

Chapter 10

Hooliganism

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10.1 CAS 2002/A/423 PSV Eindhoven v. UEFA

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This CAS Award concerns a very important matter for clubs: strict liability. On 25 September 2002 PSV Eindhoven and Arsenal FC played in the UEFA Champions League. Racist incidents occurred during the match, with Thierry Henry becoming a particular victim subjected to spectator ‘monkey noises’ accompanied by plastic lighters being thrown. The UEFA Control and Disciplinary Body imposed a CHF 30,000 fine on PSV Eindhoven, later increased to CHF 50,000 by the UEFA Appeals Body. The club was also warned of severe sanctions should there be a repeat offence. The CAS did not state any failure on the part of the club, but it did consider the strict liability regime of Article 6 para 1 of the Disciplinary Regulations to be valid. The fine was ultimately reduced to CHF 30,000. The author analyses this award, especially from the perspective of the validity of the principle of strict liability and its application under Swiss law.

10.1.1 *The Appealed Decision*

The CAS case *PSV Eindhoven v. UEFA* deals with a very important issue in sports law: strict liability. In that case, the UEFA Control and Disciplinary Body had inflicted a fine (amounting to CHF 30,000) to PSV Eindhoven because of racist incidents which had occurred during the match Eindhoven–Arsenal on September 25, 2002 (in particular, a group of supporters were screaming like monkeys in Thierry Henry’s direction). On appeal by the UEFA Disciplinary Inspector, the UEFA Appeals Body increased the fine to CHF 50’000 and issued a clear warning that a severe sanction would be applied to the club in case of repeated offence.

This decision was based on Article 6 of the UEFA Disciplinary Regulations (ed. 2002), which reads as follows:

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.

The host association or club is responsible for order and security both inside and around the stadium, before, during and after the match. It is liable for incidents of any kind, and can be rendered subject to disciplinary measures and bound to observe directives.

The UEFA Appeals Body considered that this provision could be applied even if the club had committed no fault (strict liability). However, it held that the club was at fault as it had not done its best to prevent this kind of incidents. Therefore, it inflicted a fine of CHF 50,000 to the club because of the racist incidents which had occurred. In addition, it took into account the fact that the club had already been fined for similar incidents in a recent past. PSV appealed to CAS against this decision and challenged the validity of a strict liability regime.

10.1.2 CAS Decision

In short, CAS considered that the club was not at fault, but agreed that Article 6 para 1 of the Disciplinary Regulations provided for a regime of strict liability, and affirmed its validity.

The CAS Panel however decided that Article 6 para 2 had not been infringed by the club: it held that the club had done its best to secure order and prevent incidents in the stadium. In contrast with para 1, Article 6 para 2 does not institute a regime of strict liability. The Panel therefore considered that the fine had to be reduced to CHF 30,000 (taking into account the fact that this was a repeat offence). It also held that a warning was superfluous.

10.1.3 Validity of a Regime of Strict Liability Under Swiss Law on Associations

10.1.3.1 The Autonomy of Association and its Limits Set Forth by Article 28 CC

UEFA, like FIFA, is an association formed under the laws of Switzerland.

Swiss law on associations is highly flexible (and this is certainly one of the reasons which explain why so many sports federations are associations organised under Swiss law). In particular, it is admitted that associations are free to define their organisation within the limits of the few mandatory rules set forth by law. This freedom is recognised as a basic principle which is called the “autonomy of association”. In furtherance of this autonomy, the statutes will define the rights and obligations of the members. They will also define the sanctions which may apply.

In a normal situation, nobody may be forced to adhere to an association, and if someone becomes a member, this is by choice. Those who freely choose to adhere to an association will therefore accept the statutory rules—and those who do not want to accept these rules are normally free to refuse membership. At least, this is how the situation was perceived by the lawmaker when it enacted the law on associations at the beginning of the 20th century.

Against this background, sanctions may be inflicted even without fault if this is clear from the statutes (or if this is provided by a regulation which has been validly enacted on the basis of the statutes). Under Swiss law on associations, this is largely admitted.¹

Further, any association is free in principle to accept or refuse new members. In addition, it may exclude any member even without grounds (Article 72 of the

¹ See Riemer 1990, Art. 70 N 210; Büttler 1986, p. 96 s); Corbat 1974, p. 89 f; Keller 1979, p. 36 f.

Civil Code). Some authors in the Swiss legal literature therefore contend that if the association has such a power to exclude any member, it may inflict other sanctions which are less stringent (a *majore minus*).² In the present case, CAS expressly referred to this opinion: “Article 72 para 1 of the CC allows associations to expel their members without giving their reasons for doing so. It would therefore seem paradoxical if an association were able, through its statutes, to expel its members without having to show that they had committed some kind of violation, whilst only being allowed to sanction its members if it could prove that they had breached their obligations”.³

However, the right to exclude any member has been restricted by the Federal Supreme Court for professional or economic associations which “appear in the public and vis-à-vis authorities and clients of their members as being the relevant organisation for the profession or for that economic sector”: these associations “cannot claim the full benefit of the autonomy to exclude members”. In particular, the right to develop an economic activity is protected by Article 28 of the Civil Code (which provides for general rules on the protection of personality); therefore, the Federal Supreme Court decided that members of such associations may be excluded only in the presence of justified grounds.⁴

Therefore, it is quite certain that sports federation cannot enjoy the same degree of autonomy as any “standard” association. To a certain extent at least, their situation is similar to that of a professional or economic association. Thus, it is not possible to apply the same rules as for “standard” associations, in particular as to the right to expel members or to inflict sanctions. As shown by case-law concerning professional or economic associations, limits are set forth by Article 28 of the Civil Code (CC).

Article 28 CC protects “personality” in very broad terms. This protection extends to “all essential values which are inherent to personality”. In the field of high-level sports, it has been decided that this protection includes a right to sports activity and, for professional sports, a right to develop an economic activity.⁵ Further, Article 28 CC also protects reputation, professional and social esteem. Thus, pecuniary sanctions imposed to professional players or clubs may infringe the right to develop an economic activity. More generally, disciplinary sanctions—at least if they are imposed for violation of ethical standards—may damage reputation.⁶

² See Scherrer 1985, p. 15.

³ CAS decision, at para 17.

⁴ Federal Supreme Court decisions ATF 123 III 193 and 131 III 97 (translation by the author). The right to exclude any member may also be restricted by the possible application of competition law.

⁵ Federal Supreme Court decision ATF 134 III 193.

⁶ Same decision.

Article 28 para 2 CC provides that any breach of the rules protecting personality “is unlawful unless it is justified by law, by the consent of the victim, or by an overriding public or private interest”.⁷

In the case of an association as envisioned by the lawmaker (e.g. a philatelists’ club), sanctions might be justified by the consent of the member who has accepted these sanctions when adhering to the association.⁸ Even in this case however, if a sanction was to damage reputation or to cause any other breach of the rules protecting personality, Article 28 CC may apply and—in the absence of any justification provided by law—the association which inflicts such a sanction would have to demonstrate the existence of an overriding interest.⁹ This will *a fortiori* apply in the field of disciplinary sanctions pronounced by sports federations.

