Liability in the event of riots at sports events

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Summary for readers in a hurry

In conjunction with riots by rioting "fans" before, during and after a sports event[1], there are regularly calls for the organiser[2], responsible for the financial consequences. In this article, it is shown that it needs to be differentiated whether a person comes to harm outside or inside the stadium The organiser can scarcely be made liable for damage caused by "fans" outside of the stadium because the so-called monopoly to use force (Staatsmonopol) lies with the state and the club would not even be authorised to intervene in the public space. The club can be made liable for compensation vis-à-vis a spectator for damage caused by fans inside the stadium if it has failed to take protective measures appropriate under the circumstances. In the same way, a spectator can be made liable vis-à-vis the club if the spectator causes damage. The clubs are set narrow boundaries when implementing effective protective measures. As the monopoly to use force lies with the state, a club may also not fundamentally take any measures within the stadium that require physical force. Solely the police are responsible and competent for this inside and outside the stadium. The below is written under a Swiss law perspective, but may be applicable in other jurisdiction in a similar way.

1. On the topic

"Football fans" regularly cause riots and damage to property before or after a match. For instance, the march by the "fans" on Easter Monday 2014 to the 2014 Swiss Cup Final in the Stade de Suisse in Berne recently caused quite a storm. As could be read in the media, there was massive damage to property in Berne city centre, and instances of looting[3]. According to the press reports, a total of 45 people were arrested, of whom most are likely to expect prosecution for disturbance of the peace, physical injury, violence and threats against officials and/or damage to property. During the riots, stones were thrown at the police. Five police officers were injured. Some of them are suffering from hearing problems because Zurich "fans" lit firecrackers near to them. The material damage amounted to around 40,000 francs[4].

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1 In most cases in football.

2 Federation or club to be made

3 Cf. for instance Neue Zürcher Zeitung Online dated 22 April 2014: "*FCZ gibt Krawalltouristen Schuld*" ("FCZ blames riot tourists")(http://www.nzz.ch/aktuell/zuerich/uebersicht/fcz-macht-krawalltouristen-fuer-ausschreitungen-verantwortlich-1.18288271; retrieved on 29 May 2014), Tages-Anzeiger Online dated 23 April 2014: "*Die Ohnmacht nach dem Cupfinal*" ("Powerlessness after the Cup Final") (http://www.tagesanzeiger.ch/schweiz/standard/Die-Ohnmacht-nach-dem-Cupfinal-/story/11689008; retrieved on 29 May 2014), Berner Zeitung Online dated 23 April 2014: "*Die Stadt Bern verliert die Lust am Cupfinal*" ("The City of Berne loses its appetite for the Cup Final") (http://www.bernerzeitung.ch/region/bern/Die-Stadt-Bern-verliert-die-Lust-am-Cupfinal/story/14357844?dossier_id=431, retrieved on 29 May 2014).

4 Neue Zürcher Zeitung Online, 22.4.2014.

In the follow-up to the events in Berne, the demand was raised for the Swiss Football Association or the participating clubs to have to pay for the "costs incurred" (or at least part of these costs)[5].

In light of this, the fundamental question arises whether and, if applicable, to what extent a sports organiser or a club is responsible for damage that has been caused by spectators before, during or after a sports event. The question would also arise as to responsibility under criminal law and association law. These two last-mentioned questions should, however, not be dealt with in this article for reasons of space and should be reserved for subsequent treatises[6].

2. Differentiation

When there are calls for payment of costs or participation in the damage by the (organising) club, it is first necessary to clarify terms and to differentiate between the possible financial consequences.

Initially, liability under civil law for damage incurred by a non-involved third party can be considered. A primary differentiation needs to be made between a spectator[7]and between a person who has or whose assets have incurred damage outside of the stadium[8]. The following statements therefore deal first with damage that is caused outside of the stadium[9]. The question of the liability of a club for damage incurred inside a stadium will then be dealt with[10] subsequently.

3. Liability in the event of injury to persons outside of the stadium

Because of regular riots outside of the stadiums, there are calls for the organisers to be asked to pay. The question which arises from a legal perspective here is: Is that possible? Can a club be made responsible for when "fans" demolish cars of local residents or other items as they march to the stadium?

