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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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RECAP

7 | Synthesis and conclusion

7.1 INTRODUCTION

Supporters' misconduct is an unfortunate phenomenon connected to the most popular sport in the world. 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 issues 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 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.