As regards anti-doping regulations, it has been held by the Federal Supreme Court that a regime of strict liability—at least as regards disqualification if a prohibited substance has been found—is justified by an overriding interest: otherwise, rules against doping would lose their efficiency; the need for efficient rules against doping has thus been viewed as an overriding interest in the meaning of Article 28 para 2 CC.¹⁰

The validity of regulations enacted by sports federations against racism has not been dealt with by Swiss courts. However, it must be assumed that the fight against racism justifies a regime of strict liability. This has been stressed by CAS in the present case:

If clubs were able to extricate themselves from any responsibility by claiming that they had taken all measures they could reasonably be expected to take to prevent any breach of the UEFA rules, and if supporters still managed to commit such an act, there would be no way of penalising that behaviour, even though it constituted a fault in itself. UEFA’s rules of conduct would therefore be nothing more than vague obligations, since they would be devoid of any sanction. By penalising a club for the behaviour of its supporters, it is in fact the latter who are targeted and who, as supporters, will be liable to pay the penalty imposed on their club. This is the only way in which UEFA has any chance of achieving its objectives. Without such an indirect sanction, UEFA would be literally powerless to deal with supporters’ misconduct if a club refused to take responsibility for such behaviour.

Therefore, a regime of strict liability is valid under Swiss law on associations insofar as it is necessary to protect overriding interests—because less stringent sanctions would be regarded as inefficient. However, such a regime should not be admitted in any case: if the imposition of disciplinary sanctions without fault infringes the rights which protect personality (Article 28 CC), it will be necessary

⁷ Translation by the author.

⁸ Riemer 1990, Art. 70 N 217.

⁹ See Riemer 1990, *ibid.*: if excessive, damage to reputation will be unlawful, notwithstanding consent of the aggrieved party.

¹⁰ Federal Supreme Court decision ATF 134 III 193.

to demonstrate the existence of an overriding (public or private¹¹) interest which justifies such a regime.

Further, pecuniary sanctions will be subject to judicial review: if excessive, a penalty may be reduced by the judge. This is expressly provided by Article 163 para 3 of the Code of obligations (CO). Although this provision relates to penalties stipulated in a contract (while sanctions imposed by an association are not of a contractual nature: they rely on the competence which is attributed by the statutes to the organs of the association¹²), it is admitted that it applies by analogy to those imposed by an association. Therefore, even if a pecuniary sanction is in itself justified, it is still possible to claim application of this provision, which cannot be waived in advance by the debtor. On the basis of this provision, the judge will reduce penalties which are obviously disproportionate and thus incompatible with the rules of law and equity¹³; this assessment has to be made in the case at hand.

10.1.3.2 The Grounds Invoked by the Appellant

The appellant raised three objections against the regime of strict liability instituted by Article 6 para 1 of the UEFA Disciplinary Regulations:

- Immorality in the sense of Article 20 CO
- Breach of Article 163 para 2 CO
- Abuse of a dominant position (competition law).

Immorality?

The appellant first argued that a regime of strict liability would be immoral in the sense of Article 20 CO. This provision stipulates that a contract is void if its subject-matter is impossible, illicit or contrary to morality.

However, sanctions imposed by an association are not of a contractual nature: they rely on the competence which is attributed by the statutes to the organs of the association.¹⁴ It was therefore dubious whether this provision could be invoked in this case.

Further, a contract will be “immoral” if it runs against ethical principles and values which are inherent to the Swiss legal system.¹⁵ As seen above, it is widely admitted under Swiss law on associations that statutes may provide for sanctions even in the absence of any fault. The limits which are set forth to this power laid

¹¹ See Article 28 para 2 CC quoted above (footnote 7).

¹² Heini/Scherrer 2006, Art. 70 N 20; Riemer, Art. 70 N 236. However, non-members may accept the rules of a competition by contract; in this case, law on contracts would apply.

¹³ Federal Supreme Court decision ATF 133 III 201 with further references.

¹⁴ Cf. footnote 12.

¹⁵ Federal Supreme Court decision ATF 132 III 458.

down by Article 28 CC. Against this background, the argument based on “immorality” could not succeed and thus has been rejected by CAS.

The appellant also argued that Article 6 para 1 of the UEFA Disciplinary Regulations should be declared immoral and void because it would violate foreign law; in this respect, the appellant invoked a provision of Dutch law concerning the principle of equal treatment. The CAS Panel rightly dismissed this argument: the UEFA regulations are governed by Swiss law, and the relevance of this provision of Dutch law—to the extent that it could have had any influence in this case—was unsubstantiated.¹⁶

Breach of article 163 para 2 CO?

The appellant also invoked Article 163 para 2 CO, which provides that—except if otherwise agreed—a contractual penalty may not be claimed if performance of the violated obligation was rendered impossible by circumstances for which the debtor was not responsible.

Again, sanctions imposed by an association are not of a contractual nature. For this reason, Article 163 CO should not apply here. However, it has been considered that it could apply by analogy to pecuniary sanctions pronounced by an association.¹⁷ In the present case, the CAS Panel followed this view.¹⁸ Nevertheless, Article 163 para 2 CO allows for the possibility to agree that the penalty may be due even if non-performance has become impossible by circumstances for which the debtor was not responsible. Therefore, this provision does not prohibit a regime of strict liability and CAS rejected the appellant’s arguments based on Article 163 para 2 CO.

Abuse of a dominant position?

The appellant also argued that UEFA would abuse its position by inflicting sanctions without fault. However, in the absence of any indications as to the relevant market as well as to the existence of any abuse of a dominant position, in particular, this argument has been rejected by CAS as being unsubstantiated.¹⁹

Competition law requires evidence as to the relevant market, the effects of the restriction on that market, the possible justifications etc. so that application of competition law appears as being quite complicated. Against this background, the limits set forth by Article 28 CC as regards disciplinary sanctions²⁰ provide for a

¹⁶ CAS decision, at para 38.

¹⁷ Federal Supreme Court decision ATF 119 II 165, 80 II 133.

¹⁸ CAS decision, at para 25.

¹⁹ CAS decision, at para 42.

²⁰ See 10.1.3 above.

sufficient basis to tackle the issue. Further, it is hard to imagine that disciplinary regulations which satisfy the requirements of Art. 28 CC could be seen as being abusive under competition law. Therefore, it does not seem that competition law would bring any further remedy against a regime of strict liability.

10.1.4 Conclusion

Under Swiss law, validity of a regime of strict liability has been admitted by the Federal Supreme Court in the field of anti-doping regulations (at least as regards disqualification if a prohibited substance has been found). Although the imposition of disciplinary sanctions may infringe the rights which protect personality (Article 28 CC), a regime of strict liability may be justified by an overriding interest in the meaning of Article 28 para 2 CC; the existence of such an overriding interest has been recognised as regards the rules against doping (otherwise, these rules would lose their efficiency).

Even if Swiss courts have not dealt yet with the validity of regulations enacted by sports federations against racism, it must be assumed that a regime of strict liability is also justified by an overriding interest (the fight against racism), as this has been admitted by CAS in the present case.

As regards other disciplinary regulations, it should be kept in mind that sanctions may infringe the rights which protect personality. In case of such an infringement, a regime of strict liability will be valid only insofar as it is necessary to protect overriding interests; if less stringent sanctions would be efficient to protect these interests, a regime of strict liability should not be admitted.

Further, Article 163 para 3 of the CO may be applied by analogy to pecuniary sanctions, which will be reduced by the judge if they are obviously disproportionate.

In conclusion, it is certain that the limits set forth by Article 28 CC and the possibility for the judge to reduce pecuniary sanctions still leave some room for further legal battles. Under Swiss law however, a regime of strict liability may be applied, and this has been recognised both by CAS and by the Federal Supreme Court.