3.1 No contractual liability

A contractual liability on the basis of a spectator contract can be eliminated for this. It cannot be assumed that the respective local resident has acquired a ticket, nor would the purchase of an admission ticket (if he should have bought one) give the local resident the right to compensation for such damage. The one thing (damage to his/her car by rioting fans) has nothing to do with the other (purchase of

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5 e.g. Tages-Anzeiger Online, 23.4.2014.

6 In the present article, the legal questions to be raised should be examined and answered in a generally valid manner (thus detached from the example of the 2014 Swiss Cup Final mentioned at the beginning). For this reason and in the intention of reducing the complexity of the topic in the interest of improved legibility, it is assumed in the following that a club is also the organiser. Thus, there will no longer be any specific mention of an organising association (e.g. the Swiss Football Association) in the following. Most of the statements, however, can still be transferred in an analogous manner to such an association. Finally, it is also assumed in the following that it involves matches of the top football league, and in particular not matches in the amateur sector.

7 e.g. a spectator whose coat has been damaged by a firework lit in the stadium.

8 e.g. a local resident whose car was damaged by "fans" on the way to the stadium.

9 Cf. Chapter 3 below.

10 Cf. Chapter 4 below.

an admission ticket and the right to watch the game "live" in the stadium. It would go too far to derive from the sale of an admission ticket a (primary or ancillary) obligation of the organising club to protect the property of the local resident/purchaser also outside of the stadium and to hold him/her harmless in the event of any damage by rioting "fans".

Possible unlawful action thus remains as a possible basis for liability. A liability from contract would be eliminated here.

3.2 Liability from tort

Liability from unlawful action necessitates, among others, that that the damaging party is to be charged with a unlawfulness that caused damage (in an appropriately causal manner)[11].

3.2.1 The question of liability arising from forbearance

Pursuant to established legislation of the Federal Court, the causing of damage is unlawful when it breaches a general statutory obligation by either impairing an absolute right of the damaged party or effects pure financial damage through breach of a rule that by its purpose aims to protect against such damage[12]. As in the constellation to be examined here, the organising club does not cause the damage itself, it also does not breach such a protective standard itself. For this reason, liability from forbearance would be conceivable at most.

A non-contractual liability due to forbearance necessitates pursuant to the Federal Court non-action despite the existing of a legal obligation to act[13]. Pursuant to established legislation, however, unlawfulness can also only develop when a protective standard in favour of the damaged party explicitly requires action[14]. Such protective standards can firstly arise from some part of objective law and secondly from general legal principles[15]. If an absolute right is at risk (such as ownership), according to an unwritten legal principle a capacity to act exists for the person who has created a dangerous circumstance or otherwise is responsible for it in an legally binding manner[16]. This so-called *danger clause* (Gefahrensatz) states that the person who creates or maintains a dangerous circumstance has to take the protective measures necessary to avoid damage. According to the Federal Court, it is suitable, in the event of breach of absolute legal assets[17], for establishing an unlawfulness in the event of a lack of a specific protective standard[18].

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[11] Art. 41 of the Swiss Code of Obligations (OR).

[12] e.g. BGE (Decisions of the Federal Court) 133 III 330.

[13] Ruling of the Federal Court 4A_520/2007, E. 2.1.

[14] e.g. ruling by the Federal Court 4A_520/2007, E. 2.1; BGE (Decisions of the Federal Court) 118 Ib 476.

[15] e.g. BGE (Decisions of the Federal Court) 116 Ib 374.

[16] e.g. BGE (Decisions of the Federal Court) 121 III 360.

[17] But, however, not with purely financial damage, cf. ruling of the Federal Court 4A_104/2012, E. 2.1.

[18] Ruling by the Federal Court 4A_104/2012, E. 2.1.

