterdam), 2006, p. 314ff., available at: <http://repub.eur.nl>, p. 314ff.

224 *Davis v Carew-Pole* [1956] WLR, p. 838.

in secondary regulations.[225] This includes references to rules of other organisations to the extent that members can peruse these regulations.[226]

The link between a certain offence and its sanction is generally only clearly established with regard to game violations. For instance article 49 of the FIFA Disciplinary Code provides that misconduct against match officials, after having received a direct red card, can be sanctioned with an overall suspension for: a) at least four matches for unsporting conduct towards a match official; b) at least six months for assaulting (elbowing, punching, kicking etc.) a match official; c) at least 12 months for spitting at a match official. Furthermore it is possible that a fine is imposed.[227] However, in cases of application that deal with other violations than violations of the game, the choice of the kind of sanctions to be adopted and its extent is at the discretion of the internal judicial bodies.

Besides the requirement of legality, the application of a disciplinary measure must also comply with the principles of equal treatment and proportionality.[228] The principle of equal treatment entails that similar situations should be treated in the same manner. The principle of proportionality is a general principle of law. It implies that all specific circumstances of a situation will be taken into consideration in its assessment of it.

Fault and strict liability

In considering the requirements for validly imposing a sanction, the question arises whether fault is such a requirement. None of the jurisdictions provide

225 Germany: Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 25, Rn. 10; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25, Rn. 3 and 23; Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Köln: Verlag Dr. Otto Schmidt 2012, Rn. 984. Switzerland: Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 228; Hans Bodmer, *Vereinsstrafe und Verbandsgerichtbarkeit: dargestellt am Beispiel des Schweizerischen Fussballverbandes* (diss. St. Gallen), Bern: Verlag Paul Haupt 1989, p. 102; Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, p. 847.

226 See on references section 6.

227 Art. 49 FIFA Disciplinary Code.

228 In the Netherlands case law or literature is lacking on this point. England: *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB), para 43. France: See CE 22.10.1993, *Recueil Dalloz* 1995, p. 58 obs. J.-P. Karaquillo; CE 20.10.2008, n°320111 (Paris St. Germain/FFF) and Frédéric Buy, 'Pas de responsabilité disciplinaire du fait d'autrui!, note sur T. adm. Paris 16.03.2007 (Paris Saint Germain)', *Les Cahiers de Droit du Sport* 2007/08, p. 159. Germany: Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 35, Rn. 41. Switzerland; Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, pp. 111-114; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, pp. 120-121.

a clear definitive answer to this question. In the Netherlands, this subject has not yet been a topic of discussion in case law. So far, the *Hoge Raad* has only enunciated that different standards apply in disciplinary proceedings compared to ordinary private-law proceedings.[229] In Dutch literature both sides have been argued.[230] In France, case law remains faint.[231] This is exemplified by the fact that although in 2007 the *Conseil d'État* upheld a sanction imposed on football club Lille Metropole that was based on strict liability for the behaviour of its supporters, it did not elaborate on the requirement of fault in general.[232]

Like French law, German law is characterised by contrasting views on this point. According to older case law of the *BGH*, the imposition of a disciplinary sanction does not necessarily require fault.[233] However, over time doctrinal views have developed into the direction that fault (*Verschulden*) is required.[234] Additionally, more recent case law seems to affirm this development, especially in cases where the sanction entails serious consequences or a condemnation.[235]

In Switzerland, too, it is suggested that fault is required.[236] However, this requirement is not absolute.[237] In 2007, the Swiss Federal Supreme Court considered that although strict liability infringes the personality rights of an athlete,[238] such a regulation can be justified by an overriding public interest; which in this case was the fight against doping.[239]

With regard to whether fault is required (and strict liability allowed) for the valid application of a disciplinary sanction, both case law and literature leave us with a contrasting impression. Nevertheless, it must be remarked that

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229 HR 13.10.2006, *NJ* 2008, 528 and 529 (Vie d'Or), note C.C. van Dam.

230 H. de Doelder, *Terrein en beginselen van tuchtrecht* (diss. Tilburg), H.D. Tjeenk Willink 1981, p. 106ff; T.J. van der Ploeg, 'Rafels en oude wijven in de verbindingen publiekrecht-tuchtrecht-rechtspersonenrecht-verbintenissenrecht' *TVVS* 1989, pp. 226-227; Janwillem Soek, *The strict liability principle and the human rights of the athlete in doping cases* (diss. Rotterdam), 2006, p. 314ff., available at: <http://repub.eur.nl>, pp. 191-192.

231 Mathieu Maisonneuve, 'De la faute disicplinaire en matière sportive', *Lamy Droit du Sport* n58 2008, pp. 1-3.

232 CE 29.10.2007, n°307736, *Recueil Dalloz* 2008, p. 1381, note Maisonneuve.

233 BGHZ 29, 352.

234 Horst Hilpert, *Das Fußballstrafrecht des Deutschen Fußball-Bundes (DFB)*, Berlin: De Gruyter 2009, pp. 54, 58; Jan. F. Orth, *Vereins- und Verbandsstrafen am Beispiel des Fußballsports* (diss. Köln), Frankfurt am Main: Peter Lang GmbH 2009, pp. 101-103; Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Köln: Verlag Dr. Otto Schmidt 2012, Rn. 986.

235 OLG Frankfurt am Main 18.05.2000, 13 W 29/00, E. 63, available at: <www.openjur.de>; OLG Hamm 01.04.2008, 27 U 133/07, E. 33, available at: <www.justiz.nrw.de>.

236 Urs Scherrer, *Wie gründe und leite ich einen Verein?*, Schulthess Juristische Medien AG 2009, p. 81.

237 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 243.

238 Art. 28 CC.

239 BGE/ATF 134 III 193, cons. 4.6.3.2.2.

with regard to doping, where an athlete is strictly liable for any breach of the regulations, disciplinary sanctions have been imposed and upheld in most jurisdictions.[240]

Procedural safeguards

The sanctioning process must provide for procedural safeguards in order to ensure a proper procedure. In most jurisdictions, these safeguards have been developed in case law and literature. Naturally, slight differences in the specific interpretation of the various elements exist, but on the whole the following apply in all jurisdictions.[241] First, a member threatened with a penalty must be able to know his offence. Second, he must be able to defend himself, either verbally or in writing, before the penalty is being imposed. In other words, the right to be heard must be respected.[242] Third, decisions must be notified and motivated.[243] Only with respect for these safeguards will the sanction be valid. Violations of procedural rights by the associations' bodies may lead to annulment of the sanction by the civil court, even if the measure would have proved well-founded had it been imposed in a properly conducted procedure.

In comparison, in France procedural safeguards are laid down in the *Code du sport*, which imposes compliance with the standard procedures provided in the annexes.[244] These procedural rules, also affirmed by case law,[245] include: the right to an independent an impartial tribunal, a public procedure, reasonable duration, the right to defend oneself, including a fair hearing and notification and motivation of the decision.

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240 See for instance in England: *Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192, in France for a recent example: CE 25.05.2010, n°332045 and in Switzerland: Swiss Federal Supreme Court 04.08.2006, 4P.105/2006 and Swiss Federal Supreme Court 10.01.2007, 4P.148/2006.

241 England: See for instance *McInnes v Onslow-Fane* [1978] 1 WLR 1520*; Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192; *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA 1117. See more in detail: Michael J. Beloff, Tim Kerr and Marie Demetriou, *Sports Law*, Oxford: Hart Publishing 1999, p. 195ff. Germany: BGHZ 102, 265, p. 269; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 35, Rn. 46-51. Switzerland: BGE/ATF 52 I 75; BGE/ATF 90 II 347; Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, pp. 107-110.

242 An oral hearing is not always obligatory. See *Currie v. Barton*, 1988 WL 622889 and BGHZ 29, 352, p. 355.

243 Under English law there is no general duty to give reasons for decisions. However, it has been suggested that this should perhaps be part of the rules of natural justice. See William Wade and C.F. Forsyth, *Administrative Law*, Oxford University Press 2009, p. 436.

244 Article R.131-3 and R.232-86 of the *Code du sport*. See for the details Annexe I-6 art. R131-2 and R131-7.

245 See for example CE 10.04.1991, n°115482, *Recueil Dalloz* 1993, p. 345, obs. J. Morange and more recently CE 10.06.2011, n°327158; CE 26.12.2012, n°350833.

2.9 CONCLUDING REMARKS

No unbridled imagination is needed to recognise that without rules, sport could not function. After all, how would we know how to play or who the winner is? Rules of the game were only the beginning of regulations in sports. Meanwhile, however, extensive regulatory frameworks have been created in order to govern sports on different levels. The goal of this chapter was to provide an overview of the main legal framework in which national and international sports organisations operate with special regard to rules of a disciplinary nature. The comparison that has been made across five European countries showed that, in general, the legal status of disciplinary regulations in sports is strikingly similar and that many issues are approached and reviewed in the same way.

By and large, the five jurisdictions researched display similar modalities regarding the design of the regulatory framework in which sports organisations operate (2). The significant position of the association, as the preferred organisational form, and thus association law is evident in most countries. The exception is England, where associations are generally incorporated and thus subject to company law. Nevertheless, in all jurisdictions the applicable legal framework proved to be rather lenient, being limited to provisions treating only the internal organisation and membership of the association. Associations are allowed to adjust the internal organisation to their own needs. In four of the five jurisdictions, this autonomy is said to be founded on the civil right of freedom of association. This right does not just include the right of people to freely create and adhere to associations, but also to autonomously decide how to organise them internally. Still, the regulatory power of associations is limited by both national law and their self-created internal regulations (3). It may be inferred from the above that limits of both national law and internal regulations in the respective countries are similar to a large extent. Most notably, in all jurisdictions an association is bound by the specific object for which it was created and by its articles of association and secondary regulations. In France, however, due to the interference of the state, certified and delegated federations are subject to more detailed regulations.

With regard to the binding nature of disciplinary rules, it can be concluded that although certain differences remain, the jurisdictions covered reveal the development of a shared understanding (4). The binding nature of the rules set by national and international sports federations differs depending on the relationship of an individual actor with a certain federation. In the civil-law countries, the nature of the relationship between an association and its members is generally characterised as institutional. The decisive factor in favour of this standpoint is the subordinate relationship between the federation and the members. Although it has been argued that the assertion that the relationship between a club or a player and FIFA has its source in association law is

fundamentally problematic as the club or the player has no real opportunity to influence the formation of social will that is imposed,[246] this is no less problematic with regard to the contract theory. If relations between FIFA and clubs or athletes are subject to contract law, there is no form of equality between the parties either. On the one hand FIFA, as the international governing body of football, adopts and amends the rules that are imposed on all participants in the sport. On the other hand, clubs and athletes are forced to submit to these rules if they want to play the game. Consequently, it is difficult to maintain that the relationship between FIFA and a club or an athlete derives from free will. The strong subordinate relationship between the federation and its members and the members of these members (clubs and athletes) is better explained in light of association law. By contrast, the common-law approach is very different from the outset. In England, members of an incorporated association are bound by contract. However, it has been suggested that this contract is a fictional one as there is no choice but to enter into it. Nonetheless, in all countries it is recognised that as a result of the monopoly position of national and international federations the relationship between the parties is essentially totally subordinate.

Furthermore, in all countries it is accepted that individual athletes and clubs that are not members of a federation can nevertheless be bound to its regulations (5). This subordination materialises either through an indirect relationship based on the 'membership chain' or through a licensing contract. Additionally, in order to bind all actors to the same rules it is common practice to refer to regulations of organisations that are positioned higher in the pyramid (6). By means of dynamic reference it is attempted to bind all athletes and clubs to changing rules at once. Actually, in the sporting context this phenomenon has only received attention in Germany and Switzerland, where dynamic reference can in general be accepted as long as the reference is clear and cognisable. In times of the Internet the latter requirement should not be too difficult to meet.

When rules are not followed a disciplinary sanction can be imposed. The disciplinary sanction is a peculiar legal notion (7). In all countries its definition and functions are debated in a similar fashion. It has features that bear resemblance to both penal law and private law. However, the dominant view is that the disciplinary sanction is of a private-law nature. In France too, disciplinary sanctions imposed by club associations are rooted in private law. Only because the French state interfered with sports at the national level are sanctions imposed by delegated federations of an administrative nature. A variety of sanctions exists, which can more or less be regrouped in three

246 Cédric Aguet, 'La sanction disciplinaire infligée par une fédération internationale à l'encontre d'un non-membre a-t-elle une source de droit de l'association? – Réflexions à la lumière de l'arrêt du Tribunal fédéral N° 4P.240/2006', *Jusletter 16 April 2007*, available at: <http://www. weblaw.ch>, no. 47.

categories: moral sanctions, pecuniary sanctions and sanctions that take away certain benefits. However, all sanctions are aimed at ensuring the membership obligations under the association's object.

Although an association's autonomy is extensive, it cannot justify the enforcement of sanctions as it wishes (8). Across the jurisdictions the requirements for applying a sanction bear close similarities. It is recognised that sanctions must be expressly mentioned in the regulatory framework and comply with the principles of equal treatment and proportionality. Furthermore, procedural safeguards must be met. Only with regard to the question whether fault is required does the situation remain obscure. Nonetheless, the position that fault is an absolute requirement is difficult to reconcile with the fact that sanctions that were imposed without fault have been upheld in different national courts.

3 Reviewing Disciplinary Sanctions in Sports*

3.1 INTRODUCTION

International and national sports federations[1] create, apply and enforce rules in order to regulate their sports. Associated athletes and clubs are required to comply with these rules, which are laid down in the federations' regulations. If they do not abide by the rules, a disciplinary sanction can be imposed. These sanctions can range from a fine to the exclusion of participation in certain matches, and in extreme cases even to exclusion from the federation.[2]

The creation and enforcement of the rules that athletes and clubs need to adhere to take place on different levels. From the outset it is the national or international sports federation that creates its own regulations and enforces them through an internal – and thus private – sanctioning system. Special disciplinary bodies or internal courts are tasked with imposing disciplinary sanctions upon those who have breached the rules. If a club or athlete disagrees with an imposed sanction, they can start a procedure to have the decision legally reviewed. Notwithstanding the private nature of the internal disciplinary process, rules of national law take up a prominent place in the review of the sanction.

The review of a federation's decision to impose a disciplinary sanction is conducted either by a national court or in arbitration – a form of private dispute resolution. If the sanction is reviewed in arbitration, the arbitral award – the goal of which is to reach a final decision – can in turn also be challenged before a national court. In the review of disciplinary sanctions different legal frameworks – the private rules of sports federations and national law – thus cross each other's paths. The aim of this chapter is to map out the interrelation between these frameworks by analysing the two different paths that exist for the review of a disciplinary sanction imposed by a sports federation.

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1 A national sports federation is the governing body for its sport(s) in a certain country. An international federation governs the sport on the global level and exercises a monopoly position.

2 See for an overview Chapter 2.

This chapter is structured as follows. Section 3.2 focuses on the review performed by national courts. When athletes or clubs face a disciplinary sanction from their sports federation, this decision can be reviewed in court. In this review, the private regulations of the sports federation, or at least their concrete application, are tested against rules of national law. The scope of review that is applied in these cases is discussed per country. This is followed by an overview of the review of disciplinary sanctions in arbitration. The regulations of a sports federation can provide that the federation's decisions, including disciplinary sanctions, are to be reviewed by arbitration instead of by a national court. Although this review technically stays in the private sphere, arbitration proceedings are governed by national private law. The first part of Section 3.3 analyses the requirements set by national law in regard to this arbitration procedure. The second part of Section 3.3 discusses the option of a challenge of the arbitral award by a national court. The analysis includes the requirements and issues related to overturning arbitral awards in general, and awards by the Court of Arbitration for Sport (CAS) specifically. Finally, the different interrelations found between private rules of sports federations and national law will be summarised in Section 3.4.

3.2 THE SCOPE OF REVIEW OF DISCIPLINARY SANCTIONS BEFORE NATIONAL COURTS

In principle, whenever a sports federation imposes a sanction, this decision can be challenged before a national court. The primary jurisdiction of the courts can only be ousted when a valid arbitration agreement exists. This situation is discussed in Section 3.3.

When disciplinary sanctions are reviewed by national courts, the private regulations of sports federations, or at least their concrete application, are tested against rules of national law. This section provides an overview of the scope of this review. In other words, how and under what circumstances can the courts intervene in the decision-making of the federations? The goal is to explore how the interrelation between national law and the enforcement of sports federations' regulations compares between the different legal frameworks.

3.2.1 The Netherlands

In the Netherlands, most cases in which the review of a disciplinary sanction is at issue are brought before the judge in preliminary relief proceedings (*voorzieningenrechter*) of one of the district courts. Generally, these decisions

are not appealed.[3] The legal basis upon which the review is founded is ambivalent as two different approaches can be discerned. Nevertheless, both approaches require that the claimant has exhausted all available internal appeal measures that the sports federation provides.[4] An example of such a measure is found in the regulations of the Royal Dutch Football Association (*KNVB*), which after a sanction is imposed by the disciplinary commission provides for an internal appeal before the appeals commission.[5]

The first approach has its basis in legal entity law. Based on articles 2:14 and 2:15 of the BW a resolution (*besluit*) of an association's organ can be challenged if it is contrary to the law, the articles of association, an internal regulation or if it conflicts with the standards of reasonableness and fairness imposed by article 2:8 BW.[6] The second approach, which seems to prevail in practice, is to regard the decisions of disciplinary bodies of associations as a binding opinion (*bindend advies*).[7] Under Dutch law, the binding opinion is a decision on an uncertainty or dispute taken by a third party.[8] This legal figure falls under the scope of the contract of settlement, which is governed by art. 7:900-910 BW. A binding opinion can be challenged solely on the ground that 'it would be unacceptable for a party to be bound to it, in connection with the content or the manner of its establishment in the given circumstances, according to standards of reasonableness and fairness'.[9] It should be noted that this formula is almost identical to that in art. 2:8 BW, which requires the legal entity and those involved in its organisation to act according to standards

3 R.J.J Eshuis, N.E. de Heer-de Lange & B.J. Diephuis (eds.), *Rechtspleging Civiel en Bestuur 2010,* 2011, p. 98, <http://www.cbs.nl> [accessed: 14 December 2014].

4 P.L. Dijk & T. J. van der Ploeg, *Van vereniging en stichting, coöperatie en onderlinge waarborgmaatschappij,* Deventer: Kluwer 2007, p. 150; H.J. Snijders, C.J.M. Klaassen & G.J. Meier, *Nederlands burgerlijk procesrecht*, Deventer: Kluwer 2011, no. 87.

5 *Reglement Tuchtrechtspraak Betaald Voetbal*, art. 13-17, <www.knvb.nl> [accessed: 14 December 2014].

6 Art. 2:14 BW only states that a resolution is null and void when it is contrary to the law or the articles of incorporation. However, in the parliamentary debate it has been argued that the norm of art. 3:40 BW – the general provision concerning juridical acts that are contrary to the law, public policy or good morals – also applies to resolutions of associations. See, C.J. van Zeben, *Parlementaire geschiedenis van het nieuw BW. Boek 2. Rechtspersonen*, 1962, p. 152.

7 Rb. Utrecht 14.041978, LJN: AC3512, *NJ* 1978, 496; Rb Arnhem 11.09.1985, LJN: AH0828, *KG* 1985, 296; Rb. Arnhem 17.05.1990, LJN: AH3134, *KG* 1990, 193; Rb. Utrecht 09.07.1996, LJN: AH5649 *KG* 1996, 259; Rb. Utrecht 26.07.2006, LJN: AY5200; Rb. Utrecht 21.03 2007, LJN: BA1595; Rb. Zutphen 21.07.2010, LJN: BN1808; Rb. Utrecht 18.05.2011, LJN: BQ6349; Rb. Zwolle 16.11.2011, LJN: BU4893, *RN* 2012, 19.

8 A.C. van Schaick, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 7-VIII*, Bijzondere overeenkomsten*, Deveter: Kluwer 2012, no. 170.

9 Article 7:904 BW, which codified the case law rule from the Hoge Raad (Dutch Supreme Court) HR 29.01.1931, *NJ* 1931, 1317.

of reasonableness and fairness in all their relations.[10] Regardless of the approach taken,[11] the ability of the reviewing body is marginal as it is limited to the assessment of whether the deciding body could reasonably have come to the decision.[12]

3.2.2 England

According to English law, the jurisdiction of disciplinary bodies of sports associations is generally based on contract. Disciplinary sanctions are therefore to be controlled by the ordinary remedies for breach of contract.[13] The remedies available depend on the nature of the right invoked by the claimant and are generally open after internal remedies are exhausted.[14] Traditionally, in common law there is a primacy of damages. However, in most sports cases damages will not be a suitable solution as disciplinary sanctions often have an effect on the eligibility of an athlete or club to participate in competition. Therefore an injunction, a court order that requires a party to perform or refrain from performing a particular act, is often a more suitable remedy.

Despite the undisputed contractual basis of the relationship between athletes, clubs and sports federations,[15] there has been a long-standing debate about whether sports federations are subject to the public-law remedy of judicial review, under which the legality of the decision-making process of a body exercising a public function is reviewed, instead of the merits.[16] This

10 For an overview of the differences and their consequences in Dutch law, see R.H.C. van Kleef, 'Samenloop bij de rechterlijke toetsing van tuchtrechtelijke sancties in de sport' in *WPNR* 2013/6965 , pp. 161-67.

11 In case law regarding disciplinary sanctions in sports it is not unusual to see the appeal based on both grounds: Rb. Utrecht 21.03.2007, LJN: BA1595; Rb. Zutphen 21.07.2010, LJN: BN1808; Rb. Zwolle 16.11.2011, LJN: BU4893 *RN* 2012, 19.

12 HR 02.12.1983, *NJ* 1984, 583.

13 William Wade and C.F. Forsyth, *Administrative Law (10th edn.)*, Oxford University Press 2009, p. 538-39.

14 Adam Lewis and Jonathan Taylor, *Sport: law and practice*, Haywards Heath, West Sussex: Tottel 2008, p. 292-93.

15 See R.H.C. van Kleef, 'The legal status of disciplinary regulations in sport'in *The International Sports Law Journal* 2013, published online 18 December 2013, DOI 10.1007/s40318-013-0035-z, para 4.

16 Historically, the remedies of administrative law were reserved to authorities whose powers were granted for governmental purposes but over time have been extended to other bodies. However, despite the creation of a broader 'public function test' (in *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815) the English courts have held consistently that challenges to actions of sports governing bodies should be brought in private-law proceedings and not by way of judicial review. (Landmark decision: *R v Jockey Club ex p Aga Kahn* [1993] 1 WLR 909. See also *R v Football Association of Wales ex p Flint Town United Football Club* [1991] COD 44; *R v Disciplinary Committee of the Jockey Club ex p Massingberd-Mundy* [1993] 2 All ER 207*; R v Jockey Club ex p RAM Racecourses Ltd* [1993] 2 All ER 225; *R v Football Association Ltd ex p Football League* [1993] 2 All ER 833. The contractual

debate has been settled in *Bradley v. Jockey Club*. Graham Bradley was a successful steeplechase jockey who was charged with breaching the 'Racing Rules' for allegedly passing racing information to a gambler. The Jockey Club Disciplinary Committee imposed multiple sanctions, including disqualification for a period of eight years. The court developed a so-called private-law supervisory jurisdiction.

> "The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits. It is a review function, very similar to that of the court on judicial review. Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two, I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision-maker, and so forth."[17]

Nevertheless, as in the judicial review procedure the court's assessment is largely restricted to procedural elements.

> "The court's role, in the exercise of its supervisory jurisdiction, is to determine whether the decision reached falls within the limits of the decision-maker's discretionary area of judgment. If it does, the penalty is lawful; if it does not, the penalty is unlawful. It is not the role of the court to stand in the shoes of the primary decision-maker, strike the balance for itself and determine on that basis what it considers the right penalty should be."[18]

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relationship between a sports federation and its members stands in the way of this remedy. Existing criticism on this case law is mainly based on the fact that the virtually monopolistic powers of national sports federations result in the situation that a person who wishes to practise a certain sport cannot avoid submitting to its jurisdiction. (See Michael J. Beloff and Tim Kerr, 'Why Aga Kahn was wrong,' *Judicial Review* (1) 1996, pp. 30-33; and David Pannick QC, 'Judicial Review of Sports Bodies', *Judicial Review* (2) 1997, pp. 150-153, p. 153.) According to Gardiner *et al.*, 'the monopoly position held by many bodies is acknowledged as being reason enough to supervise their activities' (Simon Gardiner *et al.*, *Sports Law*, Routledge 2012, p. 134). Accordingly, the courts have intervened on multiple occasions to ensure disciplinary bodies apply the minimal standards of natural justice. (*Davis v Carew-Pole* [1956] WLR 883; *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329; *Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192. See also P. McCutcheon, 'Sports Discipline, Natural Justice and Strict Liability', *Anglo-American Law Review* 1999/28, pp. 37-72, p. 39; Adam Lewis and Jonathan Taylor, *Sport: law and practice*, Haywards Heath, West Sussex: Tottel 2008, p. 171.)

17 *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB), per Richards J at para. 37.

18 *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB), para. 43.

Since *Bradley* it can be argued that sports governing bodies owe broadly the same obligations as a matter of private law as they would if their decisions were susceptible to the public-law remedy of judicial review.[19] The court only assesses the legal aspects of a decision and not the content of policy choices. In other words: a court cannot interfere when an association's decision is 'reasonably arrived at'.[20] This approach stems from the idea that sports associations, similarly to public bodies, have great autonomy in decision-making as long as they observe the law.[21]

3.2.3 Germany

In Germany, there is no discussion that a disciplinary sanction imposed by a sports federation is anything other than an association's decision. The review of disciplinary sanctions, however, has been a constant theme of debate in German legal doctrine since the first review under the new *BGB* took place in 1902.[22] Historically, the review of associations' decisions has been restricted to a limited test in recognition of the autonomy of an association.[23] This autonomy notwithstanding, associations cannot escape external control of their decisions as the exclusion of such a review is ineffective.[24] As to the types of decisions that are susceptible to review somewhat of a distinction can be made.

First, it is voiced that factual decisions taken by referees on the field generally should not be reviewed.[25] In the words of Pfister 'courts ought to apply

19 Compare J. Anderson, 'An Accident of History: Why the Decisions of Sports Governing Bodies are not Amenable to Judicial Review', *Common Law World Review* 2006/35, pp. 173-196, p. 189. Lewis and Taylor have even suggested that the distinction between the private-law and public-law process has now become irrelevant. Adam Lewis and Jonathan Taylor, *Sport: law and practice*, Haywards Heath, West Sussex: Tottel 2008, p. 164.

20 Per Lord Denning in *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329, 333.

21 Compare *Dawkins v Antrobus* [1881] L.R. 17 Ch. D. 615; *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329.

22 Walther Hadding and Frank van Look, 'Zur Ausschließung aus Vereinen des bürgerlichen Rechts', *Zeitschrift für Unternehmens und Gesellschaftsrecht*, 2/1988, pp. 270-280, p. 271. Compare K. Vieweg, *The Appeal of Sports Law*, 2010, <http://www.irut.jura.uni-erlangen.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrechtEnglisch.pdf> [accessed: 14 December 2014], who calls the extent of judicial review a classic problem.

23 BGH 27.02.1954 – II ZR 17/53, BGHZ 13, 5; BGH 20.04.1967 – II ZR 142/65, BGHZ 47, 381.

24 BGH 26.02.1959 – II ZR 137/57, BGHZ 29, 352, 354; BGH 28.11.1994 – II ZR 11/94, BGHZ 128, 93, 109.

25 Steffen Krieger, *Vereinsstrafen im deutschen, englischen, französischen und schweizerischen Recht. Inbesondere im Hinblick auf die Sanktionsbefugnisse von Sportverbänden*, Berlin: Duncker & Humblot GmbH 2003, p. 133-138; B. Pfister, 'Sportregeln vor staatlichen Gerichten', *Zeitschrift für Sport und Recht* 1998, pp. 221-225; J. Räker, *Grundrechtliche Beziehungen juristischer Personen im Berufssport* (diss. Köln), Berlin: Duncker & Humblot 2008, pp. 121-123.

legal rules only'.[26] However, disciplinary sanctions are always susceptible to review. A review is generally only permitted after the internal appeal remedies have been exhausted. The *BGH* has given two reasons for this approach; pending the final decision of the competent bodies of the association, it must be avoided that (1) the courts are unnecessarily called upon and (2) prematurely intervene in the autonomy of the association.[27] Over time, the scope of the review has been developed in case law and now extends to whether the measure imposed has a legal basis in the articles of association, whether the prescribed disciplinary procedure has been complied with, whether the respective regulations are consistent with state law and good morals and whether the sanction imposed is not grossly unreasonable or arbitrary.[28] Additionally, in order to prevent associations from basing their decisions on underlying facts that, according to the law, could not have been objectively determined, the establishment of facts is also subjected to review.[29]

Another important development with regard to sports is the further extension of the scope of review of decisions taken by associations holding a monopoly position.[30] Despite the view that the disciplinary sanction is based upon the free subordination of the members, the *BGH* has acknowledged that there are numerous situations in which this freedom is actually a fiction, including in the case of regional and national sports federations.[31] In order to tackle this issue the *BGH* ruled that, in cases where an association holds a preponderance of power in a specific economic or social field and the member is dependent on the membership, decisions and/or sanctions do not only have to be in accordance with good faith (§ 242 BGB) but also have to be justified by objective reasons.[32]

26 B. Pfister, 'Sportregeln vor staatlichen Gerichten', *SpuRt* 1998, pp. 221-225, p. 222.

27 BGH 27.02.1954 – II ZR 17/53, 13 BGHZ 13, 5, 16; BGH 06.03.1967 – II ZR 231/64, BGHZ 47, 172, 174; OLG Köln 23.09.2005 – 19 U 19/05, via: <http://www.justiz.nrw.de>.

28 BGH 30.05.1983 – II ZR 138/82, BGZH 87, 337, 343; BGH 27.02.1954 – II ZR 17/53, BGHZ 13, 5; BGH 04.10.1956 – I ZR 121/55, BGHZ 21, 370; BGH 26.02.1959 – II ZR 137/57, 29 BGHZ 29, 352; BGH 06.03.1967 – II ZR 231/64, BGHZ 47, 172; BGH 20.04.1967 – II ZR 142/65, BGHZ 47, 381.

29 BGH 30.05.1983 – II ZR 138/82, BGZH 87, 337.

30 Specifically named in Staudinger Kommentar as one of the issues in association law: G. Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, Vorbem zu § 21ff. and § 21, Rn. 5.

31 BGH 30.05.1983 – II ZR 138/82, BGZH 87, 337, 344; BGH 23.11.1998 – II ZR 54/98, BGHZ 140, 74.

32 BGH 19.10.1987 – II ZR 43/87, BGHZ 102, 265; BGH 24.10.1988 – II ZR 311/87, BGHZ 105, 306; see also OLG Frankfurt 18.05.2000 – 13 W 29/00; Lg Freiburg 15.05.2012 – 14 O 46/12.

3.2.4 Switzerland

In Switzerland the main remedy against a decision or sanction taken by a sports organisation is a complaint based on article 75 of the Swiss Civil Code.[33] According to this provision, decisions that breach the law or the articles of association can be challenged by each member who did not consent within a month. This right of action is by law and replaces certain legal effects if the appeal is successful.[34] However, the reviewing body can only quash the decision and not amend it. As in Germany and France, decisions made on the field of play are generally beyond review.[35] In addition, as in all other jurisdictions, this action is only open after internal appeal remedies have been exhausted.[36]

The purpose of article 75 CC is to protect members and otherwise adhered athletes and clubs[37] from abuse of the autonomy that is granted to associations.[38] In this light, the scope of the review is limited to the test whether the decision breaches the law or the articles of association. Hereto, the court first reviews whether the sanction has a legal basis in the articles of association and whether the prescribed disciplinary procedure has been complied with.[39] Regarding the merits of the decision, doctrinal opinion states that the court can only review whether the sanction is *rechtsmisbrauchlich*, i.e. whether there is a manifest abuse of a right.[40] There is a manifest abuse if an association acts contrary to general principles of law, such as equal treatment or proportionality.

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33 This provision is a *lex specialis* of the general provision art. 20 CO, according to which a contract is null and void if against the law or immoral. Legal action can be based on art. 20 CO independently of art. 75 CC. See: Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, art. 75, Rn. 113.

34 Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 65; Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 113ff.

35 BGE/ATF 118 II 12. See also Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 151-154.

36 BGE/ATF 118 II 12, cons. 3.

37 In the *Gundel* case, the Swiss Federal Supreme Court held that this remedy is also open to so-called indirect members, i.e. an athlete or club who is a member of the national, but not the international federation. BGE/ATF 119 II 271 (Gundel), cons. 3b. See also Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, pp. 71-73. See for indirect membership, Chapter 2.5 above.

38 Compare Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 114.

39 Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, art. 75, Rn. 96ff.

40 Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, art. 75, Rn. 25. See also Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, p. 144 and authors cited there.

Independently from the remedy of article 75 CC, a sanction can be challenged if it breaches certain other legal provisions, most notably article 27 and 28 CC. On the basis of these provisions, a member can take legal action if the sanction wrongfully infringes his personality rights. In general, a disciplinary sanction that suspends an athlete, for breaching doping regulations for example, infringes his personality rights. The term personality rights refers to fundamental rights of an individual that are intrinsic to his being: the right to life, physical integrity, religion, privacy, honour and also to freely choose one's profession – for instance to be a professional athlete.[41] However, a violation of personality rights is only sanctioned if the violation is unlawful. A violation is deemed legal if the breach is justified by the consent of the victim, a predominant private or public interest or by the law. In the sports context, the fight against doping has been considered to be such a predominant interest that justifies the violation of the personality rights of an athlete through a sanction.[42]

3.2.5 France

Unlike in the other countries researched, in France a disciplinary sanction imposed by a national federation is qualified as an administrative act and can therefore only be reviewed by the administrative courts. Traditionally, this review has been quite restrained; the courts only review whether the associations' rules are not unreasonably applied.[43] However, before the court proceeds to the review of the sanction, a number of formal requirements is applied in a rigorous manner. First, the person submitting the request for review has to have a sufficient interest. Naturally, the person sanctioned will meet this requirement. However, in some cases a disciplinary sanction imposed can seriously affect third parties such as an athlete's club or the league. Nevertheless, the *Conseil d'État* has limited the circle of appellants to the person subjected to the sanction.[44] In addition, also in France the courts will not review referees' field of play decisions.[45] Like all administrative acts, the decision to impose a disciplinary sanction must also be taken by the competent body and meet the applicable procedural and formal requirements.[46] Finally, French

41 A. Büchler & M. Frei, *ZGB Kommentar,* Basel: Schulthess Verlag 2011, art. 28, no. 3ff.
42 BGE/ATF 134 III 193, cons. 4.6.3.2.2.
43 J.-P. Karaquillo, 'Le pouvoir disciplinaire dans l'association sportive', *Recueil Dalloz* 1980 pp. 115-124, p. 122.
44 CE 03.04.1987, n°80239, via: <www.conseildetat.fr>. See also Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p 284.
45 CE 13.06.1984, n°44648 (Mantes-la-Ville).
46 CE 19.12.1980, n°11320, (Hechter). See also Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, pp. 287-289, Steffen Krieger, *Vereinsstrafen im deut-*

administrative courts will only proceed to a review after the internal appeal remedies have been exhausted.[47] Part of this internal appeal remedy is conciliation by the *Comité national olympique et sportif français* (CNOSF).[48]

The merits of the decision are reviewed in a somewhat stricter manner than in the other jurisdictions. Under French law, the scope of review does not only include the facts underlying the sanction (*contrôle de l'appréciation des faits*), but also the adequacy of the measure taken.[49] In cases where a sanction is based on a so-called *faute sportive* the court only verifies the facts and whether the sanction complies with the law.[50] However, in cases where the sanction is based on actions that are deemed contrary to a sport's ethics or the interest of the association, the court's review extends further as it has to interpret the facts for itself. With regard to the adequacy of the measures taken, the court reviews whether these are not manifestly disproportionate or excessive in relation to the goals pursued.[51] For example, in a case where a young judoka had been sanctioned with a life-time ban to join a judo club after sexually assaulting two other minors, the *Conseil d'État* held that considering the age of the athlete at the time of his crime and the severity of the penalty, the sanction was disproportionate.[52] In addition, as administrative acts, disciplinary sanctions are reviewed against the general norms and principles of administrative law, including *abus de droit* and *détournement de pouvoir*.

3.2.6 Summarising remarks

The scope of review of disciplinary sanctions in sports is similarly limited in all five countries. Sports organisations – whether governed by private law or public law – are permitted a large margin of appreciation in the application of their regulations. The specific wordings differ across the jurisdictions, but

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schen, englischen, französischen und schweizerischen Recht. Inbesondere im Hinblick auf die Sanktionsbefugnisse von Sportverbänden, Berlin: Duncker & Humblot GmbH 2003, pp. 124-127.

47 Landmark decision, CE 13.06.1984, n°42454 (Association Hand-ball club de Cysoing), *Recueil Dalloz* I.R. 1985, 142, note Morange. See also, CE 25.06.2001, n°234363 (*Toulouse Football Club*); CE 28.11.2007, n°294916, *Les Cahiers de Droit du Sport* 2008/11, pp. 154-166, notes F Colin; J-M Duval.

48 Art. R.141-5 *Code du Sport* (France): 'La saisine du comité à fin de conciliation constitue un préalable obligatoire à tout recours contentieux, lorsque le conflit résulte d'une décision, susceptible ou non de recours interne, prise par une fédération dans l'exercice de prérogatives de puissance publique ou en application de ses statuts.'

49 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 291.

50 CE 16.01.1985, n°52654, via: <www.conseildetat.fr>.

51 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 296.

52 CE 28.11.2007, n°294916, *Les Cahiers de Droit du Sport* 2008/11, pp. 154-66, notes: F Colin and J-M Duval.

decisions that are reasonably arrived at and not contrary to the law, which includes good morals, good faith etc., seem to be virtually untouchable. Even in Germany, where monopoly organisations such as national sports federations are controlled in a stricter manner, the test remains marginal. Only in France, perhaps, does the scope of the review extend a little further as it also tests against general principles of administrative law and interpretation of the facts. However, whether these seemingly stricter tests would lead to different results in concrete cases than in the other countries is very difficult to foretell.[53]

When a sanction is reviewed by a national court, the interrelation between national law and the private enforcement of the regulations of sports organisations has proved to be subtle. Nevertheless, the rules of national law form a safeguard for athletes and clubs against arbitrary and unlawful application of sports federations' regulations and ensure that fundamental principles of law are applied.

3.3 ARBITRATION OF DISPUTES RELATING TO DISCIPLINARY SANCTIONS IN SPORTS

Although review before a national court is a logical default option for an athlete or club to challenge a disciplinary sanction, practice shows it is often necessary to follow another route. Many national sport federations and virtually all international sport federations provide that disputes are to be settled by arbitration. The first part of this section therefore analyses the requirements for arbitration in sports-related matters. In 'international' cases – where the sanction is imposed by the international sports federation – it is generally the CAS that reviews the sanction. The goal of arbitration is to render a final decision. However, in order to supervise this form of private dispute resolution, national laws provide that an arbitral award can be challenged before a national court. The second part of this section discusses the circumstances under which arbitral awards – CAS awards in particular – can be overturned by a national court.

3.3.1 Requirements for arbitration in sports-related matters

Arbitration is a complex legal concept, which is exemplified by the lack of a single definition. There is, however, consensus more or less about what arbitration constitutes; 'a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties,

53 Krieger made an attempt at such an analysis on the basis of the Modahl case. Steffen Krieger, *Vereinsstrafen im deutschen, englischen, französischen und schweizerischen Recht. Inbesondere im Hinblick auf die Sanktionsbefugnisse von Sportverbänden*, Berlin: Duncker & Humblot GmbH 2003, pp. 173-175.

to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case'.[54] The following will focus on the various requirements that national law poses for the review of sports disciplinary sanctions in arbitration.[55]

3.3.1.1 The arbitration law

An arbitration procedure is governed by national private law in the form of the applicable arbitration law, which is not to be confused with the substantive law that governs the dispute. Although virtually every state has its own arbitration law, they generally all govern the same issues, including the validity of the arbitration agreement, the arbitration procedure and the award.[56]

The question which arbitration law applies usually does not arise when the dispute is between parties in the same jurisdiction. For example, an arbitration between a German football club and the German football association DFB will be governed by the German arbitration law, which is laid down in Book 10 of the German Code of Civil Procedure (ZPO). With regard to international arbitration procedures, the applicable arbitration law is virtually always the law of the seat of the arbitration.[57] The seat is the geographical location to which the arbitration is tied and is often specified in the arbitration clause, e.g. 'this arbitration will be governed by Dutch law'.

When a sanction is imposed by an international sports federation the regulations of those organisations generally provide that the decision can be reviewed by the CAS. The CAS is an independent institution that resolves legal disputes in the field of sport through arbitration or mediation. It was originally conceived to deal with disputes arising during the Olympics and was established as part of the IOC in 1984. After the impartiality and independence of the CAS were disputed in the famous *Gundel* case, the CAS was reformed to become an independent institution.[58] Its jurisdiction is limited to rule solely

54 G.B. Born, *International Arbitration: Law and Practice*, Kluwer Law International 2012, p. 3.

55 See for in-depth studies of arbitration of sports-related disputes in general: F. Oschütz, *Sportschiedsgerichtsbarkeit. Die Schiedsverfahren des Tribunal Arbitral du Sport vor dem Hintergrund des schweizerischen un deutschen Schiedsverfahrensrecht* (diss. Erlangen-Nürnberg), Berlin: Duncker & Humblot 2005; Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005.

56 G.B. Born, *International Commercial Arbitration: Commentary and Materials (2nd edn.)*, Kluwer Law International 2001, pp. 26-28; Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 193.

57 G. Kaufmann-Kohler and A. Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, Bern: Editions Weblaw 2010, p. 45. G.B. Born, *International Arbitration: Law and Practice*, Kluwer Law International 2012, p. 112. See also F. Russell, J. Gill & D. St. John Sutton, *Russell on Arbitration (22nd edn.)*, London: Sweet & Maxwell Limited 2003, no. 2-099.

58 BGE/ATF 119 II 271 (Gundel). The Swiss Federal Supreme Court recognised the CAS as a true court of arbitration, noting that the CAS was not a body of the Federation that had imposed the sanction at issue and that it did not receive instructions from this federation.

on disputes connected with sport, which can be of a disciplinary or commercial nature. In disciplinary cases it acts as an appeal body whereas in commercial disputes it acts a court of sole instance.[59] Without exceptions, the seat of the CAS and each arbitration panel is Lausanne, Switzerland.[60] This results in the applicability of the Swiss arbitration law, art. 176-194 of the Swiss Private International Law Act (PILA), to all cases that are brought before the CAS.

3.3.1.2 The arbitration agreement

The legal foundation for arbitration is formed by a contract: the arbitration agreement. Such an agreement expresses the will of the parties to arbitrate their current or future disputes while at the same time renounces the right to bring the case before a state court. This latter function is very important as the constitutional right of effective access to the courts has to be relinquished voluntarily.[61] Arbitration agreements are often formed by a separate provision or clause in a contract. In organised sports the arbitration agreement ordinarily takes on the form of an arbitration clause in the regulations of the sports organisation. Many national and almost all international sports federations impose such arbitration clauses upon their adhered clubs and athletes who are bound through their membership or a licence. The validity of such a clause must be reviewed under the applicable arbitration law. Naturally, this test is influenced by the prevailing views on general concepts of law in each country.

Generally, the validity of arbitration clauses in the regulations of sports federations is accepted in four of the five jurisdictions researched.[62] This is in line with European case law and the dominating view in literature, according to which adherence to an association (or other legal entity) implies the acceptance of an arbitration clause incorporated into the regulations of said entity.[63] In France, however, a disciplinary sanction imposed by a national

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However, the court noted that due to the strong links between the CAS and the IOC, the independence of the CAS could be questioned in cases were the IOC would be one of the parties.

59 Art. R27 CAS Code.

60 Art. R28 CAS Code.

61 Art. 6 ECHR; Art. 17 Grondwet (Netherlands Constitution). See also H.J. Snijders, *Groene Serie Burgerlijke Rechtsvordering. Boek IV,* Kluwer 2011, aant. 1.

62 England: *Stretford v Football Association Ltd*, [2007] EWCA Civ 238. Germany: § 1066 ZPO; G. Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25, Rn. 24. Lg Dortmund 16.10.2008 – 13 O 113/08 Kart., via: <http://www.justiz.nrw.de>. Netherlands: Dutch Code of Civil Procedure (Rv), art. 1020 (5); H.J. Snijders, *Groene Serie Burgerlijke Rechtsvordering. Boek IV,* Kluwer 2011, art. 1020, aant. 8-9. Switzerland: Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 414.

63 ECJ 10.03.1992, C-214/89, (Powell Duffryn). See also G. Kaufmann-Kohler and A. Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, Bern: Editions Weblaw 2010, p. 117, Jochen Kotzenberg, *Die Bindung des Sportlers an private Dopingregeln und private Schiedsgerichte* (diss. Marburg), Baden-Baden: Nomos 2007, pp. 128-129.

sports federation is qualified as an administrative act, which cannot be reviewed in an arbitration procedure.

However, the validity of these agreements between sports organisations and their adhered athletes and clubs can potentially be affected by two issues. The first issue is caused by the situation that in many cases clubs and/or athletes are not directly subordinated to the regulations of their international federation.[64] As a result, the arbitration clause is often part of the regulations of the international federation that the club or national federation only refers to. This raises the question whether the written form requirement of the arbitration agreement – which applies in all countries – has been met. In England, the law expressly provides that a reference to a written document containing an arbitration clause constitutes an arbitration agreement.[65] Current case law seems to suggest, however, that a general reference without expressly mentioning the arbitration clause is not sufficient, unless special circumstances exist. Such circumstances can, however, be formed through industrial use of standard documents.[66] It can be assumed that arbitration clauses in sports regulations constitute such industrial use.[67] Similarly, German law, too, does not always require a specific reference; for instance when parties are conscious of the arbitration clause in the referenced document.[68] In the Netherlands, this issue has yet to be addressed[69] while in Switzerland consistent case law of the Federal Supreme Court holds that a global reference to an arbitration clause contained in the regulations of a sports federation suffices to create a valid arbitration agreement.[70] Nevertheless, many international sports federations seated in Switzerland now make use of competition entry forms and licences that include an arbitration clause. This practice further safeguards

64 See Chapter 2.5.

65 S. 6 (2) Arbitration Act 1996.

66 See F. Russell, J. Gill & D. St. John Sutton, *Russell on Arbitration (22nd edn.)*, London: Sweet & Maxwell Limited 2003, no. 2/059-2/061 and the cases cited.

67 Compare for instance Sir A Clarke MR who stated: 'An arbitration clause has become standard in the rules of sporting organisations like The FA.' *Stretford v Football Association Ltd*, [2007] EWCA Civ 238, no. 49.

68 In case the referenced document is considered to contain general terms (AGB), a separate document is nevertheless needed. See BGH 03.12.1992 – III ZR 30/91, *NJW* 1993, 1798; F. Oschütz, *Sportschiedsgerichtsbarkeit. Die Schiedsverfahren des Tribunal Arbitral du Sport vor dem Hintergrund des schweizerischen un deutschen Schiedsverfahrensrecht* (diss. Erlangen-Nürnberg), Berlin: Duncker & Humblot 2005, pp. 194-195.

69 However, with regard to an arbitration clause in a collective labour agreement (CAO), the Dutch Supreme Court ruled that an untied employee was bound to this clause as it was agreed that the CAO rules were applicable to his individual contract. No express consent was necessary. HR 17.01.2003, *NJ* 2004, 280 (ABN AMRO/Teisman).