10.2 CAS 2007/A/1217 Feyenoord Rotterdam v. UEFA

Peter T.M. Coenen

The Feyenoord Rotterdam Award demonstrates the consequences of strict liability for a club. On 30 November 2006, Feyenoord played the French team AS Nancy-Lorraine in the UEFA Cup. A number of factors led to rioting inside and outside the stadium, with the match having to be interrupted for half an hour. The CAS asserted that in terms of Article 6 of the UEFA Disciplinary Rules, Feyenoord bore strict liability for the incidents caused

by its supporters, even if these 'supporters' were not recognised as such by the club. The CAS ultimately confirmed UEFA's sanction, the disqualification of Feyenoord from the current UEFA Cup competition 2006/07 and the fine of around CHF 100,000. The author believes this was the correct signal to send, both legally and as a deterrent.

10.2.1 Introduction

Feyenoord is perhaps the most popular football clubs in the Netherlands. The club has strong support throughout the whole of the Netherlands, thanks to its working-class image. Contrary to its rival Ajax Amsterdam, Feyenoord supporters do not expect great technical prowess from their team. Rather they expect the players of the club to live up to the club's motto: 'geen woorden maar daden', which roughly translates as 'no words, but deeds'.

The last couple of years have not gone very well for Feyenoord. The results have been meager, but more importantly the club has struggled to keep pace financially with other clubs in the Netherlands. Traditional powers PSV Eindhoven and Ajax have a lot more money to spend yearly than Feyenoord and the club has been surpassed in many levels even by AZ Alkmaar and FC Twente. One of the catalysts for this lack of success has been the failure of Feyenoord to perform well in European matches.

The events on November 30, 2006 serve as an illustration of the current state of the club. A match in the French city of Nancy on November 30, 2006 ended in complete pandemonium, with scenes of fan violence broadcast all over the news throughout the whole of Europe.²¹ This ultimately led to the club being suspended from European football for rest of the season, adding to an already woeful season for the club.

This case review deals with football hooliganism. Football hooliganism is still a huge problem; it is not a phenomenon of the 1980's. Clubs get a bad reputation based on the behaviour of their fans. They are fined or suspended from play by their national associations and international associations. As a result of fan behaviour, sponsors might decide not to attach their brand name to a certain team and its fans.²² This costs clubs lots of income. Furthermore, hooliganism gives the whole of professional football a bad reputation. In the last years, it seems that the problem of football (and sports) related violence has intensified again in places all over the world and Europe, which is the focus of this article.

This case review deals with an award from the Court of Arbitration for Sports (CAS) that confirmed the exclusion of Dutch team Feyenoord from the UEFA

²¹ NOS, *Rellen met Feyenoord fans in Nancy*, http://www.nos.nl/nosjournaal/artikelen/2006/11/30/301106_feyenoord_rellen.html (Nov. 30, 2006).

²² T-Online.de, *Hansa Sponsor droht mit rüchzug*, http://sport.t-online.de/fc-hansa-rostock-sponsor-droht-gegen-hooligans-mit-rueckzug/id_41688126/index (May, 14, 2010).

Cup, following riots instigated by Feyenoord supporters at the UEFA Cup match between the club and French team AS Nancy. The legal issue in this award is whether a club has strict liability for the acts of people associated with that club, even if that club does not want to recognize these individuals as supporters of their team. Feyenoord tried to argue against UEFA's strict liability rule with regard to supporter misconduct. The strict liability rule states that a club is responsible for the conduct of their supporters, regardless of whether the club itself is at fault. Feyenoord tried to argue that their exclusion from the UEFA Cup tournament was unjustified since the supporters that were responsible for the misconduct in Nancy were not supporters of their team. Feyenoord argued that these individuals had just come to Nancy to misbehave and were not connected legally to the team itself. In the end, CAS denied Feyenoord's appeal, but the award and the reaction by UEFA shows there may be an upcoming shift in UEFA's stance on supporter violence.

10.2.2 What Happened that Day in Nancy?

Feyenoord Rotterdam is a professional football club based in the Dutch harbor city of Rotterdam. The club has a rich history, having won numerous national and international prizes.²³ Feyenoord was the first Dutch club to win the European Cup competition in 1970, the predecessor of the UEFA Champions League. Being one of the traditional 'big three' teams in the Netherlands, the club has a large fan base at home and abroad. The club's motto is '*geen woorden maar daden*', which translates as 'no words, but deeds'.²⁴ This reflects the origin of the club, being founded by hard-working laborers in the city's harbor.²⁵ It also reflects the no-nonsense style of football favoured by the supporters.²⁶

Feyenoord is also known for its devoted and die-hard fan base.²⁷ Most of these fans are great supporters who never cause any problems for the club, but a small portion of these supporters have exhibited a tendency towards violent behaviour.

²³ Feyenoord, *Hoogtepunten*, <http://www.feyenoord.nl/pages/feyenoordcontent/s2/10010000000002-10010000000068/de+club+-+historie+-+hoogtepunten.aspx> (accessed June 13, 2007).

²⁴ Feyenoord, *Het Legioen, Van het volk, door het volk, in het volk*, <http://www.feyenoord.nl/pages/story/s2/de+club+-+historie+-+van-door-in+het+volk.aspx> (accessed June 13, 2007).

²⁵ Feyenoord, *De accommodatie, Put en Afrikaanderplein*, <http://www.feyenoord.nl/pages/story/s2/de+club+-+historie+-+put+en+afrikaanderplein.aspx> (accessed June 13, 2007).

²⁶ Feyenoord, *Het Legioen, het Feyenoord gevoel*, <http://www.feyenoord.nl/pages/story/s2/de+club+-+historie+-+het+feyenoord-gevoel.aspx> (accessed June 13, 2007).

²⁷ Feyenoord, *Het Legioen, Intro*, <http://www.feyenoord.nl/pages/story/s2/10010000000002-10010000000073/de+club+-+historie+-+het+legion.aspx> (accessed June 13, 2007).

This development can be traced back to 1974 when Feyenoord won the UEFA Cup against London team Tottenham Hotspur.²⁸ More importantly for this review, that match signified the introduction of hooliganism into Dutch football. Before and during the match, Tottenham supporters fought with Feyenoord fans and police.²⁹ Since this incident, a number of Feyenoord fans have built up quite a reputation for violence throughout the Netherlands and Europe, being involved in numerous incidents during games of the club.

On November 30, 2006, Feyenoord was scheduled to play an away game against French team AS Nancy–Lorraine (hereafter AS Nancy), as part of the group phase of the 2006/2007 UEFA Cup tournament. UEFA is the framework European Football Association, which organizes among others, the Champions League and the UEFA Cup Tournament.³⁰ On November 2, 2006, officials of Feyenoord and the Dutch police met with officials from AS Nancy and the city of Nancy in preparation for the game.³¹ As a result of this meeting, Feyenoord received about 1400 tickets for the game.³²

On November 27, 2006, Feyenoord warned AS Nancy that the number of supporters traveling to Nancy for the game would far exceed the number of tickets allocated to them.³³ A lot of fans who did not have tickets for the game would still make the trip to the French city.³⁴ Feyenoord also informed AS Nancy that about 400 tickets, allocated to AS Nancy and bought at the stadium, had been purchased by supporters who could be linked to the Rotterdam side, outside the realm of the normal away ticketing system.³⁵ In most cases, Feyenoord tries to regulate the allocation of tickets for away games so they can ensure that tickets for these games do not end up in the hands of people they do not know, or even in the hands of known troublemakers.³⁶ Because these tickets had been allocated to AS Nancy, Feyenoord had no information on who exactly bought these 400 tickets, but they feared these tickets had indeed come into the hands of known hooligans. The ‘supporters’, who bought these tickets outside the normal away ticketing system, would end up in sections with supporters of AS Nancy.³⁷ Under these circumstances, it was likely that a large

²⁸ www.sportgeschiedenis.web-log.nl, *Feyenoord en de voetbalrellen van 1974*, http://sportgeschiedenis.weblog.nl/sportgeschiedenis/2007/01/feyenoord_en_de.html (January 12, 2007).