3.2.2 Specific application

(a) Fundamental requirements for a possible liability of the club

When applied to the question of a possible liability of an organising club for damage caused by rioting "fans" outside of a stadium, these principles confirmed by the Federal Court mean that an organiser could only be made liable from unlawful action if a local resident suffers damage in an absolute right (such as to his or her property, but not solely in his or her assets) and if the circumstances reasonably require action by the organiser to avoid such damage. Whereas the breach of an absolute right will be regularly given when the car, the house or another item that is owned by a local resident is damaged, in the writer's opinion the organiser's obligation of compensation would, however, regularly fail in that the organiser cannot take any effective measures in the first place to avert damage outside of the stadium (for example in Berne city centre when the Swiss Cup Final is held), and is not even authorised to do so. This for the following reasons:

(b) No right of the club to take suitable measures

An effective averting of damage caused by rioting "fans" by the club would require the security personnel ultimately also being able to take *measures of force* outside of the stadium. But this would be blocked by the Swiss legal system.

The Federal Constitution states that the Federal government and the Cantons have to ensure the country's safety and the protection of the population within the framework of their responsibilities[19]. This constitutional provision results in an original sovereignty of the police, the *monopoly to use force*, of the Cantons. Within their monopoly to use force, the Cantons are responsible for guaranteeing public order and safety on their territory. The monopoly to use force, however, does not only obligate the state to protect the population; it also sets tight constraints on the work of private individuals in the areas of safety and protection. It follows namely from the state monopoly to use force that private individuals, such as private security staff, fundamentally do not have any rights of intervention in public space. Exceptions to this or permitted would be the usual self-help rights, such as self-defence[20] as well as purely preventative measures such as patrols and the right to detain delinquent persons for a short period of time[21].

A private organiser such as a football club would accordingly not be authorised to "ensure public order" outside a stadium because ultimately "ensuring such public order" would also require the use of force, but the monopoly to use force lies with the state. Consequently, it could also not be argued that due to the *danger clause* the club is obligated to act (outside of the stadium) and would have to work towards protecting the local residents from rioting fans. That it would also be inappropriate to expect from the club that it takes such protective precautions that could offer a comprehensive and effective protection of the spectators outside of the stadium, for instance in the entire city centre of Berne, does not therefore need to be explained further at this point.

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19 Art. 57 par. 1 of the Federal Constitution (BV).

20 and/or assistance in self-defence and emergencies.

21 BBl 2006, 649.

The task of ensuring the peace and law and order outside of the stadium thus lies with the police.

4. Liability for damage by spectators (inside the stadium)

After the question was checked in the chapter above whether a club can become liable for damage caused by rioting "fans" outside of the stadium, the question should now be examined how the case is with regard to damage that is[22] caused within a stadium.

A liability of an organising club vis-à-vis spectators for damage caused within the stadium can fundamentally not arise only from unlawful action but also, and primarily, from contract.

4.1 Liability from contract

With the question regarding liability from contract, it is firstly of interest whether the organiser can become liable vis-à-vis spectators who incur damage within the stadium; but secondly also whether a spectator can become liable vis-à-vis the club when he or she has caused damage. Before these two types of claims are addressed, the nature of the contract is to be discussed beforehand in brief and which a spectator concludes to gain admission to the stadium.

4.1.1 The spectator contract

(a) General

In legal literature, a football stadium is regularly referred to as a *semi-public* space. A space is deemed to be semi-public when it is private but is (also) to be made publicly accessible due to its designated purpose[23]. This applies with a football stadium (at least during the match) just as much as with, for instance, a restaurant, a cinema or a shopping centre. All these and similar facilities are deemed to be semi-public.

To access this semi-public space, i.e. the stadium, and to watch a match, the spectators require a valid ticket. With the purchase of the ticket, a contract is reached between the spectator and the organising club. The specific contractual content also depends on the terms and conditions of contract of the club that the spectator accepts before or during the purchase of the ticket[24].

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[22] In addition, the term "stadium" should also include the areas belonging to and directly adjoining the stadium, such as access ramps, stadium areas, till area, etc.

[23] BBl 2006, 648.

[24] The question of whether and under what circumstances such contractual conditions actually become contractual content should not be discussed here further and reference is made to the general principles regarding the contract conclusion and the use of general conditions of business.

Irrespective of the specific formulation of the respective contractual conditions of each club, it can be assumed that the fundamental points of each such *spectator contract consist in* a spectator being given admission to the stadium in return for a fee so that the spectator can follow a certain match "live"[25].