70 Swiss Federal Supreme Court 31.10.1996, 4C.44/1996 (Nagel v FEI); Swiss Federal Supreme Court 07.02.2001, 4P.230/2000 (Roberts v FIBA). However, a reference to a document containing an arbitration clause in a competition entry form does not extend to disputes outside this specific competition: Swiss Federal Supreme Court 06.11.2009, 4A_358/2009 (A v WADA).

the risk of a foreign court declaring itself competent to settle the dispute because it considers the arbitration agreement void for not meeting the written form requirement.[71] This holds especially for courts outside Europe as, in light of the legal systems discussed above, it seems unlikely that a European court would declare itself competent on the basis of this ground.

The second issue, which has been debated extensively in literature, is whether arbitration agreements incorporated into regulations or competition entry forms still qualify as consensual.[72] Or in other words, whether so-called 'forced' arbitration (or in German: S*chiedszwang*) is not contrary to the law. As mentioned above, the concept of arbitration traditionally involves an agreement between parties to have disputes decided by a third person. However, modern arbitration has evolved beyond this notion and there are now many forms of arbitration where there is prominent inequality between the parties, for instance in labour and consumer matters. With regard to clubs and athletes, they are generally bound through a subordinate – membership or other – relationship and not by contract.[73] Nevertheless, with regard to the arbitration agreement between an athlete or club and their governing bodies, it can be argued that the consent stems from the *pacte social* with the sports organisation that is formed when one chooses to become affiliated.[74]

In the Netherlands, no sport-specific case law on this issue exists. Nevertheless, Meijer has suggested that the act of accession to an association implies the acceptance of the arbitration clause.[75] In English case law it was considered that '[such]clauses have to be agreed to by anyone who wishes to have a players' licence, but it does not follow that the arbitration agreement contained in them was required by law or compulsory'.[76] The same view can be found in Swiss literature, where it is maintained that the practice of incorporated arbitration clauses is in principle not an obstacle to the voluntary nature of arbitration. According to both Baddeley and Rigozzi, 'l'objet de la relation sociale étant, en règle général, un droit à la disposition des parties, il s'ensuit qu'il peut être soumis à l'arbitrage'.[77] According to German case law, an arbitration agreement laid down in an organisation's regulations is

71 Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 420.

72 See for an overview on this debate, Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 422ff and references cited.

73 Only in England is the relationship between sports organisations and their members qualified as contractual. However, it has been suggested that this contract is in reality a fiction, as there is no choice but to enter into it (see further: Chapter 2.4. above. In addition, there are situations where an athlete or club is bound by a (competition) licence contract.

74 Compare Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 426.

75 G.J. Meijer, *Overeenkomst tot arbitrage* (diss. Rotterdam), Deventer: Kluwer 2011, p. 503.

76 *Stretford v Football Association Ltd*, [2007] EWCA Civ 238, no. 49.

77 Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 367 (citing M. Baddeley).

considered binding as all members are subordinate to them.[78] Moreover, the acceptance of this practice in German literature is founded on the reasoning that it does not obstruct the members' right to end their membership.[79] Furthermore, in the commentary on the bill that modernised the arbitration chapter in the ZPO, it is argued that inequality of the parties is not by itself reason enough to deem an arbitration agreement void.[80]

However, in two recent decisions of the courts in Munich on a claim for damages resulting from a doping ban, the arbitration agreements between German speed skater Claudia Pechstein and the national and international skating federation were found invalid due to the structural imbalance (*strukturelles Ungleichgewicht*) between the athlete and the federations which formed a monopoly. It is considered that without signing the agreements the athlete would have been unable to pursue her career and the agreements were thus not entered into voluntarily.[81] However, the Court of Appeal also considers that an arbitration clause imposed by a sports federation does not necessarily constitute a violation of competition law as there are good reasons – for example the uniform application of anti-doping rules – to have one single instance for the resolution of disputes between athletes and sports federations.[82] In the end, the court deems the institutional structure of CAS insufficient to guarantee impartiality given CAS's rules regarding the selection and appointment of arbitrators. Given the institutional changes CAS has undergone in the meantime, it remains to be seen whether this decision will have any significant impact upon sports arbitration.[83]

3.3.1.3 Arbitrability

There are disputes that involve such sensitive public policy issues that it is felt that they should only be dealt with by state courts.[84] A dispute can be deemed 'non-arbitrable' because of its perceived public importance or a felt need for formal judicial procedures and protections. For example, various

78 Landmark decision BGH 29.03.1996 – II ZR 124/95, BGHZ 132, 278, pp. 284-285 (cons. 5). See also OLG Düsseldorf 14.11.2003 – I-16 U 95/98.

79 Horst Hilpert, *Das Fußballstrafrecht des Deutschen Fußball-Bundes (DFB)*, Berlin: De Gruyter 2009, p. 253 (citing Haas in E. Reschke, U. Haas & T. Haug (eds), *Handbuch des Sportrechts* B II, Rn. 186).

80 German parliamentary documentation, BT Drucksache 13/5274, p. 34.

81 Lg München 26.02.2014 – 37 O 28331/12; OLG München 15.01.2015 – U 1110/14 Kart., via: <dejure.org>, cons. 71ff.

82 OLG München 15.01.2015 – U 1110/14 Kart., via: <dejure.org>, cons. 88ff.

83 For example, the system of the closed list of arbitrators, one of the main concerns of the court, has been abolished.

84 L.A. Mistelis, 'Part I Fundamental Observations and Applicable Law, Chapter 1 – Is Arbitrability a National or an International Law Issue?', in: L.A. Mistelis & S.L. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives*, Kluwer Law International 2009, pp. 1-18, p. 3.

countries refuse to allow arbitration of disputes concerning employment, intellectual property, real estate or family law.[85]

Like the assessment of the validity of the arbitration agreement, the question whether disciplinary sanctions can be the subject of an arbitration procedure is answered according to the applicable arbitration law. The provisions in the arbitration laws of the four countries provide no clear answer, however. In Germany, the Netherlands and Switzerland, the respective provisions are formulated in very general terms.[86] The English Arbitration Act lacks a provision on this subject altogether and the English courts approach issues of arbitrability case by case, considering whether 'the matters in dispute engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process'.[87] However, there are no disputes that will automatically fall outside this scope.

In literature, the arbitrability of the review of disciplinary sanctions has mainly been debated in Switzerland.[88] Opponents argue that these disputes are in principal contrary to public policy as a result of the monopoly position of sports organisations which unilaterally enforce their rules.[89] Nevertheless, case law, legal literature and practice show that the review of disciplinary sanctions imposed by sports federations upon their members or otherwise affiliated clubs or athletes by means of arbitration is generally accepted in Switzerland, as well as in England and Germany.[90] In the Netherlands, it remains unclear whether disciplinary sanctions of sports organisations can be reviewed by arbitration since the Dutch Supreme Court ruled that a claim

85 G.B. Born, *International Commercial Arbitration: Commentary and Materials (2nd edn.)*, Kluwer Law International 2001, p. 244.

86 England: s. 1 (b) Arbitration Act 1996; Germany: § 1030 ZPO. Netherlands: art. 1020 Rv; Switzerland: art. 354 CPC (for national arbitrations) and art. 177 Swiss PILA (for international arbitrations).

87 *Fulham Football Club Ltd. v. Richards* [2011] EWCA Civ 855 no. 40.

88 See for an extensive overview of the debate, Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 367ff.

89 P. Meier & C. Aguet, 'L'arbitrabilité du recours contre la suspension prononcée par une fédération sportive international', *Journal des tribunaux* 2002 I, pp. 55-84.

90 England: *Stretford v Football Association Ltd* [2007] EWCA Civ 238, cons. 49-54. Germany: Jochen Kotzenberg, *Die Bindung des Sportlers an private Dopingregeln und private Schiedsgerichte* (diss. Marburg), Baden-Baden: Nomos 2007, pp. 114-122; F. Oschütz, *Sportschiedsgerichtsbarkeit. Die Schiedsverfahren des Tribunal Arbitral du Sport vor dem Hintergrund des schweizerischen un deutschen Schiedsverfahrensrecht* (diss. Erlangen-Nürnberg), Berlin: Duncker & Humblot 2005, p. 155. Switzerland: Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 261; Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, pp. 187-197; Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, pp. 367, 382. Another indication of this acceptance is provided by the various sports arbitration tribunals that have been set up in the respective countries.

to void a legal entity's resolution cannot be decided by arbitrators.[91] This case dealt with very specific circumstances and the general wording of the court, effectively applying this rule to all legal entities, including (sports) associations, has been scrutinised in literature.[92] Regardless of this ruling, the regulations of most national sports federations in the Netherlands completely lack provisions on how to appeal to disciplinary sanctions, automatically leaving jurisdiction to the ordinary courts.[93]

3.3.1.4 Applicable procedural rules

National arbitration laws impose hardly any specific procedural requirements on the arbitral proceedings.[94] Therefore, in most cases the parties are entirely autonomous in deciding the procedural rules that apply. Sometimes, however, procedural rules are imposed. For example when parties opt for institutional arbitration – such as before the CAS – the procedural rules are often imposed by the institution. In the absence of agreement between the parties regarding the applicable procedural rules, national arbitration laws provide the arbitrators with the discretion to establish these.[95] When an arbitration procedure takes place before the CAS, it is the Code of Sports-related Arbitration (hereafter: the Code) that provides the applicable procedural rules. The Code was first enacted in 1994. With its first revision in 2004 certain long-established principles of CAS case law and practices consistently followed by the arbitrators and the Court Office were incorporated.[96]

3.3.1.5 Applicable substantive rules

To settle the dispute, the arbitrators will generally decide according to the law chosen by the parties, or in the absence hereof in accordance with the laws of that country to which the subject matter of the proceedings has the closest

91 HR 10.11.2006, *NJ* 2007, 561 (Groenselect) note H.J. Snijders.

92 See H.M. de Mol van Otterloo, 'Arbitrabiliteit van vennootschapsrechtelijke geschillen; het Groenselect-arrest', *Ondernemingsrecht* 2010/3; E.R. Meerdink & S. Vermeulen, 'Arbitrage over besluiten van organen van de vennootschap: hoog tijd voor wetgeving', *Tijdschrift voor Arbitrage* 2012/59.

93 M. van Koolwijk, H. van Egdom & B. Dubois-van Kleef, *Tuchtrecht bij sportbonden: inventarisatie, ambitie en aanbevelingen,* 2013 <http://www.nocnsf.nl/stream/07.b.-rapportage-tuchtrecht-bij-sportbonden.pdf> [accessed: 14 December 2014]. Only with regard to doping offences, some Dutch federations provide for an appeal to the CAS.

94 G.B. Born, *International Arbitration: Law and Practice*, Kluwer Law International 2012, p. 147. England: s. 34 Arbitration Act 1996. Germany: § 1042 (3) ZPO. Netherlands: art. 1036 Rv. Switzerland: art. 373 (1) CPC; art. 182 (1) Swiss PILA.

95 England: s. 34 Arbitration Act 1996. Germany: § 1042 (4) ZPO. Netherlands: art. 1036 Rv. Switzerland: art. 373 (2) CPC; art. 182 (2) Swiss PILA.

96 The latest version of the Code of Sports-related Arbitration entered into force on 1 March 2013.

connection.[97] In many jurisdictions parties are also allowed to agree that their disputes will be settled according to fairness or equity. However, in CAS cases arbitrators are not allowed to rule according to fairness or equity, even though the Swiss PILA provides for this option.[98]

In cases where the sanction is imposed by a national sports organisation and no choice of law has been made, the applicable law will generally be the law of the country where the organisation is seated, as it will have the closest ties to the dispute, in addition to the applicable regulations. In contrast to the review before a national court, an arbitration tribunal can be given the power to review the decision of the federation in full if this follows from the arbitration agreement.

In cases regarding disciplinary sanctions before the CAS, the position of national law is different as art. R58 of the Code emphasises the primary application of sports regulations rather than national law.

> "The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

The formulation of this provision in the old edition of the Code, which lacked the now added 'subsidarily', led Hascher and Loquin to promote the idea that these regulations can be applied exclusively from any national law.[99] This view is supported by certain CAS rulings in which the respective panels decided that in the case at hand they did not need national law to come to their decision.

> "Si les parties n'ont pas déterminé un droit national applicable, elles sont, en revanche, soumises aux statuts et règlements de la FIBA (…). Le droit fédératif adopté par la FIBA constitue une réglementation de droit privé, ayant une vocation internationale, voire mondiale, à s'appliquer dans le domaine des règles de sport régissant le basketball. Pour résoudre le présent litige, le tribunal arbitral appliquera

97 Germany: § 1051 ZPO. Netherlands: art. 1054 Rv. Switzerland: art. 381 (2) CPC (the laws that a court would have applied) and art. 187 Swiss PILA. In England the wording of Arbitration Act 1996 s 46 is a little different, but in conjunction with art. 4 of the Rome I Regulation, comes to a similar result. See also: J.D.M. Lew *et al.* (eds), *Arbitration in England,* Alphen aan den Rijn: Kluwer Law International 2013, no. 11-11.

98 See art. 187 (2) Swiss PILA and art. R.45 CAS Code *a contrario*. Contrary to disciplinary cases, arbitrators are allowed upon the parties' wish to decide according to equity and fairness in commercial cases that are brought before the CAS.

99 D. Hascher & E- Loquin, 'Tribunal Arbitral du Sport (TAS). Chronique des sentences arbitrales', *Journal du droit international* 2004, pp. 289- 340, p. 312.

donc ce droit fédératif, sans recourir à l'application de telle ou telle loi nationale au fond. "[100]

However, according to Rigozzi the suggestion that sports regulations prevail over the parallel applicable national law is difficult to reconcile with the text of the provision. In order for regulations to be exclusively applicable, a supplementary choice of law in favour of these regulations would be needed.[101] Art. R58 of the Code also bears the important consequence that in the absence of a choice of law, it is Swiss substantive law that will be applied. As the large majority of international sports organisations is seated in Switzerland, Swiss law is applicable in a majority of cases.

With regard to the applicability of EU law, it must be noted that EU rules that have a direct effect are part of the law of EU member states and must be applied by the CAS if the chosen law is the law of one of these countries. In sporting matters such rules include internal market rules and competition law prohibitions.[102] When the applicable law is Swiss law, in principal EU law does not need to be considered since Switzerland is not a member of the European Union. However, in case an award is to be executed in an EU member state or if it affects the EU market, EU law does play a role considering that the execution of an arbitral award can be stopped if it is contrary to public policy.[103] Arbitrators have the obligation to ensure an enforceable award. As a result there is a strong rationale for applying those rules of EU law that constitute rules of public policy in any case in which an award may be required to be enforced in an EU member state.[104] In addition, according to the Swiss Federal Supreme Court, 'it is generally recognised that Swiss civil courts and arbitrators should examine the validity of a contractual agreement affecting the EU market in the light of EU law, even if the parties have contractually agreed to apply Swiss law'.[105]

100 CAS 2002/A/417 (IAAF v. CADA and Witteveen), § 82-83; and repeated in CAS 2011/A/2433 (Amadou Diakite v. FIFA), § 14.

101 Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 609.

102 ECJ 12.12.1974, C-36-74 (Walrave/Koch); ECJ 15.12.1993, C-415/93 (UEFA/Bosman); ECJ 18.07.2006, C-519/04 (Meca-Medina).

103 Art. V (2) (b) New York Convention.

104 ECJ 01.06.1999, C-126/97 (Eco Swiss v Benetton).

105 Swiss Federal Supreme Court 13.11.1998, 4P.119/1998, *ASA Bulletin* 1999, 529 (Benetton), cons. 1a. See also M. Coccia, 'Applicable law in CAS proceedings: what to do with EU law?', in: M. Bernasconi, A. Rigozzi (eds.), *Sport Governance, Football Disputes, Doping and CAS Arbitration*, Bern: editions Weblaw 2009, pp. 69-93, p. 88; A Rigozzi, 'Arbitrage, Ordre public et droit communautaire de la concurrence', *ASA Bulletin* 1999, pp. 455-487, at pp. 464-465.

3.3.1.6 The scope of review in CAS cases and the arbitral precedent

In cases where disciplinary sanctions are reviewed before the CAS, the scope of review is not limited. The CAS performs a full review, which is not only based on the applicable regulations and substantive law, but also on arbitral precedent. This notion is paradoxical, given that arbitration generally lacks a doctrine of precedent or *stare decisis*.[106] Each arbitrator or arbitration panel decides cases autonomously and is not bound by previous decisions from other panels. Nevertheless, the approach in sports arbitration is different; CAS arbitration panels have demonstrated a consistent practice of referring to earlier CAS decisions.[107]

This practice already commenced in the early days of the CAS. In 1996 a panel considered that, 'although we are not obliged to follow the reasoning of a previous Tribunal (especially where it was not essential to the decision which they reached), we are disposed to do so, both out of a sense of comity and because of the desirability of consistent decisions of the CAS, unless there were a compelling reason, in the interest of justice, not to do so.'[108] In another case the respective arbitration panel stated: '[I]n arbitration there is no *stare decisis*. Nevertheless, the Panel feels that CAS rulings form a valuable body of case law and can contribute to strengthen legal predictability in international sports law. Therefore, although not binding, previous CAS decisions can, and should, be taken into attentive consideration by subsequent CAS panels, in order to help developing legitimate expectations among sports bodies and athletes.'[109] Since 2003, nearly every award contains one or more references to earlier awards.[110] This has resulted in the situation that even though there is no such thing as formal 'CAS case law', practice shows that earlier decisions are carefully studied and can therefore influence later cases.

As a result, a virtually coherent body of law seems to have emerged, which various authors have labelled as *lex sportiva*.[111] Although the definitions vary

106 G. Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture', *Arbitration International* 2007 vol. 23/3, pp. 357-378, p. 357.

107 L. Casini, 'The making of a Lex Sportiva by the Court of Arbitration for Sport', *German Law Journal* (vol.12 no. 5) 2011, pp. 1317-1340, p. 1331. As well as to advisory opinions, for instance in CAS 96/149 (A.C. v FINA), p. 8, no. 28.

108 CAS 96/149 (A.C. v FINA), p. 7, no. 19.

109 CAS 97/176 (UCI v Jogert & NCF), para 40. See for similar wording: CAS 2004/A/628 (IAAF v USA Track & Field and Jerome Young), no. 73.

110 G. Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture', *Arbitration International* 2007 vol. 23/3, pp. 357-378, p. 365.

111 E. Loquin, 'L'utilisation par les arbitres du TAS des principes généraux du droit et le développement d'une lex sportiva' in A. Rigozzi & M. Bernasconi (eds), *The Proceedings before the Court of Arbitration for Sport*, 2007, pp. 85-108, p. 99; see also K. Foster, 'Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence,' in: I. Blackshaw *et al*. (eds.), *The Court of Arbitration for Sport 1984–2004*, The Hague: T.M.C. Asser Press 2006, pp. 420-440, p. 420; J.A.R. Nafziger, 'Lex Sportiva', *International Sports Law Journal* 2004 1-2,

in scope,[112] *lex sportiva* seems to cover 'anational' rules and general principles of law that fill in the lacunas that the sports regulations leave and which often have a specific connotation in sports law cases. The most significant rule of the so-called *lex sportiva* is arguably the strict liability rule for doping offences. This rule entails that a doping offence occurs whenever a prohibited substance is found in an athlete's body, irrespective of the athlete's intention or negligence in ingesting the banned substance, for example through a contaminated supplement. Moreover, the application of this rule is so consistent, that the difference with *stare decisis* has become trivial. The strict application of certain *lex sportiva* rules results from the need for a uniform and coherent application of the regulatory framework of sports.

As a result of this consistent rule of precedent, the CAS exercises a strong influence on the rules and regulations of sports organisations, most notably on doping regulations but also on rules regarding player transfers and eligibility for international competitions. Furthermore, aside from this – perhaps more implicit – influence on regulations through its awards, the CAS also does not seem to hesitate to give explicit 'advice' on regulations it deems unsatisfactory. For example, in *A.C. v. FINA* the CAS noted, 'it would clearly be desirable if the FINA Medical Rules were revised so as to attach a flexible sanction to a failure to comply with an important and mandatory obligation of this character'.[113] Nevertheless, in their reasoning the CAS arbitrators have to take into account that their award – like all arbitral awards – runs the risk of being challenged in court.

3.3.2 Challenging the arbitral award

The purpose of arbitration is to obtain a final and binding decision. Nevertheless, most national arbitration laws provide the option to challenge or annul an arbitral award in court.[114] National law thus interferes with the completely

pp. 3-8, p. 3; J. Adolphsen, 'Eine lex sportiva für den internationalen Sport?', *Die Privatisierung des Privatrechts – rechtliche Gestaltung ohne staatlichen Zwang*, 2002, pp. 281-301, p. 281; Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 628; L. Casini, 'The making of a Lex Sportiva by the Court of Arbitration for Sport', *German Law Journal* (vol.12 no. 5) 2011, pp. 1317-1340, p. 1317.

112 From including only those principles that are developed by the CAS, according to Nafziger, to 'l'ensemble des règles de droit anational qu'il convient d'appliquer pour affranchir le droit applicable au fond dans les litiges sportifs de tout emprise des différents droits nationaux', according to Rigozzi. J.A.R. Nafziger, 'Lex Sportiva and CAS', in: I.S. Blackshaw, R.C.R. Siekmann and J. Soek (eds.), *The Court of Arbitration for Sport, 1984-2004*, The Hague: T.M.C. Asser Press 2006, pp. 409-419.

113 CAS 96/149 (A.C. v. FINA), p. 6, no. 9.

114 Some arbitration laws provide for the possibility to opt out of the possibility to challenge the award. For instance in England: s. 69 Arbitration Act 1996. In Switzerland the appeal can be excluded only if both parties are non-Swiss: art. 192 (1) Swiss PILA.

private regulatory framework of sports organisations when an arbitral award, in which the disciplinary sanction is confirmed or quashed, is being reviewed by a national court. The following discusses the rules according to which an arbitral award can be overturned, showing the limits of the review of private regulations in the private atmosphere. At the same time, it becomes apparent that on an abstract level the review of arbitral awards bears close similarity to the marginal review of disciplinary sanctions by national courts.

3.3.2.1 Grounds for overturning an arbitral award

When an award is annulled or set aside, the case will generally be referred back to either the arbitration tribunal or, if the arbitration tribunal lacked jurisdiction, to the national court that should have reviewed the sanction in the first place. Unlike the arbitration laws in England, Germany and the Netherlands, the Swiss PILA provides only one body to challenge the award: the Swiss Federal Supreme Court.[115] The available grounds upon which an award can be challenged logically depend on the applicable arbitration law. In most countries, arbitral awards can only be reversed by a national court if they are fundamentally flawed.[116] Such fundamental flaws are mainly flaws of a procedural nature and are similar across the laws of the four jurisdictions.

First, an arbitration award may be annulled if there is no valid arbitration agreement or if the tribunal wrongly assumed jurisdiction to decide on the matter.[117] A second ground for appeal is if the constitution of the arbitral tribunal was irregular.[118]

For example if circumstances raise doubt about the independence of one of the arbitrators. A third ground for appeal common to all jurisdictions is if the tribunal ruled on matters beyond the claims submitted by the parties or if it failed to rule on one of the claims.[119] Finally, all four jurisdictions include one general or multiple specific grounds regarding the arbitration procedure. For example, both Swiss arbitration laws include a reason for appeal if the equality of the parties or their right to be heard in an adversarial procedure was not respected. In the Netherlands a separate ground is if the award has not been signed or motivated.[120] And in England, the failure to comply

115 Since in France disciplinary sanctions by sports federations cannot be reviewed in arbitration, the overturning of arbitral awards according to French law will not be discussed.

116 G.B. Born, *International Arbitration: Law and Practice*, Kluwer Law International 2012, p. 302.

117 England: s. 67 Arbitration Act 1996; Germany: § 1059 (2) sub 1, a ZPO; Netherlands: art. 1065 (1) a Rv; Switzerland: art. 190 (2) b Swiss PILA; art. 393 (b) CPC.

118 Germany: § 1059 (2) sub 1, d ZPO; Netherlands: art. 1065 (1) b Rv; Switzerland: art. 190 (2) a Swiss PILA; art. 393 (a) CPC. In England, irregular constitution of the tribunal can be challenged under the lack of substantive jurisdiction provision in s. 67 Arbitration Act 1996.

119 England: s. 68 (2) b, d, Arbitration Act 1996; Germany: § 1059 (2) sub 1, c ZPO; Netherlands: art. 1065 (1) c Rv; Switzerland: art. 190 (2) c Swiss PILA; CPC, art. 393 (c).

120 Art. 1065 (1) d Rv.

with the formal requirements of the award is mentioned as one kind of serious irregularity.[121]

3.3.2.2 A restrictive review of the merits of the award

In three of the four jurisdictions the sole substantive ground to overturn an arbitration award is when the award or its results are contrary to public policy.[122] Only the English Arbitration Act allows for a wider appeal on the merits on points of English law.[123] However, such an appeal is only admissible with the agreement of all other parties to the arbitration proceedings or by leave of the court.[124] Often the parties opt out of this possibility to appeal in the arbitration agreement.[125]

The notion of public policy (or in French: *ordre public*) is both abstract and complex. In the context of this chapter it suffices to mention that public policy entails the most fundamental principles – both formal and substantive – of a legal order.[126] For example, fundamental breaches of due process, which most notably include the right to be heard, are generally esteemed contrary to public policy.[127] Other fundamental principles of public policy include *pacta sunt servanda*, rules of good faith and prohibition of discriminatory measures.[128]

In European member states, public policy also includes the fundamental provisions of EU community law. In a case where EU competition rules were at issue, the ECJ started by considering that it is in the interest of efficient arbitration proceedings that, in particular, annulment of an award should be possible only in exceptional circumstances. It then stressed, however, that article 101 (formerly 85) constitutes a fundamental provision of community law which, as such, must be regarded as a matter of public policy. As a result, 'where its domestic rules of procedure require a national court to grant an

121 S. 68 (2) h Arbitration Act 1996.

122 England: s. 68 (2) g Arbitration Act 1996. Germany: § 1059 (2) b ZPO. Netherlands: art. 1065 (1) e Rv. Switzerland: art. 190 (2) e Swiss PILA. However, art. 393 CPC instead speaks of 'manifest error of law or equity'.

123 S. 69, 82 Arbitration Act 1996.

124 S. 69 Arbitration Act 1996.

125 For example when the parties agree to submit disputes to ICC arbitration whose Rules exclude an appeal on a question of law; see art. 34 (6) ICC Rules, art. 34 (6).

126 See on the definition of public policy, H. Arfazadeh, *Ordre public et arbitrage international à l'épreuve de la mondialisation*, Geneva/Zurich/Basel: Schultess Juristische Medien SA 2006, pp. 263-273.

127 Netherlands: H.J. Snijders, *Groene Serie Burgerlijke Rechtsvordering. Boek IV*, Kluwer 2011, art. 1065, aant. 7; Germany: S.M. Kröll & P Kraft, 'Part II – Commentary on the German Arbitration Law, § 1059, nr 42', in: K-H Böckstiegel, S.M. Kröll *et al.* (eds.), *Arbitration in Germany: The Model Law in Practice*, Kluwer Law International 2007. Switzerland: BGE/ATF 132 III 389, cons. 2.2.

128 G. Kaufmann-Kohler and A. Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, Bern: Editions Weblaw 2010, pp. 534-535.

application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85 (1) of the Treaty'.[129] In short, this entails that when national law provides for annulment of an award because of its contrariness to public policy, the notion of public policy includes article 105 (formerly 85). According to doctrinal opinion, it can be assumed that this case law is not limited to EU competition law and, on the contrary, entails that all fundamental rules of European community law are part of the public policy of the member states.[130] Thus, if an arbitral award results in a situation that is contrary to a fundamental provision of European law the award could be annulled in court based on the violation of public policy.[131]

In comparison, according to Swiss law the concept of public policy with regard to appeals against arbitral awards is even narrower. The Swiss Federal Supreme Court considers that an award is contrary to public policy, 'si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique'.[132] In other words, public policy covers only those fundamental principles that are widely recognised and that should, according to the prevailing conceptions in Switzerland, be the foundation of any system of law. In contrast to the view of the ECJ, according to the Swiss Federal Supreme Court these fundamental principles do not include provisions of competition law, whether European or Swiss.[133]

This restrictive review of the merits of an arbitral award seems similar to the – also – marginal review that national courts apply when they perform the review of a disciplinary sanction. Both the sports federation and arbitral tribunal are allowed a lot of room to decide what they see fit as long as they stay within the fundamental boundaries of the law.

3.3.2.3 The Swiss Federal Supreme Court: the final instance in CAS cases

Article 191 of the Swiss PILA provides that an arbitral award rendered in Switzerland can be challenged solely before the Swiss Federal Supreme Court. As a result, CAS awards are only subjected to a single test before a national court. According to the Swiss PILA an arbitration award can be attacked, a)

129 ECJ 01.06.1999, C-126/97 (Eco Swiss v Benetton), cons. 37.

130 H.J. Snijders, *Groene Serie Burgerlijke Rechtsvordering. Boek IV*, Kluwer 2011, opschrift, aant. 8; F. de Ly, case note in *Tijdschrift voor Arbitrage* 1999, pp. 100-108, no. 17; A.P. Komninos, case note in *Common Market Law Review* vol. 37 2000, pp. 459–478, at pp. 473-475.

131 See on the debate whether rules of competition law should fall under the scope of public policy Natalya Shelkoplyas, *The application of EC law in arbitration proceedings*, Europa Law Publishing 2003, pp. 368-369.

132 BGE/ATF 132 III 389, cons. 2.2.3.

133 BGE/ATF 132 III 389.

if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly; b) if the arbitral tribunal erroneously held that it had or did not have jurisdiction; c) if the arbitral tribunal ruled on matters beyond the claims submitted to it or failed to rule on one of the claims; d) if the equality of the parties or their right to be heard in an adversarial proceeding was not respected; or, e) if the award is incompatible with Swiss public policy. Blackshaw stated that ground (d) is probably the most important, 'seeing that the CAS bends over backwards in each case to ensure that the parties are properly heard and receive a fair hearing'.[134] The opportunity of appeal notwithstanding, the number of appeals against CAS awards remains limited.

The reticence to appeal is not unlikely to result from the fact that appeals to annul arbitral awards are very rarely accepted when based on the – sole substantive – ground of infringement of public policy.[135] In the early days of the CAS, some awards were annulled due to procedural errors. However, as the CAS nowadays pays great attention to its procedure, practically the only ground left to challenge an award is contrariness with public policy. As mentioned above, in order for an award to be deemed contrary to public policy, it must breach a fundamental principle that is deemed to be part of the foundation of the system of law. This is a very high standard to meet and so far only two appeals have ever been successful on this ground, one of which was based on substantial public policy grounds.[136]

In the *Matuzalem* case, football player Matuzalem and his club Real Zaragoza were ordered to pay 12 million euro compensation to the player's former club Shaktar Donetks for breach of contract after the player's transfer to Real.[137] After both parties failed to pay in time, the player was banned from any activity in connection with football until the compensation was paid. The Swiss Federal Supreme Court held that such an open-ended playing ban constitutes a severe infringement on the player's personality rights as laid down in article 27 (2) of the Swiss Civil Code.[138] In the absence of legitimate interests by which this infringement could be justified, a breach of public policy was recognised. The case has had extensive response from scholars who, among other things, discussed whether *Matuzalem* has opened the door for more annulments of CAS awards. The majority agrees, however, that it seems

134 I.S. Blackshaw, *Sport, Mediation and Arbitration*, The Hague: T.M.C. Asser Press 2009, p. 174.

135 G. Kaufmann-Kohler and A. Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, Bern: Editions Weblaw 2010, p. 523. See for a statistical overview F. Dasser, 'International Arbitration and Setting Aside Proceedings in Switzerland: A statistical Analysis', *ASA Bulletin* 2007, pp. 444-472

136 In BGE/ATF 136 III 346 (Benfica Lisbon v. Atlético Madrid), the award was set aside based on procedural public policy grounds. The CAS violated the principle of *res judicata* when disregarding the binding effect of an earlier decision of the Commercial Court of the Canton of Zurich.

137 BGE/ATF 138 III 322 (Matuzalem).

138 According to this provision, 'no person may relinquish his freedom or restrict the use of it to a degree which is contrary to law or morals'.

unlikely that such a door has been opened in light of the exceptional circumstances of this case.[139] Subsequent case law from the Swiss Federal Supreme Court where a sports director's five-year ban from any football activities following match fixing was not deemed a breach of public policy, further reinforces this view.[140] Nevertheless, the CAS has been reminded that the legitimacy of arbitration requires that the most fundamental principles of the legal order be respected at all times.

3.3.3 Summarising remarks

Arbitration is often the mandatory path for athletes or clubs to have a disciplinary sanction legally reviewed. The review itself technically stays in the private atmosphere, but the proceedings are governed by national law in the form of the arbitration law. Except for France, the national laws of the countries studied allow disciplinary sanctions to be reviewed by arbitration. With regard to the application of national concepts of private law, such as the validity of the arbitration agreement and the question of arbitrability of the disciplinary sanction, there are no significant differences across the jurisdictions. Disciplinary sanctions can be subjected to arbitration and an agreement between athletes or clubs and sports federations, even if forced, is generally valid. Nevertheless, it must be noted that recent developments in Germany could signify a shift in appreciation of such arbitration agreements if confirmed on appeal or in subsequent cases. The arbitration law also provides according to which regulations and substantive law an arbitration tribunal ought to decide. In CAS cases a full review is being performed, not only on the basis of the applicable regulations but also on the basis of so-called arbitral precedents from earlier CAS decisions.

Even when a disciplinary sanction is being reviewed through private dispute resolution, there is still a possibility of involving public justice. National arbitration laws provide for the option to challenge or annul an arbitral award in court. However, it has become clear that this is not an easy feat. In all countries grounds for appeal are limited with the merits of the award only being tested against rules of public policy; a very high standard to meet. Finally, in CAS cases, there is only one chance to have the arbitral award reviewed by Switzerland's highest court. However, considering the restrictive grounds for review, the CAS is left with ample room to decide as

139 R. Levy, 'Swiss Federal Tribunal overrules CAS award in a landmark decision: FIFA vs Matuzalem', *The International Sports Law Journal* 2012/1-2, pp. 36-38; L. Burger, 'For the first time, the Supreme Court sets aside an arbitral award on grounds of substantive public policy', *ASA Bulletin* 2012/3, pp. 603-610.

140 Swiss Federal Supreme Court 27.03.2014, 4A_362/2013.

long as it stays within the boundaries of the fundamental principles of the law.

3.4 Concluding remarks

The creation and enforcement of disciplinary rules in sports take place on different levels. Although a sports federation can autonomously create its own regulations and enforce them through a private sanctioning system, this application of the rules – in the form of a sanction – can be tested either before a national court or in arbitration. Upon a closer look at this specific context it has become apparent that in the review of disciplinary sanctions different legal frameworks – of both private rules of sports federations and national law – are connected and interrelate in many ways.

When a disciplinary sanction is imposed, there are two ways to have an external body review the sanction. Unless an arbitration agreement exists, this review is performed by a national court. In this review, the sanction is tested against the regulations and the applicable national substantive law. The scope of the review is limited in all the countries researched and generally only allows for checking whether decisions are reasonably arrived at and not contrary to the law. Only in France, perhaps, does the scope of the review extend a little further. In general however, sports federations are allowed a large margin of appreciation to make decisions.

The alternative is to have the sanction reviewed by arbitration, which is often the mandatory path imposed by the regulations of the sport federation. Although arbitration is a form of private dispute resolution, the proceedings are almost completely governed by rules of national law. This entails the applicability of national concepts of private law, for example regarding the validity of the arbitration agreement and the question of arbitrability of the disciplinary sanction. In addition, the arbitration law prescribes how to determine the procedural and substantive rules that the arbitration tribunal ought to apply when it reviews the sanction. In contrast to national courts, the arbitration tribunal can be given the power to do a full review, which for example is the case when a disciplinary sanction is brought before the CAS.

The arbitral award is, however, not the final stop in the process; it can be challenged before a national court. However, grounds for appeal are limited in all countries researched. The restrictions to this review turned out to bear close similarity to the review of national courts when they perform the review of the disciplinary sanction in cases where arbitration is excluded. When an arbitral award is challenged, further interrelations between national law and the regulations of sports federations become apparent. Rules of national law can influence the regulations of sports federations. For example, when an arbitral award is overturned there might be a need to adapt the regulations. In this regard, the significance of the Swiss Federal Supreme Court in the

regulation of international sport is undeniable. It the only institution in the position to exercise direct influence on the CAS through its case law. This observation is reinforced by the fact that the CAS has indeed seemed willing to comply and to act on criticism from the Court – most importantly by improving procedural safeguards.[141]

Finally, this chapter made it clear that the legal protection against disciplinary sanctions in sport is approached in much the same manner in the European legal systems that were included in this exercise. In the Netherlands, England, Germany and Switzerland the dual system of review of disciplinary sanctions takes the same shape. Furthermore, the connection between the frameworks of national law and the regulations of sports federations proves to be virtually identical in these countries. France remains the exception where, unlike in the other countries, disciplinary sanctions in sport cannot be reviewed by arbitration. However, French law is not so different as regards the scope of review. After all, in France, too, sports federations are allowed considerable discretion to make their own decisions, including decisions in disciplinary matters.

141 See Rigozzi *et al*., who note that one of the amendments to the Code seems to be the result of a critical remark from the Court. (A. Rigozzi, E. Hasler & B. Quinn, 'The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration', *Jusletter* 3 Juin 2013, p. 16).

SECOND HALF

Disciplinary and civil liability of football clubs for supporters' misconduct

4 Disciplinary liability of football clubs for supporters' misconduct

4.1 INTRODUCTION

In order to tackle supporters' misconduct, national and international football organisations have created specific rules that hold clubs directly liable for the behaviour of their fan base. The disciplinary power of national and international organisations allows them to impose sanctions if supporters' misconduct occurs.[1]

The application of these rules has led to a number of cases and doctrinal debate in different jurisdictions. The central issue in these cases and the subsequent debates has been the legality of such liability rules.[2]

However, the regulations do not provide rules on how to deal with the compensation of damage caused by supporters' misconduct. As a result, this issue has remained under-examined throughout the debate. A deconstruction of the application of the disciplinary liability rules and the doctrinal debate that followed will provide a first insight into the issues related to the – potential – liability of clubs for supporters' misconduct in civil law.

Approach

This chapter is dedicated to determining the grounds, legality and desirability of the disciplinary liability of football clubs for supporters' misconduct. Hereto, the different formulations of the rule, case law and commentaries will be analysed from an international and transnational perspective. This discussion mainly serves to anticipate and identify issues and questions in regard to the liability of clubs in civil law, to which the next chapters are dedicated.

In section 4.2, the different versions of the liability rules will be analysed and compared. This is followed by a detailed overview of the existing case law in which the liability rule has been applied in section 4.3. In section 4.4, the focus will then turn to the debate that has taken place following these cases. Contributions from scholars from various jurisdictions will be analysed, before concluding that in a number of jurisdictions the disciplinary liability of clubs has now been firmly established. However, in the absence of specific case law

1 See Chapter 2.7.

2 The large majority of cases and doctrinal contributions were published between 2006-2011.

and literature from England and the Netherlands, the focus in this chapter lies mainly on French, German and Swiss law.

4.2 Liability rules in the regulations of football federations

Nowadays, international and national federations have all included disciplinary liability rules for supporters' misconduct in their regulatory frameworks. The wording of these rules differs from federation to federation.

4.2.1 Liability rules in the regulations of FIFA and UEFA

The FIFA Disciplinary Code contains a specific section on the responsibilities of clubs and associations. The two key provisions are articles 65 and 67. Article 65 specifies the obligations of associations that organise matches:

> 'Associations that organise matches shall:
> a) assess the degree of risk posed by matches and notify the FIFA bodies of those that are especially high-risk;
> b) comply with and implement existing safety rules (FIFA regulations, national laws, international agreements) and take every safety precaution demanded by circumstances before, during and after the match and if incidents occur;
> c) ensure the safety of match officials, players and officials of the visiting team during their stay;
> d) keep local authorities informed and collaborate with them actively and effectively;
> e) ensure that law and order are maintained in the stadiums and immediate surroundings and that matches are organised properly.'

According to article 66, which provides the consequences of breaching article 65, if an association fails to fulfil any of these obligations a fine will be imposed. Furthermore, additional sanctions, such as a stadium ban or ordering a team to play on neutral ground, can be imposed in case of serious infringements. For safety reasons, certain sanctions can even be pronounced if no infringement has been committed.[3] These responsibilities may seem heavy, but if an association organises a football match it is only natural that the safety of players and officials needs to be ensured. However, the obligation that the match ought to be organised properly is vague and it is not clear from the provision if it entails an obligation of means or an obligation of result.[4]

Article 67, which deals with the liability for spectator conduct, is clearer, unmistakeably imposing an obligation of result:

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3 Art. 66 FIFA Disciplinary Code (2011 edition).
4 See further on the nature of these obligations in Chapter 5.2.2.1.

1. The home association or home club is liable for improper conduct among spectators, regardless of the question of culpable conduct or culpable oversight, and, depending on the situation, may be fined. Further sanctions may be imposed in the case of serious disturbances.
2. The visiting association or visiting club is liable for improper conduct among its own group of spectators, regardless of the question of culpable conduct or culpable oversight, and, depending on the situation, may be fined. Further sanctions may be imposed in the case of serious disturbances. Supporters occupying the away sector of a stadium are regarded as the visiting association's supporters, unless proven to the contrary.
3. Improper conduct includes violence towards persons or objects, letting off incendiary devices, throwing missiles, displaying insulting or political slogans in any form, uttering insulting words or sounds, or invading the pitch.
4. The liability described in par. 1 and 2 also includes matches played on neutral ground, especially during final competitions.

By virtue of this provision, the organising club is strictly liable for any improper conduct among spectators with no possibility to reduce or eliminate this responsibility. Judging by the wording, this includes supporters from both the organising and the visiting club. In addition, the visiting club is strictly liable for any misconduct by its own supporters.

Compared to FIFA's regulations, the UEFA Disciplinary Regulations are generally much more concise. However, in 2013 the provisions regarding liability for supporters' conduct were modified and they are now more elaborate. Similarly to FIFA, UEFA also distinguishes between organising and visiting clubs. The new article 16 on order and security at UEFA competition matches states:

1. Host associations and clubs are responsible for order and security both inside and around the stadium before, during and after matches. They are liable for incidents of any kind and may be subject to disciplinary measures and directives unless they can prove that they have not been negligent in any way in the organisation of the match.
2. However, all associations and clubs are liable for the following inappropriate behaviour on the part of their supporters and may be subject to disciplinary measures and directives even if they can prove the absence of any negligence in relation to the organisation of the match:
   a) the invasion or attempted invasion of the field of play;
   b) the throwing of objects;
   c) the lighting of fireworks or any other objects;
   d) the use of laser pointers or similar electronic devices;
   e) the use of gestures, words, objects or any other means to transmit any message that is not fit for a sports event, particularly messages that are of a political, ideological, religious, offensive or provocative nature;
   f) acts of damage;
   g) the disruption of national or competition anthems;
   h) any other lack of order or discipline observed inside or around the stadium.

Paragraph 1 thus explicitly allows for the organising club to escape its liability if it proves that it has not been negligent in any way in the organisation of the match. However, in paragraph 2 this possibility to escape liability is almost directly discarded in a number of specific situations, effectively confirming that a club cannot escape liability for the acts of its own supporters. In addition, the wording of the provision suggests that the organising club can be held liable for acts of visiting supporters unless 'they can prove that they have not been negligent in any way in the organisation of the match'.

In comparison, the former article 6 of the UEFA Disciplinary Regulations,[5] which has been the subject of a number of cases before the CAS, was not formulated as precisely.

> "1. Member associations and clubs are responsible for the conduct of their players, officials, members, supporters and any other persons exercising a function at a match on behalf of the association or club.
> 2. The host associations or clubs are responsible for order and security both inside and around the stadium before, during and after the match. They are liable for incidents of any kind, and may be rendered subject to disciplinary measures and directives."

Until 2006 this provision also covered racist acts. However, since then acts of discrimination and racism have been covered by a specific provision in the regulations.[6]

4.2.2 The rule in the regulations of national federations

In line with the regulations of FIFA and UEFA, national football federations have incorporated similar provisions. Using various formulations, all five national federations relevant to this research have enacted rules that establish the liability of clubs for the misconduct of their supporters.[7]

After comparing the rules of the national federations, some commonalities and differences are worth mentioning. First, the regulations of the national federations of France, Germany, the Netherlands and Switzerland all presuppose that the organising club or association is responsible for order and security before, during and after the match.

In some, but not all, jurisdictions it is possible for clubs – both organising and visiting clubs – to be exonerated. The regulations of the Dutch national federation allow for clubs to escape liability if they plausibly argue that sufficient measures of a far-reaching and stringent nature were taken, that the

5 Up until the 2013 edition.
6 Art. 11bis of the UEFA Disciplinary Regulations (until 2011 Edition), currently art. 14 (since 2013 Edition).
7 See annex.

probability that their supporters would misbehave before, during and after the match was negligible.

> "Een bij een wedstrijd betrokken betaaldvoetbalorganisatie is verantwoordelijk voor wanordelijkheden veroorzaakt door de aanhang van de desbetreffende betaaldvoetbalorganisatie tenzij de desbetreffende betaaldvoetbalorganisatie aannemelijk maakt dat zij voor, tijdens en na de wedstrijd voldoende maatregelen heeft getroffen van dusdanig verstrekkende en stringente aard, dat de kans dat haar aanhang zich misdraagt te verwaarlozen is."[8]

Regulations of the English and Swiss federations feature similar phrasings.

> Rule 21, Rules of the Association 2015-2016: "It shall be a defence in respect of charges against a Club for Misconduct by spectators and all persons purporting to be supporters or followers of the Club, if it can show that all events, incidents or occurrences complained of were the result of circumstances over which it had no control, or for reasons of crowd safety, and that its responsible officers or agents had used all due diligence to ensure that its said responsibility was discharged."

> Article 9 (3), Règlement disciplinaire ASF 2015: "Ils répondent de tout incident, sont passibles de mesures disciplinaires et peuvent être contraints à suivre des instructions à moins qu'ils ne puissent prouver que les mesures organisationnelles concrètement mises en œuvre correspondaient aux dispositions applicables en la matière et que, compte tenu des circonstances concrètes, elles étaient suffisantes sur les plans tant qualitatif que quantitatif. Les dispositions statutaires et réglementaires sur la responsabilité causale demeurent réservées."

Taking a close look at this last formulation, the Swiss regulations seem to feature the same contradiction as UEFA's new provision as a subsequent provision states that clubs are liable without fault for a number of specific disturbances, including violent acts towards people and things and the throwing of objects.

> Article 20 (2) Règlement disciplinaire ASF 2015: "Les mêmes mesures disciplinaires peuvent être infligées aux clubs en cas de conduite incorrecte de leurs supporters *sans qu'un comportement fautif ou un manquement ne soit imputable auxdits clubs, notamment en cas*: a) d'actes de violence contre les personnes ou les choses; b) d'utilisation d'engins pyrotechniques; c) de jet d'objets sur le terrain de jeu ou en direction des spectateurs; d) de diffusion de messages en tous genres étrangers au sport, notamment au contenu politique, offensant ou provoquant, que ce soit par des gestes, des images, des mots ou d'autres moyens; e) d'envahissement du terrain; f) de toute autre atteinte à l'ordre et à la discipline qui peut être observée dans l'enceinte du stade et dans ses abords immédiats."[9]

8 Art. 20 (2a) Reglement tuchtrechtspraak betaald voetbal 2015-2016.
9 Article 20 (2) Règlement disciplinaire ASF 2015.

In contrast, the regulation of the French national federation lacks any form of exoneration.

> Article 129 (1) Règlements Généraux FFF: "Les clubs qui reçoivent sont chargés de la police du terrain et sont responsables des désordres qui pourraient résulter avant, pendant ou après le match du fait de l'attitude du public, des joueurs et des dirigeants ou de l'insuffisance de l'organisation. Néanmoins, les clubs visiteurs ou jouant sur terrain neutre sont responsables lorsque les désordres sont le fait de leurs joueurs, dirigeants ou supporters."