²⁹ *Id.*

³⁰ UEFA, www.uefa.com (accessed June 13, 2007).

³¹ *Feyenoord Rotterdam N.V. v. Union of European Football Associations*, CAS 2007/A/1217, 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Ernst Bouwes, *ESPN.com*, *The final irony*, <http://socccernet.espn.go.com/columns/story?id=404445&root=europe&&cc=5901> (accessed May 2007).

³⁷ *Feyenoord v. UEFA*, at 2.

number of known troublemakers would end up in the stadium, mixing amongst the supporters of the other team.

On November 28, 2006, AS Nancy acknowledged that tickets had been sold to Dutch supporters outside Feyenoord's away-ticketing system.³⁸ AS Nancy stated this information had been known since November 20th, and that it had taken a number of measures to avoid problems during the game. Police would check the tickets of fans coming to watch the game at the stadium entrance and would direct any Feyenoord supporters to the away sections; an extra 100 stewards were designated to the match, thus bringing the number of stewards to 400; a police force of about 300 officers was designated to patrol the match; the away sections of the stadium were to be isolated from the sections in which the supporters of the home side would watch the game; and a special entrance to the stadium would be created for supporters of the Dutch club.³⁹

Unfortunately these measures proved to be insufficient. Feyenoord supporters were present long before the match started in the city centre of Nancy.⁴⁰ Amongst them were a number of people had stadium bans in the Netherlands.⁴¹ Fearing destruction or riots, several bars and restaurants closed at the sight of the large numbers of football fans.⁴² Fans roamed the city centre, looking for something to do. Riots broke out in the city centre of Nancy hours before the match was even supposed to start.⁴³ Police moved the troublemakers from the city centre towards the stadium and opened the doors to the sections reserved for the away supporters to all Feyenoord supporters, with or without tickets.⁴⁴ The police attempted to isolate the troublemakers within the confines of the stadium, rather than let them roam free in the city centre. This decision had to be made on short notice by the chief of police of Nancy, motivated by the immediate need to halt the riots, without consulting Feyenoord representatives or UEFA delegates in Nancy.⁴⁵ The consequence of this decision was that the rioters and other supporters who did not have a ticket were driven into a section of the stadium immediately adjacent to the regular away section.⁴⁶ The hooligans quickly tore down the fence between their section and the regular away section and mixed with the Feyenoord supporters who had received their tickets through Feyenoord's normal ticketing system for

³⁸ Id.

³⁹ Id. at 3.

⁴⁰ www.voetbalprimeur.nl, *Waar het mis ging in Nancy*, <http://www.voetbalprimeur.nl/index.php?t=article&id=2772> (accessed May 15, 2007) (this is an eyewitness report of the riots in Nancy, sent in by a Feyenoord supporter and placed on the website, since it gives an interesting inside perspective in what transpired in Nancy).

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ *Feyenoord v. UEFA*, at 3.

⁴⁵ Id.

⁴⁶ www.voetbalprimeur.nl, *Waar het mis ging in Nancy*, <http://www.voetbalprimeur.nl/index.php?t=article&id=2772> (accessed May 15, 2007).

away games.⁴⁷ As the match progressed, the riots continued within the stadium. The police finally used tear gas to stop the rioting in the stands.⁴⁸ The game had to be interrupted for about half an hour because of the effects of the tear gas on the players, referees and fans.⁴⁹

After the match had ended and the dust had cleared, the fans, media, players and staff of Feyenoord braced themselves for UEFA's response to the riots in Nancy.⁵⁰ The UEFA Control and Disciplinary Body came with a ruling on 7 December 2006. Feyenoord was to pay a 200.000 CHF fine and the two next games of Feyenoord in any of the European cup competitions needed to be played without any supporters present.⁵¹ However, this order was deferred for a probationary period of three years.⁵² UEFA appealed this decision on 13 December 2006, asking for a more severe punishment for Feyenoord.⁵³ Even though this penalty was not as severe as some around the Rotterdam club might have feared, Feyenoord decided to also appeal the decision of the Control and Disciplinary body on 11 January 2007, asking for annulment of the decision and an acquittal for the Rotterdam club.⁵⁴

After a hearing was held on 19 January 2007, the UEFA Appeals body returned on January 25th 2007, with an even harsher verdict this time, excluding Feyenoord from the 2006/2007 UEFA Cup tournament and setting the fine at 100.000 CHF.⁵⁵ The team's worst fears had materialized. The decision of the UEFA Appeals Body was felt to be too harsh by the Rotterdam team, and Feyenoord decided to file an appeal against this decision with the Court of Arbitration for Sports (hereafter CAS) on 26 January 2007.⁵⁶

CAS is the highest appeals institution with whom an appeal was possible against the ruling of the UEFA Appeals Body.⁵⁷ CAS is an independent arbitration body set up to arbitrate and/or mediate sports related disputes⁵⁸ and its arbitrators are generally considered to be high level jurists.⁵⁹ CAS also has a good reputation

⁴⁷ Id.

⁴⁸ *Feyenoord v. UEFA*, at 4.

⁴⁹ Id.

⁵⁰ NOS, *Uefa toont zich mild voor Feyenoord*, http://www.nos.nl/nosstudiosport/artikelen/2006/12/7/07121734uefatoontzich_mildvoorfeyenoord.html (Dec. 7, 2006).

⁵¹ *Feyenoord v. UEFA*, at 4.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ NOS, *Feyenoord in beroep*, http://www.nos.nl/nosstudiosport/artikelen/2007/1/26/26011524_feyenoordinberoepcas.html (Jan. 26, 2007).

⁵⁷ NOS, *'zaak Feyenoord' snel aan bod bij CAS*, http://www.nos.nl/nosstudiosport/artikelen/2007/1/29/29011300zaakfeyenoord_snelbehandeld.html (Jan. 29, 2007).

⁵⁸ Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sports (CAS)*, ISLJ 2002/2, 21.

⁵⁹ Id. at 23.

in the sports community,⁶⁰ dealing with a lot of doping issues and arbitrating on a lot of cases concerning transfer fees in (international) soccer.⁶¹ UEFA has recognized the power of CAS to be an arbitrator of last instance on disciplinary matters concerning UEFA and another party.⁶²

10.2.3 CAS Upholds UEFA's Punishment

Feyenoord, in its submission to CAS, contended that *the club* is not to blame for the riots in Nancy.⁶³ It warned AS Nancy about the risks of selling tickets freely around their stadium and that a large group of potential troublemakers (whether with or without tickets) were traveling to Nancy.⁶⁴ Feyenoord further criticized the decision of the chief of police to give all supporters access to the stadium, with or without tickets.⁶⁵ Finally, Feyenoord criticized the decision to place its rogue supporters in sections of the stadium adjacent to the sections of the stadium in which the 'official' Feyenoord supporters were seated, thus giving these hooligans the opportunity to mix with the fans that had bought a ticket for the game directly from Feyenoord,⁶⁶ a perpetually volatile situation because this way it was impossible for the police and stewards to distinguish between 'good' fans and 'bad' fans.