(b) Contract qualification

As far as can be discerned, the theory assumes that the spectator contract is a work contract or a contract that is a mix between a work contract and a rental contract[26]. This opinion is attributable to the fact that the Federal Court repeatedly stated that a work pursuant to the work contract law does not necessarily have to be of a physical nature and non-physical results could indeed comply with the work term[27].

This contract qualification, however, is questioned here. A delivery obligation is also of pivotal importance for a work contract pursuant to Art. 363 et seq. of the Swiss Code of Obligations (OR) in addition to the production obligation, which is explicitly mentioned in the legal definition[28]. Although this obligation is not explicitly expressed in Art. 363 of the OR, it is taken as given, and the law then also explicitly mentions delivery in various other provisions: The customer must check the work after delivery and notify the contractor of any defects[29]. The contractor is released from his or her liability if the customer has explicitly or tacitly approved the work delivered[30]. And finally the customer has to fundamentally pay the remuneration when the work is delivered[31].

The work contract thus has an *individualising* character in the sense that a work is to be produced for a customer and delivered to him/her. The customer has to pay a remuneration as soon as he or she had made sure during an acceptance test that the work corresponds to the agreed and expected properties and specifications. In the writer's opinion, this characteristic of the type, however, is missing in a contract regarding attendance at a sports event. Although it can be argued that at a football match certain objectively determinable performance features exist such as the time of the event, the circumstance that two teams compete against one another and that the game is held over ninety minutes, the qualification as a work contract is not sufficient. It namely conceals the circumstance that it always involves sports competitions that are held (with the exception of friendlies) within the framework of a champi-

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[25] Depending on the formulation, the authorisation can result from the contract to use a certain assigned seat and/or purchase additional services such as hospitality services and/or to use the ticket for a whole season in the same way. These types of games are not relevant for the further considerations in this paper.

[26] C. Huguenin/A. Rusch: "Vorb 184 ff/Gastaufnahme- und Freizeitverträge" ("Guest admission and leisure contracts"), in: Handkommentar zum Schweizer Privatrecht, Vertragsverhältnisse Teil 1 - Innominatkontrakte, Kauf, Tausch, Schenkung, Miete, Leihe ("Hand commentary on Swiss Private Law, contractual circumstances part 1 - Innominate contracts, purchase, exchange, gift, rent, lending") - Art. 184-318 of the Swiss Code of Obligations (OR), N 13; O. Arter/E. Schweizer, Verantwortlichkeit des Veranstalters von Sportanlässen ("Responsibiity of the organiser of sports events"), in: Oliver Arter (publisher), "Sport und Recht" ("Sport and Law"), 2004, p. 62 et seq.

[27] BGE (Decisions of the Federal Court) 109 II 34 et seq.; BGE (Decisions of the Federal Court) 109 II 462 et seq.

[28] BGE 89 II 235, E. 4.a.

[29] Art. 367 par.1 of theOR.

[30] Art. 370 par. 1 of theOR.

[31] Art. 372 par. 1 of theOR.

onship[32] pursuant to the rules and standards of a sports association. Such competitions are held whether spectators are present or not. The goal of the participating sportsmen and women and teams is to determine a winner pursuant to the association law rules and standards. The participating teams do not create a work that has been ordered, and they also do not deliver such a work. Rather, they conduct a competition that the spectators are allowed to watch on site due to an agreement with the organising club. In the writer's opinion, there can thus be no talk of a production and delivery of a work in the sense of work contract law (that can then also be subjected to an acceptance test). The work contract rules within the framework of an overall analysis simply do not fit to such a sporting performance or to the right of access. Rather, an innominate contract *sui iuris* is therefore to be assumed.

(c) Contractual obligations

Ultimately, in the writer's opinion, the contractual qualification can be left open for the purposes of this article. If a spectator incurs damage in a stadium that he or she is permitted to visit due to the purchase of a ticket (or the conclusion of a spectator contract), the legal consequences can be determined from general contractual law principles (thus irrespective of whether the spectator contract is a work contract or rental contract or another nominate or innominate contract) and are determined as follows:

First of all, it is to be assumed that most organisers define specific contractual conditions that become binding according to the general rules (they must have been notified to the customer before or on conclusion of the contract and may not include any improper conditions). Such contractual conditions could, for instance, include the ban on carrying pyrotechnical or other potentially dangerous material[33]. If therefore, in light of this, a spectator should take in pyrotechnical material (or even light it), he or she would breach the contract.