Similarly to the French rule, the standard provision in the regulations of the German football federation (DFB), which is based on the former art. 6 of the UEFA Disciplinary Regulations, also lacks the possibility of escaping liability.[10]

> "§ 9a, DFB Rechts- und Verfahrensordnung:
> 1. Vereine und Tochtergesellschaften sind für das Verhalten ihrer Spieler, Offiziellen, Mitarbeiter, Erfüllungsgehilfen, Mitglieder, Anhänger, Zuschauer und weiterer Personen, die im Auftrag des Vereins eine Funktion während des Spiels ausüben, verantwortlich.
> 2. Der gastgebende Verein und der Gastverein bzw. ihre Tochtergesellschaften haften im Stadionbereich vor, während und nach dem Spiel für Zwischenfälle jeglicher Art."

In the regulations of the DFB, a defence of sufficient measures is only explicitly mentioned regarding cases where supporters engage in acts of discrimination.[11]

In summary, all national football federations presuppose the responsibility of the organising club to maintain security. Only the Dutch and English federations allow clubs to escape liability provided that sufficient measures were taken to prevent supporters' misconduct. Finally, the regulations of the French, German and Swiss federations include a strict liability rule for (certain) acts of visiting clubs.

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10 § 9a, DFB Rechts- und Verfahrensordnung.

11 § 9a (4) DFB Rechts- und Verfahrensordnung: "Eine Strafe aufgrund dieser Bestimmung kann gemildert werden oder von einer Bestrafung kann abgesehen werden, wenn der Betroffene nachweist, dass ihn für den betreffenden Vorfall kein oder nur ein geringes Verschulden trifft oder sofern anderweitige wichtige Gründe dies rechtfertigen. Eine Strafmilderung oder der Verzicht auf eine Bestrafung ist insbesondere dann möglich, wenn Vorfälle provoziert worden sind, um gegenüber dem Betroffenen eine Bestrafung gemäß dieser Bestimmung zu erwirken."

4.3 THE APPLICATION OF DISCIPLINARY LIABILITY BY THE CAS AND NATIONAL COURTS

The liability regime for supporters' misconduct, in its various forms, has frequently been applied by both national and international federations. However, the majority of occurrences of this phenomenon do not lead to rulings from national courts or arbitration tribunals. In general, sanctions imposed on clubs by the internal disciplinary body of the respective federation are not appealed.

Nevertheless, a small number of national and international courts have been sought to review sanctions imposed on clubs following supporters' misconduct.[12] In the course of these appeals, the courts were urged to shed their light on the legality of the relevant strict liability rule. These cases – some of which have led to heated debates in literature – will be examined below.

4.3.1 Application of the rule by CAS

The Court of Arbitration for Sport has ruled in two landmark cases on UEFA's strict liability regime. Both cases have been reported on in a number of commentaries and other publications.[13] Nevertheless, reiteration of the key facts and considerations of the tribunal is useful in light of the overall objective of this research.

4.3.1.1 PSV Eindhoven/UEFA

In the case *PSV Eindhoven/UEFA*, the legality of UEFA's liability regime for supporters' misconduct was disputed before the CAS for the first time.[14] The UEFA Control and Disciplinary Body had imposed a CHF 30,000 fine and a strict warning upon Dutch football club PSV Eindhoven based on the former article 6 of the UEFA Disciplinary Regulations after spectators engaged in racist behaviour and threw objects (lighters) onto the field during a Champions' League match against Arsenal FC. In the internal appeal proceedings, UEFA's Appeals Body considered that PSV should have intervened and seriously involved its service attendants in order to avoid racist behaviour, especially since it had to be aware of such a risk given its background. The Body also considered that this was a case of recidivism and increased the fine to CHF 50,000.

12 For general remarks on the review of disciplinary sanctions, see Chapter 3.

13 At this time a total of three cases has been considered. However, TAS 2008/A/1688 Club Atlético Madrid/UEFA is not included as it only reaffirms the CAS' view developed in the first two cases.

14 TAS 2002/A/423 PSV Eindhoven/UEFA.

In the case brought before the CAS, the club argued that it was not to blame and objected to the regime of strict liability on the basis of three grounds.

The club first argued that this type of liability is contrary to article 20 of the Swiss Code of Obligations, which provides that a contract is void if it is impossible, illicit or immoral.[15] Unfortunately for the club, this argument ran aground on the fact that in Swiss law an association is granted extensive freedom in its internal organisation and in defending itself against harmful behaviour of members. It is also widely admitted in Swiss law that sanctions can be imposed without fault without this constituting a breach of morality.[16] Citing Baddeley, the CAS comes to the same conclusion.

> "L'élément punitif de la sanction est ainsi relégué au second rang, au bénéfice des fonctions préventives et dissuasives que doit remplir la sanction dans l'intérêt de l'ordre interne. Partant, une sanction peut être prononcée de manière valable même en l'absence d'un comportement fautif de son auteur."[17]

Article 6 of the UEFA Disciplinary Regulations thus serves as the legal basis to enforce respect for UEFA's objective and the obligations imposed on its members and adhered third parties that are subordinate to its rules.

> "According to article 6 (1) UEFA members and clubs are responsible for any breach of the UEFA Regulations committed by all persons mentioned in the provision. This rule leaves absolutely no room for manoeuvre as far as its application is concerned. UEFA member associations and football clubs are responsible, even if they are not at fault, for the improper conduct of their supporters, including racist acts, which expressly breach the Disciplinary Regulations. Clubs are automatically held responsible if such an act has been established."[18]

The CAS proceeds to explain the objective of the rule: to penalise the supporters for their conduct by penalising the clubs. As UEFA has no direct way of penalising individual supporters, it focuses all measures on the bodies they do have authority over: the member associations and the clubs. According to the CAS, penalising the clubs for faulty supporters' conduct through an indirect sanction is the only way in which UEFA has a chance of achieving its

15 Although art. 20 CO is a provision of contract law, it is also applicable on all other civil law matters – including association law – via art. 7 of the Swiss Civil Code. See also chapter 2.3. As a result, the qualification of the disciplinary sanction – either as contractual or an institutional – is not relevant for the test against art. 20 CO as the outcome will be the same regardless of the qualification.

16 See also Chapter 2.8 and section 4.1 below.

17 TAS 2002/A/423 PSV Eindhoven/UEFA, cons. 9, citing Margareta Baddeley, *L'association sportive face au droit, les limites de son autonomie* (diss. Genève) 1994, pp. 238-244.

18 TAS 2002/A/423 PSV Eindhoven/UEFA, cons. 13-14 (translation from the CAS in CAS 2007/A/1217 Feyenoord Rotterdam/UEFA, cons.11.10).

objectives. In this light, article 6, paragraph 1 is suggested to have a preventive and deterrent function.[19]

The club also invoked that the strict liability regime constitutes a breach of article 163 (2) of the Swiss Code of Obligations, which provides that a contractual penalty may not be claimed, unless otherwise agreed, if performance has been prevented by circumstances beyond the debtor's control. The CAS considers, however, that by virtue of the same provision, it is allowed to 'agree otherwise' and that article 6 of UEFA's Disciplinary Regulations constitutes such allowed deviation. The third invoked argument – that UEFA abused a dominant position in the market – was dismissed as unsubstantiated.[20]

When turning to re-evaluating the facts of the case, the CAS first ascertains that the racist chanting of the PSV Eindhoven supporters merits the automatic application of article 6 (1) and allows UEFA to impose a sanction. Hereafter, the CAS clearly distinguishes between the first and second paragraph of article 6. Worded differently to the first paragraph, article 6 (2) stipulates that the host association or club is responsible for order and security both inside and around the stadium before, during and after the match and is liable for incidents of any kind. According to the CAS, a purely literal interpretation of this rule suggests that this is no longer a question of strict liability.[21]

> "Although this provision does impose a duty of care and diligence, requiring clubs and associations to do their utmost to guarantee order and security in and around the stadium when a match takes place, the simple fact that the incident occurs does not automatically mean that the host association or club should be penalised. The body responsible for dealing with such incidents is given a free hand to penalise the national association or club concerned in accordance with the circumstances. It would be outrageous if an association or club could be sanctioned even though it had committed no fault in relation to the organisation and maintenance of order and security at the match in question."[22]

Following this line of argumentation the CAS finally concludes that PSV Eindhoven complied with the standard of behaviour to which it was submitted under article 6 (2), considering there was no evidence that the club should have adopted other measures than the ones that were put in place. Even though the supporters of PSV Eindhoven violated the principles laid down by UEFA, order and security had at no time been seriously endangered, apart from the very isolated episode of throwing lighters on the field and the club

19 TAS 2002/A/423 PSV Eindhoven/UEFA, cons. 15-16.

20 In order not to lose the focus on the main problem, these last-mentioned arguments will not be examined further.

21 TAS 2002/A/423 PSV Eindhoven/UEFA, cons. 19-20.

22 TAS 2002/A/423 PSV Eindhoven/UEFA, cons. 20 (translation from the CAS in CAS 2007/A/1217 Feyenoord Rotterdam/UEFA, cons.11.11)

was considered not to have violated article 6 (2). On the basis of the violation of article 6 (1) and considering the fact that this was a case of recidivism, the CAS upheld the penalty imposed, but decreased it from CHF 50,000 to CHF 30,000 and revoked the warning.

From a textual point of view, this suggested difference between the two paragraphs is not very convincing. With hindsight, the CAS might have read a little too much in the text of the provision when suggesting that article 6 (2) is not a question of strict liability. Especially given the fact that the text has since been adapted to ensure that for a number of specific acts, i.e. when objects are thrown, liability cannot be escaped on the basis of the efforts made by the club to avoid disturbances. It is not unlikely that if the case was judged on the basis of the new articles 14 and 16, the outcome would be different.[23]

4.3.1.2 Feyenoord Rotterdam/UEFA

While *PSV Eindhoven/UEFA* was the first case in which the CAS recognised the legality of UEFA's liability rules, *Feyenoord Rotterdam/UEFA* is the more famous case. The severity of repercussions was far greater than for PSV Eindhoven – suspending the Dutch club from European football for the remaining part of the 2006/2007 season after riots in Nancy, France.

On November 30, 2006, Feyenoord played an away game against the French team of AS Nancy-Lorraine in the group phase of the UEFA Cup Tournament in the 2006/2007 season. During the preparation of the match Feyenoord received about 1400 tickets for the game. Three days before the match Feyenoord informed AS Nancy that they expected a huge number of people to travel to Nancy without any ticket and that about 400 tickets allocated to AS Nancy seemed to have been purchased by Dutch supporters outside the Feyenoord away ticketing system. Feyenoord opposed to these free sales, but AS Nancy argued it had taken additional measures to avoid problems during the match. These measures proved to be insufficient. Feyenoord supporters were present in the city centre of Nancy long before the match started and riots broke out hours before the match was even supposed to start. Without consulting Feyenoord or the UEFA match delegate present at the match, police moved the troublemakers from the city centre into the stadium as it was thought that the stadium was secured enough to host such supporters and it would be easier to control them in the arena rather than in the surroundings of the stadium. The rioters and other supporters who did not have tickets were put in a section of the stadium adjacent to the regular away section. The rioting supporters quickly started breaking the separation wall between their section and the regular away section and mixed with the Feyenoord supporters who got their tickets through the regular ticketing system. Riots continued during

23 See Section 2.1 above and Section 3.1.2 below.

the match with Feyenoord supporters throwing seats at the police and at crowds placed in another section until the police intervened with teargas to disperse the crowd. The match had to be interrupted for about half an hour because of the effects of the teargas on players, officials and fans.

As a result of the disturbances, Feyenoord was sanctioned by the UEFA Disciplinary Body based on the former article 6 (1). A CHF 200,000 fine was imposed and the club was ordered to play the next two home matches in a UEFA club competition behind closed doors. In the appeal proceedings, filed by both parties, a heavier sanction was imposed; the club was to be disqualified from the 2006/2007 UEFA Cup tournament and had to pay a fine of CHF 100,000.

In its appeal filed with the CAS, Feyenoord argued that the application of article 6 of the UEFA Disciplinary Regulations was unlawful as the club did nothing wrong and was not to blame in any way since they established a special away ticketing system and warned AS Nancy of the risks related to the free sale of tickets, thus doing everything within its power to prevent disturbances. Alternatively, the club also claimed that the people who caused disturbances could not be considered as Feyenoord supporters seeing as they did not travel and enter the stadium under the guidance of Feyenoord, did not wear any Feyenoord clothing, did not buy tickets through the system of Feyenoord and some of them were subject to stadium bans in Holland. Finally, the club argued that the sanction was disproportionate.

The CAS commences by stating that there is no distinction between 'official' and 'unofficial' supporters.

> "The only way to ensure the responsibility of clubs for their supporters is to leave the word undefined so that clubs know that the Disciplinary Regulations apply to, and they are responsible for, any individual whose behaviour would lead a reasonable and objective observer to conclude that he or she was a supporter of that club".[24]

Restating parts[25] of the PSV Eindhoven case, CAS went on to consider that article 6 of the Disciplinary Regulations was valid and that the strict liability rule of article 6, paragraph 1, was applicable to the case. The fact that Feyenoord did much to prevent disturbances, such as establishing special away ticketing systems and warning AS Nancy of the risks related to the free sale of tickets were of no help as the strict liability rule applied. Article 6, paragraph 2, which allows for the possibility of shifting the burden of proof, was not applicable since Feyenoord was not the host association and was not

24 CAS 2007/A/1217 Feyenoord Rotterdam/UEFA, cons. 11.6.

25 CAS 2007/A/1217 Feyenoord Rotterdam/UEFA, cons. 11.10-11.11. See the italics in Section 3.1.1 above.

involved in the organisation and maintenance of order and security at the match in question.

Regarding Feyenoord's claim that the sanction was disproportional, the CAS considered that according to its case law, 'a sanction imposed must not be evidently and grossly disproportionate to the offence'.[26] Taking into account the UEFA Appeals Body's qualification of the behaviour of the fans as a serious offence, the court concluded that UEFA was allowed to impose the heavy sanction of disqualification. In addition, Feyenoord was a multiple offender with regard to supporters' misconduct, which constitutes an aggravating factor in the UEFA Disciplinary Regulations.[27] Ultimately, the CAS upheld the ruling and sanction of the UEFA Appeals Body.

As this case was also decided under the old regime, some remarks should be made. The new article 16 clearly outlines the situations in which it is impossible to escape or limit liability. Feyenoord's claim that they had done nothing wrong was central in their line of argumentation. However, under the new regime it is clear that this argument is mute. Fundamentally, UEFA's strict liability regime has remained the same, but the new provisions provide more clarity.

In both the Feyenoord case and the PSV Eindhoven case, the CAS made it very clear that UEFA's regulations take priority. Rules of national law only apply by default. Finally, the fact that neither club attempted to appeal the respective awards before the Swiss Federal Tribunal is likely attributed to the limited grounds for a substantial appeal.[28]

4.3.2 Application of the rule by national courts

Besides the CAS cases, disciplinary liability of clubs for supporters' misconduct has been the subject of cases in both France and Germany. At this time, no cases have been reported from the other relevant jurisdictions.

On multiple occasions, sanctions imposed by the *Fédération Française de Football* (FFF) have been appealed by the club in question. Where in the other countries researched a disciplinary sanction would be brought before a civil law court or arbitration tribunal, in France disciplinary sanctions imposed by sports organisations are qualified as administrative acts. As a result, in France the court of appeal is an administrative court. After a somewhat ambiguous start, case law in France now seems to be firmly established in favour of the French strict liability rule.

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26 CAS 2007/A/1217 Feyenoord Rotterdam/UEFA, cons. 12.4.

27 Art. 19 (2) UEFA Disciplinary Regulations (2014 edition): "Recidivism counts as an aggravating circumstance".

28 See Chapter 3.3.2.3.

In Germany, the first – and so far only – case was settled by arbitration. In an appeal brought by Dynamo Dresden, the *Ständiges Schiedsgericht für Vereine und Kapitalgesellschaften der Lizenzligen* accepted the application of the strict liability provision in the DFB Regulations.

4.3.2.1 France: Tribunal Administratif in Paris St. Germain/FFF

The first case in France resulted from supporters' misconduct during the final of the 2003/2004 *Coupe de France* between the clubs of Paris St. Germain (PSG) and Berrichonne de Châteauroux. Incidents included damage to the stadium and the throwing of objects. By virtue of article 129 (1) of the *Réglements Généraux* of the FFF,[29] PSG had been sanctioned to a fine and a conditional sentence of one match behind closed doors by the judicial bodies of the FFF in the first instance and on appeal.

PSG filed an appeal to annul this decision, arguing that it could not be held liable for conduct of supporters who at the time were in conflict with the club.[30] According to the FFF, the sanction was based on the personal fault of PSG to ensure a safe match. The *Tribunal administratif* decided in favour of the club considering that the strict liability rule as laid down in article 129 (1) is incompatible with the constitutional principle of the *personnalité des peine*s.

> "En énonçant que les clubs visiteurs ou jouant sur terrain neutre sont responsables lorsque les désordres sont le fait de leurs supporters, l'article 129.1 du règlement général de la Fédération française de football méconnaît le principe de personnalité des peines, qui fait obstacle à ce qu'une personne morale soit sanctionnée disciplinairement à raison d'agissements commis par des personnes physiques autres que ses dirigeants ou ses salariés, et est donc inconstitutionnel."[31]

According to this principle, a person is only responsible for his own doing, and it prevents a legal person from being penalised for acts committed by individuals other than its officers or employees.[32]

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29 Article 129 (1) states: "Les clubs qui reçoivent sont chargés de la police du terrain et sont responsables des désordres qui pourraient résulter avant, pendant ou après le match du fait de l'attitude du public, des joueurs et des dirigeants ou de l'insuffisance de l'organisation. Néanmoins, les clubs visiteurs ou jouant sur terrain neutre sont responsables lorsque les désordres sont le fait de leurs joueurs, dirigeants ou supporters".

30 Jean-Michel Marmayou, 'La responsabilité disciplinaire des clubs du fait de leur supporteurs', note under Trib. Adm. Paris 16.03. 2007, n°0505016 (Société Paris Saint Germain), *Les Cahiers de Droit du Sport* 2007/8, pp. 146-156, p. 147. In 2004, different supporters groups united to protest the club's directors following the new security policy of the club as well as bad results.

31 Trib. Adm. Paris 16.03.2007, n°0505016 (Société Paris Saint Germain).

32 Mikaël Benillouche and Julien Zylberstein, 'La responsabilité des clubs de football du fait de leurs supporters: une occasion manquée', *Gazette du Palais* mai-juin 2007, pp. 1545-1546.

The response to this case has been dual; with commentators generally agreeing on the main considerations of the court, but also admitting that a confirmation of this judgement could have problematic repercussions in the sense that it would be hard to punish the supporters for their behaviour.[33]

> "'L'esprit sportif' n'est-il pas menacé par le caractère symbolique de l'annulation de la condamnation d'un club pour les agissements de ses supporters?"[34]

4.3.2.2 France: Conseil d'État in Lille Olympic Sporting Club/FFF

After a request for an advisory opinion from the *Tribunal administratif* of Lille following another sanction imposed as a result of supporters' misconduct, France's highest administrative court, the *Conseil d'État,* took a different approach.

Lille Olympic Sporting Club Lille Métropole appealed to the court to annul the EUR 5,000 fine that it was imposed after violent behaviour of its supporters during a league match in 2005. The *Conseil d'État* was asked to answer two questions. First, whether or not article 129 (1) was in violation of the principle of *personnalité des peines* and second, if so, whether a small adjustment[35] could be admitted to this principle with regard to the domain of sports, to take into account the objectives of the struggle against violence.[36]

In contrast with the decision of the Parisian *Tribunal administratif* of 16 March 2007, the *Conseil d'État* took a teleological approach and held that article 129 (1) does not establish a presumption of responsibility for the acts of others, but rather an obligation of result in regard to safety during a match. The court starts its reasoning by highlighting that the goal of the provisions is to combat spectator violence and to guarantee safety during matches.

> "Afin de lutter contre la violence dans les stades, de préserver l'ordre public et d'assurer le bon déroulement ainsi que la sécurité des compétitions sportives plusieurs dispositions ont (..) prévu que les clubs seraient responsables vis-à-vis d'elle des agissements de leurs dirigeants, joueurs, supporteurs et spectateurs à l'occasion des rencontres sportives."[37]

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33 Sébastien Marcali, 'Les réglementations sportives et les principes constitutionnels. note sous TA de Paris 16 mars 2007', *Recueil Dalloz* 2007, pp. 2292-2295; Jean-Michel Marmayou, 'La responsabilité disciplinaire des clubs du fait de leur supporteurs. Note sous TA de Paris 16 mars 2007', *Les Cahiers de Droit du Sport* 2007, pp. 146-156.

34 Mikaël Benillouche and Julien Zylberstein, 'La responsabilité des clubs de football du fait de leurs supporters: une occasion manquée', *Gazette du Palais* mai-juin 2007, p. 1546.

35 In French: *aménagement*, which is not an exception, but rather a small transformation or adjustment.

36 CE 29.10.2007, n°307736 (Lille Olympic Sporting Club), *Recueil Dalloz* 2008, p. 1381.

37 CE 29.10.2007, n°307736 (Lille Olympic Sporting Club), *Recueil Dalloz* 2008, p. 1381.

It continues by stating that the mere fact that the result is not achieved constitutes an objective fault of the club, which creates its disciplinary liability. As the club is thus not punished for acts committed by others, but rather for breaching a personal obligation, article 129 (1) does not infringe the principle of '*personnalité des peines*'.

> "Cet article impose aux clubs de football, qu'ils soient organisateurs d'une rencontre ou visiteurs, une obligation de résultat en ce qui concerne la sécurité dans le déroulement des rencontres.(..) La méconnaissance de ces dispositions peut faire l'objet de sanctions disciplinaires de la part de la fédération (..) Les règlements en cause sanctionnent ainsi la méconnaissance par les clubs d'une obligation qui leur incombe et qui a été édictée par la fédération sportive dont ils sont adhérents, dans le cadre des pouvoirs d'organisation qui sont les siens et conformément aux objectifs qui lui sont assignés. Ils ne méconnaissent pas, par suite, eu égard au pouvoir d'appréciation ci-dessus rappelé, le principe constitutionnel de responsabilité personnelle en matière pénale, qui est applicable aux sanctions administratives et disciplinaires."[38]

In other words, other than the *Tribunal Administratif*, which interpreted article 129 as sanctioning the club for acts of its supporters, the highest court estimates that the club is sanctioned for its own fault, which is revealed by the acts of their supporters.[39]

Nevertheless, the *Conseil d'État* considers that the measures taken by the club to avoid disturbances should be taken into account when determining the severity of the fault committed and the appropriate sanction.[40]

4.3.2.3 France: Tribunal Administratif of Paris and Conseil d'État in FFF*/Paris Saint-Germain (2)*

After this landmark case, the importance of proportionality of the sanction was reiterated by the *Tribunal Administratif* of Paris and the *Conseil d'État* in a case that featured another sanction against Paris Saint-Germain.[41] This time, the club was excluded from the next League Cup after the so-called '*affaire*

38 CE 29.10.2007, n°307736 (Lille Olympic Sporting Club), *Recueil Dalloz* 2008, p. 1381.

39 Mathieu Maisonneuve, 'Violence des supporters et responsabilité disciplinaire des clubs, note sous CE 29.10.2007', *Recueil Dalloz* 2008, pp. 1384.

40 "Il appartient aux organes disciplinaires de la fédération, après avoir pris en considération les mesures de toute nature effectivement prises par le club pour prévenir les désordres, d'apprécier la gravité des fautes commises et de déterminer les sanctions adaptées à ces manquements." CE 29.10.2007.

41 TA Paris 14.08.2008, n°081296/8/9, affirmed by CE 10.10.2008, n°320111 (FFF v/Paris Saint-Germain), *Recueil Dalloz* 2009/8, p. 519, obs. P. Rocipon; *AJDA* 2009/9, p. 500; *RFDA* 2009/4, p. 767, obs. E. Lemaire; *Les Cahiers de Droit du Sport* 2008/14, p. 105, note Colin; Michael Benillouche 'L'affaire de la banderole ou les tâtonnements des pouvoirs publics dans la lutte contre le hooliganisme', *Les Cahiers de Droit du Sport* 2008/11, pp. 23-27.

de la banderole'. During a match against Racing Club de Lens a massive banner was rolled out across almost the entire length of the pitch, positioned directly in front of the television cameras covering the match and in full view of the Lens end. The banner had various insults aimed at so-called 'Ch'ti's', people from the north of the country.

The *Conseil d'État* confirmed the decision of the *Tribunal Administratif* of Paris on 14 August 2008, which, at the request of PSG, suspended the execution of the disciplinary sanction considering that the sanction of exclusion was manifestly disproportionate, thus creating serious doubts in regard to the legality of the sanction. Even though the club could be blamed for breaching its obligation of security, the fact that the match took place on neutral ground and was not organised by the club – who nevertheless took measures to prevent disorders – should have been considered. As the penalty imposed was the highest in the scale of penalties applicable to a knockout match the court deemed that there was serious doubt regarding the legality of that decision.[42] Thus, in this case it was determined that the club had indeed infringed the obligation of result. However, the punishment that followed was deemed too severe.

Compared to the CAS cases, the French courts had to do some manoeuvring to accept the FFF's strict liability rule for supporters' misconduct. They found the solution in equating strict liability with a personal fault of the organising club for breaching the guarantee of safety. It has been noted that the *Conseil d'État*'s objective from the outset has seemed to aim at saving the provision by considering that the provision pursues objectives of the utmost importance (*"lutter contre la violence dans les stades", "preserver l'ordre public", "assurer le bon déroulement ainsi que la sécurité des competitions sportives").*[43] With regard to the strict liability of visiting clubs, the French courts have not yet had to take a stand since the *Conseil d'État*'s landmark decision. However, according to the standing case law, it seems unlikely that visiting clubs can be sanctioned without having to be held liable for the acts of another. After all, visiting clubs are not under the same obligation of result to maintain order and security during matches as organising clubs.[44]

4.3.2.4 Germany: Dynamo Dresden/DFB

As in international football, in Germany most sanctions imposed by the highest internal judicial body of the German Football Federation – the *DFB Sportgericht* –

42 Trib. Adm. Paris 14.08.2008, n°0812968/9-I (Soc. Paris Saint-Germain Football).

43 Mathieu Maisonneuve, 'Violence des supporters et responsabilité disciplinaire des clubs, note sous CE 29.10.2007', *Recueil Dalloz* 2008, pp. 1381-1385, p. 1384. See similarly, Nathalie Ros, 'Décisions commentées. CE 27 Octobre 2007', *Jurisport* 2007/85, pp. 41ff., par. II.A.1.

44 See further Chapter 5.4.1 and Chapter 6.5.1.

are not appealed. The case to be discussed here is the first one in which the strict liability regime of § 9a RuVO was brought before a higher body, the *Ständiges Schiedsgericht für Vereine und Kapitalgesellschaften der Lizenzligen.*[45]

Following severe crowd disorders during a match against Hannover 96, Dynamo Dresden was suspended from the 2013/2014 interleague German Cup. Although acknowledging that the club was not to blame for the disorder – it fulfilled all required and possible safety measures – the *DFB Sportgericht* applied the strict liability regime of § 9a RuVO without further ado. Dynamo appealed to the *Ständiges Schiedsgericht* arguing that § 9a RuVO breaches the principle of 'no liability without fault' and the principle of proportionality.

The award starts with the court's observation that in the review of the sanction the same standards will be applied as a civil-law court would apply.[46] In its considerations on the legality of the application of the sanction, the court presupposes that it does not have to decide in general whether the DFB's strict liability regime has a sufficient constitutional basis as these sanctions are not penal-law penalties but rather have their basis in civil law. The court remarks that the prevailing opinion in doctrine is that for such disciplinary sanctions fault is – or should be – required. However, this observation is followed by noting that German case law has accepted liability without fault in regard to doping sanctions.[47]

Furthermore, the court considers that § 9a RuVO falls within the DFB's regulatory autonomy because the goal of the rule is the prevention of future unsportsmanlike conduct of the supporters and this is a legitimate interest in line with the purpose of the association.[48] In fact, the regulations look for an answer to very specific problems and it is the only way to – indirectly – get to the fans to prevent misconduct. With § 9a RuVO an *attribution standard* is created which is tailored to the specific needs of the sport.

> "§ 9 RuVO steht jedenfalls mit staatlichem Recht im Einklang, wenn auf der Grundlage dieser Zurechnungsvorschrift gegen ein Verein wegen schuldhaften Verhaltens seiner Anhänger Sanktionen und Maßnahmen in Sinne des § 44 DFB-Satzung ausgesprochen werden, deren vorrangiges Ziel die Verhütung künftigen unsportlichen Verhaltens der Anhänger ist."[49]

The court further notes that the legality of the rule has also been confirmed by the CAS, to which the DFB has subjected itself in its articles of association.

The rule also passes the test against § 242 BGB, which requires that an obligor has a duty to perform according to the requirements of good faith,

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45 Permanent court of arbitration for associations and companies of the professional leagues.

46 Ständiges Schiedsgericht für Vereine und Kapitalgesellschaften der Lizenzligen 14.05.2013 (Dynamo Dresden v/DFB), *SpuRt* 2013/5, p. 200, cons. I.

47 Cons. II, 1a. See also Chapter 2.8.

48 Cons. II, 1b.

49 Cons. II, 2a.

taking customary practice into consideration. According to the court, the rule does not entail a unilaterally imposed undue liability – after all, the club has agreed to rules of DFB. In fact, the rule in question is a carefully weighed balance between ensuring danger-free matches and legitimate interests of the clubs.

> "Der in Frage stehenden Zurechnungsnorm liegt eine ausgewogene Abwägung zwischen den Erfordernissen der Gewährleistung eines gefahrenfreien und ordnungsgemäßen Spielbetriebs einerseits und den schutzwürdigen Belangen der vereine anderseits zugrunde."[50]

With regard to the proportionality of the sanction, the court considers that the club has been excluded only from one competition series. Furthermore, Dynamo had already received a warning as well as other measures, which apparently did not work. Based on these reasons, the court deems the sanction not out of proportion.[51]

Interestingly, in this first case in Germany, the arbitral court refers to the two CAS cases multiple times and also employs similar arguments.[52] The argument that a club cannot ask for the interpretation of 'supporter' to include only those that behave themselves, suggests a strong influence of CAS case law on the German panel.[53]

In summary, the review of the disciplinary liability rules by national courts feature certain differences in approach compared to the CAS. Unsurprisingly, considering the administrative-law nature of the sanction, the French courts showed much more concern for principles of national law than the CAS. In contrast, a more holistic approach was taken by the arbitral court in Germany, which considered both national law and the relevant CAS cases to come to its decision. The latter is a prominent example of how international private regulations can have a direct impact on an otherwise strictly national legal relationship.[54]

4.4 The conceptual lawfulness of disciplinary strict liability

The disciplinary cases examined above have spurred numerous reactions from legal doctrine. Especially in the aftermath of the *Feyenoord* case, a number of

50 Cons. II, 3a.
51 Cons. III.
52 Most notably the argument that there is no other way to get to the supporters than through the club. The court also embraces the CAS's definition of supporters.
53 Cons. II, 4.
54 See further on the relationship between private regulations and national (civil) law Chapter 6.2.

contributions from Germany and Switzerland were made, questioning mainly the lawfulness and desirability of a strict disciplinary liability. In contrast, based on their case notes French authors seem less concerned with the concept of strict liability as such. It is rather the application of the rule in practice – in particular regarding the proportionality of the sanction – that has been discussed.[55]

If the disciplinary liability of clubs for their supporters' misconduct should prove to be conceptually problematic, this would probably have negative implications for their liability in civil law. In the following, contributions from legal scholarship will be analysed to clarify the concept of disciplinary liability of clubs for their supporters' misconduct.

In recognition of the fact that disciplinary liability and civil liability overlap in many ways, the German-Swiss debate on the legality of the disciplinary rule largely consists of authors conducting analogies with various forms of liability in civil law.[56] This is an interesting development and further highlights the necessity of examining the concept from an overarching perspective. Although this debate has been limited to these jurisdictions, the arguments can be relevant to and valid for the other jurisdictions as well.

4.4.1 Justifying disciplinary liability without fault

In several contributions the point has been raised that in general, no liability can exist without fault.

In a discerning commentary on the *Feyenoord* case, German author Orth reasons that liability for supporters' violence of clubs without fault of their own is impossible in the light of German state law. According to Orth, the creation of such strict liability is no longer covered by the freedom of associations of art. 9 (1) of the German Constitution since the creation of strict liability in state law is not possible without a specific legal provision or law.[57] Following similar reasoning, Bahners also concludes that the disciplinary sanctioning of a club without its own fault contravenes the constitutional

55 Gérald Simon, 'Droit public et droit de la responsabilité. La responsabilité objective des clubs du fait de leurs supporters: une règle du droit sportif reconnue par le juge étatique', *Gazette du Palais,* recueil septembre-octobre 2008, pp. 3232-3235; CE 10.10.2008, n°320111 (FFF v/Paris Saint-Germain), *Les Cahiers de Droit du Sport* 2008/14, p. 105, note Colin; Michael Benillouche 'L'affaire de la banderole ou les tâtonnements des pouvoirs publics dans la lutte contre le hooliganisme', *Les Cahiers de Droit du Sport* 2008/11, pp. 23-27.

56 Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauerausschreitungen im Fussball', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 129-159, p. 136ff.

57 Jan F. Orth, 'Gefährdungshaftung für Anhänger? Kritik an der CAS/TAS-Entscheidung Feyenoord Rotterdam N.V. vs. UEFA', *SpuRt*, 2009/1, pp. 10-13, p. 11.

Schuldprinzip and is therefore void.[58] More recently, in reaction to the arbitral award in the *Dynamo Dresden* case, Orth argued that the disciplinary sanction at issue cannot be separated from the concept of penalty (*Strafe*) in national law. As the sanction presents itself as a *Strafe*, the arbitral tribunal should have applied the *Schuldprinzip*.[59]

However, other authors have noted that by measuring a private disciplinary liability directly to standards of national law, one fails to appreciate the autonomy of associations to create and enforce rules.[60] Or in the words of the *Ständiges Schiedsgericht* in the *Dynamo Dresden* case: "Es geht nicht um strafrechtliche oder strafrechtähnliche Sanktionen in Konkurrenz zum Bestrafungsmonopol des Staates"[61]

As already examined in Chapter 2, on the basis of the principle of *Vereinsautonomie* associations are free to create and enforce rules insofar as they do not breach provisions or principles of mandatory law.[62] Whether strict liability breaches mandatory law appeared somewhat unclear, however. German and Swiss case law and literature seem to suggest that fault is in principle required.[63] However, Swiss law provides for a number of exceptions to this principle, most importantly in case of overriding public interest – which in doping cases has already been accepted.[64]

Based on the concepts of *Vereinsautonomie and overriding public interest*, Haas and Jansen accept the legality of the strict liability rule in German and Swiss association law.[65] A sanction can be imposed independent of a culpable breach of duty if it has an explicit basis in the articles of association or regulations

58 Frank Bahners, 'Die Rechtmässigkeit von Verbandsstrafen gegenüber Fussballvereinen bei Zuschauerausschreitungen', *Causa Sport* 2009/1, pp. 26-28.

59 Jan F. Orth,'Von der Strafe zur Massnahme – ein kurzer Weg!', *SpuRt* 2013/5, pp. 186-190.

60 Compare Martin Schimke, 'Erwägungen des Court of Arbitration for Sport (CAS) in seinem Schiedsspruch zum Verfahren zwischen der UEFA und dem holländischen Ehrendivisionär Feyenoord Rotterdam', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, p. 32. See also J. Räker, 'Die Haftung der Clubs für Zuschauerüberschreitungen bei fehlendem Verschulden – der § 9 a DBF-RuVO stößt an seine Grenzen', *SpuRt* 2013/2, p. 47.

61 Ständiges Schiedsgericht für Vereine und Kapitalgesellschaften der Lizenzligen, 14.05.2013 (Dynamo Dresden v/DFB), *SpuRt* 2013/5, p. 200, cons. II, 1a.

62 See Chapter 2.2-2.3.

63 OLG Frankfurt am Main 18.05.2000, 13 W 29/00, E. 63, available at: <www.openjur.de>; OLG Hamm 01.04.2008, 27 U 133/07, E. 33, available at: <www.justiz.nrw.de>. Horst Hilpert, *Das Fußballstrafrecht des Deutschen Fußball-Bundes (DFB)*, Berlin: De Gruyter 2009, pp. 54, 58; Jan. F. Orth, *Vereins- und Verbandsstrafen am Beispiel des Fußballsports* (diss. Köln), Frankfurt am Main: Peter Lang GmbH 2009, p. 101-103; Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Köln: Verlag Dr. Otto Schmidt 2012, Rn. 986.

64 BGE/ATF 134 III 193, cons. 4.6.3.2.2.

65 Compare a very similar article published earlier in *Causa Sport*: Ulrich Haas and Julia Jansen, 'Verbandsstrafen zur Bekämpfung von Zuschauerausschreitungen im Fussball', *Causa Sport*, 2007/3, pp. 316-322.

of the association.[66] In addition, with regard to justification of strict liability, the authors note that known examples of such justification already include rules aiming to establish equal conditions in competition such as doping rules or rules regarding the (in)eligibility of a player.[67]

The importance of public interest is also implied by Schimke. His acceptance of strict disciplinary liability is founded on the argument that prevention of supporters' misconduct is indeed a legitimate goal of an association. Furthermore, he notes that if culpability is required, it will often be difficult – or even impossible – to react to supporters' misconduct.[68]

Finally, in regard to disciplinary sanctions aimed at clubs there might be even more room. The scope for imposing sanctions is perhaps best illustrated by looking back at the *Matuzalem* case.[69] In this case the disciplinary sanction imposed on the player was deemed illegal as it breached public policy. However, the sanction included a flagrant breach of the personality rights of a natural person, without the presence of an overriding public interest. The sanction followed the failure to pay a required compensation to his former employer. The player, however, would never be able to pay the compensation without being able to play football. In regard to supporters' misconduct, the existence of an overriding public interest is easier to argue. This observation extends beyond Swiss law, since the review of disciplinary sanctions is marginal in all jurisdictions[70]

4.4.2 Analogy with liability for risk

In the attempt to clarify arguments in the debate on the validity of the disciplinary liability for supporters' misconduct, analogies have been drawn to the civil-law concept of strict liability for risk.

In one of the more elaborate contributions, Haas and Jansen reason that since the legal nature of disciplinary law is private law, this is where we

66 Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauerausschreitungen im Fussball', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 129-159, pp. 142-143; following Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, p. 686.

67 Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauerausschreitungen im Fussball', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 129-159, p. 142.

68 Martin Schimke, 'Erwägungen des Court of Arbitration for Sport (CAS) in seinem Schiedsspruch zum Verfahren zwischen der UEFA und dem holländischen Ehrendivisionär Feyenoord Rotterdam', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, pp. 29-30.

69 BGE/ATF 138 III 322 (Matuzalem). See Chapter 3.3.2.3.

70 See Chapter 3.3.2.

should look for the justification of a 'liability without fault'. It is acknowledged that the requirement of culpability for a person to be liable for a certain conduct has many exceptions in private law, primarily in the form of strict liability for risk, or in German *Gefährdungshaftung*.[71]
Strict liability for risk or dangerous activities is regarded as the paradigm of strict liability.[72] The tort-feasor is responsible for having created a source of danger that led to the damage. The recognition of liability for ultra-hazardous activities is based on the idea that whoever benefits from such an activity should also bear the related losses.[73]

The authors conclude, however, that a comparison to *Gefährdungshaftung* is faulty. The reasoning being that although an extended responsibility of the organising party (the organising club) can possibly be justified, this does not hold for the visiting club since only the organising club benefits from organising the sporting event, for instance in the form of ticket sales.[74] In addition, another author noted that there would be no matches at all if the sports federation had not created the league, shifting the justification for *Gefährdungshaftung* to the federation.[75]

In contrast, Haslinger rightfully considers the benefits that clubs derive from matches as the main reason to accept the analogy.[76] It is not at all clear-cut that it is only the organising club that will benefit from playing a match against another club when both clubs take part in the league. Especially since nowadays revenues largely derive from TV broadcasting contracts and not from ticket sales.[77] Playing in the league, independently of playing at home or away, benefits the clubs economically and otherwise.

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71 Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauerausschreitungen im Fussball', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 129-159, pp. 146-147

72 Franz Werro and Vernon Valentine Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, p. 400.

73 PETL Text and Commentary 2005, Introduction to Chapter 5.

74 Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauerausschreitungen im Fussball', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 129-159, at p. 148.

75 Röhricht, cited in Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauerausschreitungen im Fussball', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 129-159, p. 148.

76 Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011, p. 188

77 According to research by Deloitte's Sports Business Group, of the total revenue in the season 2013/2014 of the 20 highest earning clubs only 20% derived from ticket sales as opposed to 39% from TV broadcasting contracts and 41% from sponsors and merchandising. The same research shows that, the smaller the annual revenue of the club, the more important the income from broadcasting. Deloitte, *Commercial breaks. Football Money League*, January 2015, via: <http://www2.deloitte.com/uk/en/pages/sports-business-group/articles/deloitte-football-money-league.html> (accessed: 29 September 2015).

Furthermore, even if the visiting club does not benefit monetarily, it cannot be denied that the club derives other benefits from playing away matches, such as the honour when the team wins. Football clubs are created so that football matches can be played against other clubs, whether for pleasure or monetary gain. From the perspective of *FC Zürich*, practising and promoting football are the primary goals of its existence.[78]

On the whole, the strict liability rule for supporters' misconduct possesses a number of similarities with the concept of strict liability for risk, which are put forward to further substantiate the legality of this concept.

4.4.3 Analogy with liability for the acts of others

Although to a lesser extent, it has been suggested that an analogy exists with the civil-law concept of liability for the acts of third parties. Whilst this concept takes different forms across the jurisdictions, according to Haslinger the strict liability regime in football regulations bears great resemblance to this type of liability.[79] In short, both rules are founded in the same goal: taking responsibility for the faulty acts of people in one's business or danger circle independent of one's own culpability.[80]

On the basis of the legal relationship of the club with the federation and the duties that arise from this relationship, the club reaps benefits in the form of sales of tickets and TV rights. As such, Haslinger argues, the club should also bear the personnel risks – i.e. the risk of misbehaving spectators. Liability for the acts of third parties further requires that the acts of the 'vicarious agent' is connected to the overall duty arising from the legal relationship (with the federation). In other words, the faulty acts of spectators need to be connected to the duty of clubs to organise football matches. Haslinger admits that this is where the analogy becomes problematic in light of German law.

According to consistent case law of the *BGH*, in the context of the duty it is decisive whether the act of the vicarious agent resulted from an assigned task.[81] It is finally argued that by allowing spectators in the stadium the club

78 Art. 3 Statutes of FC Zürich.

79 Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011, p. 176ff. See also § 278 BGB.

80 See Chapter 6.3 for more details.

81 "Voraussetzung für die Anwendung des § 278 Satz 1 BGB ist ein unmittelbarer sachlicher Zusammenhang zwischen dem schuldhaften Verhalten der Hilfsperson und den Aufgaben, die ihr im Hinblick auf die Vertragserfüllung zugewiesen waren." BGH 19.07.2001 – IX ZR 62/00, *NJW* 2001, 3190, cons. II.1.a.

creates the possibility that these spectators misbehave, which – according to Haslinger – could satisfy the 'assigned task' requirement.[82]

Although not without dogmatic concerns, parts of the concept of liability for the acts of third parties are similar to the concept of disciplinary liability for supporters' misconduct. Further analysis of this analogy is undertaken in Chapter 6, which is dedicated to assessing whether the disciplinary strict liability rule could be transposed to civil law in order to settle the damages resulting from supporters' misconduct.

In conclusion, the first series of cases applying the strict liability rule to clubs for supporters' misconduct resulted in a scholarly debate focusing mainly on the lawfulness of this concept. On the basis of similar approaches – comparing the concept to other forms of liability – the majority of authors overcome their initial reluctance and accept the liability in a disciplinary setting.

4.5 Concluding remarks

Disciplinary liability of clubs for supporters' misconduct appears in two distinct forms. First, all relevant regulations provide that the organising club is responsible for maintaining order and security inside the stadium and its liability is presupposed when supporters' misconduct arises. Secondly, both the organising club and visiting club are strictly liable for (certain) acts of their own supporters.

Both forms of liability – liability based on the obligation to ensure security and strict liability – have been the subject of case law. The various decisions show that the concept of disciplinary liability for supporters' misconduct is considered lawful in all jurisdictions where it was challenged: international (CAS), Germany and France.

The rationale for this conclusion, as considered by the different judicial bodies as well as in legal doctrine, is somewhat equivocal. However, the crucial foundation seems the effectual and practical argument that in the absence of a direct relationship with supporters, penalising the clubs is the only means for federations to achieve the legitimate goal of preventing supporters' misconduct.[83] Ultimately, the rules of disciplinary (strict) liability for supporters'

82 Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011, p. 181.

83 Compare: Martin Schimke, 'Erwägungen des Court of Arbitration for Sport (CAS) in seinem Schiedsspruch zum Verfahren zwischen der UEFA und dem holländischen Ehrendivisionär Feyenoord Rotterdam', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, pp. 23-33, p. 30. The French cases do not mention this argument. However, this could be due to the format of court decisions. In doctrine, this argument has been considered; see for example

misconduct are covered by the freedom of association to design a regulatory system.[84] The popular and instinctive proposition that disciplinary strict liability rules breach the principle of 'no liability without fault', is ultimately discarded by most courts and authors; with the latter considering the great number of exceptions to this principle in civil law. Most importantly, liability without fault can be imposed in case of an overriding public interest. Considering that strict liability has been applied across Europe in the fight against doping, it should not be difficult at all for combating and preventing supporters' misconduct also to be qualified as such an interest.

The development of a uniform accepted concept of disciplinary strict liability of football clubs for supporters' misconduct in Europe is, however, somewhat complicated by the approach in France. Here, sports disciplinary sanctions fall within the scope of administrative law, in which the constitutional principle of *personnalité des peines* plays an important role. This perspective resulted in a different approach towards 'strict' liability of clubs in France with the court founding the responsibility of clubs on an obligation of result to ensure safety during football matches rather than on the attribution of faulty acts of third parties. Nevertheless, from the French perspective, too, the ultimate underlying reasoning is in line with the proposition that the liability of clubs is a means to prevent and penalise supporters' misconduct.

Nathalie Ros, 'Décisions commentées. CE 27 Octobre 2007', *Jurisport* 2007/85, pp. 41ff, par. II.A.1.

84 See further: Chapter 2.

5 Contract and fault liability of football clubs for supporters' misconduct

5.1 INTRODUCTION

Nowadays the disciplinary liability of football clubs for supporters' misconduct imposed by national and international football federations is an accepted practice. As mentioned above, the handling of damages that are caused by such supporters' misconduct is, however, completely absent from this issue. The type of damages varies and ranges from personal injury to third parties, damage to property of third parties, but also damage to the stadium and its surroundings.

It is stating the obvious that the main party liable would generally be the person who directly caused the damage: the rioting supporter. However, seeking compensation from this party can be complicated for a number of reasons. First, the supporter(s) in question need to be identified. Even with modern technology this is not always possible. Second, if supporters have been identified, chances are that they are not solvent, especially in cases of personal injury. In light of the existing and accepted disciplinary liability of clubs, the question thus arises whether victims of supporters' misconduct can instead turn to the club for the compensation of their damages.

