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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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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, unmistakably imposing an obligation of result:

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.

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 parts²⁵ 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.

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 *Règlements 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 peines*.

“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

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 supporters’, 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 adjustment³⁵ 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, supporters et spectateurs à l’occasion des rencontres sportives.”³⁷

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 supporters. 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*", "*préserver l'ordre public*", "*assurer le bon déroulement ainsi que la sécurité des compétitions 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,

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 andererseits 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 Zuschauererschreitungen 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 Bahnert, ‘Die Rechtmässigkeit von Verbandsstrafen gegenüber Fussballvereinen bei Zuschauererschreitungen’, *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 Zuschauererschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, p. 32. See also J. Raker, ‘Die Haftung der Clubs für Zuschauererschreitungen 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 Zuschauererschreitungen 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 jurisdictions⁷⁰

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 Zuschauererschreitungen 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 1/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, p. 686.

67 Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauererschreitungen 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 Zuschauerschreitungen*, 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.

71 Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauererschreitungen 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 Zuschauererschreitungen 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 Röhrich, cited in Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauererschreitungen 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, *Zuschauererschreitungen 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.