However, it then also needs to be remembered that the ticket conditions (if they exist) could barely ever cover every possible misconduct by a spectator in full. For this reason, the generally recognised principle that contractual content is not solely determined by the wording of the contract but also that other obligations exist which result in good faith from the nature of the contract and correspond to the hypothetical will of the parties is also valid[34]. In the writer's opinion, such other obligations undoubtedly include the spectator's obligation not to let off any firecrackers, and, more generally, the obligation not to disturb the course of the event and not to jeopardise the health of the other spectators and of the players. From a legal dogma perspective, these are ancillary obligations of the spectators (obligations that are in addition to the payment of the admission price)[35]. Such ancillary obligations cannot always be claimed independently but when they are breached they nevertheless result at least in an obligation to pay compensation.

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[32] Swiss championship, European championships, World Cup, etc.

[33] The International Ice Hockey Federation (IIHF), for instance, states in Clause 5 of its Terms and Conditions for World Championships*: "For the purposes of security […] all persons shall be required to cooperate in respect of providing evidence of identity, conducting inspections of personal belongings, confiscation of prohibited items, and/or body checks"*.

[34] Cf. I. Schwenzer, Schweizerisches Obligationenrecht Allgemeiner Teil ("Swiss Law of Obligations General Part"), &. edition Berne 2012, margin number. 4.22.

[35] I. Schwenzer, loc. cit., margin number 4.20 et seq.

But not only the spectators; also the club regularly have such ancillary obligations that are in addition to its primary obligation (granting of admission to the match) and that are regularly not explicitly listed in the ticket conditions. This includes, for instance, the obligation to ensure appropriate protection of the spectators[36].

4.1.2 Breach of the spectator contract by the spectators

If a spectator now breaches a primary or ancillary obligation under the spectator contract, he or she becomes liable for compensation pursuant to the general regulations of Art. 97 et seq. of theOR if he or she cannot prove that he or she is not culpable. If he or she is obligated to pay compensation, he or she has to fundamentally pay for any damage caused to the organiser.

A ruling by Rostock District Court is illustrative in this context[37], which in the opinion of the writer is pioneering in the present context. This ruling was based on a case in which individual spectators had entered the picture during a German Bundesliga match, which led to the German Football Association (DFB) imposing a fine on the club. At the club's petition, the guilty spectators then had to reimburse the club for the fine. The ruling court had established that the spectators and the club had concluded a visitor contract and that the spectators, by running onto the pitch, had wilfully breached an ancillary contractual obligation. This because it is generally known that entering the pitch is prohibited[38]. The misconduct by "fans" had led to the club suffering damage because the DFB had ordered the club to pay a fine of 20,000 Euros (under association law). As the court saw a direct causal link between the imposing of the fine of 20,000 Euros on the club Hans Rostock by the DFB and the entering of the pitch by the respective spectators, the court affirmed the obligation of the guilty spectators to hold the club harmless with regard to the breach of the visitor contract.

Although this ruling was issued under German law, the principles drawn up there should also be noted under Swiss law in this sense. For an obligation of compensation, Swiss law would also require that there was a breach of contract which resulted in damage and that a "causal link" is given between the breach of contract[39] and the damage. There must then also be culpability on the part of the spectators which can easily be assumed in the example described.

The aforementioned case is an example of it being possible to make spectators who do not behave properly in the stadium and breach the spectator contract liable for compensation vis-à-vis the club due to a breach of contract. This does not require any further remarks.

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36 C. in this regard chapter also 4.1.3.

37 Rostock District Court (LG), default judgement ad final judgement dated 16 June 2005, case number 9 0 328/04.

38 Rostock District Court (LG), loc. cit. sheet 8.

39 Under Swiss law the *adequate causality*.

4.1.3 Breach of the spectator contract by the organising club

(a) Contractual obligation of the club to take precautionary protective measures

Another question is now whether the organising club can become liable for compensation vis-à-vis the spectators if damage is caused in the stadium which affects the spectators and is the result of "fan" riots. The decisive aspect when answering this question is whether the organising club has an obligation to protect the rest of the spectators from the rioting "fans". Because the spectator contract as an innominate contract is not regulated by law, this question is to be answered according to general principles under the Swiss Code of Obligations and according to the nature of the business and the hypothetical will of the parties.