One of the reasons to investigate the possible liability of the club is that the football club is the central point between all potentially involved parties. On the one hand, the club has a special relationship with its supporters. Although clubs often claim that 'rioting supporters' are 'not real fans', sociological research indicates otherwise.[1] On the other hand, the club often also has a relationship – in many cases a contractual relationship – with those who are at risk of incurring damage: other supporters who have bought tickets to watch the match but also business owners on or around the stadium premises.

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1 Eric Dunning, *Sport Matters. Sociological studies of sport, violence and civilization,* London: Routledge 1999 (chapter 6); Steve Frosdick and Peter E. Marsh, *Football Hooliganism*, Cullompton: Willan 2005; P. Gow and J. Rookwood, 'Doing it for the team – examining the causes of contemporary English football hooliganism', *Journal of Qualitative Research in Sports Studies* (2008/2-1) pp. 71-82. Joel Rockwood, Geoff Pearson, 'The hoolifan: Positive fan attitudes to football 'hooliganism'', *International Review for the Sociology of Sport* 2010/2, pp. 149-164.

It is important to note that in principle football clubs act as the main organisers of their home football matches.[2] As such, the organising club is responsible for order and security both inside and around the stadium before, during and after matches.[3] In the following, 'club' will be used for 'organising club'. It will be expressly indicated when the visiting club is included.

Approach

This chapter will focus on the various possible grounds for civil liability of football clubs for supporters' misconduct. Liability based on contract and tort (fault liability) will be consecutively examined in sections 5.2 and 5.3. As the overall approach that guides this research precludes a detailed examination of the laws of the countries chosen, the main goal is rather to examine the grounds of civil liability of clubs on a conceptual level, highlighting some of the specificities of Dutch, German, French, English and Swiss law where relevant. To assist with this exercise, a frame of reference has been chosen in the form of the Principles of European Contract Law (PECL) and the Principles of European Tort Law (PETL), which were developed with support from the European Commission.[4] Although not legally binding, these provide principles of law shared by the legal systems of the member states of the European Union, thus forming a useful tool in developing transnationally applicable solutions.[5] Finally, section 5.4 will look into three situations where establishing liability of clubs based on contract and fault are especially problematic before concluding in section 5.5.

5.2 CONTRACT LIABILITY OF ORGANISING FOOTBALL CLUBS

Football clubs enter into a number of different contracts that can trigger their liability for damages occurring in and around the stadium. Contract liability naturally requires a contract between the club and the victim who seeks

2 In some cases the main organiser is the national or international federation, for example during finals of cups on neutral ground.

3 Art. 2-3 UEFA Safety and Security regulations, edition 2006; Art. 16 UEFA Disciplinary Regulations, edition 2014.

4 The Commission of European Contract Law, Principles of European Contract Law. Parts I and II, Kluwer Law International 2000 (PECL); European Group on Tort Law, Principles of European Tort Law. Text and Commentary, Springer 2005 (PETL). The PECL and PETL were chosen as the main frame of reference considering their function of elucidating basic rules of contract law and more generally the law of obligations which most legal systems of the member states of the European Union hold in common. In addition, their aims to accommodate future development in legal thinking and development of contract and tort law fit with the goal of this research.

5 Switzerland is of course not a member state of the European Union. However, as the Swiss legal system is strongly susceptible to German and French influences, it still provides useful.

damages. Many parties are in a contractual relationship with football clubs, all of whom can potentially be affected by supporters' misconduct. These include other spectators who bought tickets from the club, the stadium owner (in cases where the stadium is not owned by the club), tradespeople present within or around the stadium, the club's players, and the attending media.

5.2.1 Contractual obligations of the parties

Before the question of liability can be treated, the contractual obligations of both parties need to be identified. These obligations – of the club on the one hand and the various potential contractual partners on the other – depend on the nature of the contract, the will expressed by the parties and the relevant circumstances.

The Principles of European Contract Law recognise these rules of interpretation in art. 5:102.

> "In interpreting the contract, regard shall be had, in particular, to: (a) the circumstances in which it was concluded, including the preliminary negotiations; (b) the conduct of the parties, even subsequent to the conclusion of the contract; (c) the nature and purpose of the contract; (d) the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves; (e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received; (f) usages; and (g) good faith and fair dealing."

It should also be noted that contracts often give rise to obligations that are implied. These implied terms stem from the intention of the parties, the nature and purpose of the contract, and good faith and fair dealing.[6] The obligation of safety can be counted as such an implied term.

5.2.1.1 The obligation of safety

The contractual relationship between a club and a spectator is generally established through the sale of the match ticket. The ticket gives the spectator the right to entrance to the match at a certain price. In principal, the organising club sells the majority of tickets, with only a small number of tickets being allocated to the visiting club.

The main obligation of the spectator is to pay the ticket price and to adhere to the instructions or terms given by the organiser.[7] In the Netherlands, this obligation is included in standard terms of contract of the Dutch football

6 Compare art. 6:102 PECL.

7 Jochen Fritzweiler *et al.*, *Praxishandbuch Sportrecht (3. neu bearbeite Auflage)*, München: Beck 2014, 3. Teil, no. 170.

association (KNVB) that are applicable to tickets for virtually all matches in the Netherlands.[8] At the other end, the main obligation of the organising club is to ensure the organisation of the match. However, the contract additionally gives rise to a number of other obligations, of which the most important one is the obligation to ensure the safety of the spectator and avoid personal or property damage.

In some jurisdictions the obligation of safety has been specifically recognised as a contractual obligation of the organiser in a spectator contract.[9] Even in 1906, the Swiss Federal Supreme Court held that in regard to a cycling race where a spectator was injured after a cyclist came off the track 'the organisation has the contractual obligation to ensure that precautions are taken to protect the public against foreseeable hazards. Or in other words, against the inherent dangers of his business.'[10] In France, the obligation of safety (*obligation de sécurité*) was first introduced in a now famous case regarding a transport contract. According to the *Cour de Cassation* all transport contracts necessarily imply the obligation to transport the goods or passengers safely to their destination.[11] The obligation of safety in regard to spectator contracts was recognised in similar wording in 1938. The court (Orléans) held that,

> "Il serait immoral et contraire à l'ordre public que les organisateurs se fissent payer le droit d'y assister alors qu'il comporterait pour les spectateurs un risque de danger grave connu, ou devant l'être, des organisateurs".[12]

In other words, the organisers contract the obligation to organise the event in such a manner that the safety of the spectators is assured.

In other countries, the obligation of safety is identified rather as a general duty of care of the organiser. In Germany this general duty is by law and expressed in § 241 (2) BGB.[13] This provision holds that aside from performance, an obligation may also oblige each party to take account of the rights, legal interests and other interests of the other party. These interests include, among others, physical integrity and property. In the Netherlands, the obligation of safety has not explicitly been recognised by the courts in regard to the spectator contract. However, according to doctrinal opinion, in principle the organiser

8 Art. 3.6 KNVB Standaardvoorwaarden.

9 France: Landmark case on obligation of security in a transport contract: Cass. Civ.1 21.11.1911, *Recueil Dalloz* 1913.1, p. 249, note Louis Sarrut. See further, Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1925.

10 Switzerland: BGE/ATF 32 II 300; BGE/ATF 70 II 218.

11 Louis Sarrut, Note under Cass. Civ.1 21.11.1911, *Recueil Dalloz* 1913.1, p. 250.

12 Cour d'appel d'Orléans 19.04.1937, *Recueil Dalloz* 19382, p. 68.

13 Germany: Gerhard Wagner, *Münchener Kommentar zum BGB. Band 5. Schuldrecht. Besonderer Teil III. 6. Auflage,* 2013, Vor § 823, no. 68 and § 823, no. 48.

of a sports event bears the primary responsibility for the safety of the spectators.[14]

In terms of potential litigation, it should be noted that the obligation of safety of the club is not limited to contracts with spectators. A similar obligation could be imagined for those who have a contract with the club to exploit their business on the premises of the club as well as for the club's employees. As in both situations it is the club that is in the position to control the safety situation, it should not be too difficult to discharge such an obligation.

5.2.1.2 Other contractual duties of care

Similar to the obligation of safety, clubs that rent or lease their stadiums have the obligation to take care of the rented property. If the organising club does not own the stadium it plays its home matches in, the stadium owner will be liable for the damage resulting from supporters' misconduct – to seats, bathrooms, security gates and walls, the pitch, etc.

A contractual relationship between the stadium owner and the club will most often be based on a rental or lease contract. The main obligation of the club in such a relationship is to pay the rental or lease fee. However, due to the duty of care, the club, as a tenant, is generally liable for damage to the stadium that occurs as a result of its activities. In French, German, Dutch and Swiss law, this duty is laid down in special provisions regarding rental contracts.[15] By contrast, in English law this duty derives directly from the tenancy contract by virtue of an express or implied contract term.[16] According to case law, rental contracts include the implied term to use the premises in a tenant-like manner, which includes "of course, not to damage the house, wilfully or negligently, and he must see that his family or guests do not damage it: and if they do, he must repair it".[17] However, as with the spectator contract, a claim will most likely be based on the tort of negligence.

In certain situations it is not a club, but rather the federation that rents a stadium for a specific match. For example, the 2014 Dutch Cup final between F.C. Ajax and PEC Zwolle was played in the home stadium of Ajax' arch rival Feyenoord, where Ajax supporters managed to cause EUR 70,000 worth of damages. In these types of situations, it will generally be the federation which

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14 Netherlands: K.J.O. Jansen, *GS Onrechtmatige daad*, artikel 162 Boek 6 BW, aant. 93.8.1 and the authors cited there.

15 France: art. 1728 and 1732 French Civil Code, which are also applicable to commercial rental agreements. Germany: § 535 BGB in connection with § 280 BGB; Martin Häublein, *Münchener Kommentar zum BGB. Band 3. Schuldrecht. Besonderer Teil. 6. Auflage*, 2012, § 535, no. 168-170; Netherlands: art. 7:218 and 7-219 BW, art. 7:353 BW for lease (*pacht*). Switzerland: Art. 257f CO.

16 Simon Garner and Alexandra Frith, *A Practical Approach to Landlord and Tenant*, Oxford University Press 2004, p. 57.

17 Denning LJ, in *Warren v Keen* [1953] 2 All ER 1118, 1121.

is liable for the damage based on a rental contract with the stadium. However, it is not inconceivable that the federation then seeks compensation from the club whose supporters caused the damage. In the Dutch Cup final case, this is exactly what happened. The KNVB withheld the amount from the premium Ajax received for its second place and the club decided not to take any fans to matches against and in Feyenoord's home stadium for three years.[18]

Both the obligation of safety as well as the obligation to be a good tenant can be categorised as contractual duties of care protecting the rights and interests of the other party.

5.2.2 Requirements for contract liability

When a contractual obligation is not met and damage occurs, there is non-performance. In general, such non-performance leads to a number of remedies; for example the option to terminate the contract or compensation of the damages.[19] In cases of personal and property damage, monetary compensation is often the most suitable remedy.

According to the PECL, 'the aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under article 8:108'.[20] Aligned with this starting point, the requirements to establish the contractual liability of the club are very similar across the jurisdictions. First and foremost, liability requires a culpable breach of a contractual obligation, as well as causation between the breach and the damage.[21]

With regard to the first element, the question thus arises what constitutes a breach of a club's contractual duty of care. Answering this question calls for a look into the nature and extent of this duty – the obligation of safety.

5.2.2.1 Obligation of result or obligation of means?

The club's obligation of safety can be qualified either as an obligation of result or an obligation of means. The main consequence of the qualification lies in the distribution of the burden of proof.

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18 http://www.rijnmond.nl/sport/12-06-2014/schade-bekerfinale-vergoed-aan-stadion-feijenoord ; http://www.ajax.nl/Ajax-Nieuws/Ajax-nieuwsarchief/Ajax-nieuwsartikel/196411/Drie-jaar-geen-Ajaxfans-in-Kuip.htm

19 See PECL 2000, chapters 8 and 9.

20 Art. 9:501 PECL.

21 France: art. 1147 CC, Geneviève Viney and Patrice Jourdain, *Traité de droit civil. Les conditions de la responsabilité (4e édition)*, Paris: LGDJ 2013, no. 246. Germany: § 280 (1) BGB. Netherlands: '*toerekenbare tekortkoming*' art. 6:74 and 6:75 BW. Switzerland: '*violation fautive*' art. 97 (1) CO, Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 97, no. 3.

If an obligation is qualified as an obligation of result, a fault is presupposed, which means that the claimant only needs to prove that the result was not met for there to be non-performance.[22] Opinions vary, however, as to whether an obligation of result culminates in strict liability.[23] In practice this means that if the obligation of safety of the organising club is qualified as an obligation of result, the only thing the claimant has to prove is that the damage has occurred. In contrast, if qualified as an obligation of means, the claimant needs to establish a fault of the club.

The issue of qualification is especially well-developed in French law, but also a topic of debate in Switzerland and the Netherlands.[24] In France, the dominant view in case law on the obligation of safety in regard to sport events is that this is qualified as an obligation of means.[25] However, this standpoint has been criticised in doctrine.[26] It is argued that according to its nature an obligation of safety should be of result, which is the case in contracts from which this doctrine was developed – e.g. labour contracts and passenger transport contracts.[27] Interestingly, however, according to France's highest administrative law court the obligation of safety of clubs is to be qualified as an obligation of result.[28]

According to Swiss author Bondallaz, the obligation of safety ought to be qualified as an obligation of means, seeing as an obligation of result would result in a *de facto* strict liability, which – in principle – is unknown in Swiss

22 PECL 2000, art. 8.101, comment 2; T.F.E. Tjong Tjin Tai, Toerekenbare niet-nakoming en de zorg van een goed schuldenaar' in: *WPNR* 2004/6574, pp. 285-290, § 1.

23 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 3222. Geneviève Viney and Patrice Jourdain, Traité de droit civil. Les conditions de la responsabilité (4e édition), Paris: LGDJ 2013, no. 522ff. Roland Schwarze, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung* 2014, § 280, no. F31-F39, Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 97, no. 54-58.

24 See for an elaborate overview: Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 3208-3372.

25 Landmark case: Cour d'appel Orléans 19.04.1937, *Recueil Dalloz* 1938 (2e partie) p. 68, note J. Loup. See also: TGI Lyon 25.06.1986 (Consorts Fuster c. L'Olympique lyonnais et autre.), *Recueil Dalloz* 1986, p. 617; Cass. Civ.1 17.05.1965 (Le Peyrehorade Sports c. Labouyrie), *Recueil Dalloz* 1966, p. 1, note de Pierre Azard. For further case citations see, Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1925ff.

26 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no.1927; Christophe Albigès *et al*., *Responsabilité et sport*, Paris: Litec 2007, p. 182.

27 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 3227.

28 Conseil d'État 29.10.2007, n°307736 (Lille Olympic Sporting Club), *Recueil Dalloz* 2008, p. 1381. See further Chapter 4.3.2.

law.[29] However, in one of the more recent papers on this topic Chappuis *et al*. argue that the obligation of safety should be qualified as an obligation of result. This view implies that the burden of proof that no fault was made rests on the shoulders of the organiser. However, according to standing case law of the Swiss Federal Supreme Court, once the violation of a standard of care is established, it is practically impossible to prove that no fault was committed.[30] Perhaps the hesitation of qualifying the obligation of safety of the club as obligation of result is rooted in this consequence. The authors justly emphasise that it is difficult to imagine how one can violate a duty of care without fault.[31]

By contrast, the issue of qualification carries less weight in German law.[32] According to § 241 (2) BGB, obligations of safety are part of any and all contracts. A damages claim for a breach of such an obligation of safety is founded on § 280 BGB. Although contractual liability on this basis always requires culpability,[33] it is noted in doctrine that with the adoption of the breach of a safety duty 'zugleich das objektiv sorgfaltswidrige Verhalten festgestellt wird'.[34]

5.2.2.2 Culpable breach or force majeure?

Compensation for breach of contract is dependent on whether this breach can be excused. According to article 8.108 PECL,

> "a party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences".

The PECL thus presupposes fault in regard to liability based on contract, putting the burden of proof for his excuse on the debtor. This is also known as the

29 Jacques Bondallaz, *La responsabilité pour les préjudices causés dans les stades lors de compétitions sportives* (diss. Fribourg), Bern: Stämpfli 1996, no. 426.

30 Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 97 no. 58. BGE/ATF 117 II 563, cons. 3c.

31 Benoit Chappuis, Franz Werro and Béatrice Hurni, 'La responsabilité du club sportif pour les actes de ses supporteurs', in: Pierre-André Wessner *et al*., *"Pour un droit équitable, engagé et chaleureux." Mélanges en l'honneur de Pierre Wessner*, Basel: Helbing Lichtenhahn 2011, pp. 65-110, p. 74.

32 The subject is, however, briefly discussed in the 2014 edition of the Staudinger Kommentar. Roland Schwarze, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 280, no. F31ff.

33 § 280 (1) second sentence BGB contains a rebuttable presumption of liability for the damages caused in connection with the contract.

34 Hansjörg Otto in the 2009 edition of the *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2009, § 280, no. F26.

theory of *force majeure*. *Force majeure* and culpability are thus two sides of the same coin. Either the breach is due to someone's fault and there is no *force majeure*, or the breach is due to *force majeure*, meaning there is no culpability and thus the conditions for contract liability are not met. In line with the PECL, Dutch, German, French and Swiss law all presuppose fault but accept exoneration for breach of contract if the debtor has a valid excuse.[35] Upon a closer look, however, the jurisdictions show some variation in their application.

In German law, breaching a contractual duty is excused if the debtor is not responsible.[36] According to § 276 (1) BGB the debtor is responsible for intention and negligence. However, a different standard of liability can be inferred from the content of the contract, in particular from giving a guarantee or the assumption of a procurement risk.[37] As already highlighted above, in case of a breach of a safety duty, negligence is practically inferred. Dutch law is very similar in this regard. It is required that the breach of a contractual obligation is attributable (*toerekenbaar*). A breach of contract is attributable if the debtor is at fault or if it constitutes a risk for which he is accountable by law or general accepted principles. For example, by virtue of articles 6:76 and 6:77, a debtor is strictly liable for his accessories in performance. As in Germany, attribution of a breach of a duty of care (*zorgplicht*) is virtually automatic. Furthermore, German, Dutch and Swiss law are all aligned with the PECL in that the debtor cannot be excused if the cause of the breach was foreseeable.[38]

In France, doctrinal opinion has nuanced the dogma of presupposition of fault. Where in principle the debtor bears the burden of proof that all obligations are fulfilled or that *force majeure* has occurred, according to literature this only holds in case of *inexécution totale*. If the main obligation has been fulfilled, however, the question which party bears the burden of proof depends

35 France: Art. 1147 CC. Germany: § 280 (1) BGB; Roland Schwarze, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung* 2014, § 280, no. D2. Netherlands: Art. 6:75 BW; A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2011, no. 344. Switzerland: Art. 97 (1) CO; Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 97, no. 54-58.

36 See wording § 280 (1) BGB.

37 § 276 (1) BGB.

38 Germany: Manfred Löwisch and Cornelia Feldmann, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung* 2014, § 287, no. 10. Netherlands: A foreseeable circumstance is more than a circumstance that is deemed possible. Rather, the obstacle should be – at the time of entering into the contract – so likely to occur that a prudent debtor could reasonably have considered it and would have taken appropriate precautions. See A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2012, no. 354. Switzerland: art. 119 CO. Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 119, no. 7.

on the nature of the accompanying obligations.[39] As the contractual duty of care in spectator contracts as well as in stadium rental or lease contracts is clearly a secondary obligation, the qualification of the obligation determines which party bears the burden of proof.[40] If qualified as an obligation of result, it only needs to be proved that the result was not met. The club can then only escape if it proves *force majeure*, which is only possible if the breach was unforeseeable and irresistible.[41] However, if qualified as an obligation of means, the victim needs to prove that the club's behaviour was faulty.

In English law, exoneration for breach of contract is not really an issue as the main question in all cases is: what did the parties agree? Whether liability for non-performance can be excused depends on the specific obligation. Nevertheless, in cases where the breach can also be based on the tort of negligence the burden of proof that applies is the same which would apply there.[42] It should be noted that in England, unless a contract contains an express provision warranting safety, actions resulting from damage occurring in and around the stadium will generally be based on the general tort of negligence or on the Occupiers Liability Act 1957. Previous to the enactment of this statute some cases were based on contract.[43] Section 5(1) of the statute now provides that, if a contract is silent on the matter – which it usually is – it shall be implied in the contract that the occupier owes the entrant the common duty of care'. However, a contractual entrant is allowed to frame his claim as a non-contractual visitor.[44]

Applying the PECL criteria to the case of supporters' misconduct gives rise to the following image. Supporters' misconduct is clearly something that is beyond the control of the club. However, it is not something that the club could not have been expected to take into account. The phenomenon is widely known, which is also exemplified by the risk analyses, which take place on a constant basis. The crucial point is thus whether the club could have been reasonably expected to overcome the supporters' misconduct or its consequences.

Force majeure originally applied to foreign – in the sense of strange – causes. Dutch scholar Tjong Tjin Tai explains that the early views on *force majeure*, which are based on Roman law, indicate the situation that the debtor cannot

39 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 2362-2363.

40 See also Section 5.2.2.1 above.

41 The third element of 'extériorité' was abandoned by the *Cour the Cassation* in 2006. Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1806.

42 Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study*, Munich: Sellier 2004, p. 66.

43 Simon Gardiner *et al.*, *Sports Law*, Oxon: Routledge 2012, pp. 564-565.

44 See: *Sole v W.J. Halt* [1973] Q.B. 574.

be held responsible for the fact that he has failed to perform because the cause of the breach is a greater power to which the debtor does not need to – or be able to – offer any resistance.

> "Al deze begrippen duiden de situatie aan dat het de schuldenaar niet kan worden aangerekend dat hij niet is nagekomen, aangezien de oorzaak niet bij hem ligt, en hij ook geen voorzorgsmaatregelen had kunnen of hoeven treffen tegen deze oorzaak. De oorzaak is een 'groter geweld', een 'over-macht', iets waaraan de schuldenaar geen weerstand behoeft te (kunnen) bieden."[45]

Accordingly, it should thus be considered to what extent a debtor can exert influence on the onset or the effects of the causes or risks – even if that influence is not so strong that the breach is due to a lack of care, such as in the choice of employees or suppliers. Consequently, the cause is not completely 'foreign'.[46] In respect to supporters' misconduct clubs exert quite a strong influence on the risk of supporters' misconduct in their stadium, for example in the choice of preventative and repressive measures.

In summary, if the obligation of safety of the organising club is qualified as an obligation of result, it will be up to the club to then prove that the breach was not attributable to it, i.e. that there was *force majeure*. By contrast, if qualified as an obligation of means, the claimant needs to establish a fault of the club. Regardless of the qualification and thus of the question who bears the burden of proof, it is the scope of the duty of care of the club in the specific circumstances that will determine the club's liability. Only by determining the extent of this obligation in the concrete circumstances can it be discovered if a breach has occurred. As this is the same general standard that applies to fault liability in tort,[47] the scope of this obligation will be discussed in section 3.2 below.

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45 T.F.E. Tjong Tjin Tai, Toerekenbare niet-nakoming en de zorg van een goed schuldenaar' in: *WPNR* 2004/6574, pp. 285-290, § 2.

46 See Tjong Tjin Tai, Toerekenbare niet-nakoming en de zorg van een goed schuldenaar' in: *WPNR* 2004/6574, pp. 285-290, § 4.

47 France: Christoph Albiges *et al*., *Responsabilité et sport*, Paris: LexisNexis SA 2007, p. 181. Germany: Roland Schwarze, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 280 BGB, no. C45. Netherlands: A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2012, no. 344. Switzerland: Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, Art. 41 CO, no. 62. See also Von Bar and Drobnig: "where the duty to compensate requires fault, the starting point is the same in both contract law and tort law". Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study*, Munich: Sellier 2004, p. 46.

5.2.3 Contractual exclusion of liability

In contractual relationships, the parties are generally free to agree on exclusion of liability. In its various contracts, the club could attempt to exclude its liability for damage caused by supporters' misconduct. Such clauses excluding liability can be agreed upon individually or be included in a set of standard contract terms. This difference has implications for the legal assessment of the clause.

The general rule across all jurisdictions and expressed in the PECL is that clauses limiting or excluding liability are allowed unless it would be contrary to good faith or reasonableness to invoke the clause.[48] It follows that exclusion of liability for intentional acts and gross negligence is not permitted.[49] However, exclusion of liability for negligence is in principle allowed in Dutch, French, German and Swiss law.

The limits of whether it is contrary to good faith or reasonableness to invoke a specific exclusion clause are decided by the courts. Recurring criteria in this assessment in all jurisdictions include the exploitation of the weaker party through a position of power, blatant violation of the equality of the parties or granting excessive benefits to one party at the expense of the other, and excessive restriction of a party's economic or personal liberty.[50] According

48 Art. 8:109 PECL; France: art. 1134 CC, every contract must be executed according to good faith. Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1136, 1150; Germany: § 276 (1) BGB, Georg Caspers, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 276 BGB, no. 114, 128; Netherlands: art. 6:248 (2) BW, landmark case: HR 19.05.1967, *NJ* 1967, 261 note GJS (Saladin/HBU); A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2012, no. 364; Switzerland: art. 100 CO is seen as a 'specialis' of 'Prinzips des guten Sitten', see Rolf H. Weber, *Das Obligationenrecht*, Berner Kommentar. Kommentar zum schweizerischen Privatrecht, Band VI/1, 5. Teilband, Bern: Stämpfli Verlag 2000, art. 100, no. 134.

49 France: art. 1150 CC; Alain Bénabent, *Droit des Obligations* (13e édition), Paris: Montchrestien – Lextenso éditions 2012, no. 423; Germany: § 276 (3) BGB, Georg Caspers, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 276 BGB, no. 119; Netherlands: art. 6:248 (2) BW, A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2012, no. 364; Switzerland: Art. 100 (1) CO; Rolf H. Weber, *Das Obligationenrecht, Berner Kommentar. Kommentar zum schweizerischen Privatrecht, Band VI/1, 5. Teilband,* Bern: Stämpfli Verlag 2000, art. 100, no. 92ff.

50 France: Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1080, Germany: Georg Caspers, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 276 BGB, Nr. 128, Netherlands: A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-III, Algemeen overeenkomstenrecht*, Kluwer 2014, no. 482; Switzerland: Art. 100 CO ; Rolf H. Weber, *Das Obligationenrecht*, Berner Kommentar. Kommentar zum schweizerischen Privatrecht, Band VI/1, 5. Teilband, Bern: Stämpfli Verlag 2000, art. 100, no. 138-141.

to doctrinal opinion in France, however, exclusion of liability is only allowed if there remains some kind of engagement.[51] In Germany, the courts also take into consideration which of the parties can and generally does insure themselves against the type of damage occurred.[52]

In contrast, in England, the possibility of excluding liability is more restrained. According to the Unfair Contract Terms Act (UCTA), limiting one's liability for negligence is only allowed insofar as the term or notice satisfies the requirement of reasonableness.[53] The UCTA only applies to business liability, which is defined as 'liability for breaches of obligations or duties arising: a) from things done or to be done by a person in the course of a business (whether it's his own business or another's); or b) from the occupation of premises used for the business purposes of the occupier'.[54] In cases of a club's liability for damage that occurred in relation to a football match, this criterion will be easily met.

5.2.3.1 Exclusion clause in general contract terms

In many situations, clauses that exclude liability are incorporated into general contract terms. As a result, the test of reasonableness is more stringent than in cases where the clause has been individually negotiated. Art. 4.110 (1) PECL illustrates the predominant view on exclusion clauses in the various jurisdictions.[55]

> "A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded."

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51 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1136.

52 Georg Caspers, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 276 BGB, no. 128.

53 S. 2 (2) UCTA 1977.

54 S. 1 (3) UCTA 1977.

55 Germany: § 307 BGB; Netherlands: art. 6:233 BW, (A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2011, no. 364; France and Switzerland: French and Swiss law do not provide separate rules for general contract terms in general but only for consumers. As a result, in business-to-business relations one has to return to general rules. Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1136; Alain Bénabent, *Droit des Obligations* (13e édition), Paris: Montchrestien – Lextenso éditions 2012, no. 165ff ; Rolf H. Weber, *Das Obligationenrecht, Berner Kommentar. Kommentar zum schweizerischen Privatrecht, Band VI/1, 5. Teilband*, Bern: Stämpfli Verlag 2000, art. 100, no. 128-133.

Furthermore, if the contract is a consumer contract – for example a contract between a club and spectator in the form of a match ticket – the exclusion of liability will be easily presumed unfair based on the EU Directive on unfair contract terms in consumer contracts, which is implemented in all EU jurisdictions.[56]

As a result of this legislation, it will be difficult for clubs to exclude liability in standard contract terms that are part of the spectator contract. Furthermore, also with regard to exclusion clauses in general contract terms in other – non-consumer – contracts the lists of unfair contract terms can be an indication of whether a term is unreasonable.[57]

5.2.3.2 Exclusion of liability for personal injury

With regard to the exclusion of liability for personal injury, the laws of the relevant jurisdictions are even more stringent.

In England, exclusion of liability for personal injury incurred by negligence is prohibited by law.[58] In German and Dutch law, there is no such general prohibition to exclude liability for personal injury. However, when incorporated into standard contract terms the exclusion is ineffective according to German law. In Dutch law such a clause is deemed unfair, but proof to the contrary is allowed.[59] Nevertheless, Dutch legal doctrine tends to reject the exclusion of liability for personal injury.[60]

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56 England: The Unfair Terms in Consumer Contracts Regulations 1999, France: In France, such a clause is illegal on the basis of art. R132-1 n°6 *Code de Consommation;* Germany: § 309 BGB; Jochen Fritzweiler *et al*., *Praxishandbuch Sportrecht (3. neu bearbeite Auflage)*, München: Beck 2014, 5. Teil. no. 96; Netherlands: Art. 6:237 (f) BW. In Switzerland, protection of consumers against unfair contract terms is laid down in art. 8 of the Federal law against unfair competition *Bundesgesetz gegen den unlauteren Wettbewerb (UWG)/Loi fédérale contre la concurrence déloyale (LCD)*. With the new art. 8, the Swiss legislature has sought connection with the directive.

57 England: in England, the Unfair contract terms act also applies to business-to-business relations. France: in France, the definition of *consommateur* is broad and as a result can apply to business-to-business relations; Alain Bénabent, *Droit des Obligations (13e édition)*, Paris: Montchrestien – Lextenso éditions 2012, no. 174; Germany: Peter Schlosser, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse (Recht der Algemeinen Geschäftsbedingungen),* Berlin: Sellier de Gruyter 2013, Vorbem zu § 305ff, no. 24. Netherlands: A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-III, Algemeen overeenkomstenrecht*, Kluwer 2014, no. 502.

58 S. 2 (1) van de Unfair Contract Terms Act 1977 (UCTA). In s. 1 (1) UCTA negligence is defined as "the breach of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract, or any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty)".

59 § 309 (7)a BGB.

60 V. van den Brink, *De rechtshandeling in strijd met de goede zeden* (diss. Amsterdam UvA), Den Haag: Boom Juridische uitgevers 2002, pp. 71-72, T.H.M. van Wechem & J.G.J. Rinkes, 'Toepasselijke normering bij het toetsen van exoneraties voor letselschade', *AV&S* 2002,

Similarly, in France also it is controversial whether exclusion of liability for personal injury is allowed.[61] Certain authors argue that the human body cannot be the object of a contract and as a result *obligations de sécurité* are thus a matter of public policy which cannot be excluded.[62] In Switzerland, too, the majority view seems to be that exclusion of liability for personal injury is not permitted. Personal integrity is deemed such an important right that any exclusion of liability is contrary to morality and therefore void.[63]

In short, the exclusions of liability for personal injury featuring in contracts between clubs and the various relevant parties – most notably spectators – risk being unenforceable.

5.2.4 Summarising remarks

The goal of this section was to discover whether clubs can be held liable for damage caused by their supporters' misconduct on the basis of a contract. As a result of their main activity, clubs owe a contractual obligation of safety (or: duty of care) to various parties. Breaching this obligation leads to liability for the occurring damage unless the breach cannot be attributed to the club.

In regard to breach of contract, the fault of the club is generally presupposed and can only be excused if the breach was due to factors beyond the control of the club and that the club could not be expected to foresee. However, multiple jurisdictions struggle with the question whether or not the sole occurrence of damage constitutes a breach of contract. The doctrinal debate on whether the obligation of safety is qualified as an obligation of result or an obligation of means is primarily relevant to the question who bears the burden of proof in establishing or denying a breach of the obligation of safety. Although this is an important practical issue in light of the difficulty for the claimant to prove what the club should have done in a specific situation, it is first necessary to determine the extent of the obligation of safety.

One option to escape liability based on contract is for a club to contractually exclude its liability. However, clauses that are included in general contract terms, for example on the back of match tickets, are subjected to a strict test of reasonableness. In addition, clauses that exclude liability for personal injury are generally deemed unreasonable or even unlawful in the different juris-

178, par. 3.3, M.B.M. Loos, 'Exoneraties in Comsumentenovereenkomsten', *Ars Aequi* 2007, p. 745. *A contrario*: J.H. Duyvensz, *De redelijkheid van de exoneratieclausule* (diss. Tilburg), Den Haag: Boom Juridische uitgevers 2003, p. 178.

61 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1057-1058, 1137.

62 Alain Bénabent, *Droit des Obligations (13e édition)*, Paris: Montchrestien – Lextenso éditions 2012, no. 423; Philippe Malinvaud, *Droit des obligations*, Paris: LexisNexis 2003, no. 743.

63 Roland Brehm, *Berner Kommentar, Bd. VI/1/3/1, Die Entstehung durch unerlaubte Handlungen*, Bern: Stämpfli Verlag AG 2013, art. 41, no. 232a and references cited.

dictions. Clubs have a better chance with clauses that are individually negotiated. Nevertheless, these, too, need to pass the test of reasonableness. Finally, it is worth mentioning that allowing exclusion of liability that is based on a duty of care seems somewhat illogical.

5.3 Fault liability of organising football clubs

Aside from a breach of contract, the violation of a duty of care can also give ground to liability based on tort. If the victim is a party to a contract with the organising club, it depends on the rules of concurrence in his jurisdiction whether he can bring a claim based on tort. In some jurisdictions, the victim has no other choice than to stick with his contractual claim (i.e. France); in others he might make a choice. However, when there is no contractual relationship between the victim and the club, the victim will have no choice but to base his claim on tort. For example, in case of spectators who attend a match for free,[64] referees, players of the other team, volunteers, etc.

General findings of comparative tort law show that there are two forms of liability: fault liability and strict liability. According to Werro and Palmer, the first form is based on the deviation of a required standard of behaviour while the second is a liability according to which a defendant is accountable even though his behaviour was perfectly correct.[65] The systems of tort law in the jurisdictions relevant for this research are all different. However, all systems feature a general norm for fault liability and a number of different strict(er) liabilities. The difference between fault liability and strict liability is, however, far from clear-cut. Some even argue that the distinction is outdated.[66]

As discussed in the previous chapter, the disciplinary liability of football clubs is largely based on strict elements. In the absence of a specific rule in civil law, the issue of supporters' misconduct will, however, first be tested against the concept of fault liability. The concept of strict liability and possible application of this concept in relation to supporters' misconduct will be dealt with in the next chapter.

64 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1928.

65 Franz Werro and Vernon Valentine Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, p. 7.

66 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 1005.

5.3.1 Protected interests in tort law

Unlike contract law, which regulates the obligations between contractual parties, tort law concerns obligations towards everyone. In Europe, the general goal of tort law can be summarised in one word: protection.[67] More precisely, protection of a variety of rights and interests, which include but is not limited to life, physical integrity, privacy, property rights, and economic interests.

The rights and interests protected in tort law are dealt with in different ways in the relevant countries.[68] Some jurisdictions, such as France and Switzerland, are characterised by flexibility. French law does not limit the list of rights to be protected and it is left to the courts to decide on whether a *dommage* gives rise to compensation. By contrast, in Germany compensation based on tort law is only an option if there is an infringement of one of the rights listed in § 823 BGB. The rights listed include: right to life, bodily integrity, health, freedom, property and other rights.[69] In English law the starting point is different as the primary focus lies on the duty of care that is owed to someone in a specific situation. Breaching this duty constitutes an infringement of a right that is owed.[70]

As mentioned above, actions that fall under the scope of supporters' misconduct risk infringing a number of legally relevant rights. Looking back at past occurrences, different parties risk infringements of different rights. People that are present in the stadium while disturbances occur bear the risk of personal injury and damage to their property, for example clothes that are ripped or burnt due to fireworks. In addition, the phenomenon of racist chanting infringes personality rights.[71] The owner of the stadium very likely will suffer damage to his property, for example broken seats or trashed bathrooms.

An infringement of a right is often the starting point, but does not by itself result in liability. For a football club to be liable based on tort for damage that results from supporters' misconduct it is necessary that the legal requirements of liability are fulfilled.

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67 Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study*, Munich: Sellier 2004, p. 26: "The purpose of tort law is to protect persons and the preservation of their property." See further on the goals of tort law Chapter 6.3.

68 See for an in-depth overview: Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, chapter 7.

69 These 'other rights' have to be absolute rights.

70 See: Robert Stevens, *Torts and Rights*, Oxford University Press 2007 cited by Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 701-2. F.n. 3.

71 See further on this issue Section 5.4.3 below.

5.3.2 Requirements for fault liability

Fault liability, or 'negligence' in different terminology, is based on the deviation of a required standard of behaviour and can exist both for intentional and negligent conduct. In the context of this research, the liability of clubs arises not from doing harm, but rather for not doing enough to avoid harm. Looking beyond national terminology, establishing liability of the club requires proving that the club has acted negligently, as well as (adequate) causation between the negligent act and the damage.[72] The requirements of damage and causation are expected to be fulfilled without any major issues. In contrast, establishing fault/negligence is the crucial and most challenging step.

A detailed explanation of the fault requirement in the different legal systems goes beyond the scope of this research.[73] However, the following brief overview will show that with regard to the liability of football clubs the basic applicable standard is practically identical across the jurisdictions.

5.3.2.1 Fault

According to the PETL, fault consists of the intentional or negligent violation of the required standard of care.[74] With this objective standard of conduct, to which everybody has to conform, the notion of blameworthiness has become obsolete.[75]

In comparison with the PETL and other jurisdictions, the structure of fault liability in French law is the simplest of all; one has to prove intention or negligence (*faute*), damage and causation. The French Code Civil features the most general provision on tort law. "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer."[76] The provision is followed by art. 1383 CC, which provides that 'everyone is liable for the damage he causes not only by his act, but also by his negligence or by his imprudence'. As the legislator has left interpreting '*faute*' to the courts, doctrinal opinions on the definition of '*faute*' are extensive and come in many variations.[77] However, generally speaking, most definitions include the following: conduct that breaches a pre-existing obligation, a

72 See also PETL Text and Commentary 2005, title II, III and IV.

73 See for detailed overviews comparative law works by: Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013; Christian von Bar, *The Common European Law of Torts (Volume 1)*, Oxford: Clarendon Press 1998 and the classic work Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law (3rd rev. ed. repr.)*, Oxford: Clarendon Press, 2011.

74 Art. 4:101 PETL.

75 PETL Text and Commentary 2005, Chapter 4, introduction, no. 3.

76 Art. 1382 CC.

77 Already in 1948, 23 different definitions of *faute* were distinguished. Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, p. 58.

statutory duty or conduct that does not meet the legal standard of conduct. In French this legal standard is better known in its classic formulation: *la conduit du bon père de famille*.[78]

By contrast, in Germany, Switzerland and the Netherlands fault liability consists of additional requirements.[79] In Germany, the three provisions of the BGB that regulate fault liability require (a) the violation of a codified normative rule, (b) unlawfulness, and (c) fault (*Verschulden*). As mentioned above, the violation of a codified rule concerns the infringement of another person's protected rights. In principle, by infringing one of these rights, the defendant acts unlawfully. However, in cases where a person suffers damage as a result of someone's omission, the sole infringement of his rights is not sufficient to establish liability as this would lead to undesirable results. The classic example of this issue is a tree belonging to the defendant falling on the claimant's house. As the tree cannot be qualified as another building or structure in the sense of § 836 BGB, the defendant cannot be held liable unless a duty of care exists. In 1902, this lacuna was filled by German case law.[80] Since then, an omission is deemed unlawful if it constitutes a breach of a safety duty (*Verkehrssicherungspflicht*) due to failing to take appropriate safety measures.[81] The third requirement is that the defendant acted intentionally or negligently; conduct is deemed negligent if it is contrary to the care required by society.[82]

The Swiss and Dutch systems take a middle ground between French and German law. In addition to damage and causation, the required elements are unlawfulness and fault – in Dutch law more precisely accountability (*toerekenbaarheid*).[83] Similar to the situation in Germany, in both systems a vast body of case law has been developed with regard to duties of care, which when they are breached, constitute unlawfulness.[84] In general, unlawfulness can be rebutted by a ground of justification. For example, during surgery, a doctor infringes the right of personal integrity which is justified by the patient's consent. However, it becomes clear that in cases of breached duties of care it has become difficult to separate the atmospheres of unlawfulness and fault.

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78 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 6705; Geneviève Viney and Patrice Jourdain, *Traité de droit civil. Les conditions de la responsabilité (4e édition)*, Paris: LGDJ 2013, no. 445ff.

79 Germany: § 823 (1), § 823 (2) and § 826 BGB. Netherlands: art. 6:162 BW. Switzerland: art. 41 CO; Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 41, no. 6.

80 RG 30.10.1902, RGZ 52, 373.

81 BGH 15.06.1954 – III ZR 125/53, BGHZ 14, 83; Gerhard Wagner, *Münchener Kommentar zum BGB. Band 5. Schuldrecht. Besonderer Teil III. 6. Auflage*, 2013, § 823, no. 311-365.

82 § 276 (I) BGB.

83 Art. 6:162 BW and art. 41 CO.

84 Switzerland: Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 41 CO, no. 79 and case law cited there. Netherlands: Landmark case: HR 05.11.1965 (Kelderluik), *NJ* 1966, 136, note. G.J. Scholten.

This is perhaps most visible in German law where the legal 'formula' to establish fault ('neglect of due care') is already needed to establish unlawfulness.[85] When unlawfulness is based on the breach of a safety duty, it follows that there can be no ground of justification. In Dutch law an unlawful act can be attributed if it is due to a person's own fault or if he is accountable by law or pursuant to generally accepted principles.[86] The latter is an objective accountability from the point of view of conventional standards (*verkeersopvatting*) and aims at providing a realistic foundation for liability rather than extending the notion of fault.[87] Similar to German law, once the breach of a duty of care is established, the accountability of this breach is automatically given on the basis of this standard.

In English law, the general liability rule is embodied in the tort of negligence, which consists of three elements: a duty of care, the breach of this duty and resulting damage.[88] The most difficult element is to establish whether or not a duty of care is legally owed in a specific situation. If there is no precedent, three requirements need to be fulfilled in order to establish a duty of care: the harm must be reasonably foreseeable, there has to be proximity between the claimant and the defendant, imposing a duty of care has to be fair, just and reasonable.[89] The key requirement is, however, the breach of the duty. This test focuses on the question: given the existence of a duty, what is the standard of care that was to be exercised? In similar wording to the legal standard in French law, this standard is that of the *reasonable man*. The classical formulation of this standard reads:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do: or doing something which a prudent and reasonable man would not do."[90]

However, in contrast to the continental law systems, in English law the general liability rule (tort of negligence) is not that relevant regarding liability of

85 'Neglect of due care', § 276 (2) BGB; Georg Caspers, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 276 BGB, no. 29. A similar view is defended in Switzerland too, Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 41 CO, no. 57 and 81.

86 Art. 6:162 (3) BW.

87 A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-IV*, De verbintenis uit de wet*, Kluwer 2011, no. 121.

88 John Charlesworth and Rodney Algernon Percy, *Charlesworth and Percy on Negligence (13th edition)*, London: Sweet & Maxwell 2014, no. 1-34.

89 The so-called 'Caparo test' was developed by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617. See further: John Charlesworth and Rodney Algernon Percy, *Charlesworth and Percy on Negligence (13th edition)*, London: Sweet & Maxwell 2014, no. 2-29ff.

90 Alderson B. in *Blyth v Birmingham Waterworks* (1856) 156 ER 1047, 1049; John Charlesworth and Rodney Algernon Percy, *Charlesworth and Percy on Negligence (13th edition)*, London: Sweet & Maxwell 2014, no. 7-03.

organising clubs. In fact, this situation is covered by a separate tort: breach of a statutory duty; the statute in question being the Occupiers Liability Act 1957.[91] By virtue of this statute a duty is owed in respect to risks arising on the premises 'due to the state of the premises or to things done or omitted to be done on them'.[92]

The liability rule is nevertheless based on negligence and the applicable standard bears close resemblance to the duty of care in the tort of negligence. Section 2 (2) of the Occupier's Liability Act provides:

> "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

In summary, in all jurisdictions the case of supporters' misconduct falls in the category of 'safety duties' or duty of care. As in contract law, whether in a specific situation an organising club is liable for the damage caused by its supporters depends on the scope of the standard of care that lies upon the club.

5.3.2.2 The standard of care: a transnationally uniform applicable standard

In all the relevant legal systems, establishing fault requires the comparison of the conduct of the club with the standard of care. This is not a normative standard, but a concrete standard of what was expected from the defendant in this exact situation. In other words: who is the reasonable man and what would he have done in this situation?[93]

In this assessment, all circumstances of the case have to be taken into account.[94] This generally accepted approach is reflected in Art. 4:102 (1) PETL:

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91 Before the Act was introduced, the occupier of premises owed different standards of care depending on his relationship with the other party. If there was a contract, there was an implied warranty that the premises were as safe as reasonable care and skill could make them. Lower duties were owed to those who entered the premises on business interests both to himself and the occupier, or with express or implied permission without such business interests. The Act abolished the common-law distinction and substituted this with one single duty of care owed to all 'visitors'. W.V.H. Rogers, *Winfield & Jolowicz on Tort* (16th ed.), London: Sweet and Maxwell 2002, no. 9.3.

92 S. 1 (1) Occupiers' Liability Act 1957.

93 On the complexity of the notion of the reasonable person: John Cartwright, 'The Fiction of the 'Reasonable Man'', in: A.G. Castermans *et al*. (eds.), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009.

94 England: Lord Reid in *Morris v West Hartlepool Co Ltd* [1956] AC 552, 574. France: Geneviève Viney and Patrice Jourdain, *Traité de droit civil. Les conditions de la responsabilité (4e édition)*, Paris: LGDJ 2013, no. 462. Germany: Johannes Hager, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Buch 2 Recht der Schuldverhältnisse*, Berlin: Sellier – de Gruyter 2009, § 823, no. E25ff; Netherlands: HR 05.11.1965 (Kelderluik), *NJ* 1966, 136, note G.J. Scholten;

> "The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods."

The list of circumstances is by no means exhaustive. Many factors play a role in the evaluation of the applicable standard of care in a specific case and they all vary in weight. The assessment itself consists of balancing the expected risk and the precautions taken or needed. In other words: the interest of the victim not to get hurt is balanced against the interest of the club not to take burdensome precautionary measures.

It is important to note that in certain cases, courts require such a high level of precautionary measures that the defendant's duty is rather a guarantee of safety. An example of this is the standard that applies to drivers of motor vehicles. In many countries, the courts have set the standard of care so high that precautionary measures have become irrelevant.[95] As a result, when an accident occurs, the driver is practically strictly liable. The trend of a rising standard of care has manifested itself in many different situations and has been widely discussed in doctrine.[96] For the purpose of this research, it suffices to be aware of this trend and the reasons behind it, which include the rise and development of insurance and the notion of reaping benefits from a dangerous activity.[97]

5.3.3 The standard of care owed by organising clubs according to the courts

Extensive research shows that the occasions in which a victim of supporters' misconduct has brought a civil claim to obtain damages from a football club are few and far between.[98] Cases of supporters' misconduct that did result

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A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-IV*, De verbintenis uit de wet*, Kluwer 2011, no. 58. Switzerland: Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 41 CO, no. 88.