Furthermore, Feyenoord claimed that the troublemakers were not supporters of the club under the definition given to the term supporters by UEFA.⁶⁷ These troublemakers did not buy their tickets through Feyenoord, did not travel to the stadium under the guidance of Feyenoord, could not be identified from their appearance as Feyenoord fans, and some of them even had a stadium ban in the Netherlands.⁶⁸ Feyenoord argued that nothing distinguishes these individuals as being Feyenoord fans and therefore Feyenoord cannot be held responsible for the behaviour of these individuals.⁶⁹ Finally, the team complained about the proportionality of the sanction of the UEFA Appeals Body.⁷⁰ The punishment received means that Feyenoord will miss out on a lot of income that could have been generated in the following round(s) of the UEFA Cup tournament.

⁶⁰ Id. at 25.

⁶¹ Id. at 21.

⁶² *Feyenoord v. UEFA*, at 7.

⁶³ Id. at 5.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id. at 6.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

UEFA responded to Feyenoord's contentions, saying that it is not a question of who is at fault for the behaviour of the supporters.⁷¹ Feyenoord is responsible for the behaviour of its supporters, irrespective of what the club may have done to either prevent or encourage this behaviour.⁷² The rule is strict liability for a club regarding the behaviour of its supporters. This also means that the warnings and measures taken by Feyenoord are irrelevant to the liability question.⁷³

With regard to the definition of the term supporter, UEFA stated that there is no clear definition of who is a supporter of a club. UEFA stated that the term supporter is "not linked only to race, nationality of the place of residence of the individual, nor is it linked to a contract which an individual has concluded with the national association or the club in purchasing a ticket".⁷⁴ UEFA then concluded that "there is no distinction between official and unofficial supporters of a team".⁷⁵

CAS started its deliberations by stating it has competence to deal with this case and that the rules applicable to this dispute are the relevant UEFA rules and regulations.⁷⁶ CAS then ruled that "disciplinary law implemented in [UEFA's] regulations and directives is essentially a tool which allows UEFA to create order within the organization and to assert statutory standards of conduct through sanctions imposed by specific bodies and to ensure their appropriate execution".⁷⁷ CAS goes on to conclude that Feyenoord is subject to UEFA's rules and regulations and more specifically the ones upon which the decision by the UEFA Appeals Body is based.⁷⁸

CAS points at Article 6 of UEFA Disciplinary Regulations, which provide that:

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 at the request of the association or club.

The host association or club is responsible for the order and security both inside and around the stadium, before, during and after the match. It is liable for incidents of any kind, and can be rendered subject to disciplinary measures and bound to observe directives.⁷⁹

CAS pointed out that, according to this article, Feyenoord has strict liability for the behaviour of its supporters.⁸⁰ The point of contention that remained, then, was which persons can be defined as being a supporter. CAS noted that UEFA

⁷¹ Id.

⁷² Id.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id. at 7.

⁷⁷ Id. at 8.

⁷⁸ Id.

⁷⁹ Id. at 9.

⁸⁰ Id.

intentionally did not define the term supporter.⁸¹ UEFA did not specify the term supporter in terms of race, nationality, place of residence of the individual, or whether that person has a contract with a club or association by buying a ticket for a certain game.⁸² Defining the term supporter would alleviate clubs of responsibilities for supporters it does not want to recognize for legal purposes.⁸³ The disciplinary sanctions of UEFA would in such a case apply only to supporters the club want them to apply to, while this could have never been the purpose of UEFA.⁸⁴

CAS went on to state that by leaving the term supporter undefined, the reasonable and objective observer could determine someone is a supporter of a club.⁸⁵ Determinants that can help the reasonable and objective observer come to this conclusion are the behaviour of the individuals concerned and where they are located in the stadium and their vicinity.⁸⁶ CAS went on to point to their prior case law, in which they considered that article 6 Disciplinary Regulations was perfectly valid. CAS especially points to one case, *PSV Eindhoven v. UEFA*, CAS 2002/A/423.⁸⁷ In that case, PSV was punished for racist behaviour by its supporters directed towards players of the opponent in a match in the Champions League tournament.

In this case CAS pointed to rule 6 para 1 Disciplinary Regulations, and stated:

According to this provision UEFA members and clubs are responsible for any breach of the UEFA Regulations committed by any of those persons. There is therefore no doubt that, under this rule, member associations and clubs bear strict responsibility for the actions of third parties, who are nonetheless specifically identified. 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...⁸⁸

CAS further acknowledged that by penalizing the clubs, UEFA in essence aims to penalize the supporters for their conduct.⁸⁹ UEFA does not have a direct way of penalizing individual supporters and therefore focuses all measures on the one body they do have authority over-the teams. UEFA in this way tries to indirectly achieve its goal of controlling the behaviour of certain (groups of) supporters by penalizing the club these fans support. The objective of article 6, then, with regard to the behaviour of supporters is to deter and prevent violent conduct, not to

⁸¹ Id.

⁸² Id.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id. at 10.

⁸⁹ Id.

penalize clubs for wrongdoings.⁹⁰ The strict liability rule makes sense in this context given that the goal is to prevent the violent acts of the supporters, so it does not matter what actions the club itself took.

CAS went on to conclude that the supporters responsible for the problems surrounding the match between AS Nancy and Feyenoord could be identified as Feyenoord supporters and therefore the strict liability rule applied.⁹¹ The fact that Feyenoord took measures to prevent any disorder does not alter the liability of the club for the behaviour of its supporters.⁹² The fact that there may have been errors in the way AS Nancy handled ticket sales, the way the French police handled the situation by giving the troublemakers access to the stadium and enabling them to mix with the ‘official’ Feyenoord supporters, was all held to be irrelevant for this case. Feyenoord is liable for the conduct of its fans under Article 6 para 1 Disciplinary Regulations.⁹³ This needs to be distinguished from the liability the home team possibly has under Article 6 para 2 of the Disciplinary Regulations as the host and the organizer of the match.

Feyenoord further appealed to CAS on the severity of the penalty.⁹⁴ However, CAS first stated that according to article 14 Disciplinary Regulations, disqualification from the UEFA Cup competition could be used as a possible penalty for violation of the Disciplinary Regulations.⁹⁵ CAS went on to assess Feyenoord’s claim that disqualification would be disproportionate to the offence committed. CAS stated that according to its case law, a “sanction imposed must not be evidently and grossly disproportionate to the offence.”⁹⁶ CAS came to the conclusion that UEFA was allowed to impose the heavy sanction of disqualification.⁹⁷ In reaching this conclusion it took into account that the behaviour of the fans, (e.g. breaking a wall inside the stadium to reach the supporters of the opposing team, throwing projectiles towards individuals) could have been considered as serious offences by the UEFA Appeals Body.⁹⁸ Furthermore, Feyenoord was a multiple offender with regard to supporter misconduct.⁹⁹ UEFA regards recidivism as an aggravating factor in its Disciplinary Regulations.¹⁰⁰ Over the past five years there have been 12 disciplinary cases against Feyenoord for supporter misconduct.¹⁰¹ Finally, a disqualification

⁹⁰ Id.

⁹¹ Id. at 11.

⁹² Id.

⁹³ Id. at 12.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id. at 13.