It has already been stated that precisely not only the spectators have certain ancillary obligations[40], but that also the organising club has to comply with and meet certain ancillary obligations. This undoubtedly includes the obligation to protect the spectators to a certain extent from damage.

(b) Scope of the "protection obligation"

But how far does this obligation of protection extend? Maximum protective measures protecting against all possible incidents do not exist and comprehensive protection can also not be expected from the organising club in good faith. However, it can be demanded that the club, taking into account the fundamental circumstances, takes the objectively appropriate protective measures[41]. The principle of appropriateness and the consideration of the specific circumstances are also found in the law in various provisions[42] and ultimately results from the fundamental principle in contract law of good faith. The event organiser thus has to take the security measures that the spectator can reasonably expect.

When examining the specific circumstances, for instance, the quality of the stadium, the type of match (friendly, championship-deciding match, etc.) as well as the notorious willingness to use violence by own fans and those of the visiting club need to be taken into account. In this regard, important indications are also offered by the relevant regulations that the responsible sports association has issued on the topic of safety and safety measures in stadiums[43]. If such regulations exist, a court that has been called upon to assess an incident of damage will then also orient itself to this (in particular). If an organising club does not comply with these regulations, it could be able to assert only in exceptional cases that the specified measures were excessive or not expedient and it therefore did not comply with

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40 such as those of not disrupting the course of a match and not entering the pitch during the match or after the match has ended.

41 Cf. also in this regard the statements on the match EV Zug – ZSC Lions in CaS, 2009, p. 375 et seq.. Even if the subject of responsibility of the organising club was treated there under association law aspects, the considerations made there are also illustrative in the present context.

42 for instance in Art. 321 e par. 2 of the Swiss Code of Obligations (OR), Art. 364 par. 1 of the Swiss Code of Obligations (OR) and Art. 398 par. 1 of the Swiss Code of Obligations (OR).

43 e.g. the "SFV Stadium Ordinance" of the Swiss Football Association (SFV); http://www.football.ch/de/SFV/SFV-Service/Service/Dokumentationen-497-1/Stadionordnung.aspx; retrieved on 30 May 2014. This regulation primarily contains instructions for action and bans directed at the spectators. However, specific obligations of action by the clubs can be derived from these regulations for the purpose of enforcing the corresponding standards. If the clubs do not comply with these obligations, or only do so insufficiently, this can result in a liability from contract of the club if damage or injury is incurred by somebody. For instance, Clause 4.3 demands that persons who are under the influence of drugs or alcohol or carry dangerous or prohibited items with them can be refused entry to the stadium. Apart from the fact that the regulation would be better formulated as "must be refused", no lengthy statements are necessary to concluded that a club makes itself liable when it admits a heavily inebriated group of people into the stadium without further checks and these "fans" then harm other spectators with knives that they have brought with them.

them. In addition, a club as an association member will regularly be involved in the process of enacting the corresponding regulation and will probably also agree to it in most cases. It would then have to have such consent (and its misconduct) offset when determining the care to be applied in compensation proceedings under civil law (and not only in association-internal sanction proceedings).

It can thus be stated that each club that stages a championship match has to implement suitable and appropriate measures in order to safeguard the spectators' safety.

However, it also needs to be checked in this context whether the club is obligated or entitled to also *apply physical force* in order to protect the spectators from harm.

4.1.4 Special question: May the organising club apply physical force to avert harm?

A special question that arises with regard to the protection of the spectators within a stadium is therefore whether the club is obligated or entitled to protect the spectators from rioting "fans" also using physical force. The clubs usually commission private security firms whose employees are to carry out certain functions to keep order in the stadium. It needs to be clarified how far the competences of these security people go.

(a) Contractually agreed/permissible measures

It has already been explained in brief that a stadium is viewed as a *semi-public* space. According to general opinion private individuals may only take measures in such a space that are derived from so-called house law[44] as well as the relevant self-help measures, such as self-defence, (and the corresponding help for this)[45].