95 Following case law, most jurisdictions enacted special provisions to deal with this type of liability, the majority in a strict liability rule.

96 See for example Bénédict Winiger, 'Strict Liability: What About Fault?', in: Helmut Koziol and Barbara C. Steiniger (eds.), *European Tort Law 2001*, Vienna: Springer Verlag 2002, pp. 2-17; Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 1001-1002.

97 See further Chapter 6.4.1.

98 Providing reasons for this lack would be only speculation. It should, however, be noted that the high-profile Hillsborough disaster, which resulted in the death of 96 people and injuries to 766 others, was settled out of court. In addition, the Heysel disturbances took place in Belgium. It is not inconceivable that victims (or their insurers) of other occurrences

in litigation against the organising club show the courts' struggle between the necessity and willingness to apply a standard of care that is apt to prevent damage on the one hand and the averseness that this standard practically manifests as strict liability on the other.[99]

5.3.3.1 France

The idea to look at the club for compensation for damages incurred by supporters' misconduct is not novel. This is exemplified by *Cts Fuster c/Olympique Lyonnais et autres*, which is perhaps the first published case of its kind.[100]

During a match between Olympique Lyonnais and Olympique Marseille, a twenty-one-year-old man was seriously injured in the face by the explosion of a flare launched by an unknown supporter and died as a result. His family turns to the club for compensation, arguing that Olympique Lyonnais breached its contractual obligation of safety which it owed towards the spectators. According to the family the club failed to provide appropriate security measures to avoid the occurrence of incidents, which were predictable considering the rivalry between the two teams, the particularly high number of spectators (35,000) and the increasing violence prevalent in stadiums. Furthermore, from the start of the match, violent incidents between the supporters of both teams resulted in the throwing of many different projectiles. The club defends itself by stating that it has taken all necessary measures for safety and to avoid damage by increasing the presence of municipal police and private security guards. Further, the club stressed that the accident could not be foreseen and that it seemed to be attributable to Marseille fans, for which the club thus cannot be held responsible.

In its assessment of the case, the court first considers that Olympique Lyonnais as the organiser of the event is held under a contractual obligation of safety in respect of spectators. Based on the fact that the match between the two rivalling clubs was likely to result in disturbances, the large number of spectators as well as the violence that had prevailed during the 'away' match, the club should have taken increased, even exceptional, security measures in anticipation of any incident that could pose a danger to the spectators. The court continues that, on the basis of the regulation of the

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reached settlements or have not thought to bring the club before the court rather than the responsible individuals.

99 This paragraph focuses on cases resulting from claims for damages. Cases based on other claims – such as *Stichting Ban/ADO* in the Netherlands, which is covered in Section 5.4.3 below – are excluded for structural reasons.

100 TGI Lyon 25.06.1986 (Consorts Fuster c. L'Olympique lyonnais et autre.), *Recueil Dalloz* 1986, p. 617 note Gérard Sousi; La semaine juridique 1990 II, no. 21510, note Pierre Collomb. Appeal from Olympique lyonnais rejected: Cass. Civ.1 12.06.1990, n°89-11.815, via: <http://www.legifrance.gouv.fr>.

national federation the club had to ensure that no dangerous objects – such as rockets – enter the stadium.[101]

> "Attendu que force est de constater que l'association susnommée a méconnu l'article 20 du règlement de la Ligue nationale de football, auquel elle ne prétend pas ne pas être soumise, qui prévoit une interdiction d'accès du stade aux personnes en possession d'objets de nature provoquer des blessures aux spectateurs, ladite interdiction s'appliquant aux articles pyrotechniques, tels que pétards, fusées ou feux de bingale".[102]

The court also considered that the twenty-meter barrier between the spectators clearly was insufficient to constitute an effective protection area as fireworks easily reach a distance of 80 to 100 meters. Finally, it was considered that the disturbances between the spectators and the throwing of missiles and firing of rockets lasted at least several minutes without an immediate response from the security personnel. According to the court, this lack of intervention revealed that the number of security personnel was not sufficient – at least in the vicinity of supporter groups, while their presence there was essential. Ultimately, the club is held liable for the death of the young man due to its lack in taking appropriate measures during the organisation of the match to ensure the safety of spectators. This conclusion held before the *Cour de Cassation*.

It is interesting to note that, although the club owes an obligation of means, for each precaution the court takes the *result* as the starting point. For example, the fact that so many fireworks entered the stadium proves that the club did not take enough measures to comply with the obligation to prevent fireworks from entering. The court's line of reasoning practically results in an obligation of result or even strict liability as it is difficult to see how a club can prove that the breach of the obligation cannot be attributed to it.

A similar train of thought can be seen in a case from the same court where a supporter of the visiting team was hit on the head by a large object launched from an adjourning stand while waiting to leave the stands.[103] The court considered that as the match in question between two regional teams was susceptible to result in violent conflicts – as it had in the past – the organiser could not exclude the risk of aggression between the supporters. The fact that a group of fans was left waiting for over an hour on a closed platform, while supporters of the organising team on the adjourning grandstand were able to move, constituted a breach of the duty of the organiser.

The *Cour d'appel de Toulouse* laid a similar foundation for its decision to hold an organising club liable for the injuries of a sixteen-year-old who hurt

101 On the autonomy of the national federation to create and impose such rules see Chapter 2.2.

102 TGI Lyon 25.06.1986 (Consorts Fuster c. L'Olympique lyonnais et autre.).

103 Cour d'appel de Lyon (6e chambre) 17.02.1999, n°97/00170 (Rousset c/Association Olympique Lyonnais).

himself with a smoke grenade he found in a room in the stadium that was made available to the supporters' club the victim was a member of.[104]

> "La SAOS TFC savait que les supporters faisaient usage régulièrement de fumigènes, ce qui laissait supposer que ces fumigènes faisaient partie du matériel entreposé dans cette salle, d'autant plus que le TFC avait été informé que des fumigènes avaient été dérobés à la SNCF et que ceux-ci avaient été retrouvés sur des supporters. La SAOS se devait donc de prendre des précautions renforcées, d'assurer une surveillance accrue du local, du parcours menant de celui-ci aux tribunes et aux places réservées aux supporters."[105]

Even though the courts demonstrate severity on the issue of security, the liability of organisers is not always systematic.[106] For example, a rugby referee that was attacked by a spectator was denied his claim for damages from the club as, according to the court, they did not exercise control over the supporters.[107] In another case it was held that a match that took place in a village of 5000 inhabitants and in the presence of a few dozen supporters did not warrant additional security measures.[108]

Nevertheless, considering the facts of these cases, they do not provide sufficient arguments to conclude that professional football clubs do not owe a virtual guarantee of safety. On the contrary, clubs risk almost automatic liability if supporters' misconduct causes damage.

Considering the many case notes and commentaries that followed the disciplinary cases in France between 2007-2010, it is interesting that the civil-law cases, especially *Fuster/Olympique Lyonnais,* remained absent from the debate on disciplinary liability.[109] Perhaps this can be explained from the administrative-law nature of the disciplinary cases. However, the civil-law liability of football clubs has not received much scrutiny at all and seems firmly established in French civil liability law.[110] An explanation could be that in French law the contractual liability of clubs, which results from a 'strict' obligation of safety, is seen as more logical compared to a strict liability for

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104 Cour d'appel de Toulouse (3e chambre, 1re section) 14.05.2002, n°2001/01793 (Roussillon c/SAOS Toulouse Football Club).

105 Cour d'appel de Toulouse (3e chambre, 1re section) 14.05.2002, n°2001/01793 (Roussillon c/SAOS Toulouse Football Club), cons. B.

106 Compare Christophe Albiges, Stéphane Darmaisin, Olivier Sautel, *Responsabilité et sport*, Paris: LexisNexis SA 2007, p. 187.

107 CA Agen 09.02.1999, n°96001345 (Assoc. le club de rugby Le Vernet c/Bringuier et al.).

108 Cass. Civ.1, 07.02.2006, n°03-21157 (Fonds de guaranties des victims des actes de terrorisme et d'autres infractions c/Swiss life et al.).

109 See case notes referenced in Chapter 4.3.2.

110 Neither right after in case notes or later in time. Sports law books only refer to the case when talking about the obligation of safety of event organisers, but criticism is absent. For example, Buy *et al. Droit du sport (3e éd)*, Paris: LGDJ 2012, no. 957; and, Christopthe Albiges, Stéphane Darmaisin, Olivier Sautel, *Responsabilité et sport*, Paris: LexisNexis SA 2007, p. 186.

the behaviour of third parties – even though in practice the results could end up being very similar.

5.3.3.2 England

In England, case law has been limited to one relevant decision so far.[111] In *Cunningham v Reading Football Club*, police officers brought a claim against Reading after they were injured during a match against Bristol in 1984. Already during the first half, Bristol fans had broken barriers between their section and that of the home fans and some fighting occurred. Then, just after the second half had started there was a lot of fighting and Bristol fans threw a very large number of missiles onto the pitch and towards the area where the Reading supporters were seated. After a number of people invaded the pitch, the referee stopped the match and police went onto the pitch to clear it of the invaders. It was then that a number of police officers were injured. They all were struck by pieces of concrete and one unfortunate officer was severely kicked and punched by hooligans after being hit on the head by a heavy chunk of concrete.

According to the claimants, the football club breached its duty as occupier to take reasonable steps to ensure that visitors to the stadium, including police officers, were not unreasonably exposed to danger arising from violence from spectators. In particular, the club knew that it was likely that violence would occur during this particular match and that no measures were taken to repair the ground although the club knew that hooligans had broken pieces of concrete from the stands and used them as missiles before. It was also argued that fencing was inadequate and that insufficient steps were taken to exclude hooligans from attending the match.

J. Drake found the club to be liable based on breach of its statutory duty and under common-law negligence, considering that,

> "the club knew very well that the visiting Bristol crowd was very likely indeed to contain a violent element. They also knew from previous experience, particularly at a match less than four months earlier, that unruly fans might very well throw pieces of concrete as missiles, should they be able to obtain such ammunition and no steps whatsoever had been taken to make it more difficult for that to be done".[112]

The claimants' argument that more stewards could have prevented the outbreak of violence was also considered. However, it was held that in the light

111 *Cunningham and Others v Reading Football Club Limited*, 19.031991, [1992] P.I.Q.R. p. 141.
112 J. Drake in *Cunningham and Others v Reading Football Club Limited*, 19.03.1991, [1992] P.I.Q.R. p. 150.

of circumstances and knowledge at the time of the match, the club was not negligent in this respect.

Interestingly, the Football Association (FA) did not initiate disciplinary proceedings as a Commission decided on the match day that all relevant measures were taken. According to Justice Drake, this discrepancy in evaluation could be explained from the fact that the evidence before the Commission was not as complete as before the courts. Notwithstanding, he considers that the outcome of such disciplinary proceedings would not be relevant as the Football Association had to consider the events according to FA Rules and not according to civil law.[113] This latter view contrasts with developments in English law where private regulations have become increasingly relevant to determining the applicable standard of care.[114]

5.3.3.3 Germany

In Germany, the standard of care of football clubs has been considered in a small number of cases. However, in contrast to France, it proves challenging to establish liability based on a breach of the standard of care.

As far as is known, only once was a football club held liable on the basis of § 823 BGB in a German court.[115] After a promotion match which was won by the organising team, the separation between the field and spectator area was left open resulting in supporters storming onto the field to celebrate the victory. A number of young fans climbed the trainers' shelter, which collapsed and injured another spectator. The court reiterated standing case law from the *BGH* that the organiser is held to take all necessary precautions to protect third parties.[116] The scope of this duty also extends to risks arising from faulty or intentional acts of third parties.[117] The court continues by considering that sufficient personnel should be employed when panicky crowd reactions are to be expected.

> "Soweit hysterische und panikartige Massenreaktionen zu befürchten sind, müssen inbesondere Ordnungskräfte in der Anzahl zum Einsatz kommen, die nach polizeilichen Erfahrungen erforderlich ist, um gegebenenfalls jede kritische Situation, die noch im Rahmen des Vorhersehbaren liegt, zu beherrschen".[118]

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113 J. Drake in *Cunningham and Others v Reading Football Club Limited*, 19.03.1991, [1992] P.I.Q.R. pp. 147-148. See Chapter 6 for another approach.
114 See further Chapter 6.2.
115 OLG Düsseldorf 04.03.1994 – 22 U 209/93, *SpuRt* 1994/4, pp. 146-148
116 BGH 02.10.1979 – VI ZR 245/78, *NJW* 1980, 233.
117 OLG Düsseldorf 04.03.1994 – 22 U 209/93, *SpuRt* 1994/4, pp. 146-148, cons. 1.
118 OLG Düsseldorf 04.03.1994 – 22 U 209/93, *SpuRt* 1994/4, pp. 146-148, cons. 1.

In short, by not having prevented the spectators from accessing the field and climbing on the trainers' shelter the organising club was held liable for the damage incurred by the claimant.

In another case, a spectator was injured at the entrance to the stadium after a large group of 50-70 young people suddenly started running in the direction of the entrance.[119] Again, it is presupposed that the club has the obligation to take all necessary measures to protect spectators from harm. However, in this case the court considers that a standard of safety that excludes any accident or harmful event cannot be met; one only needs to only take those precautions that are suitable to avert danger to third parties in light of the expected safety concerns.

> "Da jedoch eine Verkehrssicherung, die jeden Unfall oder jedes schädigende Ereignis ausschließt, nicht erreichbar ist, muss nicht für alle denkbaren, entfernteren Möglichkeiten eines Schadenseintrittes Vorsorge genommen werden. Vielmehr sind nur diejenigen Vorkehrungen zu treffen, die nach den Sicherheitserwartungen des jeweiligen Verkehrssicherungspflichtigen geeignet sind, Gefahren von Dritten tunlichst abzuwenden."[120]

In the case at hand the required level of precautionary measures was high, notably because the clubs' supporters had shown violent behaviour in the past. However, according to the court, neither the deployment of more security forces, nor earlier separation of supporter groups could have prevented the horde of young people unexpectedly storming into the stadium. It was further added that the club could only have intervened inside the stadium and not outside. This last point was not further elaborated upon, however.

A similar situation happened in 2001 when two friends visited an international football match between Germany and England at the Olympic Stadium in Munich.[121] Just before entering the stadium, one of them found himself in a 'rampaging horde of English hooligans' who knocked him down and kicked him. The attack was so massive that he passed out and only regained consciousness after the police arrived. The unfortunate man claimed damages arguing that the organiser – in this case the German football federation (DFB) – had not taken sufficient measures to prevent the disturbances. The court of first instance considered that, during major sporting events such as the sold-out match between Germany and England, incidents of this nature cannot be completely ruled out in spite of all the reasonable safeguards taken by the organiser.[122] The attack of the English hooligans had been sudden, unforeseeable and unprovoked. According to the court, such incidents could only be

119 LG Gera 27.09.1996 – 6O 543/96, *SpuRt* 1997/6, pp. 205-206.
120 LG Gera 27.09.1996 – 6O 543/96, *SpuRt* 1997/6, p. 205.
121 LG München I, 04.11.2005 – 34 S 1125/05, *SpuRt* 2006/3, p. 122.
122 AG München 08.12.2004 – 242 C 28746/04, via:< http://www.kostenlose-urteile.de>.

prevented if there was a security person for every stadium visitor and requiring this would be an unfair burden on the operators. The appeal that followed was also rejected, with the consideration that, both organisers and visitors of international football matches should expect supporters' misconduct and that it is unreasonable to require such extensive measures for incidents to be completely ruled out.

> "Grundsätzlich müssen sowohl Veranstalter als auch Besucher von internationalen Fußballspielen und Großveranstaltungen des Sports mit Krawallen, Gewalttätigkeiten und Angriffen rechnen. Die Verkehrssicherungspflicht des Veranstalters wird jedoch durch die Zumutbarkeitsgrenze eingeschränkt. Wie das Amtsgericht zutreffend festgestellt hat, ist es unzumutbar, solche umfassende Sicherheitsvorkehrungen zu treffen, dass derartige Vorkommnisse vollständig ausgeschlossen werden."[123]

In both these cases, the courts' appreciation of the facts to establish the concrete scope of the standard of care remained quite brief. In the most recent case, the Court of Appeal of Frankfurt took a much more elaborate approach.[124] The facts of the case were as follows.

A club was brought before the courts following injuries to one of the landscapers at the stadium at a Bundesliga match in 2008. During the match, various fireworks were thrown from the visiting section, some of which exploded in the vicinity of where the landscaper was standing. As a result, the landscaper suffered permanent damage to his hearing, as well as headaches, dizziness and insomnia. According to the court of second instance, the district court rightly dismissed the claim as the stadium operator did not violate its safety duties. Following standing case law, whoever creates a dangerous situation is obliged to take reasonable precautions to avoid damage. In its assessment of the claim, the court first considers that this duty also applies to organisers of football matches vis-à-vis their spectators. The reason being that,

> "der Veranstalter eines solchen planmäßig durchgeführten sportlichen Wettkampfes mit öffentlichem Interesse, zu dem Zuschauer gegen Entgelt eingeladen werden, „schafft" die Gefahr, indem er den Zustand, von dem für die Zuschauer eine Gefährdung ausgehen kann, herbeiführt oder andauern lässt".[125]

Secondly, the court notes that as safety duties that exclude all damage are impossible to achieve, one has to take those precautions that result in a level of security that is deemed necessary in the sector of activity. In the present case that meant that the defendant had to bear in mind that the common risks

123 LG München I, 04.11.2005 – 34 S 1125/05, *SpuRt* 2006/3, p. 122.
124 OLG Frankfurt 24.02.2011 – 3 U 140/10, <http://dejure.org/2011,2037>, *SpuRt* 2011/4, p. 162. The appeal to the BGH is still pending.
125 Idem.

of Bundesliga football matches include fans throwing burning articles and fireworks which can injure other people in the stadium. As the match was categorised as a high-risk match, because the fans of both clubs had been rivals for years and there had been riots at previous matches, the organiser had to take this into account as well. Finally, the court comes to the conclusion that considering the state of security standards in 2008, the club put in place sufficient measures (although barely) and thus did not breach its duty of care.

> "Auch wenn man davon ausgeht, dass bei Sportveranstaltungen, insbesondere Fußballspielen, an den Schadensverhütungsaufwand nicht nur zum Schutz der Sportler, sondern auch zum Schutz der übrigen Beteiligten besonders große Anforderungen zu stellen sind, weil durch das Aufeinandertreffen rivalisierender, emotionsaufgeladener und zum Teil sogar gewaltbereiter Fans in großer Zahl die nicht unerhebliche Gefahr bewusster tätlicher Auseinandersetzungen besteht, hat die Beklagte vorliegend die an ihre Sicherungspflicht zu stellenden Anforderungen (gerade noch) erfüllt."[126]

The measures taken were in line with those at other national and international football matches and there was no evidence that measures beyond this standard were needed. Acknowledging that other *Bundesliga* football matches take place at much lower controls, the court deemed that the increased security efforts recognised the extra risk of this particular match.

An interesting point to highlight in regard to the reasoning of the court is that it takes time to explore the relevance of developments in security technology. It specifically notes that nowadays scanners and detectors, which are used at airports for example, could prevent the entrance of fireworks to a much greater extent. That this would entail considerable financial expenses or would require more time for the entrance of the public is not deemed to be a valid excuse.[127] Given the turnover achieved in professional football such costs are negligible and requiring such measures from clubs would be neither impossible nor unreasonable, says the court.

This last case is perhaps the best illustration of the difficulty to determine a standard of care which is apt to prevent the majority of foreseen risks without resorting to practically imposing strict liability. It is not surprising that in the majority of German cases care was deemed sufficient, considering the inclination of strict application of legal concepts. In light of the trend of the increasing standard of care, the result of the case is arguable, however, and definitely unsatisfactory for the victim. However, if the same situation were to happen today, the level of security measures required by the court would

126 Idem.

127 In general, when it comes to the scope of the necessary safety precautions the financial capacity of the organiser of sporting events is only of minor importance – if of any. See, BGH 29.11.1983 – VI ZR 137/82, *NJW* 1984, 801-803.

likely be much higher. Considering the security systems available today, a few extra checks would not have sufficed. The court's anticipation of future cases and its dismissal of the argument that implementing such systems is 'too expensive', is at least encouraging.

5.3.4 In summary: the relevant factors to establishing the scope of the standard of care

The goal of this section was to uncover whether football clubs can be held liable for damage caused by their supporters' misconduct based on fault in the relevant jurisdictions. Establishing liability of the club requires proving that the club has acted negligently, as well as causation between the negligent act and the damage. As the concept of fault consists of the intentional or negligent violation of the required standard of care, it is the scope of the latter which determines liability of a club in a specific situation. This is regardless of whether the claim is founded in tort or contract.

From the comparative analysis of fault liability in the different countries as well as the relevant case law, it emerges that in the appreciation of the conduct of clubs in regard to damage caused by supporters' misconduct a number of circumstances should be taken into account.

First, the nature and value of protected interests. The type of interest or right that is at stake has influence on the required care. In cases of supporters' misconduct, the interests at stake will often likely be personal integrity or property, both of which are valued highly in law.

Secondly, the dangerousness of the activity. It is clear that organising professional football matches is not a dangerous activity in itself. However, nowadays supporters' misconduct is an unfortunate but familiar aspect of this activity and a well-known risk. In multiple countries risk assessment of matches takes place on a continuous basis. If supporters' misconduct materialises, the foreseeability of damage as a result of fireworks, fighting, vandalising etc. is great.

Thirdly, the availability and costs of precautionary measures. In their defence, it is not unlikely that clubs will use the argument that complete security is a myth or that heavy security measures ruin the unique atmosphere in the stadium and with this the game of football.[128] In this light it can also be noted that the organising club is the only party that can influence the security. After all, one is not allowed to bring any means of self-defence into the stadium and is thus completely dependent on the organising club to ensure safety. Case law suggests that it is expected that clubs at least adhere to sector

128 As does for example András A. Gurovitz Kohli, 'Die zivilrechtliche Haftung bei Zuschauerausschreitungen', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 161-188, p. 177.

standards – which are laid down in the applicable regulations of the international and national federations. However, this does not entail that compliance with the rules is always sufficient. It is not unusual for organisers to be liable even if they complied with all security rules.[129]

These three factors, whilst not forming an exhaustive list, have guided the limited civil-law case law up until now. However, it is important to remember that these rulings essentially only remain an illustration of the possibilities as well as the difficulties in dealing with damage caused by supporters' misconduct. A clear red thread remains yet to be developed.

5.4 Situations where establishing liability is problematic

Up until now, the focus of this chapter has been on the liability of organising clubs for damage occurring inside the stadium. The reason for this is to be able to clearly distinguish between the situations in which football clubs can be held liable for the damage caused by supporters' misconduct and on what basis. However, in addition to this 'standard situation', supporters' misconduct manifests itself in other situations as well. These situations include more complex cases where causality and other tricky points could stand in the way of liability based on contract or fault. This section consecutively examines whether football clubs also owe a duty of care if they are the visiting club, for damage caused outside the stadium, or, for racist acts.

5.4.1 The standard of care owed by visiting clubs

Fault liability of organising clubs is based on a breach of the standard of care owed by them, which is most often related to safety in the stadium. In light of the disciplinary liability of football clubs – whether they are organising or visiting – the question arises whether the visiting club also owes a duty of care in relation to the behaviour of its own supporters. This is especially relevant in light of the possibility that visiting supporters instigate disturbances with the aim of hurting the organising club, thus provoking both sanctions as well as possible civil liability.[130]

In Germany, case law from a lower court has indeed considered the thought that a visiting club also has obligations in terms of preventing supporters'

129 Benoit Chappuis, Franz Werro and Béatrice Hurni, 'La responsabilité du club sportif pour les actes de ses supporteurs', in: Pierre-André Wessner *et al.*, *"Pour un droit équitable, engagé et chaleureux." Mélanges en l'honneur de Pierre Wessner*, Basel: Helbing Lichtenhahn 2011, pp. 65-110, p. 89.

130 The same issue is observed by Ros. Nathalie Ros, 'Décisions commentées. CE 27 Octobre 2007', *Jurisport* 2007/85, p. 41ff, par. II.B.2

misconduct. Although the case dealt with an appeal to the disciplinary sanction imposed on the visiting club after one of its supporters hit a steward, its considerations are nevertheless relevant in light of the duty of care of visiting clubs.

The court considered that if the disturbances are instigated by the visiting team, this team is also responsible if there was a fault (*Verschulden*). As disturbances had already occurred during the home match, the visiting team should have taken measures to prevent further problems during the away match. In the case at issue, however, the club had remained passive. The court further added that the club can also not argue that the deployment of stewards would not have prevented the disturbances.[131]

Following this case, it has been rightfully questioned whether such deployment of stewards would actually mitigate the possibility of disturbances.[132] However, it is difficult to argue that visiting clubs have no duty whatsoever to attempt the prevention of misconduct among their own supporters. Indeed, the few authors that have touched upon this question all consider that the visiting club owes a duty of care – albeit limited.[133]

However, according to Bondallaz, such a duty of care can only be assumed in exceptional cases, for example if the supporters are known to be susceptible to violence, if those doing the damage are clearly part of the visiting club's supporters, or if the visiting clubs has created conditions favourable to violence in terms of, for example, transport or match ticket sales.[134] Furthermore, Bondallaz argues that it would not be unreasonable to hold the visiting club accountable for accepting insufficient safety measures taken by the organising club or for continuing a match while spectators start to act violently.[135]

Considering the risks involved, it is not unreasonable to require the visiting club to take measures to prevent misconduct from its own supporters, for example by putting in place surveillance measures or organising and obliging specific modes of transport to away matches. These measures all include things

131 LG Koblenz 21.02.2003 – 411 C 367/03, *SpuRt* 2006, pp. 81-83, p. 82.

132 Wolf-Dietrich Walker, 'Zivilrechtliche Haftung für Zuschauerausschreitungen', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, pp. 35-59, p. 49.

133 Switzerland: Jacques Bondallaz, *La responsabilité pour les préjudices causés dans les stades lors de compétitions sportives* (diss. Fribourg), Bern: Stämpfli 1996, no. 75ff; Germany: Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011, p. 205; Wolf-Dietrich Walker, 'Zivilrechtliche Haftung für Zuschauerausschreitungen', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, pp. 35-59, p. 49. In French, English and Dutch literature, this issue is largely, if not completely, disregarded.

134 Jacques Bondallaz, *La responsabilité pour les préjudices causés dans les stades lors de compétitions sportives* (diss. Fribourg), Bern: Stämpfli 1996, no. 92-102.

135 Jacques Bondallaz, *La responsabilité pour les préjudices causés dans les stades lors de compétitions sportives* (diss. Fribourg), Bern: Stämpfli 1996, no. 84-85.

visiting clubs can control – at least in some way. Some federations include such obligations in their regulations.

In summary, if the visiting club indeed also owes a duty of care, this can lead to civil liability. In this case, joint liability of the organising and visiting club for damage caused by a supporter of the latter in the stadium is a possibility. After all, if disturbances arise, it is not unlikely that both clubs breached their respective duties of care. It will then be up to the courts to decide the distribution of the liability and damages between the two clubs – and possibly also the injurious supporters if they can be identified. However, if no breach of the visiting club's duty of care can be established, this leads to the undesirable situation in which the organising club risks full liability; also in the case of intentional rioting by the visiting club with the aim of hurting the organising club.

5.4.2 The standard of care owed outside the stadium

So far, the focus of this chapter has been on exposing the liability of football clubs for damage caused by their supporters inside the stadium. It is, however, not unusual – and unfortunately increasingly common – that supporters' misconduct leads to damage outside stadiums. For example, during the 2014 Cup final in Switzerland, supporters caused at least 40,000 CHF in property damage during their march from the station to the stadium and looted a souvenir shop.[136]

For those who have suffered damage, a claim based on contract will be impossible as it is unlikely that a club has contractual relations with people living or exercising their business in the vicinity of the stadium. For a claim based on fault liability to succeed, it needs to be established that the club has breached a duty of care.

The essential conditions to hold a club liable for damage outside the stadium risk being very difficult to meet. Only when a third party's protected interest is harmed and when the circumstances require that the club should have averted such damage, can a duty of care be assumed.[137] This is where the problem arises, since clubs often do not have the possibility or authority to implement measures outside the stadium that could avoid this. In the public space it is the police who have not only the duty, but also the monopoly to

136 Afterwards, the SFV offered to pay CHF 200,000 towards the security costs, which were estimated at half a million. <http://www.srf.ch/news/regional/bern-freiburg-wallis/fussballverband-soll-fuer-cupfinal-randale-bezahlen>. In 2015 the Cup final took place in Basel, after Bern no longer wanted to host.

137 Compare András Gurovitz, 'Die zivilrechtliche Haftung für Zuschauerverhalten', *Causa Sport* 2014, pp. 267-276, p. 269.

ensure safety.[138] However, the clubs do have to inform and collaborate with the relevant police forces so as to ensure they can do their job.[139]

Despite the police's responsibility, an organising club's duty of care does not start and end at the stadium gates. On match days, the immediate surroundings of a stadium clearly pose risks that are closely connected to the club's activities and controlled by them, such as tickets sales at the entrance and entrance control.[140] As aptly phrased by Haslinger, "[d]ie Verkehrssicherungspflicht umfasst insoweit die Abscherung von Gefahren, die an die Veranstaltung und nicht das Grundstück als solches anknüpfen, auch wenn sie über das Stadiongelände hinausgehen".[141]

However, the further away the damage is incurred the more difficult it will be to prove the club owed a duty of care and breached it. In France, the *Cour de Cassation* decided that the organiser of a motor racing event was not responsible for damages suffered by the owners of a refreshment bar built at the circuit, which was ransacked and partially burned by unidentified spectators. The court considered that, firstly, the police force that was present on the premises in order to ensure order and security was not acting under the direction and control of the organiser. Secondly, the organiser had taken all necessary measures for the smooth running of the event and had had no opportunity to prevent the fire and subsequent demolition of the building.[142]

This is especially relevant in connection with the views defended in literature that clubs should be expected to take measures to ensure proper circumstances for the arrival and departure of the different spectator groups.[143] However, here too it will be difficult to accept a duty of care that extends further than the immediate vicinity of the stadium. One of the German courts already cited above considered that the organisers can only exercise powers of intervention inside the stadium, which seemed to suggest that no duty of care exists outside the stadium.[144] Furthermore, one has to agree with Walker, that even if there is a certain standard, it is still very difficult, if not impossible

138 In England, the police are often hired to do indoor security work as well. Simon Gardiner *et al*., *Sports Law. Fourth edition*, Oxon: Routledge 2012, p. 567ff.

139 Neglecting this duty likely leads to liability, as it is in breach of the standard of care.

140 Jochen Fritzweiler, Bernhard Pfister,Thomas Summerer, *Praxishandbuch Sportrecht (3. neu bearbeite Auflage)*, Munich: CH Beck Verlag 2014, p. 546.

141 Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011, p. 204.

142 Cass. Civ.2 22.02.1984, n°82-16041, Bull civ II, n°36.

143 András A. Gurovitz Kohli, 'Die zivilrechtliche Haftung bei Zuschauerausschreitungen', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 161-188, p. 180ff; Jacques Bondallaz, *La responsabilité pour les préjudices causés dans les stades lors de compétitions sportives* (diss. Fribourg), Bern: Stämpfli 1996, no. 741-800.

144 LG Gera 27.09.1996, 6O 543/96, *SpuRt* 1997, 206.

to secure the entire way from the station to the stadium with stewards, who also don't have the authority to intervene.[145]

Another, perhaps somewhat unrealistic – option for residents or business owners in the vicinity of the stadium is to base a claim on nuisance. In short, nuisance can be described as causing a substantial and unreasonable interference with someone's land or his use or enjoyment of that land.[146] Classic nuisance cases related to sports infrastructures and events generally involve either noise or the risk of balls flying out of the field and causing damage to property or passing people.[147] So far, no cases are known to have been filed following supporters' misconduct and whether this would succeed is doubtful.[148]

In short, unless a club has been negligent in accurately informing the police about the expected security risks, it will be virtually impossible to bring a successful claim against a club for damage incurred outside the stadium grounds.

5.4.3 Liability for racist acts

Up until now, the main focus has been liability for damage caused by supporters' misconduct. However, the issue of racism in football has received increasingly more attention in recent years. With both UEFA and FIFA having launched campaigns to combat racism and verbal violence in football, it is firmly on the agenda. Additionally, a number of federations have modified

145 Wolf-Dietrich Walker, 'Zivilrechtliche Haftung für Zuschauerausschreitungen', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, pp. 35-59, p. 49.

146 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 1412, 1414-1, 1416.

147 Nuisance cases. Germany: Jochen Fritzweiler, Bernhard Pfister,Thomas Summerer, *Praxishandbuch Sportrecht (3. neu bearbeite Auflage)*, Munich: CH Beck Verlag 2014, p. 546; England: Simon Gardiner *et al.*, *Sports Law. Fourth edition*, Oxon: Routledge 2012, p. 555ff, see cases cited. France: Christoph Albiges *et al.*, *Responsabilité et sport*, Paris: LexisNexis SA 2007, p. 195.

148 A number of German authors have attempted to compare disciplinary strict liability to § 1004 BGB, the majority ultimately concluding that this analogy is faulty. Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauerausschreitungen im Fussball', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 129-159; Frank Bahners, 'Die Rechtmässigkeit von Verbandsstrafen gegenüber Fussballvereinen bei Zuschauerausschreitungen', *Causa Sport* 2009/1, pp. 26-28.

their regulations in order to provide for minimum sentences and stricter rules regarding (enforcement and) recidivism.[149]

As holds for physical or property damage caused by supporters' misconduct, identifying the original tortfeasor of racist or discriminatory acts is also difficult – if not even more so. Is it feasible for victims of racist or discriminatory acts to address the clubs instead?

This question has been examined by Dippel from a German law perspective. Depending on the victim's relationship with the club there are a few options available to him. First, in its capacity as employer, a club can be held liable for discriminatory acts of players (of both teams) as well as supporters if the act is aimed at one of its employees.[150] Based on the German General Equal Treatment Act (*AGG*), the employer has the duty to take measures necessary to ensure protection against discrimination, including preventive measures.[151] However, these measures are limited to those risks the employer should reasonably take into account.[152] The risk of racist chants from supporters can definitely be categorised as such a risk.[153] Although it has been doubted whether the obligation of preventive measures also applies in regard to third parties such as supporters, Dippel argues that clubs have various options to influence supporters to prevent racist acts, including the display of banners, information stands, fan coaching and provisions on tickets.[154] According to the *AGG*, the club also has the obligation to employ repressive measures.[155] However, the scope of these measures has not yet been developed. Nevertheless, in regard to repressive measures following racist acts at football matches, one could think of banning orders.[156] In principle, if an employer breaches these duties, the victim can claim damages by virtue of article 15 *AGG*. However, the majority opinion in Germany is that such claims would go too far and are contrary to the history of the statute.[157]

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149 UEFA implemented recidivism aggravation in the 2013 edition of its Disciplinary Regulations. The Dutch Federation has also tightened its rules over the last few years: <http://home.knvb.nl/themas/veiligheid/spreekkoren-in-het-voetbal/>.

150 Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 206.

151 Art. 12 AGG.

152 Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 209.

153 See also: Marc-Philippe Weller, 'Die Haftung von Fußballvereinen für Randale und Rassismus', *NJW* 2007, p. 963.

154 Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 210.

155 Art. 12 (3), (4) AGG.

156 Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 218.

157 See Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 220; Wolf-Dietrich Walker, 'Zivilrechtliche Haftung für Zuschauerausschreitungen', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart:

Despite the existence of equality statutes in all jurisdictions, victims of racist acts during football matches will generally have to resort to basing their claim on a breach of the (contractual) standard of care. The idea that clubs owe the duty to prevent racist acts is in principle supported in literature.[158] However, as no clear standard has been developed yet, courts will have to resort to a balancing of interests of the club and the victim.[159]

So far, the sole example of a club having been brought before a court following racist acts from its supporters is the Dutch case *Stichting Bestrijding Antisemitisme/ADO Den Haag*.[160] The *Stichting Bestrijding Antisemitisme* (hereafter: BAN), a foundation fighting anti-Semitism, brought summary court proceedings to football club ADO Den Haag for failing to prevent and react to anti-Semitic chanting during a league match between ADO Den Haag and A.F.C. Ajax on March 20, 2011.[161] During the confrontation ADO supporters frequently chanted anti-Semitic slogans. After having unsuccessfully approached ADO to ensure it would take measures in the future, BAN demanded the court in preliminary relief proceedings to order ADO to immediately take action when anti-Semitic chants are sung, and if necessary stop the match.[162] The foundation argues that the repeated and offensive anti-Semitic chants generated by the public during the match are totally unacceptable in a civilised society. According to the applicable law and regulations of the KNVB, ADO was required to act promptly against the chanting by stopping the match, which was within its power, and acted unlawfully by failing to do so. ADO defends itself by arguing that the chants were not massive and only short-lived and, furthermore, that it did not notice the chants. The foundation's main argument is thus that ADO has breached KNVB regulations as well as its own.

The court presupposes that it is the primary responsibility of a professional club to act against unwanted chants as this follows clearly from the applicable

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Richard Boorberg Verlag 2009, pp. 35-59, p. 58; Gregor Thüsing, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 1: Allgemeiner Teil*, München: Verlag C.H. Beck 2012, § 15 AGG, no. 25.

158 Marc-Philippe Weller, Die Haftung von Fußballvereinen für Randale und Rassismus', *NJW* 2007, pp. 960-964, p. 963; Gregor Thüsing, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 1: Allgemeiner Teil*, München: Verlag C.H. Beck 2012, § 12 AGG, no. 12.

159 Compare, Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 269.

160 Pres. Rb. Den Haag 9.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>. See for a more detailed case note, R.H.C. van Kleef, Football Club held Liable in Dutch Court for Failing to Take Measures against Racist Chanting', in *International Sports Law Journal* 2012/1-2, pp. 101-103.

161 Pres. Rb. Den Haag 9.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>. See for a more detailed case note, R.H.C. van Kleef, Football Club held Liable in Dutch Court for failing to take Measures against Racist Chanting', in *International Sports Law Journal* 2012/1-2, pp. 101-103.

162 Pres. Rb. Den Haag 9.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>, cons. 2.1.

internal regulations.[163] The court goes on to consider that under the circumstances and based on social decency (*maatschappelijke betamelijkheid)*, the KNVB regulations and its own by-laws, ADO had the duty to take immediate action against the anti-Semitic chanting.[164] By failing to do so, ADO acted unlawfully. With regard to the scope of eventual preventive measures required, the court considered that racist chants do not necessitate the immediate shutdown of the match. Before doing so, a club can take a number of other steps that are less intrusive. Only when these have no effect, will the match have to be temporarily or permanently suspended.[165] The argument that suspension of the match could lead to disturbances was countered by the court, considering that clubs should anticipate such possible risks.

> "Dat het stilleggen van een wedstrijd kan leiden tot organisatorische problemen en/of risico's voor de handhaving van de openbare orde ontslaat ADO niet van voormelde verplichting. Dat zou immers kunnen meebrengen dat kwetsende spreekkoren worden getolereerd, hetgeen moet worden uitgesloten. Het ligt op de weg van ADO om te anticiperen op de mogelijkheid dat een wedstrijd wordt stilgelegd, opdat in een voorkomend geval snel en adequaat kan worden gehandeld, bijvoorbeeld door met het oog daarop afspraken te maken met de verschillende betrokken instanties."[166]

In the assessment of any potential future cases, the following indicators will be relevant in establishing the standard of care. First, protection against discrimination or racism is regarded as one of the most important interests to be protected by law.[167] Secondly, it should be noted that although the occurrence of racist acts is perhaps not a typical risk inherent to the organisation of football matches, it is most definitely a probable risk in the football context. With regard to the availability and costs of precautionary measures it should not come as a surprise that racist acts of supporters are practically impossible to prevent.[168] There are some options available, but even with stadium bans, dismissals of supporters, and stadium-wide announcements, racists chants remain very difficult to prevent. Considering the costs of measures, one has to agree that although this is a factor, an economic approach is difficult to imagine when the interest at stake is human dignity.[169]

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163 Cons. 3.3.
164 Cons. 3.5.
165 Cons. 3.9.
166 Cons. 3.10.
167 See for example, art. 2:102 (2) PETL: 'Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection'.
168 This argument only covers verbal acts. When, for example, banners featuring discriminatory phrases are displayed, preventive measures could have avoided such banners from entering the stadium.
169 Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 282.

Finally, in regard to causation it should be noted that the connection between the violation of the victim's rights and the breach of standard of care will not be too difficult to prove if there were no measures put in place. However, if the club did implement measures, the argument that racist acts would have happened anyway might hold.[170] In line with the ADO case, in order to escape liability the most important thing clubs can do is reacting to racist acts, in other words, by implementing repressive measures.

In summary, even more so than in regard to other forms of supporters' misconduct, racist acts are almost impossible to prevent. Unless the club has remained completely passive or breached its own internal regulations, it seems highly unlikely it would be held liable.

5.5 Concluding remarks

Liability of organising clubs based on contract or fault liability requires the victim to prove that the club breached the required standard of care. In the assessment of the standard of care in specific cases, courts have been guided by three main factors: the nature and value of protected interests, the dangerousness of the activity, and the availability and costs of precautionary measures.

In general, the interests at stake – property and personal integrity – are valued highly and thus require a high standard of care. Regarding the dangerousness of the activity, it was argued that the occurrence of supporters' misconduct is a known risk. Furthermore, significant damage is foreseeable, which provides further argument for a high standard of care. With regard to the critical factor of availability and costs of precautionary measures, *Stichting Bestrijding Antisemitisme/ADO Den Haag* shows that although the assessment of this factor is guided by the applicable regulations from the federation, compliance with these rules does not equal compliance with the standard of care. It became clear that considering the interests at stake, the dangerousness of the activity and foreseeability of damage, the requirements of precautionary measures to be put in place are very high and will likely be almost impossible to meet.

The available case law has further shown the courts' struggle between the necessity and willingness to apply a standard of care that is apt to prevent damage on the one hand and the averseness that this standard practically manifests as strict liability on the other. However, the case law also shows that organising clubs do owe a high standard of care to their contractual

170 Wolf-Dietrich Walker, 'Zivilrechtliche Haftung für Zuschauerausschreitungen', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, pp. 35-59, p. 58.

partners and third parties and that liability for damage caused by supporters' misconduct is a very real possibility for clubs, especially in England and France, where the standard of care is set very high. Although case law is absent, the same conclusion can be drawn for the Netherlands considering the continuous rising standard of care in this jurisdiction. In Germany, the courts seem to be a bit more reluctant. However, a club has been held liable before and there has been no sign of a systematic reluctance.

Nevertheless, it can be questioned whether it is desirable that the liability of clubs for supporters' misconduct is dependent on a breach of the applicable standard of care. Especially, since this standard has to rise to extreme heights in order to be attainable. In addition, there remain instances of supporters' misconduct for which the club cannot be held liable – or only in very unusual circumstances – on the basis of a breach of the standard of care while voices from society seem to expect more here. In the next chapter it will be explored whether strict liability – similar to the disciplinary liability rule – could solve these issues.

6 The disciplinary standard and civil law – interaction, rationale and limitations

6.1 INTRODUCTION

Under certain circumstances, football clubs can on the basis of a contract or due to negligence be held liable for damage caused by supporters' misconduct. The question whether a club could also be held liable by virtue of a rule of strict liability similar to the rule in disciplinary law is relevant for a number of reasons.

First, the purpose of rules of strict liability is to improve the claimant's position by no longer having the right to compensation be dependent on the defendant's negligent conduct.[1] A rule of strict liability for clubs would increase the legal certainty for victims.

Secondly, strict liability would eliminate several difficulties in regard to establishing a breach of the standard of care. The burden of proof would no longer rest on the claimant and less room for factual interpretation of the standard of care would lead, again, to increased legal certainty for all parties involved. In addition, a rule of strict liability would also resolve the more theoretical issue of extending the notion of fault liability beyond its limits.

Finally, strict liability could potentially also resolve the problematic cases of the visiting club's liability and liability for damage outside the stadium. As mentioned above, visiting clubs generally are not in charge of ensuring safety in and around the stadium. As a result, their duty of care in regard to preventing supporters' misconduct is very limited in comparison with the duty of care that rests on the organising club. This leads to the somewhat peculiar situation in which the organising club can be held liable for the misconduct of visiting supporters. In addition, it can be envisaged that supporters from the visiting team will provoke or start riots with the aim of hurting the organising club. Strict liability of the visiting club for the behaviour of its own supporters – similar to the existing disciplinary liability – could potentially avoid this.

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1 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 906-2 and 1001.

Approach

In addition to the practical reasons for looking into the application of the disciplinary rule in civil law already mentioned, another pertinent reason exists on a more conceptual level. As there is already a rule that addresses the same type of circumstance, though from a different angle and primary perspective, logic almost requires an investigation into the application of the disciplinary liability rule in civil law. Is there, however, also a systematic rationale? Are disciplinary liability and civil liability connected in any way? What are the issues that could prevent successful application of a strict liability rule in civil law – and can these be overcome? By all means, it would be desirable if the disciplinary strict liability rule were to be acceptable as a concept of strict liability in civil law as well. This way a club would not have to deal with two different liability concepts for the same situation and could potentially avoid systematic problems when individuals sue clubs for damages caused by their supporters.

In summary, this chapter will focus on answering whether the strict liability rule as laid down in the private regulations of football organisations can be transposed to civil law. First, Section 6.2 will examine to what extent private regulations – such as regulations created by sports organisations – can be applied in civil law and how they influence open standards such as the standard of care. Section 6.3 will then take a closer look at the rationale behind applying the specific rule of disciplinary strict liability in civil law. What does the rule encompass and how does this influence its application outside its original scope? In Section 6.4, a conceptual analysis of the matter of supporters' misconduct against the requirements of the various categories of strict liability that are present in the relevant legal systems will be carried out. Finally, Section 6.5 will discuss some opportunities and limitations of a civil-law strict liability rule in regard to the misconduct of supporters of the visiting team, damage caused outside the stadium and racist chanting.

6.2 THE INFLUENCE OF PRIVATE REGULATIONS ON THE STANDARD OF CARE

The sports sector is for a large part founded on private regulations.[2] Many of these regulations impose obligations and restrictions that the members of the specific sport need to adhere to. In the rulings available in regard to supporters' misconduct, courts regularly referred to privately-made rules, namely those laid down in security and disciplinary regulations created by national and international football federations.[3] In light of this research, it is important to clarify the status of these rules in civil proceedings. Does a

2 See Chapter 2.
3 Chapter 5.3.3.

breach of a rule in private regulations lead to civil liability?[4] Or in other words, to what extent can and should the private regulations of sports organisations be taken into consideration when determining the applicable standard of care?

6.2.1 Private regulations

Apart from sport, private regulations are an important instrument to regulate many other sectors in society. Nowadays, wide ranges of fields use private regulations, including environmental protection, professional services, banking and finance, telecom, e-commerce, food safety and, of course, sports. Across these sectors there are great differences in regard to the interference by national and increasingly EU law.[5] In a number of fields, legislature even delegates regulation to private organisations.

One of the cited reasons behind the success of private regulations is that private organisations can often demand higher levels of expertise in their field than national legislature, potentially resulting in a higher standard of protection.[6] Furthermore, compared to rules of national law, private regulations can generally be adapted faster to new innovations and circumstances.[7]

Although thus not a new phenomenon in itself,[8] the discussion about private regulations and their position in private law is relatively recent and still being developed.[9] This is further illustrated by the fact that neither the PETL nor DCFR pay much attention to this phenomenon. However, the influ-

4 Another commonly used term is self-regulation.

5 F. Cafaggi, 'Private Regulation in European Private Law', in: Arthur S. Hartkamp, Martijn W. Hesselink *et al.*, *Towards a European Civil Code. Fourth Revised and Expanded Edition*, Alphen aan den Rijn: Kluwer Law International 2011, pp. 91-126, p. 92.