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ Id.

ensures that in the further course of the UEFA Cup season, there would not be any further incidents of supporter misconduct of Feyenoord's supporters.¹⁰² On these grounds, CAS ruled that the sanction imposed by the UEFA Appeals Body was not disproportionate to the offences committed.

10.2.4 A Strong Signal?

In its ruling that was upheld by CAS, the UEFA Appeals Body gave a strong signal to clubs whose supporters are repeatedly involved in violence. UEFA handed down a rigorous penalty and excluded Feyenoord from further participation in the UEFA Cup tournament for the season.

Ironically, this prevented Feyenoord from playing Tottenham Hotspur in the next round of the UEFA Cup, a clash that in 1974 began the tradition of hooliganism a part of the supporters of the Rotterdam club is now known for. Even though Feyenoord tried to distance itself from these hooligans, UEFA was able to apply their rule of strict liability to them for the behaviour of their supporters. UEFA punished Feyenoord for the behaviour of a small portion of its supporters in Nancy-supporters, many of whom are not allowed inside a stadium in the Netherlands. Of course, not all Feyenoord supporters are hooligans and therefore the club's argument that these people do not belong to their club holds some merit. These hooligans do make up only a small portion of the otherwise great supporters of the Rotterdam team. And these hooligans do spoil it for all the good supporters. But the fact remains that Feyenoord is the connecting factor among these hooligans and they take the games of the Rotterdam club as an excuse to start their mayhem. No respectable club wants to be associated with such fans. This does not mean, however, that a club should not have to assume liability over the behaviour of these supporters.

Hooligans linked to Feyenoord had been involved in numerous incidents over the previous European seasons before that faithful night in Nancy and therefore the club was already on notice with UEFA.¹⁰³ There had been twelve previous disciplinary cases involving supporter misconduct in the five years before the game between Nancy and Feyenoord against the Rotterdam team, so it came as no surprise that UEFA handed down such a harsh penalty. In its reasoning with regard to the sanctions, CAS states that this punishment will have the effect of eradicating any further incidents with Feyenoord's supporters during the 2006/2007 UEFA Cup season. It is hard to argue with this, but will the outcome of this case also have the effect of preventing incidents from happening in the future?

¹⁰² Id.

¹⁰³ Id.

From the way the question is formulated, the reader may think the answer would be a resounding no, but the answer to this question is much more complicated. Sending a strong message to a repeat offender might have a deterrent effect for the future. Next time supporters might consider that their club will be excluded from European football before they start rioting. It could help. But a strong signal in one, individual instance is not enough to 'eradicate hooliganism', as CAS stated in its award. Strong punishments will only have a noticeable effect if they are handed out consequently and in a consistent manner. It took UEFA twelve instances of supporter related misconduct to issue such a strong penalty against Feyenoord. And since Feyenoord's exclusion of the 2006/2007 UEFA Cup competition, the supporters of the club have once again been involved in violent incidents surrounding European matches against Lech Poznan from Poland¹⁰⁴ and against Deportivo La Coruna¹⁰⁵ from Spain.

Feyenoord is not the only club that is forced to deal with the problem of football hooliganism. There have been numerous problems with the fans of the English and German national teams at international games, including at the European¹⁰⁶ and World Championships.¹⁰⁷ To date, the English and German national teams have not been ruled out of any tournaments. In the Champions League, there have been large scale incidents of football hooliganism involving supporters of English side Manchester United in France (Lille)¹⁰⁸ as well as in Italy (Rome).¹⁰⁹ Manchester United has never been excluded from the Champions League or any other European tournaments. Many more examples of clubs with a record of violence can be shown, where UEFA has not handed out strong penalties.

Action taken by UEFA might have a noticeable effect in preventing further incidents, but UEFA alone cannot tackle the problem of hooliganism. In this instance, would it have made a difference if AS Nancy and Feyenoord had better regulated the sale of tickets for the game? Would it have mattered if there was a place where all Feyenoord fans could have gathered before the game, a place that had provided them with some recreation, some food and drinks? Would it have

¹⁰⁴ UEFA, *Feyenoord punished for December Disturbances*, <http://en.uefa.com/uefa/footballfirst/matchorganisation/disciplinary/news/newsid=802401.html>

¹⁰⁵ UEFA, *Feyenoord, Depor, Roma and Marseille fined*, <http://en.uefa.com/uefa/footballfirst/matchorganisation/disciplinary/news/newsid=786431.html>

¹⁰⁶ Nick Amies, *DW-WORLD.de, The Specter of Hooliganism Returns*, <http://www.dw-world.de/dw/article/0,2144,1539291,00.html> (Apr. 7, 2005).

¹⁰⁷ Sean Ingle, *Guardian, Fan fears grow ahead of England match*, <http://football.guardian.co.uk/worldcup2006/story/0,,1805689,00.html> (June 25, 2006).

¹⁰⁸ BBC Sport, *Lille and Man Utd. Fined by UEFA*, <http://news.bbc.co.uk/sport2/hi/football/europe/6481931.stm> (Mar. 22, 2007).

¹⁰⁹ BBC News, *Fans in hospital after violence*, <http://news.bbc.co.uk/2/hi/europe/6528049.stm> (May 4, 2007).

made a difference if the so called Football Law had already entered into force and hooligans with a stadium ban would have had to report at a police station at the time of the match? All of such measures could have helped to prevent the riots in Nancy from happening. What we do know is what happened without these measures.

Does this mean that Feyenoord should not have been punished for the conduct of its supporters in Nancy? Of course not. It means that UEFA in this single instance took a strong stand against supporter violence. This must be applauded. But it also means that if UEFA wants to hand out stricter penalties for supporter misconduct, it should be consistent. After Feyenoord's exclusion, only one other team was expelled from a UEFA competition for the behaviour of their fans. In 2007, Legia Warsaw was expelled from that year's Intertoto Competition.¹¹⁰ This is not enough. A zero tolerance policy will only work if clubs and supporters know beforehand what the consequences of their behaviour will be and if UEFA enforces this policy, regardless of the name or the status of the club (or country) involved.

I would propose a re-evaluation of UEFA penalties for uniformity. Deterrence is a goal that can only be achieved with a heavy hand and patience. It is crucial that UEFA is consistent and is not afraid to hand out a strong punishment, where this is warranted, regardless of the name of the team or club. If UEFA would consistently hand out similar punishments for offences, it would signal a determined shift towards zero tolerance. If, however, as seems to have been the case, penalties for similar offences are not equal or similar, the case of Feyenoord simply goes down in the books as an idiosyncrasy—an aberration. This actually frustrates the goal of preventing supporter violence.

UEFA President Michel Platini, in a reaction to the CAS ruling, said: "I am very happy with the decision of CAS to uphold the UEFA Appeals Body judgment. This sends out a strong message that acts of violence by fans within the game will be heavily dealt with and punished by the relevant authorities. Recent tragic incidents have shown that we must work together to eradicate all forms of hooliganism or violence from our game."¹¹¹ These were fierce words from the UEFA President in the immediate aftermath of the incident in Nancy. Unfortunately, it seems that the case of Feyenoord v. UEFA has not led to a zero tolerance policy that applies to *all* clubs (or national teams) whose supporters misbehave.

¹¹⁰ UEFA, *Legia given suspended sentence*, <http://en.uefa.com/uefa/footballfirst/matchorganisation/disciplinary/news/newsid=574658.html>, (Aug. 23, 2007).

¹¹¹ UEFA, *CAS uphold UEFA Appeals Body Decision*, <http://www.uefa.com/newsfiles/505338.pdf> (Feb. 9, 2007).