However, on the basis of the *state's monopoly on the use of force*, all other measures are fundamentally reserved for the police,[46]whereby there is consensus that the organising club, in addition to the self-help rights, may also take the measures that are needed to ensure an orderly course of the event if a special legal basis, for instance a contractual agreement in the spectator contract, exists. Based on a contractual consent of the parties concerned, the following safety measures are deemed to be permissible: Admission checks, intervention for the spatial separation of groups of persons, searches when they are connected with the safety of the respective event, confiscation of items when they are associated with the safety of the respective event, recording of personal details; accordingly, however, own identification measures by the private security firms would be deemed unlawful[47].

It still needs to be checked whether the club, based on another legal basis, would be authorised to use further measures. The focus here is primarily the Concordat on Measures to Combat Violence during Sports Events *(Concordat)*

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[44] Derived from Art. 13 par. 1 of the Federal Constitution (BV) and Art. 27 of the Federal Constitution (BV)

[45] BBl 2006 648.

[46] M. Mohler, Sicherheit & Recht ("Safety & Law"), 2/2010, p. 72.

[47] BBl 2006 648.

(b) Measures based on the Concordat on Measures to Combat Violence during Sports Events.

Following the 2014 Swiss Cup Final, the Concordat also gave cause for discussion. In particular, the question was raised as to whether this Concordat offered any benefit at all if riots regularly took place despite it being in force.

The Concordat has been in force in all Cantons since 1 September 2010 and thus has legal effect[48]. On 2 February 2012, the Concordat was amended to introduce further-reaching measures. Complaints against the Concordat and the admission of the Cantons of Lucerne and Aargau to the Concordat respectively were submitted to the Federal Court. The Federal Court ruled within the framework of the abstract check of standards that the amendments to the Concordat with two exceptions did not warrant any cause for complaint. The Federal Court ruled the introduction of a minimum duration of one year for the designation of off-limit areas to be irreconcilable with the principle of proportionality[49] and the mandatory doubling of the duration of the reporting obligation in the event of a breach of obligation without excusable grounds. According to the Federal Court, the amended Concordat and the accession decisions of the Cantons of Lucerne and Aargau were therefore to be rescinded in this sense, i.e. solely with regard to these two points[50]. For the rest, the Federal Court had no grounds for complaint with regard to the supplemented Concordat.

In the majority of cases, the Concordat makes provision for official measures and tasks, such as the designation of off-limit areas, the reporting requirement and police custody.

In addition, however, the Concordat also makes provision for the authorities being able to authorise private security firms that are commissioned by the organiser with admission checks to the sports venues to conduct clothed body searches for prohibited items by persons of the same gender, irrespective of a specific suspicion[51] [52]. In the process, the organising club must inform the visitors about the possibility of searches[53]. The organising club can thus also, either at its own initiative[54] or at the recommendation of an authority issue a ban on entering the stadium[55]. Finally, the Concordat[56] can also result in the obligation of the clubs to request from the spectators as they enter the stadium to show some proof of identity in order to ensure that no persons are admitted who have had a stadium ban or measures pursuant to the Concordat imposed on them.

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48 The Federal Court had checked the original version of the Concordat during the abstract check of standards and rejected the complaints filed against it: BGE (Decisions of the Federal Court) 137 I 31 et seq. and 1C_278/2009.

49 Art. 4 par. 2 of the amended Concordat

50 BGE 140 I 47.

51 Art. 3b par. 2 of the amended Concordat.

52 The Federal Court has explicitly confirmed the compliance of this provision with the Constitution; cf. BGE 140 I 30.

53 Art. 3b par. 3 of the amended Concordat.

54 Based on its house law, Art. 13 par. 1 and Art. 27 of the Federal Constitution.

55 Art. 10 of the Concordat.

56 Art. 3a par. 3 of the amended Concordat.

However, none of these provisions of the Concordat empowers the organising club to order measures of violence itself or via security firms commissioned by it to protect spectators from rioting fans.

The boundaries set for the clubs in combating violence in the stadiums are also derived as an example from the "Sample agreement violence in sport", according to the Concordat[57]. Article 2 on "Responsibilities" defines:

> *"1 The sports club […] is responsible for the safety in the stadium […] and on the surrounding private area. It can delegate tasks in the area of security to the stadium operator. 2 The authority guarantees safety in the public area. It intervenes on the private premises in the surrounding area of the stadium […] and in the stadium itself if […] this is agreed with the sports club …]; there is a substantial risk to safety (for instance attacks on physical integrity); or […] a police assignment is necessary for investigation reasons*"[58].