6 Julia Black, *Rules and Regulators*, Oxford: Clarendon Press 1997, pp. 219-220. The EU is of the same opinion, recognising that 'legislation is often only part of a broader solution and that non-binding rules can be equally important for the attainment of a given objective'. European Commission, 'European Governance – A White Paper' COM (2001) 428, 25 July 2001, p. 20.

7 J.B.M. Vranken, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel****, Kluwer 2005, § 91.

8 Julia Black, 'Constitutionalising Self-Regulation', *Modern Law Review* (59) 1996, p. 25.

9 An important starting point has been the European White Paper on governance: European Commission, 'European Governance – A White Paper' COM (2001) 428, 25 July 2001; F. Cafaggi, *Reframing Self-Regulation in European Private Law*, Kluwer Law International: the Netherlands 2006. See further F. Osman, 'Avis, directives, codes de bonne conduite, recommandations, déontologie, éthique, etc.: réflexion sur la dégradation des sources privées du droit', *Revue trimestrielle de droit civil* 1995, pp. 509-531; Jahrbuch Junger Zivilrechtswissenschaftler 2002, *Die Privatisierung des Privatsrechts. Rechtliche Gestaltung ohne staatlichen Zwang*, Richard Boorberg Verslag: Stuttgart 2003; Anne Röthel, *Normkonkretisierung im Privatrecht*, Tübingen: Mohr Siebeck 2004; Christian Bumke and Anne Röthel (eds.), *Privates Recht*, Tübingen: Mohr Siebeck 2012; I. Giesen, *Alternatieve regelgeving en privaatrecht*, Deventer: Kluwer 2007.

ence of private regulations in the interpretation of the numerous open standards prevalent in civil law has been examined by a number of authors. Cafaggi explains that 'standards defined by codes or guidelines are referred to by judges when filling the meaning of general clauses, such as the standard of care in tort law, the standard of performance in contractual undertakings, or fairness in unfair competition law'.[10] Giesen formulates a similar thought as follows: 'rules of private regulation are a reflection of the prevailing legal conviction (*rechtsovertuiging*) that help determine open standards such as reasonableness (*billijkheid*)'.[11]

Through the interpretation of open standards in civil law, private regulations can thus become relevant for third parties who, while not bound by the regulations, can invoke these rules in civil proceedings. In this light, the question arises whether and to what extent the rules of football federations could be applied in cases of civil liability of football clubs for supporters' misconduct. Clues to answering this question will be sought through analysing how the courts have applied private regulations from other fields as well as in sports.

In the following, relevant case law considerations will be analysed and used to illustrate the influence of private regulations from a number of different sectors on the scope of the standard of care. It will become apparent that in practically all jurisdictions, courts refer to and consider private regulations to help establish the concrete standard of care.

6.2.2 Technical and safety standards

Generally speaking, the courts in the relevant jurisdictions extensively use technical and safety standards incorporated into private regulations to determine the required standard of care in a particular case.[12]

In Germany, the general opinion on technical and safety standards is that they form valuable references to determine the standard of care in concrete

10 F. Cafaggi, 'Private Regulation in European Private Law', in: A.S. Hartkamp, M. W. Hesselink *et al.*, *Towards a European Civil Code. Fourth Revised and Expanded Edition*, Alphen aan den Rijn: Kluwer Law International 2011, pp. 91-126, p. 97.

11 I. Giesen, *Alternatieve regelgeving en privaatrecht*, Deventer: Kluwer 2007, p. 99.

12 For example, in a case regarding the safety of snow sport facilities, the Swiss Federal Supreme Court held that, '[a]ls Massstab zieht das Bundesgericht jeweils die von der Schweizerischen Kommission für Unfallverhütung auf Schneesportabfahrten ausgearbeiteten Richtlinien für Anlage, Betrieb und Unterhalt von Schneesportabfahrten (SKUS-Richtlinien) und die von der Kommission Rechtsfragen auf Schneesportabfahrten der Seilbahnen Schweiz herausgegebenen Richtlinien bei. *Obwohl diese Richtlinien kein objektives Recht darstellen, erfüllen sie eine wichtige Konkretisierungsfunktion im Hinblick auf die inhaltliche Ausgestaltung der Verkehrssicherungspflicht*'. BGE/ATF 130 III 193, cons. 2.3.

cases and act as minimum standards.[13] One of the landmark cases in regard to private technical standards follows a sad accident. A little girl fell into a non-enclosed pond on a construction site in her neighbourhood, causing injuries from which she later died. In the procedure against the owner of the construction site and various contractors, the *BGH* considered standards from the DIN – the German Institute for Standardization – to be especially relevant to fill in safety standards.

> "[N]ach ständiger Rechtsprechung des Senats spiegeln die DIN-Normen den Stand der für die betroffenen Kreise geltenden anerkannten Regeln der Technik wider und sind somit zur Bestimmung des nach der Verkehrsauffassung zur Sicherheit Gebotenen in besonderer Weise geeignet."[14]

However, in subsequent case law it has been reiterated that the scope of the required standard of care in a specific situation is not only determined by such standards. According to the *BGH*, anyone creating a dangerous situation has to determine independently what measures are necessary to prevent damage to others. Relevant statutory or other rules do not provide conclusive behavioural standards with regard to the safeguarding of protected interests; rather, such rules help to determine the content and scope of the standard of care.[15] Nevertheless, in regard to DIN standards it has been held that if these are not observed there is a rebuttable presumption that the damage is attributable to a breach of the standards, leaving it up to the defendant to prove that the damage is not due to a breach of the standards.[16]

The approach in English law is very similar.[17] Mr Ward was severely injured when he fell backwards over a low balustrade on the balcony of the Ritz hotel after fainting. Since its renovation, the balustrade was lower than required by the British Standards Institute. In the first proceedings, Ward's claim was dismissed. The judge considered that although on the facts the plaintiff's fall would not have occurred if the balustrade had been of the height required by the British Standards, failure to observe a British Standard did not necessarily constitute a breach of the defendants' duty of care to the plaintiff as their lawful visitor.[18] On appeal, more weight was given to the relevant safety regulations.

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13 Johannes Hager, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Buch 2 Recht der Schuldverhältnisse*, Berlin: Sellier – de Gruyter 2009, § 823, no. E34; Gerhard Wagner, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 5 Schuldrecht Besonderer Teil III. 6. Auflage*, München: Verlag C.H. Beck 2013, § 823, no. 361.

14 BGH 12.11.1996 – VI ZR 270/95, *NJW* 1997, 582, cons. II.1.b.aa.

15 BGH 13.03.2001 – VI ZR 142/00, *NJW* 2001, 2019, cons. 13.

16 BGH 19.04.1991 – V ZR 349/89, via: lexetius.com/1991,391, cons. 12.

17 C.T. Walton MA *et al*. (ed.), *Charlesworth & Percy on Negligence (13th ed.)*, London: Thomson Reuters 2014, no. 7-50.

18 *Ward v. Ritz Hotel (London)* [1992] P.I.Q.R. 315.

> "[A]lthough British Standards were not legally binding, they were a guide which provided strong evidence as to the consensus of professional opinion and practical experience as to sensible safety precautions at their date of issue. The judge had given too little weight to the British Standard. D had not taken reasonable care for P's safety".[19]

Furthermore, subsequent English case law has maintained that the type and origination of a technical or safety regulation can make a difference as to whether following the rules offers a defence. However, if the regulation is the 'result of careful work by an expert committee' a judge can be 'entitled to accept the evidence which led him to conclude that it remained the touchstone of reasonable standards'.[20]

This latter case subtly touches upon the subject of the nature and legitimacy – or binding nature – of privately made rules, which has received quite some attention in literature on private and self-regulation.[21] In short, with regard to certain regulations there are concerns as to their democratic nature, and thus to the justification of applying these rules in civil (or other) procedures. In regard to the regulations of football federations, the democratic nature of these rules is, however, safeguarded through the system of rule creation in association law.[22] National football federations all have a vote in the general

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19 *Ward v. Ritz Hotel (London)* [1992] P.I.Q.R. 315. Interestingly, in another case also involving a balcony balustrade the Swiss Federal Supreme Court came to a similar decision. Decision dated 16.06.1984 (Joos/Steiner), cons. 2a: "Die Beklagten bestreiten zu Unrecht, dass eine Balkonbrüstung (...) als fehlerhaft anzusehen ist (...). Entscheidend ist vorliegend, dass eine SIA-Empfehlung über das Ausmass solcher Geländeröffnungen missachtet worden ist. Dass es sich dabei nicht um Rechtsnormen handelt und die Empfehlung auch nicht zum Gegenstand einer baupolizeilichen Auflage gemacht worden ist, ändert daran nichts; solche Empfehlungen eines Fachverbandes gelten unbekümmert darum zum Ausdruck der üblicherweise zu beachtenden Sorgfalt."

20 *Baker v Quantum Clothing Group Ltd*, [2011] 1 W.L.R. 1003, no. 101: "(..) [T]o follow a relevant code of practice or regulatory instrument will often afford a defence to a claim in negligence. But there are circumstances where it does not do so. For example, it may be shown that the code of practice or regulatory instrument is compromised because the standards that it requires have been lowered as a result of heavy lobbying by interested parties; or because it covers a field in which apathy and fatalism has prevailed amongst workers, trade unions, employers and legislators; or because the instrument has failed to keep abreast of the latest technology and scientific understanding. But no such circumstances exist here. The code was the result of careful work by an expert committee. As the judge said, the guidance as to the maximum acceptable level was "official and clear". He was entitled to accept the evidence which led him to conclude that it remained the "touchstone of reasonable standards" for the average reasonable and prudent employer (..)."

21 I. Giesen, *Alternatieve regelgeving en privaatrecht*, Deventer: Kluwer 2007, p. 56ff; Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World', 54 *Current Legal Problems* 2001, pp. 103-147; Gregor Bachmann, *Private Ordnung. Grundlagen Ziviler Regelsetzung*, Tübingen: Mohr 2006, p. 339; Gregor Bachmann, Legitimation privaten Rechts, in: Christian Bumke and Anne Röthel (eds.), *Privates Recht*, Tübingen: Mohr Siebeck 2012, pp. 207-227.

22 See Chapter 2.2.

assembly of the international bodies UEFA and FIFA. Individual football clubs have the same right in their respective national federations.

6.2.3 Professional standards

Apart from technical and safety regulations, a large number of liability cases revolve around professional regulations or standards. Most prevalent in this regard are medical professional standards, but professional regulations and codes of conduct from other sectors, such as finance and insurance, increasingly make their appearance in case law.

In contrast to the influence of the DIN standards, the position of medical professional regulations in relation to the standard of care is a more recent development in Germany.[23] However, although the development started later, at present the situation looks very similar. According to standing case law 'instructions in guidelines of medical professional bodies or associations should not be blindly identified with the standard of care. Such guidelines do not replace the expert advice and cannot be adopted as the standard of care'.[24]

In Switzerland too, it is held that the violation of private regulations *can* also constitute a fault in terms of art. 41 CO, as the recommendations from a professional association are considered the standard of necessary care.[25]

Similarly, the approach in English law also follows this line of reasoning. Depending on the circumstances, professional rules can help to fill in the standard of care. However, the relevance of regulations will depend largely on their nature and level of detail.[26] In short, the more detailed the rules are, the more likely a breach of these rules is considered careless.

In comparison with Germany, England and Switzerland, the approach of courts in the Netherlands and France appears more progressive and will therefore be looked into in greater detail.

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23 Hans Berndt Ziegler, 'Leitlinien im Arzthaftungsrecht', *Versicherungsrecht* 2003, pp. 545-549, p. 546; Reinhard Damm, 'Wie wirkt „Nichtrecht"? Genesis und Geltung privater Regeln am Beispiel medizinischer Professionsnormen', *Zeitschrift für Rechtssoziologie* 2009/1, pp. 3-22.

24 BGH 28.03.2008 – VI ZR 57/07, via: openjure.de.; BGH 15.04.2014 – VI ZR 382/12, *VersR* 2014, 879. However, here too there is the rebuttable presumption of deviation from medical standards.

25 Roland Brehm, *Berner Kommentar, Bd. VI/1/3/1, Die Entstehung durch unerlaubte Handlungen*, Bern: Stämpfli Verlag AG 2013, no. 174ff.

26 J.L. Powell and R. Stewart, *Jackson & Powell on Professional Liability. Seventh edition*, London: Sweet & Maxwell 2012, no. 2-012.

6.2.3.1 Netherlands: towards a direct application of professional standards

Arguably the first case in which the Dutch *Hoge Raad* directly based civil liability on a private regulation resulted from a medical error. Against hospital protocol, a doctor omitted to provide his patient medication to prevent thrombosis after a knee operation. The patient developed thrombosis and brought a compensation claim before the courts. The *Hoge Raad* considered that as the protocol is based on the consensus between the hospital and doctors, they must adhere to the rules established by themselves.[27] The liability of the doctor was based exclusively on the violation of the protocol and thus on a private regulation.

With regard to other regulations, the Dutch highest court has shown some diverging decisions in terms of its application of private regulations. Nevertheless, the cases do show a seemingly growing importance of professional regulations and codes of conduct.

Kouwenberg/Rabobank, is a famous Dutch case regarding a bank's duty of care to warn its customers for the dangers of trading in stock options.[28] The bank acted contrary to private regulations, more precisely the 'rules for trading on the option market' (*Reglement voor de handel op de optiebeurs, RHO*), when it carried out orders while its client's coverage was not sufficient. The claimant argued that the bank breached its duty of care. According to the *Hoge Raad* the rule is a private regulation and subsequently does not meet the criteria to be considered as law in the sense upon which it can annul or overturn decisions of lower courts.[29] This entails that the regulation in itself cannot be a basis for liability. Nevertheless, the court does take the regulation into account when it determines the *extent* of the bank's duty of care, which in the end upholds the claim.

With regard to the Corporate Governance Code, which contains principles and best practice provisions that regulate relations between the management board, the supervisory board and the shareholders of all listed companies registered in the Netherlands, it has been held that it expresses the prevailing legal opinion in the Netherlands.

> "Voor een oordeel in andere zin is onvoldoende steun te vinden in de wet en in de in Nederland heersende algemene rechtsovertuiging zoals deze onder meer tot uiting komt in de Nederlandse corporate governance code. (…) welke rechtsovertuiging mede inhoud geeft aan (i) de eisen van redelijkheid en billijkheid naar welke volgens art. 2:8 BW degenen die krachtens de wet of de statuten bij de vennootschap zijn betrokken zich jegens elkaar moeten gedragen, en aan (ii) de eisen die voort-

27 HR 02.03.2001, *NJ* 2001, 649 (Trombose), cons. 3.3.3.
28 HR 11.07.2003, *NJ* 2005, 103 (Kouwenberg/Rabobank).
29 See art. 79 RO (Statute on judicial organisation).

> vloeien uit een behoorlijke taakvervulling waartoe elke bestuurder ingevolge art. 2:9 gehouden is."[30]

The court tentatively implied that legal opinions expressed in the Code have to be considered when interpreting open standards, such as reasonableness and fairness (*redelijkheid en billijkheid*) and social decency. However, in a number of summary proceedings decisions, the Dutch Commercial Division applied the Code directly and the company in question was forbidden to deviate from principle III.6 of the Code. An appeal from the company was dismissed by the *Hoge Raad*, which followed the Commercial Division's reasoning.[31] Subsequent case law of lower courts tends to follow the approach set out by the *Hoge Raad*, turning the Code into virtual 'hard law'.[32]

Following a recent case in the insurance sector, the shift towards direct application of private regulations has received quite a boost.[33] Insurance company Interpolis hired an investigation agency to carry out a personal investigation on their client who received benefits from disability insurance. The client was asked to provide information and to keep a diary and was observed – and filmed – for eight days. The investigation concluded that the client knowingly provided incorrect information to the company, which consequently ended the disability benefits and demanded repayment of the payments made as well as compensation of the costs related to the investigation. In the civil procedure, the code of conduct regarding personal research of the Association of Insurers plays a crucial role. The code was enacted to protect individuals against unnecessary infringements of their privacy and provides a framework for judicial review. According to the Court of Appeal, personal investigations such as the one at issue, in principle breach the right of privacy – thus constituting a fault – unless there is a lawful justification. In assessing the justification of the breach of privacy argued by the insurer, the Court closely reviews the code of conduct. Based on the rules in the code, the insurer should have taken other measures before resorting to the personal investigation. Furthermore, using the result of a breach of the code to its advantage is not reconcilable with the goal of self-regulation. As a result, the court considers that the insurer has acted unlawfully against its client and cannot rely on the evidence that it obtained illegally.[34]

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30 HR 13.07.2007, *NJ* 2007, 434 (ABN AMRO), cons. 4.4.

31 HR 14.09.2007, *NJ* 2007, no. 611 and 612 (Versatel II and III).

32 K.H.M. de Roo, 'De Corporate Governance Code en het drijfzand van de open norm', *Ars Aqui* 2015/257. The Dutch approach approaches that in Germany, where the Corporate Governance Code is incorporated into a Statute. According to Bachmann, with this solution part of the appeal and advantages such codes have to offer are lost. Gregor Bachmann, *Private Ordnung. Grundlagen Ziviler Regelsetzung*, Tübingen: Mohr 2006, p. 46.

33 HR 18.04.2014, *NJ* 2015/20 (Achmea/Rijnberg) notes by M.M. Mendel and H.B. Krans.

34 Hof 's-Hertogenbosch 04.09.2012, ECLI:NL:GHSHE:2012:BX9465, cons. 36.

According to the court, the code is thus a "major embodiment of the balancing test, although not necessarily decisive". The violation of the Code is deemed important, but also – 'furthermore' – the non-utilisation of alternative means of information gathering".[35] The highest court, i.e. the *Hoge Raad* took a firm stand and held that, when an insurance company acts in breach of the code this constitutes an unjustified and therefore unlawful infringement of the privacy of the insured.

> "Blijkens de inleiding is beoogd in de Gedragscode aan te sluiten bij bestaande wetgeving op het gebied van privacy, zoals de Wet bescherming persoonsgegevens en wetgeving over het (heimelijk) gebruik van camera's. Gelet op inhoud en opzet van de Gedragscode, kan tot uitgangspunt worden genomen dat indien een verzekeraar in strijd met de code handelt, sprake is van een ongerechtvaardigde en derhalve onrechtmatige inbreuk op de persoonlijke levenssfeer van de verzekerde."[36]

In legal literature, it has been suggested that the court has taken the debate further than was necessary and that it could have sufficed with the observation that the reasoning of the Court of Appeal was not merely based on a breach of the code.[37] Whether this case indeed solidifies the progressive approach regarding the direct application of private regulations remains to be seen. Nevertheless, indications in the affirmative are there.

6.2.3.2 France: progressive development reverted

Interestingly, French case law seemed to be developing in a similar direction before it was again reverted. Although the general opinion in French doctrine is that breaching a customary rule – such as professional standards and other private regulations – can result in a civil fault, it is often reiterated that this is not automatic and judges have a large measure of discretion in regard to these sources.[38] It must be pointed out that many professional regulations in France are enacted in the form of state decrees.[39]

Nevertheless, the wordings of the highest courts suggest a compelling influence from privately made rules. In an often-cited case on medical pro-

35 Compare A.G. Castermans and C.P.L. van Woensel, 'Juridische determinanten van een nieuw voedselbeleid', *Ars Aequi* 2014/857, p. 864.

36 HR 18.04.2014, *NJ* 2015/20 (Achmea/Rijnberg) notes by M.M. Mendel and H.B. Krans, cons. 5.2.1.

37 A.G. Castermans and C.P.L. van Woensel, 'Juridische determinanten van een nieuw voedselbeleid', *Ars Aequi* 2014/857, p. 864.

38 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 3792-1, 6759,6760; Geneviève Viney and Patrice Jourdain, *Traité de droit civil. Les conditions de la responsabilité (4e édition)*, Paris: LGDJ 2013, no. 461. Joël Moret-Bailly, 'Règles déontologiques et fautes civiles', *Recueil Dalloz* 2002, p. 2820ff. Also for rules of associations imposed on members.

39 Joël Moret-Bailly, 'Règles déontologiques et fautes civiles', *Recueil Dalloz* 2002, p. 2820ff.

fessional standards, the *Cour de Cassation* held that the appeal court was right to infer a *faute* following the breach of professional regulations in France.

> "[S]uivant les directives ou conseils d'un praticien étranger, sans juger par lui-même de la nécessité d'effectuer ces travaux, ce comportement étant interdit par les règles déontologiques françaises; que de ces constatations et énonciations, la cour d'appel a pu déduire l'existence d'une faute professionnelle."[40]

As in the Netherlands, the Commercial Division of the *Cour de Cassation* has also directly based liability on the breach of professional standards. The Court considered that "la méconnaissance des règles déontologiques de la profession d'expert-comptable, (...) suffisait à établir que de tels agissements étaient constitutifs de concurrence déloyale."[41] This stance was confirmed in another case four years later.[42] However, in 2013 the Court reverted this standing but controversial case law that considered that any breach of a professional regulation necessarily constitutes an act of unfair competition.[43]

> "un manquement à une règle de déontologie, dont l'objet est de fixer les devoirs des membres d'une profession qui est assortie de sanctions disciplinaires, ne constitue pas nécessairement un acte de concurrence déloyale."

The Commercial Division thus follows the other Division of the *Cour de Cassation* where the majority of cases is characterised by the traditional approach that uses the regulations to help determine the standard of care rather than applying them directly.

6.2.4 Regulations of sports organisations

Apart from the more traditional sectors, where private regulations play an important role – such as the construction industry and the medical profession – private regulations of sports organisations have also been the subject of consideration in civil liability cases.

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40 Cass. Civ.1 24.01.1990, n°87-18008, Bull. civ. I, n°25. See for a more recent example: Cass. Civ 1e, 29.11.2005, n°04-13805, Bull civ.1, n°455.

41 Cass. Com. 29.04.1997, *Recueil Dalloz* 1997, p. 495, note Y. Serra. "Ignoring the professional rules of the accounting profession, (...) was sufficient to establish that such acts had constituted unfair competition".

42 Cass. Com. 22.05.2001, n°95.14.909, "Les transferts de dossiers de certains clients s'étaient effectués en méconnaissance des règles déontologiques de la profession d'expert comptable, ce qui suffisait à établir que de tels agissements étaient constitutifs de concurrence déloyale." See further: Joël Moret-Bailly, 'Règles déontologiques et fautes civiles', *Recueil Dalloz* 2002, pp. 2820-2824.

43 Cass. Com. 10.09.2013, n°12-19.356, *Semaine Juridique* 2013, p. 2013, note Jean-Marie Brignant.

Perhaps the most prevalent private regulations in relation to civil liability cases in sports are the FIS Rules for Conduct.[44] The FIS Rules are developed by the international skiing federation (FIS) and consist of ten rules that apply to all who use the slopes. Although the FIS Rules have not (yet) been applied directly as a ground of civil liability, they have long been utilised to specify the standard of care.

In 1967 on the Zeller Mountain, an accident between two skiers left one of them with a complicated broken ankle. In this case the German *BGH* presupposed that,

> "die Pflichten, deren Verletzung durch den Beklagten in Betracht kommt, sind besondere Ausgestaltungen der allgemeinen Verhaltenspflichten. Ihr Inhalt geht für den Skifahrer auf einer befahrbaren Abfahrt dahin, sich so zu verhalten, dass er keinen anderen gefährdet oder schädigt".[45]

While referring to the FIS Rules, the court continues that in individual cases this means that the *Eigenregeln des Skiläufers* should be applied. Following a careful review of the facts the court concludes that both parties breached these duties and reduces the compensation by half.

In addition, courts in Switzerland, France and even the Netherlands have considered the FIS Rules when required to determine the standard of care in civil liability cases resulting from skiing accidents.[46] Interestingly, and contrary to the developments regarding other private regulations as outlined in section 2.3.1. above, the application of the FIS Rules in the Dutch case was less strict than can generally be observed in Germany and Switzerland.

Another example of the application of regulations from sports organisations are the jockey rules. During a horse race in France, a jockey quits charging his horse. He finishes in fourth place and receives a disciplinary sanction for not charging his horse all the way to the finish line in breach of the *Code des courses*.[47] Interestingly, the claim is brought by a gambler who argues the loss of a chance to win his bet on the horse in question as a result of the

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44 See for example, Germany: BGH 11.01.1972, BGHZ 58, 40; Switzerland: BGE/ATF 118 IV 130; Even in the Netherlands, the FIS Rules have been subjected to consideration after a collision between two Dutch skiers who were on holiday in France, Hof Leeuwarden 26.06.2012, ECLI:NL:RBLEE:2011:BP5822.

45 BGH 11.01.1972, BGHZ 58, 40, cons. 17.

46 France: See for an overview, Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 6805; the Netherlands: Hof Leeuwarden 26.06. 2012, ECLI:NL:GHLEE:2012:BW9768, cons. 8-9; Switzerland: see for an overview of decisions from lower courts, Hans-Kaspar Stiffler, *Schweizerisches Schneesportrecht (3rd ed.)*, Bern: Stämpfli Verlag AG 2002.

47 Cass. Civ.2 04.051972, n°71-10.121 (Poincelet c. Luca), *Recueil Dalloz* 1972, p. 596, note Le Tourneau.

jockey's behaviour. The *Cour de Cassation* follow's the appeal court and confirms the gambler's claim.

> "Mais attendu qu'après avoir observé, d'une part, que Poincelet avait fait l'objet d'une sanction de la part des commissaires de la Société d'encouragement pour l'amélioration des races de chevaux en France pour avoir insuffisamment soutenu sa monture à l'arrivée alors que l'article 68 du Code des courses interdit à un jockey, quelles que soient les circonstances, de cesser de soutenir un cheval qui lutte pour les places, d'autre part, que ledit Poincelet ne justifiait pas de l'excuse qu'il alléguait, l'arrêt constate que Scallywag était en troisième position lorsqu'à quelque distance de l'arrivée il n'avait plus été soutenu par son jockey et énonce que le manquement de ce dernier à l'obligation édictée par le texte précité avait perdre à Luca « une chance de réaliser des gains correspondant à ses paris".[48]

Interestingly, in this case, the court not only refers to the regulation, but also considers the disciplinary sanction imposed on the jockey to establish the fault.

Football regulations

The safety and conduct rules laid down in the regulations of football federations have also played a role in cases before several courts in Europe when they had to consider the liability of clubs following supporters' misconduct. In the French and German cases, which were discussed in Chapter 5.3.3., the safety regulations of the football federations were applied to determine the scope of the standard of care.

To reiterate shortly, in *Fuster/Olympique Lyonnais* the court held that by virtue of the regulation of the national federation the club had to ensure that no dangerous objects – such as rockets – were to enter the stadium. The use of such dangerous objects was considered to be customary, since it required a special prohibition in the rules of the National Football League; leaders *Olympique Lyonnais* therefore could perfectly predict it and committed negligence in failing to take sufficient measures to comply with this prohibition.[49] However, in addition to the regulations, the court also paid attention to – and independently determined – the insufficient means of security. According to annotator Collomb, although in principle sports regulations do not bind the judge – who is always free to determine independently whether the measures adopted met the standard of care – in practice, ignorance of a sports rule is often used by courts to establish a civil or criminal fault.

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48 Cass. Civ.2 04.05.1972, n°71-10.121 (Poincelet c. Luca), *Recueil Dalloz* 1972, p. 596, note Le Tourneau.

49 TGI Lyon 25.06.1986 (Consorts Fuster c. L'Olympique Lyonnais et autre.), *La semaine juridique* 1990 II, no. 21510, note Pierre Collomb.

> "Il est, bien sur, de principe que les règles sportives ne lient pas le juge toujours libre d'apprécier la suffisances des mesures adoptées. Néanmoins, il se produit en pratique une sorte d'attraction entre les règles sportives et les décisions des juges: la méconnaissance de la règle fédérale est couramment retenue pour établir la faute civile, voir pénale."[50]

Also in the German case from 2011, the court weighed the fact that stadium regulations and instructions from the federation acknowledged the risks of flaming objects, through a ban on carrying such items and also through special inspections of spectators.

> "Sowohl die einzelnen Stadionordnungen als auch die Hinweise der Sportverbände tragen diesen Gefahren durch ein Verbot des Mitführens solcher Gegenstände als auch durch besondere Kontrollen der Zuschauer Rechnung."[51]

In the Dutch case *Stichting BAN/ADO Den Haag* the claimant's main argument was that by not reacting to the racist chants from its supporters the club breached the regulations of the national federation as well as its own.[52] This is an interesting argument since these regulations, the internal rules of both the KNVB and ADO, are not set out to have external effect. In its decision the court discusses the numerous internal rules and regulations in great detail.

First, the court presupposes that it is the primary responsibility of a professional club to act against unwanted chants as this follows clearly from the applicable internal regulations.[53] It then continues by considering that according to social decency, the KNVB regulations and its own by-laws, ADO had the duty to take immediate action against the anti-Semitic chanting.

> "Onder voormelde omstandigheid rustte op ADO – op grond van de maatschappelijke betamelijkheid, alsmede de KNVB-regels en haar eigen Huisregels – de plicht om onmiddellijk op te treden tegen de zich voordoende antisemitische spreekkoren."[54]

In short, the club was thus not held liable for the behaviour of its supporters, but for the fact that it remained passive and took no action in order to end the chanting, which constituted a breach of the applicable private regulations. In its concise decision, the court made it clear that a club is expected to abide by its own rules as well as the federation's rules. It is interesting to note, however, that the KNVB did not intervene in order to force ADO to comply with

50 Pierre Colomb, note sous TGI Lyon 25.06.1986 (Consorts Fuster c. L'Olympique lyonnais et autre.), *La semaine juridique* 1990 II, no. 21510, § I, B.
51 OLG Frankfurt 24.02.2011 – 3 U 140/10, via: <http://dejure.org/2011,2037>, cons. 20.
52 Pres. Rb. Den Haag 09.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>.
53 Pres. Rb. Den Haag 09.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>, § 3.3.
54 Pres. Rb. Den Haag 09.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>, § 3.5.

the applicable regulations. Had the federation reacted, perhaps the case would not have been brought before the court.[55] This illustrates that with regard to the enforcement of rules of self-regulation, non-compliance does not always evoke a reaction.

6.2.5 Summarising remarks

Private regulations form an important tool in determining the applicable standard of care in concrete cases. The general stance of European courts as outlined above is perhaps best articulated in the Swiss *Berner Kommentar*.

> "Dieser bonus pater familias hat sich in seinem täglichen Leben je nach den Umständen an verschiedene Regeln zu halten: Zuerst einmal an die gesetzlichen Vorschriften, bei deren Fehlen an allgemein anerkannte privatrechtliche Richtlinien, und bei deren Fehlen an die allgemeinen Vorsichtsregeln."[56]

From an interaction perspective, the apparent influence of private regulations on civil liability is perhaps not unexpected, but pertinent nonetheless. In all jurisdictions, judges have shown their preparedness to apply privately made rules, either to assist in establishing the standard of care or even directly, in which case a breach of a privately made rule establishes a civil fault. In short, compliance with private regulations is not optional.

According to Nolte, the extent and scope of the influence of private rules on state law standards will largely depend on whether and to what extent the self-regulating powers of the sports organisation in question are assessed by the state as viable and persuasive.[57] Following this train of thought, it can be argued that courts even have the obligation to take relevant football regulations into account.[58] They are the result of careful work by experts taking

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55 In another case BAN demanded in court that the KNVB be ordered to take measures if chanting occurs during any matches of which it is the official organiser (such as Cup finals) subject to a penalty. However, the judge in preliminary relief proceedings considered that the case provided too limited a framework to foresee the first instance judgment regarding the question of whether (and to what extent) the chants are anti-Semitic and offensive and if so what actual measures should be adopted and enforced to end such chants. See Rb Midden Nederland 25.07.2014, KG ZA 14-357, via: rechtspraak.nl, ECLI:NL:RBMNE:2014:3170.

56 Roland Brehm, *Berner Kommentar, Bd. VI/1/3/1, Die Entstehung durch unerlaubte Handlungen*, Bern: Stämpfli Verlag AG 2013, art. 41 CO, no. 172b.

57 Martin Nolte, 'Vereinbartes Recht am Beispiel der lex sportiva', in: Christian Bumke and Anne Röthel (eds.), *Privates Recht*, Tübingen: Mohr Siebeck 2012, pp. 107-118, p. 117.

58 Also reflected in, *Baker v Quantum Clothing Group Ltd*, [2011] 1 W.L.R. 1003 cited above; as well as in J.B.M. Vranken, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel****, Kluwer 2005, § 83-84.

into account years of experience and the legitimacy and binding nature of the regulations are firmly safeguarded through their basis in association law.

This form of application of private regulations is an interesting development in light of the scope of the standard of care imposed on football clubs. It is quite likely that a breach of the regulations of football organisations – such as the obligation to prevent supporters from lighting fireworks or throwing missiles, which can be inferred from art. 16 (2) of the UEFA Disciplinary Regulations – will lead European courts to establish a breach of the standard of care. In line with developments in the Netherlands, it is not unimaginable that the standards expressed in the regulations will find direct application in Dutch courts.

6.3 Applying the disciplinary strict liability rule in civil law

We have already seen that disciplinary rules in many sectors can have an influence on the scope of the required standard of care and that this influence seems to be increasing – at least in certain jurisdictions.[59] However, in order to determine whether the disciplinary strict liability rule can also be applied in civil law as a separate basis for liability, it is important to analyse the rule in more detail.

6.3.1 The disciplinary strict liability rule deconstructed from a civil-law perspective

The disciplinary strict liability rule in the regulations of football federations is a peculiar rule. It constitutes both an implicit behavioural standard as well as an attribution component.[60] Across Europe the national football federations have created different versions of the rule.[61] Arguably, the most important version remains the UEFA rule.

> "1. Host associations and clubs are responsible for order and security both inside and around the stadium before, during and after matches. They are liable for incidents of any kind and may be subject to disciplinary measures and directives unless they can prove that they have not been negligent in any way in the organisation of the match.

59 See Section 6.2 above.

60 This attribution component sometimes differs for the organising and visiting club. As outlined in Chapter 4.1. UEFA and the Swiss Football federation distinguish between the organising and visiting club. However, this difference is discarded in many situations, including when spectators create damage.

61 For the exact formulations of the rule in the regulations of the different national and international football federations, see Chapter 4.1.

2. However, all associations and clubs are liable for the following inappropriate behaviour on the part of their supporters and may be subject to disciplinary measures and directives even if they can prove the absence of any negligence in relation to the organisation of the match:
   a) the invasion or attempted invasion of the field of play;
   b) the throwing of objects;
   c) the lighting of fireworks or any other objects;
   d) the use of laser pointers or similar electronic devices;
   e) the use of gestures, words, objects or any other means to transmit any message that is not fit for a sports event, particularly messages that are of a political, ideological, religious, offensive or provocative nature;
   f) acts of damage;
   g) the disruption of national or competition anthems;
   h) any other lack of order or discipline observed inside or around the stadium."

In the complex wording of the rule, which distinguishes between general and specific forbidden acts in the two subsections, the dual nature can easily be overlooked. Looking solely at subsection 2, which accounts for a large part of the disturbances, the dual nature becomes more apparent.

On the one hand, the normative component of the rule focuses on a club's responsibility for the behaviour of third parties through the form of an imposed guarantee for order and security – which is premised in subsection 1. If one or more of the specific disorders laid down in subsection 2 arise, a breach of this guarantee is established. The disciplinary fault of the club thus seems based on the fact it did not prevent such disorders. Whether the disorders were practically preventable is, however, irrelevant.[62]

On the other hand, it can be questioned whether the rule was really meant to constitute such a guarantee. In fact, more than a basis for liability for the club's own conduct, the rule is an attribution norm (*Zurechnungsnorm*) for faulty behaviour of its supporters or anyone who falls in the club's scope of risk.[63] From the landmark disciplinary case *Feyenoord/UEFA*, it can be derived that it is the latter interpretation that is to be preferred.[64] This interpretation was initially put forward by UEFA in the arbitration proceedings and was then applied by the CAS. When analysing the potential application of the rule in civil law, this interpretation will thus have to be kept in mind.

62 CAS 2007/A/1217 Feyenoord Rotterdam/UEFA.

63 Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011, p. 211.

64 CAS 2007/A/1217 Feyenoord Rotterdam/UEFA, cons. 7.1. See further Chapter 4.3.1.

6.3.2 The shared goal connecting disciplinary liability and civil liability

Although victims of supporters' misconduct can resort to basing a claim on contract or fault, both theory and practice show that this might not always suffice to adequately protect them – the necessary imposition of an almost absolute standard of care being the main stumbling block.[65] Despite its different primary angle, the disciplinary strict liability rule is the only existing legal tool that addresses the issue of liability of clubs for their supporters' misconduct.

Not many have addressed the connection between disciplinary liability and civil liability in an extensive manner.[66] The most pertinent contribution is from French scholar Jacques. According to this author, although they seem similar and bear a resemblance to each other, disciplinary liability is different from civil liability. Not only are the interests served by both distinct, each also has a different extent – with disciplinary liability often requiring compliance with stricter rules – and different addressees.[67] Taking a look at the interests served by both forms of liability, it can indeed be posited that in general the main goal of civil liability is to restore or compensate for damage suffered, whereas the main goals of disciplinary rules are internal reparation and prevention.[68] However, there is more to this than Jacques suggests.

In general, the goal of civil liability is to protect the *status quo ante* between private persons.[69] This protection comes about both through reparation (literally or by means of compensation) and prevention of deterioration of the status quo in specific cases.[70] The origin of protection of the status quo lies in the balance between the principles of *casum sentit dominus* and *alterum non laedere*. In other words, in principle losses lie where they fall, leaving the victim to bear its own loss, unless there is a specific reason to shift this loss.[71] How-

65 See the relevant case law in Chapter 5.3.3.

66 The connection is rather mentioned in more general contributions on disciplinary law (for example J.S.L.A.W.B. Roes, 'Wat is tuchtrecht?', *WPNR* 2008/6778, pp. 919-92) or touched upon in contributions where the focus lies on private regulations in civil law (J.B.M. Vranken, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel****, Kluwer 2005, § 85).

67 Ph. Jacques, 'Les rapports entre faute civile et faute disciplinaire', in: Pascal Ancel and Joël Moret-Bailly (eds.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Étienne 2007, pp. 175-205, p. 181, 189ff.

68 See Chapter 2.7.

69 T. Hartlief, *Ieder draagt zijn eigen schade* (oratie Leiden), Deventer: Kluwer 1997, p. 15; S.D. Lindenbergh, *Schadevergoeding, Algemeen, Deel 1,* Mon. BW B34, Deventer 2008, pp. 7-9.

70 S.D. Lindenbergh, *Smartengeld* (diss. Leiden), Deventer: Kluwer 1998, p. 30.

71 T. Hartlief, *Ieder draagt zijn eigen schade* (oratie Leiden), Deventer: Kluwer 1997, p. 11.

ever, the reasons for shifting losses are continuously subject to change due to social and political movements.[72]

Serving different functions, which have also changed over time, the ultimate goal of civil liability is not uncontroversial. Historically, civil liability law also had a retributive function to deter and reform, which is still visible in common law in the form of punitive damages.[73] Although the function of punishment is now largely left to criminal law, additional goals of civil liability include prevention, loss-spreading, loss allocation, and the recognition of the fact that one has suffered damage.[74]

Of these additional goals, prevention is arguably the most important and widely accepted. It is the only other goal apart from compensation to feature in the Principles of European Tort Law. According to article 10:101 PETL, which governs the nature and purpose of damages:

> Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm.

In the commentary on this provision it is explained that the aim of preventing harm means that by the prospect of the imposition of damages a potential tortfeasor is forced, or at least encouraged to avoid doing harm to others.[75]

With regard to disciplinary rules, their primary goal is, indeed, to safeguard the interests or common objective of the group.[76] However, the strict liability rule for supporters' misconduct is different in this regard. It has been developed as an alternative solution to the problem that the federations cannot directly address the supporters themselves as they are not 'part of the group'. Therefore, sanctioning through the club is the only way to reach the supporters with the goal of prevention of future unsportsmanlike conduct of the supporters. Despite the fact that the focus of the disciplinary strict liability rule

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72 R.C. Meurkens, *Punitive Damages. The Civil Remedy in American Law, Lessons and Caveats for Continental Europe* (diss. Maastrticht), Deventer: Kluwer 2014, p. 148. T. Hartlief, *Ieder draagt zijn eigen schade* (oratie Leiden), Deventer: Kluwer 1997, p. 24. Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 609-1.

73 R.C. Meurkens, *Punitive Damages. The Civil Remedy in American Law, Lessons and Caveats for Continental Europe* (diss. Maastrticht), Deventer: Kluwer 2014, p. 152.

74 For an overview on the functions of tort law, see R.C. Meurkens, *Punitive Damages. The Civil Remedy in American Law, Lessons and Caveats for Continental Europe* (diss. Maastrticht), Deventer: Kluwer 2014, par. 6.2. However, it is also argued that compensation can still be seen and felt as punishment even if this is technically not a 'function'. See W.H. van Boom, 'Beter schadevergoedingsrecht begint bij een beter onderscheid', *NTBR* 2011/22.

75 PETL Text and Commentary 2005, Art. 10:101, comment 2, no. 3.

76 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1 Allgemeiner Teil 6. Auflage,* Munich: Verlag C.H. Beck 2012, § 25, Rn. 18.

lies more on an external party (the supporter), the issue of compensation of damage incurred by 'other' third parties is generally not addressed in the regulations.[77]

This is in line with the nature of disciplinary law. The fact that, in general, many of the rules and eventual sanctions have no regard for the eventual victims of the undesirable behaviour further illustrates the internal focus of disciplinary rules and reinforces the main goal of internal reparation and prevention.[78] According to Jacques, this even holds for sanctions in the medical and legal professions as these are imposed in the interest of all the members of said profession.[79] However, in this light one has to raise the question whether disciplinary rules – including those of the professions – have not also been developed to protect third parties such as clients and patients?[80] Disciplinary rules exist to safeguard the quality of services and trust in the professions. However, when third parties suffer damage as a result of bad quality service or negligent behaviour without there being consequences, this unequivocally impacts the trust in the profession, thus harming the interest of said group.

The same observation is relevant in regard to football federations, where non-compliance with the applicable regulations can easily lead to damage. In fact, the reason that federations impose the obligation to prevent missiles from being thrown, fireworks being set off, etc. is because these pose risks for people. Although not introduced as such, the surge in regulations regarding stadium safety following the Heysel and Hillsborough disasters further illustrates the focus on preventing harm.[81] In addition, some rules even expressly refer to this goal. For example, the regulations of the FFF state that access to the stadium should be denied to any person in possession of pyro-

77 Only the regulations of the Dutch federation (KNVB) include a provision on damage, which according to the federation is applied in practice.

78 Ph. Jacques, 'Les rapports entre faute civile et faute disciplinaire', in: Pascal Ancel and Joël Moret-Bailly (eds.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Etienne 2007, pp. 175-205, p. 192. See also Chapter 2.7.

79 Ph. Jacques, 'Les rapports entre faute civile et faute disciplinaire', in: Pascal Ancel and Joël Moret-Bailly (eds.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Etienne 2007, pp. 175-205, p. 185-186.

80 Dutch author Roes does not agree with this outset, but acknowledges that this subsidiary goal has been developed over time and is now firmly present. J.S.L.A.W.B. Roes, 'Wat is tuchtrecht?', *WPNR* 2008/6778, pp. 919-927.

81 During the Heysel disaster on 29 May 1985, 39 people were killed and 600 injured when escaping fans were pressed against a collapsing wall in the Heysel Stadium in Brussels, Belgium, before the start of the 1985 European Cup Final between Juventus and Liverpool. The Hillsborough disaster took place on 15 April 1989 at a match between Liverpool and Nottingham Forest at Hillsborough Stadium, Sheffield, England. The lack of police control and overcrowding resulted in the deaths of 96 people and injuries to 766 others.

technic articles such as firecrackers, rockets or flares, as these can be generators of serious accidents.[82]

In summary, an important secondary goal of disciplinary rules is to protect certain rights of parties that are not part of the group – or in other words; to prevent them from suffering harm. It became apparent above that this goal is also arguably one of the most important secondary goals of civil liability rules. Although disciplinary regulations thus pursue a different primary goal, it is difficult to argue that disciplinary liability and civil liability are unconnected.

6.3.3 The legitimacy of interaction between disciplinary law and civil law

Disciplinary sanctions following supporters' misconduct are imposed after virtually every round of European club football.[83] However, reparation of damage resulting from this misconduct is not addressed and victims have to pursue their claim separately before the civil courts. What influence do disciplinary regulations have on a civil procedure?

As outlined in Section 6.2 above, in their assessments the courts do take into consideration disciplinary regulations available. However, the fact that a disciplinary sanction is imposed does not systematically lead to civil liability.[84] In the majority of jurisdictions, disciplinary rules are not statutory rules and a breach therefore does not independently give rise to a civil fault.[85] Although disciplinary rules do form part of the legal order, the influence of proven disciplinary liability is currently limited to being a helpful tool for a court to motivate its decision.

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82 Art. 129 (2) FFF, "L'accès au stade de toute personne en possession d'objets susceptibles de servir de projectiles doit être interdit, comme est formellement proscrite l'utilisation d'articles pyrotechniques tels que pétards, fusées, ou feux de Bengale, dont l'allumage, la projection ou l'éclatement peuvent être générateurs d'accidents graves."

83 See UEFA's disciplinary news index at <www.uefa.org/disciplinary>.

84 Vranken, however, has always wondered why the breach of a disciplinary rule does not lead to civil liability. J.B.M. Vranken, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel****, Kluwer 2005, § 85.

85 See *a contrario* for example § 823 (II) BGB which implies that someone acts unlawfully and is liable for damage if he violates a statutory rule that aims to protect the claimant against the damage he has suffered. The *Cour de Cassation's* general standpoint is that violation of a disciplinary rule does not by itself justify the awarding of damages (see for example Cass. Civ. 1 04.05.1982, *Recueil Dalloz* 1983, somm. p. 378. Obs. Penneau). It should be noted that in France, the strict liability rule of the French Football Federation is an administrative rule. Breach of this rule could thus potentially give rise to liability based on the breach of a statutory duty (Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 904 and references cited.). However, there has not been a case to establish this precedent.

Reasons cited for not letting disciplinary regulations influence civil liability are for the most part grounded in the supposedly different goals.[86] However, as this argument has been diffused, perhaps the question should be rephrased. Considering the strong similarities of the functions and goals of both disciplinary regulations and civil liability, is it legitimate to hold on to barriers between these fields of law? In other words, are there valid reasons for disregarding disciplinary regulations based on rules that have been developed by private institutions such as football federations?

There are actually mainly arguments supporting the negative. First, the rules are valid from a disciplinary law perspective. They have been tested and applied in courts around Europe and in arbitration following responses to supporters' misconduct.[87] In these assessments, disciplinary rules are also influenced by concepts and rules of civil law[88] Furthermore, there does not seem to be opposition with regard to the influence of many other forms of private regulations. On the contrary, it is widely acknowledged that such rules influence civil law.[89] Civil liability law is susceptible to the context in which it operates.[90] With regard to supporters' misconduct, this context entails the accepted disciplinary liability of football clubs. There is no reason why the disciplinary rules of football federations should be looked at differently.

Finally, it is difficult to defend that lawmakers and judges should not be influenced by those who have taken the initiative to reflect upon law and created solutions for complex issues. Critical reflection is a necessary step in the process of good lawmaking. Holding on to barriers that were created in a time when supporters' misconduct was not an issue only leads to forced arguments against new solutions.

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86 Ph. Jacques, 'Les rapports entre faute civile et faute disciplinaire', in: Pascal Ancel and Joël Moret-Bailly (eds.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Étienne 2007, pp. 175-205, p. 198; J.S.L.A.W.B. Roes, 'Wat is tuchtrecht?', *WPNR* 2008/6778, pp. 919-927, § 2.3.