10.3 CAS 2008/A/1688 Club Atlético de Madrid SAD v. Union des Associations Européennes de Football (UEFA)

Juan de Dios Crespo Pérez

In the Atlético de Madrid Award the CAS had to rule on racist and discriminatory incidents which took place on 1 October 2008 during the UEFA Champions League tournament group stage match between Atlético de Madrid and Olympique de Marseille. The author analyses the CAS' ruling which reduced UEFA's sanction against Atlético de Madrid SAD to one match played behind closed doors (instead of two after the first appeal) and reduced the fine by half (EUR 75,000 instead of EUR 150,000).

10.3.1 Preamble

The racism is a plague all over the world and exists in all kind of events but in sport and particularly in football, the governing bodies have taken steps not only to avoid systematically the introduction of racist conducts in the fields and in the stadiums but also to sanction any discrimination or similar behaviour.

UEFA, as the European football governing body, is particularly conscious of this problem and its Disciplinary Regulations¹¹² clearly provide both the offenses and the sanctions to such comportment.

Insults to a group of persons “including on grounds of colour, race, religion or ethnic origin, shall incur a suspension for five matches or for a specified period” as for a player and “playing of one or more matches behind closed doors, a stadium closure, awarding of a match by default, deduction of points or disqualification from a competition” for a club or association.

Thus, the disciplinary measures are not a joke and have to be taken into consideration not only by players who behave directly but also by clubs that can be banned or lose matches for their crowd conduct. This, which is a problem to be discussed deeply, is known as the “objective responsibility/liability” and it has been approved by UEFA¹¹³ when stating that:

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.

This is not the place to discuss in length this particular objective liability even though it has been one of the arguments that Atlético de Madrid used in its statement against some of the decisions taken by UEFA.

Finally, and as for the racist topic, with the creation of FARE (Football Against Racism in Europe)¹¹⁴ network, a product of a melting pot of different associations

¹¹² Article 11 bis.

¹¹³ Article 6 of UEFA Disciplinary Regulations.

¹¹⁴ www.farenet.org

throughout the continent, from the European Gay & Lesbian Sport Federation to the Progetto Ultra, the fight against racism and discrimination in sport has reach a level that has got UEFA into it with the UNITE AGAINST RACISM campaign that begun in 2003 in a conference that took place at the premises of Chelsea FC in London.

A guide has been developed by UEFA in order to give clubs that participate in European competitions the necessary weapons to tackle racism.

The guide does not include only the racist issue but also how to deal with the homophobia and sexism.

10.3.2 Introduction

The so-called “racist case of the Calderón” was widely spread on the press during quite four months (from October 2008 to February 2009) as “the case against racism” and the object of several problems not only within football but also at a legal and political level between France and Spain, and with UEFA being involved in order to let the world know that no discriminatory behaviour, particularly racism, would be tolerated in its competitions.

As we will see in this commentary, things were perhaps magnified in their initial step and the end of the history was not, at all, the one of a racist conduct.

10.3.3 Facts

On the 1st of October 2008 a match of the UEFA Champions League group stage took place at the “Calderón”, the stadium where Atlético de Madrid currently plays its competition matches.

The game was against the French club Olympique de Marseille, which had an accompanying crowd of some thousand fans, who were duly situated, according to UEFA rules, to a place of their own as it is always the case in UEFA Competitions.

The UEFA Control and Disciplinary body, which is the first instance in deciding a sanction in those matters, opened a proceeding according to a complaint brought by the French club as well as to the reports submitted by the official delegate and the security officer. Those documents were supported by video footage of the incidents.

The incidents were two, divided in several actions as follows:

- *The lack of organization*, as Marseille’s fans entered a banner (which should have been forbid its entrance by the stewards of Atlético Madrid) with a picture of a skull and crossbones with the word “Ultra” on it. This brought the intervention of the Spanish Police, according to the Spanish Law in which Racist behaviour is strongly prohibited and then tried to remove the banner, an action which lead to a real conflict between the policemen and the fans, with several

wounded in both parties.

In the same kind of incident, UEFA says that they were insufficient measures of security in place for the journalists and representatives of the Press of French nationality to protect them from physical and verbal attacks by certain supporters of Atlético Madrid.

Finally, some disabled OM supporters were not located in an appropriate area in the stadium and then removed and halftime to another place.

- *The misbehaviour of the local supporters*, as it was said by several OM players (concretely the goalkeeper Steve Mandanda and the forward Mamadou Niang), that the crowd uttered racist chants (known as monkey noises, or UH,UH,UH) when those two blacks players got the ball.

A black Marseille journalist gave also evidence that he was insulted by certain Atlético Madrid supporters when he shouted after the goal of the French club. Finally, a half–full bottle was thrown by Atlético’s fans at a disabled supporter of OM.

10.3.3.1 UEFA Disciplinary Proceedings in First Instance

UEFA first deciding body (Control and Disciplinary) stated that, according to the Regulations¹¹⁵ the home club is always responsible for “security before, during and after the match”, the already mentioned *objective liability*.

Entering into the case itself, the club failed to ask UEFA first to intervene as he has the responsibility to organize and maintain the order and security at the match, including a “duty to organize cooperation with the police”.

In Spain, the law against racism and discrimination permits the direct intervention of the police and thus Atletico defended itself by saying that the Spanish police action falls outside of its competence.

In fact, the police saw the skull and bones banner which is clearly mentioned in the FARE booklet distributed throughout Europe stadiums to stewards and security staff as an “*SS-Totenkopf/SS-Skull*”, a Nazi symbol used by SS groups. Olympique Marseille defended that the banner only displayed what was described as a “pirate” (*sic*).

The Control and Disciplinary body decided that the conduct of the police (nota bene, not that of Atlético de Madrid) was “inappropriate and disproportionate” and that the incident related to a banner that “ended up not even being considered as a problem itself” produced an obvious lack of organization.

It was then clear that the club and UEFA should have been in contact together first and then should have talk to the police as they better know if the banner “breaches or not UEFA Regulations”.

¹¹⁵ 5.04 of the UEFA Champions League Regulations and 6(2) of the Disciplinary Regulations.

Just a remark before continuing, as it is evident that the national legislations have also something to say and, particularly within the Spanish Laws, the racism in sports events is not only prohibited but persecuted by the Police, as it is a matter of public order.

Here again we can sense the difficulties to disassociate the international sporting regulations from the national legislations. In this particular case, the Spanish police reacted intending to remove the banner and the behaviour of the OM fans was so tough that a battle was engaged. Then, possibly, the policemen put too much force into the ground but the images showed that OM supporters were not exactly willing to help.

But, what is clear is that something has to be improved either in the Regulations or in the meetings for security in European matches in order to have a clear step by step position for such cases.

Thus, the club was sanctioned accordingly.

As for the racism issue and the crowd misbehaviour, again the Control and Disciplinary body says that according to the rules¹¹⁶ “the clubs are responsible for the behaviour of their players, officials, members and supporters, as well as any person carrying out a function at a match on their behalf”.

The body says that the various reports, the statements by Olympique and the video footage were evident and that Atlético’s fans uttered racist chants when the black players Niang and Mandanda got the ball.

The body stated that “there is no doubt that such behaviour insults the human dignity of a person or group of people on grounds of race”.

From the very beginning, Atlético Madrid denied all the racism topic and gave video footage of the match itself and other several matches of the club where the Argentinean striker “Kun” Agüero was chanted as “KUN, KUN, KUN”. And, by the way, Agüero was always near the ball when the so-called “monkey noises” seemed to appear.

But UEFA body decided also that the chants and insults exist and then sanctioned the club, as “the fight against racism is a high priority for UEFA, which has zero tolerance for racism and discrimination on the pitch and in the stands”.

The Control and Disciplinary Body decided, on the 13th of October 2008, that:

1. The use of the Calderon stadium in Madrid is banned for three UEFA club competition matches. The ban for the third competition match is deferred for a probational period of five years.
2. The two following matches at home had to be played at least 300 km from Madrid.
3. A fine of 150,000 EUR is imposed too.

¹¹⁶ Article 54.03 of the UEFA Champions League Regulations and 6(1) of the Disciplinary Regulations.

10.3.3.2 UEFA Disciplinary Proceedings On Appeal

UEFA Regulations¹¹⁷ permit an appeal against the decision of the Control and Disciplinary Body and this is what Atlético Madrid did on the 16th of October 2008.

The appeal was not only made against the decision itself but also requested interim measures, such as the stay of the decision as a match had to be played quite immediately. Such stay was given by the President of the Appeal Body on the very same day of the appeal.

As for the substance of the appeal, we have to remind that normally there is a hearing which took place in the present case on the 31st of October 2008.

At the hearing, several footages of the match were displayed as well as some witnesses were heard, among them players (from both clubs), the French journalist, the UEFA Security Officer, etc....

The Appeal body decided that the club is the sole responsible for all the incidents, including those where the Spanish Police was present and overacted.

As the club has made its registration in the Champions League, he had engaged itself to fulfill all and every duties of the UEFA Regulations and that even an action by the Police is still the club's responsibility and that if the club thinks that the Police is responsible it should present a claim against it or the Spanish State.

As for the banner, the Appeal Body insists that the banner is not racist (according to the FARE booklet as the skull wears a "bandana" on it) and, what is more important in my opinion is that Atlético Madrid failed in the search of the banner when the OM fans entered the stadium. This was the main problem for the Spanish club and subsequently the club should have informed UEFA of the banner and in any case should have put the police in contact with UEFA in order to communicate with the French supporters and try to avoid the clash that finally occurred.

On the racism issue, the facts were also clear for the Appeal Body and the "KUN, KUN, KUN" chants were not evident and, on the contrary, the declarations of the players Mandanda and Niang and the French journalist were credible.

Anyhow, the UEFA representatives present at the match and at the hearing did not recognized clearly the monkey noises.

As for the disabled supporters, the duty of security was not fulfilled by Atlético Madrid and they have put them in an erroneous place in the stadium and that a bottle was thrown to them.

But, finally, the Appeal Body decided that the previous decision was excessive and then that the three matches ban of the club and to be reduced to two only, but to be disputed in the Calderon stadium instead of in a stadium situated 300 km away from Madrid. The fine remained the same of 150,000 EUR and as permitted in the appeal proceedings, Atlético was to support costs of such appeal.

¹¹⁷ Article 48 of the Disciplinary Regulations.

Then, at least Atlético Madrid received a lesser sanction (2 instead of 3 matches), the deferred match to be for a probational period of 2 years instead of 5, and the matches to be played in Madrid (within close doors anyway) instead of 300 km away from it.

Nevertheless, the Spanish club decided to appeal before the CAS¹¹⁸ which was done on the 13th of November 2008 and as the proceedings were urgent, the hearing took place on the 19th of November.

10.3.4 CAS Award

The hearing was attended by Atlético Madrid as the Appellant and UEFA as the Respondent, together with a number of witnesses, including football players of both teams, the French journalist, UEFA representatives at the match and the President of the disabled supporters association.

10.3.4.1 Atlético's Misbehaviour and Responsibility in the Spanish Police Action

The first error was that the club did not prevent the banner that started all the mess to enter and according to the UEFA Security Regulations¹¹⁹ the club has the duty to search all the spectators before their entry to the stadium.

If the search had been done in a correct way, the banner would not have been permitted and, quite surely, the incidents would not have taken place:

if the banner had a racist content, it should not have entered into the stadium.¹²⁰

Then, and again, the UEFA Disciplinary Regulations brings a direct and objective liability to the home clubs and Atlético Madrid should have referred to UEFA responsible instead of to the police when the banner was showed and “the private security of the club tried to remove the banner with the sign of a skull”.¹²¹ This was the second error of Atlético Madrid.

If the private police was not able to remove the banner, UEFA would have intervened with the OM officials and representatives in trying to have it taken off, if the Police thought that it was racist, but the private security reported directly to the Police.

¹¹⁸ Article 62 (edition 2007 in force then) of the UEFA Statutes.

¹¹⁹ Article 33.1 and 2.

¹²⁰ Point 106 of the award.

¹²¹ Point 86 of the award.

10.3.4.2 The Disabled Supporters

The UEFA officers said that the position of the disabled supporters “was not an ideal scenario to have away above home fans”.¹²²

Consequently, the club had to be responsible of the supporters behaviour as for putting the disabled supporters in a place where they could be hit, as it was quite done with a half full bottle.¹²³

10.3.4.3 The Racism Issue

As for the racism, the first thing that has to be said is that the witnessing of the “French part” (players, disabled supporters and journalist) was given a higher level of credibility that those of the “Spanish part” and this was criticize by the CAS.¹²⁴

Contrary to the reports of the “French side”, the Atlético Madrid players who attend as witnesses (both black and one of them French, Sinama-Pongolle) declared that the “KUN, KUN, KUN” chant is current in the stadium and was what happened also in that match against OM.

The two UEFA representatives at the match declared that they were not sure that the monkey noises were that and not the “KUN” ones and then the Panel realized that the sanction shall be based on well established facts and on formal proofs and not on the preference of one statement instead of another.¹²⁵

So, the racism issue was dismissed. But just for the sake of clarity, and even though the award did not mention it, the appeal body also took into consideration the insults that both players, the journalist and the President of the disabled supporters said they have heard directed to them (in the first two cases) or to black players (in the latest witnessing of the President of the disabled supporters): “puta de negra”, said in Spanish.

A rough translation would end to a “black whore”, but it is more subtle. What was strange is that the written statements of the players and the journalist had the same “puta de negra” and that in the hearing, all of them continued to affirm that the same insult was thrown to them, and finally the President of the disabled supporters also add his own witnessing confirming having heard such insult.

The problem, raised by Atlético Madrid at the hearing, was that such insult does not exist in Spanish as it should have been, in any case, shouted as a “puto negro”, as firstly the Spanish language does not admit the “de” in between both words, “puta” and “negra”; secondly, as they were all men, it should have been said

¹²² Point 113 of the award.

¹²³ Points 115 to 119 of the award.

¹²⁴ Points 125 to 127 of the award.

¹²⁵ Points 142 and 143 of the award.

“puto” (masculine) instead of “puta” (feminine); and thirdly the word “negro” (masculine) should have been said instead of “negra” (feminine).

Obviously, this was not recalled in the award but was something else to add or detract from the credibility of the witnesses in order to give more of it to the “French side” than to the “Spanish side” as the Panel finally said (see above). The racist acts alleged by UEFA could then not been established with certainty, a must in disciplinary matters.

Finally, the CAS had, again, its sanction reduce to ONE match behind closed doors (instead of two after the first appeal); the fine was reduced to half (75,000 EUR instead of 150,000 EUR) and the club was released from paying the costs of the UEFA bodies.

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