87 See Chapter 4.

88 Or administrative law, in the case of France.

89 Walter van Gerven and Steven Lierman, *Algemeen deel – 40 jaar later – Privaat- en publiekrecht in een meergelaagd kader van regelgeving, rechtsvorming en regeltoepassing*, Mechelen: Kluwer 2010, p. 148, no. 56. See further Section 6.2 above.

90 Or in the words of famous Dutch scholar Paul Scholten "It is in the facts themselves that law is to be found" ("*het recht ligt in de feiten*"). Paul Scholten, *Mr. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel**, Zwolle: W.E.J. Tjeenk Willink 1974, p. 9. Translation via digital Paul Scholten project: <http://www.paulscholten.eu/research/article/english>.

6.4 TOWARDS CIVIL-LAW STRICT LIABILITY FOR SUPPORTERS' MISCONDUCT

In order to determine whether the civil-law strict liability for supporters' misconduct fits in with the existing legal framework, this section will analyse the different forms of strict liability existing in civil law and their potential application to the issue of supporters' misconduct.

A brief look into the concept and development of strict liability in civil law will provide the necessary background for this analysis. Hereafter, the rule will be tested against the requirements of existing forms of strict liability in the different jurisdictions. The existing forms chosen are liability for the acts of others and liability for risk. Another main field or category that features rules of strict liability is liability for defective objects.[91] The rationale behind this type of strict liability is that the supervisor of an object – whether a thing or grounds or premises – has the possibility to influence the state and security of the object. It could be argued with regard to liability of football clubs, that the stadium is such an object. However, considering the focus of the disciplinary rule as a rule of attribution of the behaviour of third parties, this category has been excluded.

6.4.1 Concept and development of strict liability

Strict liability is no straightforward concept and multiple ways are used to refer to it. In doctrine, strict liability is described as liability without fault (*résponsabilité sans faute*), objective liability (*responsabilité objective*, *kwalitatieve aansprakelijkheid*), or risk liability (*Gefährdungshaftung*); the latter two meaning that liability is to be established independently from the defendant's conduct.[92] It should, nevertheless, be noted that the majority of these 'strict liabilities' are based on the presumed fault of failing to supervise, which can be rebuttable. To escape liability, the defendant will have to disprove the presumed fault.[93]

Fault is considered the cornerstone of tort liability and since the creation of the French Civil Code in 1804 fault has been a necessary requisite for liability in European civil-law systems.[94] However, since the end of the 19th century, increasing technical and industrial risks called for an extension of

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91 See Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013 & Christian von Bar, *The Common European Law of Torts (Volume 1)*, Oxford: Clarendon Press 1998.

92 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, p. 297. See further on strict liability from a comparative perspective: Christian von Bar, *The Common European Law of Torts (Volume 1)*, Oxford: Clarendon Press 1998, no. 97ff.

93 In Dutch law, the possibility of rebuttal is provided in the so-called '*tenzij clausules*' in the respective provisions.

94 See the country reports on fault in Pierre Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005.

the requirement of fault in light of the particularity of these dangers to arise without anybody's fault.[95] The most illustrating example of liability for a certain risk is probably the liability for car accidents. As briefly touched upon in the previous chapter, most European legal systems feature special provisions in which the owner of a car is held liable for the damage resulting from car accidents.[96] In England, damage caused by motor vehicles is dealt with under the traditional negligence liability. However, the standard of care is so high that it virtually has become strict liability.[97] Needless to say the car has not been the only invention whose use comes with an inherent great risk of damage. The creation of risk has since become a widespread justification to impose liability. The recognition of liability for dangerous activities is based on the idea that whoever benefits from such an activity should also bear the related losses.[98]

In addition to increasing technical and industrial risks, advancements in the field of business led to the development of employer's liability. This liability is based on the idea that the employer should bear the losses that are related to the business as he is in a better position to control the risks than the employee.[99] Another argument is that it is easier for the victim to identify the employer as the tortfeasor and the risk of insolvency is also much lower when it is the employer that is held accountable.

In light of these developments, Van Dam explains the shift towards stricter liabilities as predominantly driven by policy reasons. "Tort law is about balancing the interests of individuals, private and public bodies. It distributes rights, duties and money."[100] As a result, a sense of justice and practical policy reasons influence the outcome of cases. The influence of policy is not limited to tort law. On the contrary, in sports disciplinary law, policy reasons have had a strong influence on decisions. An example can be found in the *PSV Eindhoven* case, where the CAS considered that if clubs were able to extricate themselves from any responsibility by claiming that they had taken all

95 Franz Werro and Vernon Valentine Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, p. 3; Bénédict Winiger, 'Strict Liability: What About Fault?', in: Helmut Koziol and Barbara C. Steiniger (eds.), *European Tort Law 2001*, Vienna: Springer Verlag 2002, p. 2: Konrad Zweigert and Hein Kötz, *An introduction to Comparative Law*, Oxford: Clarendon Press 1998 (translated from German by Tony Weir), p. 647.

96 See Chapter 5.3.2. France: *Loi n° 85-677 du 5 juillet 1985, tendent à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation*; Germany: 1909 *Strassenverkehrsgesetz*; Netherlands: *Wegenverkeerswet (WVW)*; Switzerland: *Strassenverkehrsgesetz (SVG)/Loi fédérale sur la circulation routière (LCR)*.

97 *Nettleship v Weston* [1971] 2 QB 691, *Roberts v Ramsbottom* [1980] 1 WLR 823.

98 PETL Text and Commentary 2005, Introduction to Chapter 5.

99 Franz Werro and Vernon Valentine Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, pp. 393-394.

100 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 609.

measures they could reasonably be expected to take to prevent any breach, and if supporters still manage to commit such an act, there would be no way of penalising that behaviour, even though it constituted a fault in itself.[101] According to the CAS and UEFA, penalising the clubs for their supporters' misconduct through an 'indirect' sanction is the only way in which the football federation has a chance of achieving its objectives.

Before turning to an analysis of the applicability of a civil-law strict liability rule in cases of supporters' misconduct, some general points should be made in regard to the different jurisdictions.

French law features a conceptual approach to strict liability, which consists of two general 'judge-made' rules of strict liability for persons and for things based on the first sentence of art. 1384 CC.[102] These rules are complemented by a number of specific rules of strict liability for animals, products, buildings, minors, employees, and – as mentioned above – motor vehicles. In contrast, a general rule of strict liability is absent from the other jurisdictions.

In Germany, specific rules of strict liability are only accepted for damage to body, health or property and are almost all the result of special acts.[103] Similarly, the Dutch Civil Code features a limitative number of 'objective liabilities' for specific persons and objects.[104] These liabilities do not require a personal fault or act of unlawfulness, but are based on one's relationship with the person or object. It must be noted that the provisions allow for exoneration if the defendant can prove that due care was exercised.[105]

Swiss law is very similar in this respect; a number of objective liabilities (*Kausalhaftung*) with the possibility of exoneration are provided in the Code of Obligations, including liability for employees, animals and buildings.[106] In addition, more specific 'objective liabilities' that are based on the realisation

101 TAS 2002/A/423 PSV Eindhoven/UEFA, no. 15-16.

102 On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.

103 Judges are not allowed to introduce strict liabilities for comparable risks, see: BGH 7.11.1974 – III ZR 107/72, BGHZ 63, 234.

104 Art. 6:169 – 6:179 BW. In addition to these, strict liability for motor vehicles is laid down in a special Act.

105 For example, art. 6:173 BW provides: 'A possessor of a movable thing which is known to constitute a special danger for persons or things if it does not meet the standards which, in the given circumstances, may be set for such thing, is liable if this danger materializes, *unless, pursuant to the preceding Section (on fault liability) there would have been no liability if the possessor would have known of the danger at the time it arose*.' (Translation: Hans Warendorf *et al*., The Civil Code of the Netherlands, Alphen aan den Rijn: Kluwer Law International 2013.)

106 Art. 55-59a CO.

of a specific risk are laid down in special Acts, such as those on traffic transport, electric and nuclear installations, defective products etc.[107]

Finally, in English law strict liability is a rarity. At present, there is only strict liability for defective products (based on the EU Directive), for animals and employees.[108] All other situations are governed by the tort of negligence.

6.4.2 Liability for the acts of others

The main goal of rules of strict liability for the acts of others is to protect third parties against the insolvency of the actual tortfeasor. In addition, it also directs the cost of the activity to the person who benefits from it.[109] The analogy between the disciplinary rule creating liability of clubs and civil liability for the acts of others has already been briefly touched upon in Chapter 4.[110] According to Haslinger, both rules are grounded in the same goal: taking responsibility for the faulty acts of people in one's business or danger circle independent of one's own culpability.[111]

In general, liability for the acts of another person is said to be based on one of two different notions.[112] First, one can be held responsible for having failed to supervise the person who committed the faulty act. In other words, failing to supervise a person with whom one has a special relationship qualifies as a personal lack of care. The notion of liability for a personal lack of care is predominant in the fields of liability of parents, teachers and other guardians. Secondly, in certain situations another person's conduct can be imputed to one as if it were his own. This is also called vicarious liability. The most important type of vicarious liability is employer's liability. In other words, this 'other' person has committed a fault for which they can themselves be held liable. Often, from the victim's point of view this still entails having to prove a fault liability, while for the defendant, this liability is strict. In other

107 Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, Intro. art. 41-61, no. 3. For an overview see: Alfred Keller *et al.*, *Dispositions de responsabilité civile (13e édition)*, Bern: Stämpfli 2011.

108 The development of a more general strict liability rule, first applied in *Rylands v Fletcher* [1868] L.R. 3 H.L. 330, was brought to a halt in *Read v Lyons & Co. Ltd* [1947] AC 156. See further Anthony M. Dugdale and Michael A. Jones, *Clerk & Lindsell on Torts (19th edition)*, London: Sweet & Maxwell Ltd 2006, chapter 21.

109 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 1601-1.

110 See Chapter 4.4.3.

111 Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011, p. 176ff.

112 See similarly, Franz Werro and Vernon Valentine Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, p. 393ff. and Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 1601ff.

words, once the fault of the 'other' person has been established, the employer cannot escape liability.

In the attempt to hold a club liable for the damage caused by supporters' misconduct by basing a claim on either of the abovementioned forms of liability for others the following should be considered.

Liability for the conduct of children and mentally ill persons is based on the duty of supervision. The comparison of this liability to the potential liability of clubs for damage caused by supporters' misconduct exposes a number of flaws. It cannot be reasonably argued that the club ought to supervise its supporters in the same way parents supervise their children. Most football supporters are of age and have civil capacity. Basing liability of the club on a personal fault on its behalf for failing to supervise the supporters would be systematically unjust.

In comparison, basing a claim on vicarious liability could be more promising. As outlined above, employer's liability is based on the idea that it is the employer who should pay for the damages caused by activities that are for the benefit of his business. Provisions of liability for other auxiliary agents in Dutch and German law are based on the same idea, whereas in Swiss law, liability for other auxiliaries is covered by the provision on employer's liability.[113] The term '*auxiliaire/Hilfperson*' in this latter provision is very broad and covers all those who are in a factual subordinate relationship with an employer.[114]

In France, the general rule of strict liability for others allows the courts to create new liabilities for the acts of persons in one's care, which can only be escaped by *force majeure*.[115] One of the most significant examples of the elaboration of the list of persons are the so-called 'rugby cases'. In both cases, a rugby player was injured by a player from the other team during an amateur match. According to the *Cour the Cassation*, amateur sports clubs are liable for the faults committed by players during the game, which is justified by the fact that sports clubs have the power to organise, direct and control the activities of their members during the game.[116] However, in the case where a rugby referee was attacked by a spectator, the court held that the club did

113 Germany: § 831 BGB; Detlev W. Belling, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse (Unerlaubte Handlungen 3)*, Sellier-De Gruyter 2012, § 831, no. 5; Netherlands: art. 6:171 BW; A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-IV*, De verbintenis uit de wet*, Kluwer 2011, no. 194, 199. Switzerland: Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 55 CO, no. 7.

114 Heinrich Honsell *et al.* (eds.), *Basler Kommentar, Obligationenrecht I (5th ed.)*, Helbing Lichtenhahn Verlag 2011, art. 55. no. 7-8. However, Swiss case law excludes liability of self-employed agents such as architects, lawyers and taxi drivers towards their clients.

115 Cass. Assemblée plénière 29.03.1991 (Blieck), *Recueil Dalloz* 1991, 324, note Ch. Larroumet.

116 Cass. Civ.2 22.05.1995 (UAP rt a. c/Rendeygues *et al.*); Cass. Civ.2 22.05.1995 (USPEG c/ Fédération française de rugby *et al.*), *JCP* 1995-II, 22550, note Jean Mouly.

not exercise control over the supporters in the same way as over its members.[117] For this reason, Simon *et al.* state that evidently clubs cannot be held liable based on '*fait d'autrui*' for damage caused by supporters.[118] Similar to this last view, in England liability for the acts of others cannot be established without an employment or agency situation.[119]

Despite their differences, all jurisdictions require the same two key elements: there must have been a subordinate relationship in which the principal exercised control and the act must have been committed in the course of the work or assistance.[120] Applying these criteria to the case of supporters' misconduct, it should be noted that allowing supporters to attend the match benefits the football club – both the organising and visiting club – which receives income from television rights and tickets. In addition, research also indicates that the presence of supporters is beneficial to a team during a match, especially to the home team.[121] The colloquial name 'the 12th man' thus seems to be well-founded. Nonetheless, to qualify supporting a team in the stadium as 'work' or 'assistance', which is necessary to fulfil the requirements of the relevant provisions, seems to stretch things too far.

The second requirement – the existence of a subordinate relationship – is also not straightforwardly satisfied in the case of supporters' misconduct. Football supporters have no relation of dependence on the football club in the same sense employees or other auxiliary persons have on their employer or 'supervisor'. They are not obliged to observe instructions from the club based on a subordinate relationship. In general, it is the subordination criterion

117 CA Agen 09.02.1999, n°96001345 (Assoc. le club de rugby Le Vernet c/Bringuier *et al.*) see also Chapter 5.3.3.1.

118 G. Simon *et al.*, *Droit du sport*, Paris: Presses Universitaires de France 2012, p. 484. Unfortunately, this statement is not elaborated any further.

119 W.V. Horton Rogers, 'Liability for Damage Caused by Others under English Law' in: J. Spier (ed.), *Unification of Tort Law: Liability for damage caused by others*, The Hague: Kluwer Law International 2003, pp. 63-84, no. 14.

120 England: Anthony M. Dugdale and Michael A. Jones, *Clerk & Lindsell on Torts (19th edition)*, London: Sweet & Maxwell Ltd 2006, no. 6-04ff. France: Geneviève Viney and Patrice Jourdain, *Traité de droit civil. Les conditions de la responsabilité (4e édition)*, Paris: LGDJ 2013, no. 791-792. Germany: Detlev W. Belling, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse (Unerlaubte Handlungen 3)*, Sellier-De Gruyter 2012, § 831, no. 99, 123. Netherlands: A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-IV*, De verbintenis uit de wet*, Kluwer 2011, no. 183-190. Switzerland: Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 55 CO, no. 6ff. See also art. 6:102 PETL.

121 Stephen R Clarke and John M. Norman, 'Home Ground Advantage of Individual Clubs in English Soccer', *The Statistician* Vol. 44/4, 1995, pp. 509-521. Barry Schwartz and Stephen F. Barsky, 'The Home Advantage', *Social Forces*, vol. 55/3, 1977, pp. 641-661, David Lavallee, John Kremer *et al.*, *Sport Psychology. Contemporary Themes*, New York: Palgrave Macmillan 2004, pp. 187-188.

that is decisive.[122] If the supporter has obtained a ticket to the match he will be contractually obliged to observe instructions and also often explicitly forbidden to misbehave. Breaching these obligations can result in banning orders from a public authority or even criminal prosecution.[123]

The question that will have to be answered is thus whether the contractual obligation of football supporters to behave qualifies as a subordinate relationship. In a penal law case in France, a candidate of an election campaign was declared to be the principal of one of his supporters who assaulted an opponent.[124] With the contractual obligation, the underlying principle of being responsible for someone over whom you have, to a certain extent, *control* and who *assists* you in your business endeavours can be construed with regard to football clubs and their supporters. However, considering the need to stretch two of the key elements of the standing rules of liability for the acts of others, it is a leap that European courts might – and perhaps also should – not be ready to take.

6.4.3 Liability for risk: a general strict liability rule

Strict liability for risk (or in German: *Gefährdungshaftung*) is regarded as the paradigm of strict liability.[125] The tortfeasor is responsible for having created a source of danger that led to the damage. The reasoning behind this liability is that whoever benefits from a dangerous activity should also bear the related losses.[126]

It is not difficult to argue that football clubs participating in league and other official matches benefit from this activity and thus fall under the *ratio legis* of strict liability for risk. Furthermore, supporters' misconduct can be qualified as a danger in the sense that it is inherent to the activity and of such intensity that even very strict precautionary measures cannot eliminate it.[127]

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122 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, n. 1607-3 and Christian von Bar, *The Common European Law of Torts (Volume 1)*, Oxford: Clarendon Press 1998, no. 191.

123 First implemented in England in 1999, a football banning order can be used to ban a certain individual from attending football matches both at home and abroad for a specific period. In addition, such banning orders can include the banning from using public transport on match days and from visiting other potentially violent places as well as the obligation to report to a police station during matches.

124 Cass. Crim. 20.05.1976, n°75-92036, <www.legifrance.fr>.

125 Franz Werro and Vernon Valentine Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, p. 400.

126 PETL Text and Commentary 2005, Introduction to Chapter 5.

127 See Section 4.2 above. This is not to say, however, that prevention should be regarded as humanly impossible.

At present, there is no general rule of strict liability for risk in any of the relevant jurisdictions that courts can apply in all types of situations or which could include the case of liability for supporters' misconduct. In England, Germany and Switzerland, there is strong reluctance to expand the reach of the existing rules of strict liability.[128] In the Netherlands, too, the list of strict liabilities provided by law is exhaustive. However, the general clause for fault liability provides that a person is liable for a tort 'if it is due to a cause for which he is *accountable pursuant to generally accepted principles*.[129] This wording has the potential of a general clause for strict liability. However, the provision has not yet been used as such. Only in France have the two rules of strict liability seen constant development by virtue of the courts.

Although most national discussions remain stuck on the argument that strict liability is the prerogative of the legislator, the development of a general rule of liability for risk has been given ample thought in the different transnational projects in Europe.[130] The Principles of European Tort Law provide a general rule for strict liability for risk. In this light, it is interesting to note that the PETL working group, comprised of senior legal scholars from across Europe, is not at all opposed to expansion of strict liability by way of analogy.[131]

Looking at the latter, strict liability for supporters' misconduct falls under the scope of articles 1:101 and 5:101. According to article 1:101 (1):

> "A person to whom damage to another is legally attributed is liable to compensate that damage."

Damage may be attributed in particular to the person: a) whose conduct constituting fault has caused it; or b) whose abnormally dangerous activity has caused it; or c) whose auxiliary has caused it within the scope of his functions.[132]

Is organising a football match such an 'abnormally dangerous activity'? According to article 5:101 (2), an activity is abnormally dangerous if (a) it creates a foreseeable and highly significant risk of damage, even when all due care is exercised in its management and (b) it is not a matter of common usage. Again, the serious risk of supporters' misconduct at football matches is difficult to deny; even when proper precautions are taken. The existing case law – as

128 See Section 4.1. above.

129 Art. 6:162 (3) BW: 'Een onrechtmatige daad kan aan de daderworden toegerekend, indien zij te wijten is aan zijn schuld of aan een oorzaak welke krachtens de wet of de in het verkeer geldende opvattingen voor zijn rekening komt.' A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-IV*, De verbintenis uit de wet*, Kluwer 2011, no. 121ff.

130 Both in the PETL, but also in the Draft Common Frame of Reference (DCFR).

131 See PETL Text and Commentary 2005, art. 5:102 (2) and comments, no. 3.

132 Art. 1:101 (2) PETL.

well as many more recent events that have not (yet) resulted in case law – make this blatantly obvious.[133]

The question whether football matches are a matter of common usage is worth some consideration. In the commentary on article 5:101 PETL an activity is qualified as common usage "if it is carried on by a large fraction of the people in the community, the community thereby being those at risk under the circumstances".[134] Based on this phrasing, it can be argued that football in a broad sense is a matter of common usage; it is the number one sport practised in Europe and the UEFA Champions League and EURO, and FIFA World Cup are followed by an enormous portion of the population.[135] However, organising a football match in a professional league is not as common, as is attending such a match.

With regard to causation, art. 3:101. PETL requires *conditio sine qua non*: "An activity or conduct is a cause of the victim's damage if, in the absence of the activity, the damage would not have occurred." This requirement is met for if the football match had not been organised, the damaging supporters' misconduct would not have occurred. However, according to article 3:201 PETL, whether and to what extent damage may be attributed to a person depends on different factors. Such factors include, but are not limited to:

a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity;
b) the nature and the value of the protected interest (Article 2:102);
c) the basis of liability (Article 1:101);
d) the extent of the ordinary risks of life; and
e) the protective purpose of the rule that has been violated.

Taking into account these factors, it can be reasonably concluded that the damage can be attributed to the club. Most notably, it was foreseeable and in case of personal or property damage, the value of the protected interest is high. Furthermore, it is difficult to argue that suffering damage from supporters' misconduct while attending a football match is an ordinary risk of life.

Finally, the PETL offers a defence against strict liability if the injury was caused by an unforeseeable and irresistible (a) force of nature (force majeure),

133 See Chapter 5.3.3.

134 PETL Text and Commentary 2005, art. 5:101 and comment, no. 8.

135 The 2014 FIFA World Cup showed record-breaking figures overall, with the final reportedly watched by over 900 million people worldwide. <http://www.iptv-news.com/2014/07/world-cup-final-breaks-records-worldwide-for-tv-broadcasters/>, accessed: 20 September 2015.

or (b) conduct of a third party. Although such defence might at first glance seem to discard a club's liability for supporters' misconduct, this is not the case. While consisting of conduct of a third party, supporters' misconduct at a football match is decidedly not unforeseeable or irresistible.[136]

Fulfilling each of the criteria, it can thus be argued that organising football clubs can be held liable for damage caused by supporters' misconduct according to the provisions of the PETL. This can be taken as an indication that a rule of strict liability of football clubs for the damage caused by the misconduct of their supporters is justified and would not constitute an exotic animal in the transnational legal framework.

6.4.4 Strict liability and the expected safety standard – two sides of the same coin?

In general, strict liability rules cannot be seen in isolation from the relevant safety requirements and the standard of care. On the contrary, both concepts are intertwined.[137] In Dutch law, strict liability for defective objects (*kwalitatieve aansprakelijkheid voor gebrekkige zaken*) is defined in terms of *the requirements of safety that can be expected in the circumstances*.[138] The same holds for the definition in the EU Directive on product liability. The higher the expectations in regard to safety, the more logical strict liability becomes.

Strict liability for supporters' misconduct may be regarded in the same way. In civil law the rationale for such a rule may be found in the expected safety standard as well. Looking back at the rule in UEFA's disciplinary regulations, it can be derived from the wording that the highest level of safety is required and measures need to be taken to prevent incidents of any kind.[139] With regard to the specific acts covered under article 16 (2) of the UEFA Disciplinary Regulations, which include any acts of damage, apparently there

136 See on *force majeure* Chapter 5.2.2.2.

137 See also Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 1004.

138 J.H. Nieuwenhuis, 'De grenzen van de aansprakelijkheid voor gebrekkige zaken', *WPNR* 1983/5666, pp. 581-590, p. 587. The *Hoge Raad* used a similar wording in the landmark case *Wilnis* about a deficient dike. HR 17.12.2010 ECLI:NL:HR:2010:BN6236, *NJ* 2012, 155 (*Wilnis*) note by T. Hartlief, cons. 4.4.3: "Bij de eisen als bedoeld in art. 6:174 lid 1 gaat het om de eisen die men uit het oogpunt van veiligheid aan de desbetreffende opstal mag stellen. Daarbij spelen, zo volgt uit de wetsgeschiedenis, gedragsnormen als veiligheidsvoorschriften en in het algemeen aan een bezitter of gebruiker van die zaak te stellen zorgvuldigheidsnormen een belangrijke rol. De omstandigheid dat een opstal in algemene zin voldoet aan geldende veiligheidsvoorschriften, staat niet in de weg aan het oordeel dat de opstal (niettemin) niet aan bedoelde eisen voldoet en derhalve gebrekkig is in de zin van art. 6:174 lid 1."

139 Art. 16 (1) UEFA Disciplinary Regulations (2014 Edition).

is no amount of safety measures that justify the occurrence; the expectation from the sector is absolute safety.

The legitimacy of strict liability for supporters' misconduct can thus be sought in the assumption that it is up to the club to prevent its emergence. It can be argued that extreme security measures can be taken to prevent supporters' misconduct. For example, organising clubs could use airport security scanners to prevent dangerous objects from entering the stadium or even employ as many stewards as ticketed supporters so everyone can be supervised. Such measures may be economically or practically difficult for individual clubs to take, they are not humanly impossible. Despite extreme measures, supporters' misconduct can most likely not be completely ruled out. The fact that risks remain despite having taken all *proper* precautionary measures is part of the rationale of the concept of strict liability.[140]

The question whether in civil law such an expectation of safety is reasonable, is a policy decision. However, the possibility of being held liable even when the required safety standard is practically unfeasible to attain is a fact of life which is accepted in many fields of law.[141]

6.5 Opportunities and limitations of a strict liability rule for supporters' misconduct

In the following, it will be analysed whether a civil-law strict liability rule can be an apt solution for those situations where contract or fault liability based on a breach of the standard of care do not apply, or only under exceptional circumstances. These situations are the liability of the visiting team, liability for damage outside the stadium, and liability for racist chanting.

6.5.1 Liability of the visiting club for damage inside the stadium

Visiting clubs generally do not have to worry about being held liable on account of contract or fault liability. This is not because they do not owe a standard of care. On the contrary, in terms of preventing supporters' misconduct, visiting clubs do have certain obligations.[142] However, unless the visiting club remains passive in regard to those aspects where it can exercise a certain control – such as the organisation of transport or ticket sales – it is

140 Compare § 4.1 above. See also PETL Text and Commentary 2005, art. 5:101, comments, no. 4.

141 Including for example product liability and liability for traffic accidents.

142 See Chapter 5.4.1.

unlikely it will breach the standard of care.[143] Taking the example of Feyenoord, scholars unanimously agree that the club did everything it could to try and avoid problems during the away match in Nancy in 2006.[144] Obviously, these circumstances did not discard Feyenoord's disciplinary liability, but without strict liability in civil law, the club would escape civil liability.

However, there are valid reasons to question whether this does not result in an unreasonable disparity between the liability of the organising club and that of the visiting club. After all, it can be imagined that visiting supporters instigate disturbances with the aim of hurting the organising club. If they succeed in bringing in fireworks, for example, in the current stance of disciplinary and civil law, the organising club risks both sanctioning as well as civil liability whereas the visiting club only risks sanctioning.

Furthermore, visiting clubs are a necessary component of any football match. Without them there would be no 'dangerous activity' in the first place. It goes without saying that visiting clubs also receive significant benefits from partaking in this activity, even though they are not the official organiser.[145] Looking back at the PETL requirements evaluated above, strict liability of the visiting club for damage caused by its own supporters could very well be envisaged and thus serve as a solution to discard this disparity between the organising and the visiting club.

In Chapter 4 it became apparent that the disciplinary liability of clubs for supporters' misconduct appears in two distinct forms. First, the organising club is responsible for maintaining security and its liability is presupposed when supporters' misconduct arises. Secondly, both the organising club and the visiting club are strictly liable for (certain) acts of their own supporters. Taking clues from how the disciplinary liability of football clubs is organised, it is to be advised to take a similar approach in civil law.

This would give rise to the following picture. The organising club is to be held strictly liable for acts of its own supporters as well as on account of contract or tort for damage resulting from inadequate safety measures. However, the visiting club is strictly liable for (certain) acts of its own supporters. If these acts were made possible through inadequate organisation of the match, both clubs could be jointly liable towards the victim.

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143 LG Koblenz 21.02.2003 – 411 C 367/03, *SpuRt* 2006, pp. 81-83, p. 82. See further Chapter 5.4.1.

144 See for example: Jan F. Orth, 'Gefährdungshaftung für Anhänger? Kritik and der CAS/TAS-Entscheidung Feyenoord Rotterdam N.V. vs. UEFA', *SpuRt*, 2009/1, pp. 10-13. Frank Bahners, 'Die Rechtmässigkeit von Verbandsstrafen gegenüber Fussballvereinen bei Zuschauerausschreitungen', *Causa Sport*, 2009/1, pp. 26-28; Jan F. Orth,'Von der Strafe zur Massnahme – ein kurzer Weg!' in *SpuRt* 2013/5, pp. 186-190.

145 Visiting clubs receive TV income from the matches they play, regardless whether this is a home or away match.

6.5.2 Damage outside the stadium grounds

The inadequacy of liability based on a breach of the standard of care is perhaps the most apparent in situations where supporters' misconduct results in damage outside the stadium grounds. Nowadays, it is these situations that make the biggest headlines and create outrage among the general public.[146]

Implementation of strict liability of football clubs covering these situations would most likely satisfy this indignation. However, would a strict liability rule for this situation be acceptable in light of the current legal framework?

Taking another look at the PETL criteria gives rise to the following image. To quickly restate; according to the PETL, damage may be attributed in particular to the person whose abnormally dangerous activity has *caused* it.[147] The *conditio sine qua non* is easily met, without the football match the misconduct and thus the damage would not have occurred. However, it can be doubted whether damage that occurred outside the stadium grounds and the abnormally dangerous activity in which both clubs partake – namely the organisation of a high-level football match – are sufficiently connected in order for the damage to be attributed to the activity.[148]

To reiterate article 3:201 PETL, whether and to what extent damage may be attributed to a person depends on different factors. Such factors include, but are not limited to:

a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity;
b) the nature and the value of the protected interest;
c) the basis of liability;
d) the extent of the ordinary risks of life; and
e) the protective purpose of the rule that has been violated.

In terms of the foreseeability factor, both the time and space between a specific football match and the supporters' misconduct are problematic. This is especially true when damage occurs in the city centre, far away from the stadium, the day before the match, or all of the above, as was the case with the Feyenoord riots in Rome in 2015. Furthermore, it can be argued that when supporters' misconduct occurs outside the stadium, the football match is not the only cause. Another cause could be a lack of measures taken by public authorities or even provocation by such authorities.

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146 See for example the many articles on the rampage of Feyenoord supporters before a Europa League match in February 2015 in Rome which damaged the 500-year-old Barcaccia fountain. Search words 'Feyenoord Rome fountain' provide over 100 results just in English and Dutch.

147 Art. 1:101(2) b PETL.

148 Compare PETL Text and Commentary 2005, art. 3:101, comment 5.

In conclusion, implementation of a strict liability rule in civil law for damage caused by supporters outside the stadium does not seem feasible in light of the current legal framework. Although it could be a desirable solution for victims, the further the misconduct is removed from the football match, the less reasonable it is that it will be considered part of the activity itself. Compensation for this type of damage should thus primarily be sought via the supporters themselves.

6.5.3 Liability for racist acts

Racist and discriminatory acts, mostly in the form of chanting, are almost impossible to prevent. If serious measures are taken on the basis of the applicable regulations, it is therefore unlikely that football clubs will be held liable on account of a breach of the standard of care.[149]

In order to determine whether the strict liability rule in civil law could also be an apt tool to deal with this particular issue, a number of observations should be made.

First, it is worth remembering that the concept of strict liability was primarily developed to deal with the increased risks of damage that emerged in connection with society becoming industrialised and more complex. It is no coincidence that product liability remains the most universally accepted form of strict liability across Europe. In this light, it is difficult to imagine such liability being imposed for the racist or discriminatory acts of third parties.

Furthermore, some legal systems only allow for specific rules of strict liability for damage to body, health or property and are almost all the result of special acts.[150] Although injuries to one's personality rights[151] in general can give rise to compensation, in the assessment of such damages all circumstances of the case have to be taken into account, but especially the scope of the protected interest.[152] Whilst difficult to grasp in monetary terms, this protected interest of human dignity that is infringed by racist and discriminatory acts is very important.[153] However, it is difficult to argue that this great interest alone merits strict liability.

149 See further Chapter 5.4.3.

150 Judges are not allowed to introduce strict liabilities for comparable risks, see: BGH 07.11.1974 – III ZR 107/72, BGHZ 63, 234.

151 The term personality rights includes a range of aspects in regard to protection of the person, including human dignity, privacy, the right to free development of one's personality. See for an overview of this right in the different jurisdictions Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 706ff.

152 PETL Text and Commentary 2005, art. 10.301, comment 7-9.

153 PETL Text and Commentary 2005, art. 10:301, comment 6.

Although strict liability for racist acts does not seem feasible, national and international football federations can at least ensure that the club is held liable under the applicable disciplinary regulations and receives a sanction. This way, reparation of the harmed interest can – at least indirectly – still take place.

6.6 CONCLUDING REMARKS

Football clubs can be held liable for the damage caused by supporters' misconduct on various grounds. It has not been the goal of this chapter to put forward strict liability as a preferred course of action. Rather, the goal was to show that the evolution of strict liabilities allows for an additional – and perhaps more fitting – concept on which to base liability in a world that is becoming more and more complex every day.

It was established that there are many reasons for an attempt to transpose the disciplinary rule to civil law. First, private regulations, such as disciplinary regulations, form an increasingly important tool in determining the applicable standard of care in concrete cases. In all jurisdictions, judges have shown their preparedness to apply privately made rules, either to assist in establishing the standard of care or even directly, in which case a breach of a privately made rule establishes a civil fault. Secondly, disciplinary liability and civil liability are closely connected. An important secondary goal of disciplinary rules is to protect certain rights of parties that are not part of the group – or in other words; to prevent them from suffering harm. It became apparent above that this goal is also arguably one of the most important secondary goals of civil liability rules. In fact, the disciplinary liability rules and civil-law rules are in part related standards.

In examining the various categories of rules of strict liability, it became apparent that strict liability of the organising club for its supporters' misconduct would not constitute a foreign concept or systematic flaw in the majority of jurisdictions. However, whether a legislative effort is needed to introduce such a rule depends on the respective jurisdiction. In France and the Netherlands, there is room for the courts to take the initiative and develop such a rule on the basis of art. 1384 CC and art. 6:162 BW respectively. In England, Germany and Switzerland a statutory rule would, however, need to be enacted. Considering the broad catalogue of strict liabilities already existing in German and Swiss law, the introduction of new forms of strict liability will probably not face strong systematic reservations. However, the debate for a rule of strict liability for supporters' misconduct might only be launched after an unsatisfactory court decision.

In addition, in terms of damage caused by supporters from the visiting team, a strict liability rule similar to the one developed in disciplinary law could provide a useful addition to the system. Implementation of such a rule would discard the unreasonable disparity between organising and visiting

clubs. In addition, it could prevent visiting supporters from instigating disturbances with the aim of hurting the organising club. Strict liability is, however, not the solution to all problems. It proved unfeasible to apply the rule in situations where damage was caused outside the stadium or with regard to racist acts.

RECAP

7 Synthesis and conclusion

7.1 Introduction

Supporters' misconduct is an unfortunate phenomenon connected to the most popular sport in the word. Despite many legislative efforts, incidents keep occurring, often resulting in damage. The difficulty to address the misbehaving individuals directly has led to the idea of addressing football clubs instead. There are two forms of liability of football clubs for supporters' misconduct – disciplinary liability and civil liability. Both forms of liability have been the subject of a number of court cases across Europe. In light of these cases, this research focused on the interaction between the disciplinary regulations of national and international football associations regarding the liability of clubs for supporters' misconduct and civil law.

More specifically, it was investigated whether the disciplinary standard can be applied in civil law in order to handle compensation of damage caused by supporters' misconduct. To provide a good overview, the disciplinary and civil liability of clubs was examined from a comparative, transnational and interaction perspective. This final chapter considers the research findings from the various chapters and presents some concluding observations, including some recommendations to the legislature, judiciary, clubs and football's governing bodies.

7.2 Disciplinary regulations in sport and their connections to civil law

Before focusing on the liability of clubs for supporters' misconduct and the potential application of the disciplinary liability standard in civil law, Chapters 2 and 3 provided an overview of the creation, application and review of disciplinary regulations in sport. Conclusions that can be derived from this part are that disciplinary rules can be freely created and enforced by governing sports organisations and that disciplinary sanctions are generally only subjected to a marginal review. Also, on the European level, the systems and control mechanisms in respect of disciplinary regulations and sanctions in sports have proved to be very similar.

Chapter 2

In order to govern sports in general and football in particular, extensive private regulatory frameworks have been created. Chapter 2 provided an overview of the main legal framework in which national and international sports organisations operate with special regard to rules of a disciplinary nature. The comparison across the different countries showed that the legal status of disciplinary regulations in sports is strikingly similar and that many issues are approached and reviewed in the same way.

A significant position is played by the legal concept of the association. As the preferred organisational form of sports organisations, association law is at the root of the disciplinary liability of football clubs. Association laws are closely similar across the jurisdictions and feature lenient rules.[1] As a result, associations are allowed to adjust the internal organisation to their own needs. Their regulatory power is limited only by mandatory provisions of national law, the association's self-created internal regulations and by the specific object for which it was created.[2]

The binding nature of the disciplinary rules set by sports federations upon individual athletes and clubs turns out to be the subject of debate. According to most authors, the nature of the relationship between an association and its members is characterised as institutional. Others argue that the binding nature lies in a contract. However, the strong subordinate relationship between the federation and its members and the members of these members (clubs and athletes) is better explained in light of association law. In England, where members of an incorporated association are bound by contract, the view is quite similar. It has been suggested that this contract is a fictional one as there is no choice but to enter into it.[3] In addition, individual athletes and clubs that are not members of the federation are bound by the rules through an indirect relationship based on the 'membership chain' or a licensing contract.[4] When rules are not followed a disciplinary sanction can be imposed. The disciplinary sanction is a peculiar legal notion with features that bear resemblance to both penal law and private law. However, the dominant view across the jurisdictions is that the disciplinary sanction is of a private-law nature.[5]

Although an association's autonomy is great, it cannot enforce sanctions as it wishes. There are a number of requirements that must be met in order for sanctions to be legally imposed.[6] The important question for this research

1 Chapter 2.2.
2 Chapter 2.3.
3 Chapter 2.4.
4 Chapter 2.5.
5 Chapter 2.7.
6 Chapter 2.8.

whether fault is required (and strict liability allowed) for the valid application of a disciplinary sanction, is not clearly answered in case law and literature as there are diverging opinions. Nonetheless, it was established that the position that fault is an absolute requirement is difficult to reconcile with the fact that a number of different sanctions (the majority in doping cases) that were imposed without fault have been upheld in different national courts.[7]

Chapter 3

In anticipation of the examination of the disciplinary sanctions imposed on football clubs on account of misconduct of their supporters and to provide a perspective on these cases, Chapter 3 focused on the different aspects of this review.

As was established in Chapter 2, the private sanctioning system which sports federations use to apply their rules comes in the form of disciplinary sanctions. These can be tested either before a national court or by arbitration. In this review the private rules of sports federations and national law are connected and interrelated in many ways.

In the review before state courts, the sanction is tested against the association's own regulations and the applicable national substantive law. The scope of the review is limited in all the countries researched and generally only checks whether decisions are reasonably arrived at and not contrary to the law.[8] However, sports federations are allowed a great margin of appreciation to make decisions.

Often the mandatory path imposed by the regulations of sports federations is, however, to have the sanction reviewed by arbitration. Although arbitration is a form of private dispute resolution, the proceedings are almost completely governed by rules of national law. This entails the applicability of national concepts of private law, for example regarding the validity of the arbitration agreement and the question of arbitrability of the disciplinary sanction. The arbitration law further prescribes how to determine the procedural and substantive rules that the arbitration tribunal ought to apply when it reviews the sanction.[9] It was established that with regard to CAS cases the applicable procedural rules provide that in the absence of a choice of law, it is Swiss substantive law that will be applied. As the large majority of international sports organisations are seated in Switzerland, Swiss law is applicable in a majority of cases as a result.[10]

The arbitral award can be challenged before a national court. However, in all countries researched, grounds for appeal are limited and allow only for

7 Chapter 2.8.
8 Chapter 3.2.
9 Chapter 3.3.1.
10 Chapter 3.3.1.5.

a marginal review.[11] However, this review may entail rules of national law influencing the regulations of sports federations, for when an arbitral award is overturned there may be a need to adapt the regulations. In this regard, the significance of the Swiss Federal Supreme Court in the regulation of international sport was highlighted as the only institution in a position to exert direct influence on the CAS through its case law.[12] The marginal review applied in both arbitration and in the review by state courts reinforces the power of private regulations of sports organisations. However, there are enough safeguards as well.

7.3 DISCIPLINARY AND CIVIL LIABILITY OF FOOTBALL CLUBS FOR SUPPORTERS' MISCONDUCT

The main focus of this research was situated in the second half, which concentrated on analysing and developing the grounds on which football clubs can be held liable for damage resulting from their supporters' misconduct. The question that this part aimed to answer is: can football clubs be held liable for improper behaviour of their supporters according to national civil law? And what roles do disciplinary regulations of football associations play in this regard?

Chapter 4

By virtue of their regulatory power, national and international football federations have created specific rules that hold clubs directly liable for the behaviour of their supporters. In order to establish whether these liability rules are also equipped to deal with the handling of damages, Chapter 4 was dedicated to examining the application of this disciplinary liability in practice.

The disciplinary liability of clubs appears in two distinct forms in the regulations of international and national football federations across Europe.[13] First, all relevant regulations provide that the organising club is responsible for maintaining order and security inside the stadium and its liability is presupposed when supporters' misconduct arises. Secondly, both the organising club and the visiting club are strictly liable for (certain) acts of their own supporters.

The liability rules for supporters' misconduct are frequently applied by the various football federations. However, only a small number of national and international courts have been asked to review sanctions imposed on clubs

11 Chapter 3.3.2.
12 Chapter 3.3.2.3
13 Chapter 4.2.

following supporters' misconduct.[14] These cases, hailing from different jurisdictions, were analysed and it was established that the central issue in these cases and the subsequent debates in literature was the legality of the different (strict) liability rules for supporters' misconduct. The examination of case law demonstrated that both forms of liability – liability based on the obligation to ensure security and strict liability – are legally acceptable. The concept of disciplinary liability for supporters' misconduct is considered lawful in all jurisdictions where it was challenged (international/CAS, France, Germany).[15] The rationale for this liability lies in the effectual and practical argument that in the absence of a direct relationship with supporters, penalisation of the clubs is the only means for federations to attempt to prevent supporters' misconduct.

Ultimately, the rules of disciplinary (strict) liability for supporters' misconduct are founded and legitimised in the freedom of association to design a regulatory system. In addition to the case law, several doctrinal contributions were discussed in order to identify potential issues in relation to the clubs' liability in civil law.[16] No major issued were found. The popular and instinctive proposition that disciplinary strict liability rules breach the principle of 'no liability without fault', is ultimately discarded by most courts and authors; with the latter considering the great number of exceptions to this principle in civil law. Most importantly, liability without fault can be imposed in case of an overriding public interest.

Chapter 5

The overall framework in regard to the civil liability of football clubs for supporters' misconduct was outlined in in Chapter 5. It was examined whether football clubs can be held liable for supporters' misconduct on the basis of contract law and tort law. The concepts of contract and fault liability were described from a simultaneous comparative perspective and applied to the situation of supporters' misconduct.

It was established that liability of organising clubs, regardless of whether the ultimate basis lies in contract or tort law, requires the victim to prove that the club breached the required standard of care.[17] In general, the relevant interests at stake – property and personal integrity – are valued highly and thus require a high standard of care. As regards the dangerousness of the activity, it was argued that the occurrence of supporters' misconduct is a known risk. Furthermore, significant damage is foreseeable, which provides further arguments for a high standard of care. It was further observed that in light of looming civil liability, clubs will probably argue that complete

14 For general remarks on the review of disciplinary sanctions, see Chapter 3.
15 Chapter 4.3.
16 Chapter 4.4.
17 Chapter 5.2.2; 5.3.2.

security is impossible or that heavy security measures are undesirable. However, in the attempt to argue against the standard of care this is not convincing, as the organising club is the only party that can influence said security. After all, one is not allowed to bring any means of self-defence into the stadium and is thus completely dependent on the organising club to ensure safety.

Cases from multiple jurisdictions were examined in order to test these assumptions and further clarify the standard of care of organising clubs. Case law from France showed that the civil-law liability of football clubs is firmly established in French contract law. Professional football clubs owe a virtual guarantee of safety and clubs risk almost automatic liability if supporters' misconduct causes damage in the stadium.[18] The sole decision from England reinforced the idea that the occurrence of supporters' misconduct is often a known risk to which clubs need to respond adequately.[19] Finally, in Germany it proved more challenging to establish liability on account of a breach of the standard of care. The courts are reluctant to impose a standard of care that, similar to the French approach, would lead to a guarantee of safety. In the majority of cases, clubs were deemed to have met the standard of care. However, a club has been held liable before and there has been no sign of systematic reluctance.[20]

Case law also suggests that it is expected that clubs at least adhere to sector standards – which are laid down in the applicable regulations of the international and national federations.[21] With regard to the critical factor of availability and costs of precautionary measures, *Stichting Bestrijding Antisemitisme/ ADO Den Haag* showed that although the assessment of this factor is guided by the applicable regulations from the federation, compliance with these rules does not equal compliance with the standard of care. However, this does not entail that compliance with the rules is always sufficient to escape liability.

It became clear that considering the interests at stake, the dangerousness of the activity and foreseeability of damage, the requirements for precautionary measures to be put in place are very high and will likely be almost impossible to meet. Especially in Germany, the courts struggle between the necessity and willingness to apply a standard of care that is apt to prevent damage on the one hand and the averseness that this standard practically manifests as strict liability.[22] Nevertheless, case law also showed that organising clubs do owe a high standard of care to their contractual partners and third parties and that liability for damage caused by supporters' misconduct is a very real possibility for these clubs. In this light, the question was raised whether it is desirable that the liability of clubs for supporters' misconduct is dependent on a breach

18 Chapter 5.3.3.1.
19 Chapter 5.3.3.2.
20 Chapter 5.3.3.3.
21 This was discussed in Chapter 6.2.4.
22 Chapter 5.3.4.

of the applicable standard of care. Especially, since this standard has to be raised to extreme heights in order for non-liability to be attainable.

In addition to the liability of organising clubs for damage inside the stadium, several other situations were discussed in Chapter 5. First, with regard to the liability of the visiting club, it was established that they, too, have to adhere to a certain standard of care or risk liability. Considering the risks involved, it is not unreasonable to require the visiting club to take measures to prevent misconduct from its own supporters, for example by putting in place surveillance measures or organising and obliging specific modes of transport to away matches. These measures all include aspects that visiting clubs can – to a certain extent – control. However, if no breach of the visiting club's duty of care can be established, this leads to the undesirable situation in which the organising club risks full liability; also in the case of intentional rioting by the visiting club with the aim of hurting the organising club.[23] Secondly, with regard to liability of clubs for damage caused outside the stadium, liability cannot be established on account of a breach of the standard of care, unless a club has been negligent in accurately informing the police about the expected security risks.[24] Thirdly, liability for racist acts is also very difficult to establish on account of a breach of the standard of care. Even more so than in regard to other forms of supporters' misconduct, racist acts are virtually impossible to prevent. Unless the club has remained completely passive or breached its own internal regulations, it is highly unlikely that liability resulting from contract or fault liability will be successfully established.[25]

Chapter 6

The findings in Chapter 5 showed that although it is possible to establish liability of football clubs for supporters' misconduct due to a breach of the standard of care, a number of issues remain. It appeared from the examination of case law that in the assessment of civil liability on the basis of contract or tort, there is a lot of room for factual interpretation of the standard of care – one could even argue too much room. This, along with the fact that the burden of proof for establishing that the club has breached this (unclear) standard rests on the victim of supporters' misconduct, results in legal uncertainty for all parties involved.

Besides, in order for the standard of care to be apt to prevent supporters' misconduct, the level of care required is extremely high. It can be argued that this leads to stretching the notion of fault liability too far. In addition, there remain situations of misconduct by supporters for which the club cannot –

23 Chapter 5.4.1.
24 Chapter 5.4.2.
25 Chapter 5.4.3.

or only in very unusual circumstances – be held liable on account of a breach of the standard of care. Nevertheless, the serious nature and potential of unrecoverable damages resulting from these situations require further investigation into alternative options for liability. With this in mind, the goal of Chapter 6 was to determine whether the standard that is set in disciplinary law – the strict liability rule – can be transposed to civil law and serve as an alternative basis of liability.

In general, private regulations form an important tool for determining the applicable standard of care in concrete cases. The analysis of the approach by the courts in the different jurisdictions showed that they are prepared to apply privately made rules, either to assist in establishing the standard of care or sometimes even directly, in which case a breach of a privately made rule establishes a civil fault.[26] As a result it is quite likely that a breach of the regulations of football organisations – such as the obligation to prevent supporters from lighting fireworks or throwing missiles, which can be inferred from art. 16 (2) of the UEFA Disciplinary Regulations – will lead European courts to establish a breach of the standard of care.

In addition, in line with the more progressive approach in the Netherlands, it is not inconceivable that the standards expressed in the regulations will find direct application in Dutch courts.

The disciplinary strict liability rule is the only existing legal tool that addresses the issue of liability of clubs for their supporters' misconduct. Despite the different primary angle, it was argued that in addition to the trend of increasing influence of private regulations in general, there are additional reasons to suggest application of disciplinary rules specifically. First, disciplinary liability and civil liability are closely connected. An important secondary goal of disciplinary rules is to prevent parties that are not part of the group from suffering harm. The same goal is also arguably one of the most important secondary goals of civil liability rules. In addition, the rules are valid from a disciplinary law perspective. They have been tested and applied in courts around Europe and in arbitration following responses to supporters' misconduct. In these assessments, disciplinary rules are also influenced by concepts and rules of civil law. Civil liability law is susceptible to the context in which it operates. With regard to supporters' misconduct, this context entails the accepted disciplinary liability of football clubs.[27]

After a brief look at the concept and development of strict liability in civil law, the strict liability rule for supporters' misconduct was tested against the requirements of existing forms of strict liability in the different jurisdictions. The comparison with existing forms of liability for the acts of others (or: vicarious liability) turned out to be problematic.[28] However, it was established

26 Chapter 6.2.
27 Chapter 6.3.
28 Chapter 6.4.2.

that as strict liability for risk, strict liability of the organising club for its supporters' misconduct would not constitute a foreign concept or systematic flaw in the majority of jurisdictions.[29] The reasoning behind strict liability for risk is that whoever benefits from a dangerous activity should also bear the related losses.[30] Football clubs that participate in league and other official matches benefit from this activity – financially and in other ways – and thus fall under the *ratio legis* of strict liability for risk. Furthermore, supporters' misconduct can be qualified as a danger in the sense that it is inherent to the activity and of such intensity that even very strict precautionary measures cannot eliminate it.

On the basis of the provisions of the PETL, a number of questions needed to be answered in order to conclude that liability for supporters' misconduct meets the criteria of liability for risk. Is organising a football match an 'abnormally dangerous activity'? According to article 5:101 (2), an activity is abnormally dangerous if (a) it creates a foreseeable and highly significant risk of damage, even when all due care is exercised in its management and (b) it is not a matter of common usage. The serious risk of supporters' misconduct at football matches was not difficult to admit; even when proper precautions are taken practice shows that the risk remains high. With regard to b, it was concluded that despite the popularity of football, organising a football match in a professional league is not common usage. With regard to causation (art. 3:101 and 3:201PETL) it was accepted that this requirement is met, for if the football match had not been organised, supporters' misconduct and the damage would not have occurred. Taking into account the factors on the basis of which a cause may be attributed to a person, it can be reasonably concluded that the damage can be attributed to the club. Most notably, it was foreseeable and in case of personal or property damage, the value of the protected interest is high. Furthermore, it is difficult to argue that suffering damage from supporters' misconduct while attending a football match is an ordinary risk of life. Finally, as conduct displayed by a third party, supporters' misconduct at a football match is decidedly not unforeseeable or irresistible, and can thus not be qualified as *force majeure*.[31]

On the basis of the PETL, it can thus be deduced that strict liability for supporters' misconduct would form an acceptable addition to the current legal framework. However, whether a legislative effort is needed to introduce such a rule depends on the respective jurisdiction. It is not unlikely that the debate for a rule of strict liability for supporters' misconduct will only be launched after an unsatisfactory court decision.

The situations of supporters' misconduct in which liability on account of a breach of the standard of care proved more problematic were also tested

29 Chapter 6.4.3.
30 PETL Text and Commentary 2005, Introduction to Chapter 5.
31 Chapter 6.4.3.

against the PETL. With regard to visiting clubs, it was concluded that strict liability for risk would be an apt solution as all the PETL requirements are met.[32] However, the same does not hold for damage caused by supporters outside the stadium. Strict liability of the club is not feasible in light of the current legal framework.[33] With regard to liability for racist acts, it was also concluded that strict liability is not the solution. Most importantly because there are many legal systems that only allow for specific rules of strict liability for damage to body, health or property.[34]

Considering the advantages of strict liability – most importantly in the form of legal certainty – it would be desirable if strict liability of the organising club for supporters' misconduct inside the stadium were to be accepted as a concept in civil law. In terms of damage caused by supporters from the visiting team, a strict liability rule similar to the one developed in disciplinary law provides a useful addition to the system. Implementation of such a rule discards the unreasonable disparity between organising and visiting clubs. In addition, it could help to prevent visiting supporters from instigating disturbances with the aim of hurting the organising club. As a result, it is suggested to approach the civil liability of football clubs in a way similar to the liability rules in the disciplinary regulations of football federations. This would give rise to the following picture. The organising club is to be held strictly liable for acts of its own supporters as well as on the basis of contract or tort for damage resulting from inadequate safety measures. However, the visiting club is strictly liable for (certain) acts of its own supporters. If these acts were made possible through inadequate organisation of the match, both clubs could be jointly liable towards the victim.

7.4 FINAL THOUGHTS

Civil law and disciplinary regulations interact and influence each other reciprocally. On the one hand, civil law influences the limits and review of disciplinary regulations. On the other hand, disciplinary regulations influence the interpretation of open standards in civil law.

Whereas initially it met with reluctance and disbelief, both in the academic and football worlds, disciplinary liability for supporters' misconduct is now an accepted concept and practice. It is not inconceivable that the same will happen to civil liability. Until then it is important to remember that civil liability of football clubs for supporters' misconduct is not defined in terms of culpability but rather in terms of responsibility.

32 Chapter 6.5.1.
33 Chapter 6.5.2.
34 Chapter 6.5.3.

The development of rules of strict liability cannot be seen separately from the rising standard of care. Due to the flexibility of liability based on a breach of a standard of care, it is easy to imagine that practical outcomes under a strict liability rule and fault liability based on a lack of care of the organising club will be very similar. Regardless of this grey area between strict liability and liability based on the breach of a standard of care, it is important to remember the distinctive factor between the two: whether or not liability rests on the judgment that the club should have behaved otherwise than it did.[35] More than anything, the ultimate decision whether football clubs should be held strictly liable for damage caused by supporters' misconduct is a policy decision about who (or perhaps whose insurer) should carry the burden of compensating the damages caused by this phenomenon. In order to make such a decision, it is important to consider the full context of the issue of supporters' misconduct, which includes the parallel framework of disciplinary liability based on private regulations. It is hoped that this research provides some guidance to help make this decision.

To round off, a suggestion with regard to the main issues that were not solved. It was concluded in Chapter 6 that compensation for damage outside the stadium caused by supporters' misconduct should primarily be sought via the supporters themselves. Currently, clubs cannot be held liable for compensation of such damage, for example to the historical fountain in Rome that was damaged by Feyenoord supporters on the eve of a Europa League match. However, this is not to say that the football world could not think about other ways to assist with the compensation of such damage. For example, by establishing a compensation fund. Football federations could donate the fines collected after incidences of supporters' misconduct to a fund where victims of this type of damage could apply for compensation if the individuals cannot be found and insurance does not cover the damage.[36]

35 Franz Werro and Vernon Valentine Palmer, *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, p. 7.

36 Similar to the Dutch Violent Offences Compensation Fund, which provides financial support to victims of violent crimes who have sustained serious injury as a result, the fund would not necessarily need to provide full compensation, but rather a financial contribution to cover the damage.

Samenvatting (Dutch summary)

AANSPRAKELIJKHEID VAN VOETBALCLUBS VOOR SUPPORTERSGEWELD
Een onderzoek naar de interactie tussen het tuchtrecht van sportorganisaties en burgerlijk recht

1 INLEIDING

Supportersgeweld is onlosmakelijk verbonden met 's werelds meest populaire sport. Wie draait er voor op? Het aanspreken van individuele supporters voor de door hen veroorzaakte schade is om verschillende redenen problematisch. De aandacht richt zich daarom op voetbalclubs. Er zijn twee vormen van aansprakelijkheid van voetbalclubs voor supportersgeweld – tuchtrechtelijke aansprakelijkheid en civiele aansprakelijkheid. In dit onderzoek zijn de tucht- en civielrechtelijke aansprakelijkheid van clubs onderzocht vanuit een rechtsvergelijkend, transnationaal- en interactief perspectief. Het onderzoek is toegespitst op de interactie tussen het tuchtrecht van nationale en internationale voetbalbonden en het burgerlijk recht ten aanzien van de aansprakelijkheid van voetbalclubs. Meer specifiek is onderzocht of de tuchtrechtelijke norm betekenis heeft voor de civielrechtelijke aansprakelijkheidsnorm.

2 HET TUCHTRECHT IN DE SPORT EN ZIJN VERHOUDING TOT HET CIVIELE RECHT

De hoofdstukken 2 en 3 geven een overzicht van de totstandkoming, toepassing en toetsing van de tuchtrechtelijke regels in de sport.

Hoofdstuk 2 schetst het juridische kader waarin de nationale en internationale sportorganisaties hun activiteiten vormgeven, met speciale aandacht voor regels van tuchtrechtelijke aard. Uit de rechtsvergelijking tussen de verschillende landen blijkt dat dit kader over de grenzen heen grote gelijkenissen vertoont. Veel problemen worden op eenzelfde manier benaderd en beoordeeld.

Een belangrijke rol is weggelegd voor de vereniging. Het is de meest gebruikte organisatievorm van sportorganisaties. Het verenigingsrecht vormt daarmee de basis van de tuchtrechtelijke aansprakelijkheid van voetbalclubs. Dit rechtsgebied wordt in verschillende Europese landen gekenmerkt door

soepele regels op grond waarvan verenigingen vrij zijn de interne organisatie aan te passen aan hun behoeften.[37] De regelgevende bevoegdheid van verenigingen wordt enkel beperkt door dwingende wetsbepalingen, de door de vereniging zelf gecreëerde interne regelgeving en door het specifieke doel waarvoor de vereniging is opgericht.[38]

Het juridisch bindende karakter van de tuchtrechtelijke normen van sportbonden ten aanzien van individuele sporters en clubs is onderwerp van debat. Volgens de meeste auteurs is de aard van de relatie tussen een vereniging en haar leden institutioneel. Anderen verdedigen dat sprake is van een contractuele rechtsverhouding.[39] Per saldo kan de sterk ondergeschikte relatie van de clubs en hun leden ten opzichte van de overkoepelende bond het best worden verklaard vanuit het perspectief van het verenigingsrecht, waarbij de tuchtrechtelijke sanctie als een privaatrechtelijke moet worden gekwalificeerd.[40] Overigens blijkt dat individuele sporters en clubs die geen lid zijn van de overkoepelende bond in de praktijk toch óók gebonden zijn aan de tuchtrechtelijke normen van de bond, hetzij door middel van een indirecte relatie gebaseerd op de lidmaatschapsketen hetzij door middel van een licentieovereenkomst met de bond.[41]

Hoewel de autonomie van een vereniging om zichzelf te organiseren groot is, kan zij bij normoverschrijding niet zomaar een straf opleggen aan individuele sporters of clubs. Voor het rechtsgeldig opleggen van een tuchtrechtelijke straf, moet namelijk aan een aantal eisen worden voldaan.[42] Zo dienen de sancties uitdrukkelijk in de regelgeving te zijn vermeld en in overeenstemming te zijn met de beginselen van gelijke behandeling en het evenredigheid. Bovendien moeten procedurele rechten worden gewaarborgd. Voor dit onderzoek was verder de vraag belangrijk of schuld is vereist voor de rechtsgeldige oplegging van een tuchtrechtelijke straf – of dat ook risicoaansprakelijkheid is toegestaan. Daarover bestaan in jurisprudentie en literatuur uiteenlopende opvattingen. Niettemin kan worden vastgesteld dat het standpunt dat schuld een absoluut vereiste is, moeilijk valt te verenigen met de bevestiging door verschillende nationale rechters van tuchtrechtelijke straffen die zijn opgelegd zonder dat schuld is vereist of is komen vast te staan (de meerderheid van de dopinggevallen).[43]

De tuchtrechtelijke straf kan worden getoetst door een nationale rechter of door arbiters. Deze toetsing staat centraal in *hoofdstuk 3*. Daaruit blijkt hoezeer

37 Hoofdstuk 2.2.
38 Hoofdstuk 2.3.
39 Hoofdstuk 2.4.
40 Hoofdstuk 2.7.
41 Hoofdstuk 2.5.
42 Hoofdstuk 2.8.
43 Hoofdstuk 2.8.

de private regels van de sportbonden en het nationale civiele recht met elkaar zijn verbonden.

De nationale rechter toetst de tuchtrechtelijke straf aan de eigen regels van de vereniging alsmede aan het toepasselijke nationale materiële recht. In alle onderzochte landen is de omvang van de toetsing beperkt. Over het algemeen wordt slechts gecontroleerd of de bond in redelijkheid tot de beslissing tot strafoplegging had kunnen komen en deze niet in strijd is met de wet.[44] Aan sportverenigingen wordt derhalve een grote beoordelingsruimte toegekend.

In de meeste gevallen is in de reglementen van sportbonden voorgeschreven dat tuchtrechtelijke straffen worden getoetst door arbitrage. Omdat arbitrage een vorm is van private geschillenbeslechting, wordt de procedure bijna volledig beheerst door regels van nationaal recht. Dat heeft als gevolg dat nationale concepten van privaatrecht hun toepassing vinden in die arbitrage. Bijvoorbeeld ten aanzien van de beoordeling van de geldigheid van de overeenkomst tot arbitrage en de vraag of tuchtrechtelijke sancties al dan niet vatbaar zijn voor arbitrage. De toepasselijke arbitrageregels schrijven verder ook voor welke procedurele en materiële regels het scheidsgerecht moet toepassen bij de toetsing van de straf.[45] Aangezien de grote meerderheid van de internationale sportbonden in Zwitserland is gevestigd, is in de meeste gevallen Zwitsers recht van toepassing.[46] In die gevallen zal gelden dat zonder andersluidende rechtskeuze, de sanctie die door het CAS is opgelegd, moet worden getoetst aan het Zwitserse materiële recht.

De uitspraak van een scheidsgerecht kan vervolgens worden aangevochten bij een nationale rechter. De mogelijkheid van toetsing is in alle onderzochte rechtsstelsels beperkt. Bovendien kan een arbitrale uitspraak slechts marginaal worden getoetst.[47] Evenwel kunnen nationale rechtsregels de reglementen van sportbonden door deze toetsing beïnvloeden. Als een nationale rechter een arbitrale uitspraak vernietigt, kan het bovendien voor een sportbond noodzakelijk zijn de eigen regels aan te passen. In dit opzicht blijkt het Zwitserse Federale Hooggerechtshof in het bijzonder van belang ten aanzien van de regulering van de internationale sport. Dat is de enige instelling die in een positie verkeert om direct invloed uit te oefenen op het CAS door middel van zijn rechtspraak.[48]

Het feit dat zowel in arbitrage als bij de toetsing door de nationale rechter tuchtrechtelijke sancties marginaal worden getoetst, versterkt de macht van de private regelgeving van sportorganisaties. Desalniettemin blijken er ook voldoende waarborgen te bestaan.

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44 Hoofdstuk 3.2.
45 Hoofdstuk 3.3.1.
46 Hoofdstuk 3.3.1.5.
47 Hoofdstuk 3.3.2.
48 Hoofdstuk 3.3.2.3

3 TUCHTRECHTELIJKE EN CIVIELRECHTELIJKE AANSPRAKELIJKHEID VAN VOETBALCLUBS VOOR SUPPORTERSGEWELD

Het zwaartepunt van dit onderzoek ligt op de analyse en ontwikkeling van de gronden van aansprakelijkheid van voetbalclubs voor schade door supportersgeweld (hoofdstukken 4-6). De vraag die dit deel van het onderzoek poogt te beantwoorden is of voetbalclubs volgens het nationale civiele recht aansprakelijk kunnen worden gesteld voor supportersgeweld en welke rol hierin is weggelegd voor de tuchtrechtelijke regels van voetbalbonden.

Nationale en internationale voetbalbonden hebben specifieke regels tot stand gebracht die clubs rechtstreeks aansprakelijk houden voor het gedrag van hun supporters. Om vast te stellen of deze aansprakelijkheidsregels volstaan voor de afhandeling van schade, wordt in *hoofdstuk 4* de toepassing van deze tuchtrechtelijke aansprakelijkheid in de praktijk behandeld.

De reglementen van internationale en nationale voetbalbonden bevatten twee verschillende vormen van tuchtrechtelijke aansprakelijkheid van clubs.[49] In de eerste plaats is bepaald dat de organiserende club verantwoordelijk is voor de handhaving van orde en veiligheid in het stadion, en dat haar aansprakelijkheid wordt verondersteld wanneer supporters zich hebben misdragen. In de tweede plaats rust op zowel de organiserende club als de bezoekende club een risicoaansprakelijkheid voor bepaalde handelingen van de eigen achterban.

Deze – interne – aansprakelijkheidsregels voor supportersgeweld worden regelmatig door verschillende voetbalbonden toegepast. Het komt zelden voor dat overheidsrechters worden gevraagd om tuchtrechtelijke sancties voor supportersgeweld te toetsen.[50] In de paar Franse en Duitse zaken die in de literatuur worden besproken staat de rechtsgeldigheid van de verschillende (risico)aansprakelijkheidsregels voor supportersgeweld centraal. Uit het jurisprudentieonderzoek blijken beide vormen van tuchtrechtelijke aansprakelijkheid, te weten aansprakelijkheid op grond van veiligheid in en rondom het stadion en risicoaansprakelijkheid voor bepaalde handelingen van de eigen achterban, juridisch aanvaardbaar.[51] Daarbij is niet alleen de vrijheid van verenigingen hun eigen regels te ontwerpen van belang, maar ook het ontbreken van een directe relatie van voetbalbonden met de supporters. Het aanspreken van clubs is voor voetbalbonden praktisch gezien het enige middel om tegen supportersgeweld te ageren. Daarbij verwerpen de meeste rechters en auteurs de gedachte dat aansprakelijkheid zonder schuld niet zou kunnen bestaan, getuige het grote aantal uitzonderingen op dit 'beginsel' in het civiele

49 Hoofdstuk 4.2.
50 Zie Hoofdstuk 3 voor de toetsing van tuchtrechtelijke sancties in het algemeen.
51 Hoofdstuk 4.3.

recht.[52] Belangrijker nog is dat aansprakelijkheid zonder schuld kan worden gerechtvaardigd door het algemeen belang gelegen in de bestrijding van supportersgeweld.

Hoofdstuk 5 schetst een algemeen kader voor de civiele aansprakelijkheid van voetbalclubs voor supportersgeweld. Onderzocht is of voetbalclubs aansprakelijk kunnen worden gehouden voor het gedrag van hun supporters op grond van het contractenrecht en/of het aansprakelijkheidsrecht..

Voor aansprakelijkheid van organiserende, in de regel thuisspelende, clubs is vereist dat de benadeelde bewijst dat de club zijn zorgplicht heeft geschonden, ongeacht of de uiteindelijke grondslag is gelegen in het contractenrecht of de onrechtmatige daad.[53] Over het algemeen worden aan de in het geding zijnde belangen – eigendom en persoonlijke integriteit – hoge waarde toegekend en vereisen die dus een hoge zorgvuldigheidsmaatstaf. Supportersgeweld is een bekende risicofactor bij het organiseren van voetbalwedstrijden, waarbij de voorzienbare schade aanzienlijk kan zijn.

Het verweer van clubs tegen aansprakelijkheid, inhoudende dat absolute veiligheid onmogelijk is te waarborgen of dat zware veiligheidsmaatregelen ongewenst zijn, zal niet overtuigen. De organiserende club is nu eenmaal de enige partij die invloed heeft op de veiligheid in zijn stadion. De club kan bepalen en organiseren dat voorwerpen die kunnen dienen tot zelfverdediging buiten het stadion blijven. Voor de veiligheid in een stadion is men derhalve aangewezen op de organiserende club.

Uit Franse jurisprudentie blijkt dat de civielrechtelijke aansprakelijkheid van voetbalclubs stevig is geworteld in het contractenrecht. Professionele voetbalclubs worden geacht de veiligheid in het stadion te garanderen en zijn dientengevolge bijna automatisch aansprakelijkheid indien schade zich voordoet als gevolg van supportersgeweld.[54] De enige zaak uit Engeland versterkt het idee dat supportersgeweld een bekend risico is, waarop clubs op straffe van aansprakelijkheid adequaat dienen te reageren.[55] In Duitsland blijkt aansprakelijkheid op grond van schending van de zorgvuldigheidsnorm minder eenvoudig. De rechtelijke instanties zijn terughoudend met een zorgvuldigheidsnorm zoals die is geformuleerd in de Franse rechtspraak. In de meeste gevallen werden clubs geacht aan hun zorgplicht te hebben voldaan. Niettemin is er ook in Duitsland reeds een club aansprakelijk gesteld, zodat geen systematische aversie is te ontdekken tegen aansprakelijkheid van voetbalclubs op grond van schending van hun zorgplicht.[56]

52 Hoofdstuk 4.4.
53 Hoofdstuk 5.2.2; 5.3.2.
54 Hoofdstuk 5.3.3.1.
55 Hoofdstuk 5.3.3.2.
56 Hoofdstuk 5.3.3.3.

Uit de onderzochte jurisprudentie is verder af te leiden dat van de clubs ten minste wordt verwacht dat zij voldoen aan de relevante normen die in de reglementen van de internationale en nationale bonden zijn opgenomen.[57] Overigens blijkt uit *Stichting Bestrijding Antisemitisme/ADO Den Haag* dat, hoewel de beoordeling van preventieve maatregelen mede wordt bepaald door de geldende voorschriften van de bond, naleving van deze regels niet betekent dat ook aan de concrete zorgvuldigheidsnorm is voldaan. Naleving van de regels op zich is dan ook niet altijd voldoende om aan aansprakelijkheid te ontsnappen.

De vereiste voorzorgsmaatregelen dienen zeer streng te zijn, gezien de betrokken belangen, het gevaar van de activiteit en de voorzienbaarheid van schade. Zelfs zo streng, dat het in de praktijk vrijwel onmogelijk zal zijn daaraan te voldoen. Vooral in Duitsland hebben de rechters er moeite mee om een zorgplicht toe te passen die hoog genoeg is voor preventie van toekomstige schade, zonder dat die zich praktisch manifesteert als een risicoaansprakelijkheid.[58] De jurisprudentie toont uiteindelijk aan dat organiserende clubs een strenge zorgplicht hebben tegenover hun contractspartners en derden en dat aansprakelijkheid voor schade veroorzaakt door supportersgeweld een zeer reële mogelijkheid is. Deze constatering doet de vraag rijzen of wenselijk is dat de aansprakelijkheid van clubs voor supportersgeweld afhankelijk is van een schending van de concrete zorgvuldigheidsnorm.

Ook de bezoekende club heeft een zorgplicht. Gelet op de veiligheidsrisico's is het niet onredelijk om van een bezoekende club te eisen dat zij maatregelen neemt ter voorkoming van wangedrag van de eigen achterban; bijvoorbeeld door het nemen van surveillancemaatregelen of door het organiseren van verplicht vervoer naar uitwedstrijden. Dit zijn aspecten die een bezoekende club – tot op zekere hoogte – kan controleren. Als echter niet kan worden vastgesteld dat de bezoekende club zijn zorgplicht heeft geschonden, leidt dat tot de ongewenste situatie dat de organiserende club volledig aansprakelijk kan worden gehouden; ook in het geval dat de supporters van de bezoekende club opzettelijk rellen met als doel de organiserende club te beschadigen.[59]

Verder blijkt uit dit onderzoek dat aansprakelijkheid van clubs op grond van een schending van hun zorgplicht niet kan worden vastgesteld voor schade veroorzaakt buiten het stadion, tenzij de club nalatig is geweest bij informatieverstrekking aan de politie.[60]

Ook ten aanzien van racistische uitlatingen van supporters blijkt aansprakelijkheid van clubs op grond van hun zorgplicht moeilijk vast te stellen. Meer nog dan bij andere vormen van supportersgeweld zijn racistische uitlatingen vrijwel onmogelijk te voorkomen. Het is dan ook onwaarschijnlijk dat aanspra-

57 Dit werd behandeld in Hoofdstuk 6.2.4.
58 Hoofdstuk 5.3.4.
59 Hoofdstuk 5.4.1.
60 Hoofdstuk 5.4.2.

kelijkheid met succes zal worden vastgesteld, tenzij de club volledig passief is gebleven of haar eigen interne regels heeft geschonden.[61]

Uit het jurisprudentieonderzoek blijkt dat veel ruimte bestaat voor een feitelijke interpretatie van de omvang van de zorgplicht. Deze ruimte leidt tot rechtsonzekerheid voor alle betrokken partijen, temeer omdat de bewijslast voor vaststelling van schending van deze (onduidelijke) norm op de benadeelde van supportersgeweld ligt. Nu de zorgvuldigheidsnorm tot extreme hoogte moet stijgen om supportersgeweld te kunnen voorkomen, wordt daarmee de schuldaansprakelijkheid ver opgerekt. Bovendien kan een club niet altijd worden aangesproken op grond van schending van zijn zorgplicht, terwijl de ernst en omvang van de schade het onwenselijk maken dat de club vrijuit gaat. Tegen deze achtergrond is *hoofdstuk 6* gewijd aan de toepassing van risicoaansprakelijkheid – de tuchtrechtelijke aansprakelijkheidsnorm – in het civiele recht.

Rechters uit de verschillende rechtsstelsels blijken bereid interne, private, regelgeving toe te passen, hetzij als hulpmiddel bij het vaststellen van de concrete zorgplicht, hetzij rechtstreeks door daarmee de tekortkoming of onrechtmatige daad vast te stellen.[62] In lijn daarmee is het zeer waarschijnlijk dat Europese rechtbanken ertoe zullen worden bewogen schending van de zorgplicht vast te stellen indien sprake is van schending van de regels van voetbalorganisaties. Gezien de meer progressieve benadering in de Nederlandse rechtspraak is in het bijzonder niet ondenkbaar dat de private normen directe toepassing zullen vinden bij de Nederlandse rechter.

De tuchtrechtelijke risicoaansprakelijkheidsregel is het enige bestaande rechtsinstrument dat voorziet in het vraagstuk van aansprakelijkheid van clubs voor supportersgeweld. Daar private regelgeving aan invloed wint, is van belang de toepasselijkheid van de tuchtrechtelijke risicoaansprakelijkheid in het civiele recht nader te onderzoeken. Diverse argumenten ondersteunen de toepassing van deze tuchtrechtelijke regel in het civiele aansprakelijkheidsrecht.[63]

De vergelijking tussen de risicoaansprakelijkheidsregel voor supportersgeweld en bestaande normen voor risicoaansprakelijkheid voor derden lijkt op het eerste gezicht problematisch.[64] Een risicoaansprakelijkheid van de organiserende club voor supportersgeweld in de vorm van een 'algemene risicoaansprakelijkheid' (*strict liability for risk*) lijkt echter aanvaardbaar.[65] De ratio van een algemene risicoaansprakelijkheid is dat degene die profiteert van een gevaarlijke activiteit ook de daarmee samenhangende verliezen dient

61 Hoofdstuk 5.4.3.
62 Hoofdstuk 6.2.
63 Hoofdstuk 6.3.
64 Hoofdstuk 6.4.2.
65 Hoofdstuk 6.4.3.

te dragen.[66] Voetbalclubs die deelnemen aan competitie- en andere officiële wedstrijden profiteren van deze activiteit – zowel financieel als anderszins – en vallen dus onder de ratio legis van de algemene risicoaansprakelijkheid. Bovendien kan supportersgeweld worden gekwalificeerd als gevaarlijk; in die zin dat het inherent is aan de activiteit en dat het van een zodanige intensiteit is dat zelfs zeer strenge voorzorgsmaatregelen het gevaar niet kunnen elimineren.

Uit de toetsing van de tuchtrechtelijke regel aan de Principles of European Tort Law (PETL) blijkt dat risicoaansprakelijkheid voor supportersgeweld een acceptabele toevoeging aan het huidige juridische kader zou vormen.[67] Het hangt echter af van het rechtssysteem of een wetgevende inspanning nodig is om een dergelijke regel te introduceren. Het is niet ondenkbaar dat het debat over civielrechtelijke risicoaansprakelijkheid voor supportersgeweld eerst zal aanvangen nadat een onbevredigende rechterlijke uitspraak is gedaan.

Ook de situaties van supportersgeweld waarin aansprakelijkheid op grond van een schending van de zorgplicht problematisch is, zijn getoetst aan de PETL. Risicoaansprakelijkheid van bezoekende clubs voor schade veroorzaakt door hun eigen aanhang binnen het stadium zou een passende oplossing zijn voor dit probleem, omdat daarmee aan alle PETL-vereisten wordt voldaan.[68] Dat is anders voor schade veroorzaakt door supporters buiten het stadion. Risicoaansprakelijkheid van de club is dienaangaande niet haalbaar in het licht van het huidige wettelijk kader.[69] Ook voor racistische uitlatingen is risicoaansprakelijkheid van de club geen oplossing. De meeste rechtssystemen dulden risicoaansprakelijkheid slechts in de vorm van specifieke regels en vaak ook alleen voor personen- en zaakschade.[70]

Gezien de voordelen van risicoaansprakelijkheid – vooral in de vorm van rechtszekerheid – zou het wenselijk zijn als risicoaansprakelijkheid van de organiserende club voor supportersgeweld binnen het stadion als civielrechtelijk concept zou worden aanvaard. Met betrekking tot schade veroorzaakt door de supporters van de bezoekende ploeg, zou een risicoaansprakelijkheid vergelijkbaar met de in het tuchtrecht ontwikkelde regel een nuttige aanvulling op het systeem kunnen bieden. De toepassing van een dergelijke regel neemt de onredelijke ongelijkheid tussen organiserende en bezoekende clubs weg. Voorgesteld wordt dan ook om civiele aansprakelijkheid van clubs in te richten naar het tuchtrechtelijke model. Dat zou in het kort inhouden dat de organiserende club aansprakelijk is voor handelingen van haar eigen supporters op grond van risicoaansprakelijkheid, alsmede uit contract en/of onrechtmatige daad voor schade die het gevolg is van onvoldoende veiligheidsmaatregelen.

66 PETL Text and Commentary 2005, Introduction to Chapter 5.
67 Hoofdstuk 6.4.3.
68 Hoofdstuk 6.5.1.
69 Hoofdstuk 6.5.2.
70 Hoofdstuk 6.5.3.

De bezoekende club is aansprakelijk voor (bepaalde) handelingen van haar eigen supporters op grond van risicoaansprakelijkheid. Worden deze handelingen mogelijk gemaakt door een gebrekkige organisatie, dan zijn beide clubs hoofdelijk aansprakelijk.

De uiteindelijke beslissing of voetbalclubs risicoaansprakelijk zouden moeten worden gehouden voor schade veroorzaakt door supportersgeweld is er één van politieke aard. Namelijk, wie (of: wiens verzekeraar) is het meest aangewezen om de schade veroorzaakt door supportersgeweld te vergoeden? Bij het nemen van een dergelijke beslissing is het van belang het fenomeen supportersgeweld in volle omvang – en dus met oog voor de tuchtrechtelijke aansprakelijkheid – te beschouwen.

Annex to Chapter 4

England
FA – Rules of the Association 2013-2014 (2015-2016)[1]

20 *Each Affiliated Association, Competition and Club shall be responsible for ensuring:*
(a) that its directors, players, officials, employees, servants, representatives, *spectators, and all persons purporting to be its supporters or followers, conduct themselves in an orderly fashion and refrain from any one or combination of the following: improper, violent, threatening, abusive, indecent, insulting or provocative words or behaviour (including, without limitation, where any such conduct, words or behaviour includes a reference, whether express or implied, to any one or more of ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability) whilst attending at or taking part in a Match in which it is involved, whether on its own ground or elsewhere*; and
(b) that no spectators or unauthorised persons are permitted to encroach onto the pitch area, save for reasons of crowd safety, or to throw missiles, bottles or other potentially harmful or dangerous objects at or on to the pitch.

21 Any Affiliated Association, Competition or Club which fails effectively to discharge its said responsibility in any respect whatsoever shall be guilty of Misconduct. *It shall be a defence in respect of charges against a Club for Misconduct by spectators and all persons purporting to be supporters or followers of the Club, if it can show that all events, incidents or occurrences complained of were the result of circumstances over which it had no control, or for reasons of crowd safety, and that its responsible officers or agents had used all due diligence to ensure that its said responsibility was discharged.*
This defence shall not apply where the Misconduct by spectators or any other person purporting to be a supporter or follower of the Club included a reference, whether express or implied, to any one or more of ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability.

1 <http://www.thefa.com/football-rules-governance/more/rules-of-the-association> (accessed: 29 September 2015).

France
Règlements Generaux FFF (Saison 2015-2016)[2]

Article – 129

1. *Les clubs qui reçoivent sont chargés de la police du terrain et sont responsables des désordres qui pourraient résulter avant, pendant ou après le match du fait de l'attitude du public, des joueurs et des dirigeants ou de l'insuffisance de l'organisation. Néanmoins, les clubs visiteurs ou jouant sur terrain neutre sont responsables lorsque les désordres sont le fait de leurs joueurs, dirigeants ou supporters.*
2. L'accès au stade de toute personne en possession d'objets susceptibles de servir de projectiles doit être interdit, comme est formellement proscrite l'utilisation de pointeurs laser et d'articles pyrotechniques tels que pétards, fusées, ou feux de Bengale, dont l'allumage, la projection ou l'éclatement peuvent être générateurs d'accidents graves. Il appartient aux organisateurs responsables de donner toute publicité à l'intention du public pour que cette dernière prescription soit portée à sa connaissance.
3. Les ventes à emporter, à l'intérieur du stade, de boissons ou autres produits sont autorisées seulement sous emballage carton ou plastique. Les ventes en bouteilles ou boîtes métalliques sont interdites.
4. Dans tous les cas cités ci-dessus, les clubs sont passibles d'une ou plusieurs des sanctions prévues au Titre 4.

Netherlands
Reglement Wedstrijden Betaald Voetbal 2015-16[3]

Artikel 40 – Orde en veiligheid

1. Het bestuur betaald voetbal kan in het belang van de orde en de veiligheid van spelers, functionarissen en publiek aan iedere betaaldvoetbalorganisatie algemeen geldende voorschriften en bijzondere aanwijzingen geven met betrekking tot de handhaving van de orde en de veiligheid bij wedstrijden of toernooien waarop de reglementen van de KNVB van toepassing zijn.
2. Onverminderd het hiervoor in lid 1 bepaalde is elke betaaldvoetbalorganisatie zowel voor, tijdens als na de wedstrijd, ongeacht of sprake is van het spelen van een uit- of thuiswedstrijd of van een wedstrijd op een neutraal speelveld, verplicht tot het leveren van haar bijdrage aan:
   a. het handhaven van de orde zoals onder meer aangegeven in de hiervoor in lid 1 genoemde voorschriften en (bijzondere) aanwijzingen;
   b. de persoonlijke veiligheid van de spelers en functionarissen.

2 <http://www.fff.fr/la-fff/tous-les-statuts-et-reglements/statuts> (accessed: 29 September 2015).

3 <http://downloadcentrum.knvb.nl/sportlink/knvb/document/reglementenbundel%20bv.pdf?id=401> (accessed: 29 September 2015).

Artikel 41 – Schadevergoeding
Een betaaldvoetbalorganisatie is verplicht de schade te vergoeden die het gevolg is van wanordelijkheden, genoemd in artikel 20 lid 2 onder a Reglement Tuchtrechtspraak Betaald Voetbal, indien deze wanordelijkheden veroorzaakt zijn door (een gedeelte van) haar aanhang.

Reglement tuchtrechtspraak betaald voetbal 2015-2016[4]

Artikel 19
1. Met inachtneming van de bepalingen in artikel 27 en 29 van dit reglement zal in het algemeen strafbaar zijn een zodanig handelen of nalaten, dat:
   a. in strijd is met de Statuten, reglementen, spelregels en/of (bestuurs)besluiten van de KNVB, de UEFA of de FIFA;
   b. de belangen van de sectie betaald voetbal of de voetbalsport in het algemeen schaadt.
2. *Voor het strafbaar zijn van overtredingen is opzet, schuld, nalatigheid of onzorgvuldigheid vereist.*

Artikel 20
1. De tuchtrechtelijke organen kunnen de in artikel 22 van dit reglement genoemde straffen opleggen aan betaaldvoetbalorganisaties indien de desbetreffende betaaldvoetbalorganisatie:
   a. niet voldoet aan de verplichtingen uit hoofde van de reglementen van de KNVB en/of (bestuurs) besluiten betreffende de orde en veiligheid als genoemd in artikel 40 van het Reglement Wedstrijden Betaald Voetbal;
   b. (mede) verantwoordelijk wordt gehouden voor de hierna in lid 2 te noemen wanordelijkheden;
   c. verantwoordelijk wordt gehouden voor een overtreding, die is begaan door haar leden, spelers of functionarissen.
2. a. *Een bij een wedstrijd betrokken betaaldvoetbalorganisatie is verantwoordelijk voor wanordelijkheden veroorzaakt door de aanhang van de desbetreffende betaaldvoetbalorganisatie tenzij de desbetreffende betaaldvoetbalorganisatie aannemelijk maakt dat zij voor, tijdens en na de wedstrijd voldoende maatregelen heeft getroffen van dusdanig verstrekkende en stringente aard, dat de kans dat haar aanhang zich misdraagt te verwaarlozen is.*
   b. Een uitspelende betaaldvoetbalorganisatie wordt niet bestraft voor wanordelijkheden door (een deel van) haar aanhang indien de betaaldvoetbalorganisatie aantoont dat (het desbetreffende deel van) haar aanhang die de wanordelijkheden heeft veroorzaakt:
      - niet beschikte over door de betaaldvoetbalorganisatie verstrekte geldige toegangskaarten en

4 <http://downloadcentrum.knvb.nl/sportlink/knvb/document/reglementenbundel%20bv.pdf?id=401> (accessed: 29 September 2015).

- de betaaldvoetbalorganisatie zoveel mogelijk heeft bevorderd dat haar aanhang niet zonder door de betaaldvoetbalorganisatie verstrekte geldige toegangskaart zou afreizen.

c. Indien een wedstrijd van overheidswege wordt verboden, is de thuisspelende betaaldvoetbalorganisatie – of de uitspelende betaaldvoetbalorganisatie indien de oorzaak van het verbod bij haar ligt – daarvoor verantwoordelijk, tenzij de desbetreffende betaaldvoetbalorganisatie aantoont dat zij in redelijkheid alle maatregelen heeft getroffen van dusdanig verstrekkende en stringente aard dat het verbod had kunnen worden voorkomen.

Germany
Rechts- und Verfahrensordnung (RuVO)[5]

§ 9
Diskriminierung und ähnliche Tatbestände

1. Eines unsportlichen Verhaltens gemäß §1 Nr. 4. macht sich insbesondere schuldig, wer sich politisch, extremistisch, obszön anstößig oder provokativ beleidigend verhält.
2. Wer die Menschenwürde einer Person oder einer Gruppe von Personen durch herabwürdigende, diskriminierende oder verunglimpfende Äußerungen oder Handlungen in Bezug auf Rasse, Hautfarbe, Sprache, Religion oder Herkunft verletzt, wird für mindestens fünf Wochen gesperrt. Zusätzlich werden ein Verbot, sich im gesamten Stadionbereich aufzuhalten und eine Geldstrafe von eur 12.000,00 bis zu eur 100.000,00 verhängt. Bei einem Offiziellen, der sich dieses Vergehens schuldig macht, beträgt die Mindestgeldstrafe eur 18.000,00.
   Verstoßen mehrere Personen (Trainer, Offizielle und/oder Spieler) desselben Vereins/Kapitalgesellschaft gleichzeitig gegen Absatz 1 oder liegen anderweitige gravierende Umstände vor, können der betreffenden Mannschaft bei einem ersten Vergehen drei Punkte und bei einem zweiten Vergehen sechs Punkte abgezogen werden; bei einem weiteren Vergehen kann eine Versetzung in eine tiefere Spielklasse erfolgen. In Spielen ohne Punktevergabe kann ein Ausschluss aus dem Wettbewerb ausgesprochen werden.
3. *Wenn Anhänger einer Mannschaft bei einem Spiel gegen Nr. 2, Absatz 1 verstoßen, wird der betreffende Verein/Kapitalgesellschaft mit einer Geldstrafe von eur 18.000,00 bis zu eur 150.000,00 belegt.*
   In schwerwiegenden Fällen können zusätzliche Sanktionen, insbesondere die Austragung eines Spiels unter Ausschluss der Öffentlichkeit, die Aberkennung von Punkten oder der Ausschluss aus dem Wettbewerb ausgesprochen werden.
4. Eine Strafe aufgrund dieser Bestimmung *kann gemildert werden oder von einer Bestrafung kann abgesehen werden, wenn der Betroffene nachweist, dass ihn für den betreffenden Vorfall kein oder nur ein geringes Verschulden trifft oder sofern anderweitige wichtige Gründe dies rechtfertigen.* Eine Strafmilderung oder der Verzicht

5 <http://www.dfb.de/verbandsservice/verbandsrecht/satzungen-und-ordnungen/> (accessed: 29 September 2015).

auf eine Bestrafung ist insbesondere dann möglich, wenn Vorfälle provoziert worden sind, um gegenüber dem Betroffenen eine Bestrafung gemäß dieser Bestimmung zu erwirken.

§ 9a
Verantwortung der Vereine

1. Vereine und Tochtergesellschaften sind für das Verhalten ihrer Spieler, Offiziellen, Mitarbeiter, Erfüllungsgehilfen, Mitglieder, Anhänger, Zuschauer und weiterer Personen, die im Auftrag des Vereins eine Funktion während des Spiels ausüben, verantwortlich.
2. *Der gastgebende Verein und der Gastverein bzw. ihre Tochtergesellschaften haften im Stadionbereich vor, während und nach dem Spiel für Zwischenfälle jeglicher Art.*

Switzerland
Règlement disciplinaire ASF 2015[6]

Article 9 Responsabilité

1 Les clubs sont disciplinairement responsables du comportement de leurs membres, joueurs, officiels et supporters.
2 Les spectateurs se trouvant dans le secteur visiteur d'un stade sont considérés, sous réserve de la preuve du contraire, comme des supporters du club visiteur. Les autres spectateurs sont considérés, sous réserve de la preuve du contraire, comme des supporters du club recevant.
3 *Les clubs recevants ou les organisateurs répondent de l'ordre et de la sécurité dans l'enceinte du stade et dans ses abords immédiats avant, pendant et après le match.* Ils répondent de tout incident, sont passibles de mesures disciplinaires et peuvent être contraints à suivre des instructions *à moins qu'ils ne puissent prouver que les mesures organisationnelles concrètement mises en œuvre correspondaient aux dispositions applicables en la matière et que, compte tenu des circonstances concrètes, elles étaient suffisantes sur les plans tant qualitatif que quantitatif. Les dispositions statutaires et réglementaires sur la responsabilité causale demeurent réservées.*

Article 6 Culpabilité

Sauf disposition contraire du présent Règlement disciplinaire, *les infractions disciplinaires sont punissables qu'elles aient été commises intentionnellement ou par négligence*.

Article 15 Discrimination et infractions similaires

1 Celui qui porte atteinte à la dignité d'une personne ou d'un groupe de personnes, par quelque moyen que ce soit, en raison de sa couleur, de sa race, de sa religion ou de son origine ethnique, sera puni disciplinairement.

6 <http://www.football.ch/fr/Portaldata/1/Resources/dokumente/RPO_2015_F.pdf> (Accessed: 29 September 2015).

2 Un club dont les supporters commettent une infraction décrite à l'alinéa 1 de la présente disposition sera puni disciplinairement quand bien même aucun comportement ou omission fautifs ne peut lui être imputé.
3 La propagande idéologique extrémiste sous toutes ses formes est interdite avant, pendant et après le match. En cas d'infraction, les alinéas 1 et 2 s'appliquent par analogie.

Article 20 Infractions disciplinaires des clubs
1 Les mesures disciplinaires prévues statutairement peuvent par ailleurs être infligées aux clubs en cas de:
a) violation de l'article 13 du Règlement disciplinaire par l'équipe, des membres, des joueurs ou des officiels;
b) conduite incorrecte de l'équipe, par exemple si l'arbitre a prononcé des sanctions disciplinaires à l'encontre d'au moins cinq (5) de ses joueurs lors d'un même match. Pour les compétitions de futsal, le nombre minimal de joueurs sanctionnés constitutif de l'infraction est de trois (3).
2 Les mêmes *mesures disciplinaires peuvent être infligées aux clubs en cas de conduite incorrecte de leurs supporters sans qu'un comportement fautif ou un manquement ne soit imputable auxdits clubs*, notamment en cas:
a) d'actes de violence contre les personnes ou les choses;
b) d'utilisation d'engins pyrotechniques;
c) de jet d'objets sur le terrain de jeu ou en direction des spectateurs;
d) de diffusion de messages en tous genres étrangers au sport, notamment au contenu politique, offensant ou provoquant, que ce soit par des gestes, des images, des mots ou d'autres moyens;
e) d'envahissement du terrain;
f) de toute autre atteinte à l'ordre et à la discipline qui peut être observée dans l'enceinte du stade et dans ses abords immédiats.

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Curriculum vitae

Rosmarijn van Kleef was born in 1987 in Alphen aan den Rijn, the Netherlands. After finishing her pre-university education at the Scala College in Alphen aan den Rijn in 2005, she studied law in Rotterdam, Leiden and Neuchâtel. Until 2007, Rosmarijn combined her studies with competing internationally in alpine skiing. In 2009 she finished her Masters in Jurisprudence and Philosophy of Law (with distinction) in Leiden. Additionally, she completed the Talent Programme of the Graduate School of Legal Studies. In 2011 Rosmarijn obtained her LL.M. degree in Sports Law from the University of Neuchâtel in Switzerland. From November 2011 until February 2013, she worked as a researcher and lecturer at the Insitute for Private Law of the Leiden Law School, where she started her PhD research under the supervision of Professor A.G. Castermans and Professor A. Rigozzi (University of Neuchâtel). During this time, she also was part of the members' council of Rabobank Gouwestreek. In March 2013, Rosmarijn took a position at TSE Consulting, the international consulting firm specialised in sports based in Lausanne, Switzerland.

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