It follows from all this that the state's monopoly on using force remains. If there are violent disputes in the stadium, it is the responsibility of the police to intervene, as is also the case outside of the stadium. The clubs have their hands tied with regard to effective measures to curb violence.

4.1.5 The question of recourse by the club against the spectator

If the organising club now becomes liable for compensation vis-à-vis a spectator because it has possibly not complied sufficiently with the obligations resulting from the spectator contract for the protection of the spectators, the club, as already depicted above in connection with the case of the German club Hansa Rostock, can fundamentally transfer the damage to the rioting fan if the rioting fan for his/her part has breached the spectator contract vis-à-vis the club and this resulted in the damage incurred by the spectator in question. The compensation amount that the club has to pay to the spectator who has incurred the damage is fundamentally offsettable pursuant to general principles of compensation law as a damage amount of the club vis-à-vis the spectator causing the damage.

In averting the club's claim for compensation, the damaging spectator could also still be tempted to argue that the circumstance that the organising club became liable for compensation vis-à-vis the injured spectators shows that the organising club itself acted without due care. Consequently, the club has interrupted the causal link between hooliganism and the obligation imposed on the organiser to pay compensation. At least, however, the claim is to be reduced as the result of self-culpability[59]. Apparently, the fans used this argumentation in the aforementioned case of Hansa Rostock. The court

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[57] Retrievable on the website of the Cantonal Judicial and Police Directors (KKJPD): http://www.kkjpd.ch/frameset.asp?sprache=d; retrieved on 3 June 2014.

[58] Even if the sample agreement, as recorded even in the accompanying media release of the KKJPD dated April 2010 (retrievable under: http://www.kkjpd.ch/frameset.asp?sprache=d; retrieved on 3 June 2014) is not binding, it shows examples of the limits that a private club has in combating violence in the stadium. Pursuant to this media release from the KKJPD, however, the sample agreement is to develop its effect because the judicial and police directors are resolved to implement this policy of the KKJPD in their area of influence and, in particular, to make the participation of the clubs in the police costs dependent on the club's efforts.

[59] Art. 44 par. 1 of the Swiss Code of Obligations (OR).

ruled, however, that the wilful action by the hooligans fully superseded a negligent breach of obligation by the organising club[60] and that therefore the rioting fans cannot use this argument to dispute their obligation of compensation. In the writer's opinion, this would not have to be decided upon differently according to Swiss law.

4.2 Liability from unlawful action

In addition to liability arising from the spectator contract, non-contractual liability from unlawful action is fundamentally[61]also possible if damage is incurred inside the stadium.

Non-contractual liability is primarily of importance with regard to the persons in the stadium who have not concluded a contract with one another, i.e. primarily between the spectators themselves. The question that then arises is whether a spectator who has incurred damage to his/her health or assets by a rioting "fan" can file legal action against the damaging "fan".

He or she can fundamentally do this if the general liability prerequisites pursuant to Art. 41 of the Swiss Code of Obligations (OR) are met[62], thus a damage incurred by the spectator, unlawful conduct by the damaging "fan", the adequate causal link between the conduct in question and the damage and culpability on the part of the damaging party.

As already stated, damage to assets alone does not yet constitute unlawfulness in the legal sense. Rather, an unlawfulness is not given until the damaging conduct breaches a standard that prohibits intervention in a protected legal asset and/or stipulates a conduct that aims to avoid such intervention, or if the conduct breaches an absolutely protected legal asset such as life, physical integrity, health, personality or property. As depicted, financial assets are not included in these absolutely protected legal assets. But everywhere where the financial damage is attributable to a breach of a protected legal asset or a liability-relevant protective standard, the basis also exists for non-contractual liability. If e.g. a fan injures another spectator with a firework, he or she causes damage to this spectator by breaching special standards of legal protection, for instance physical injury and damage to property. In this case, he or she causes damage to health (burns) and/or to his or her property (e.g. burns to the coat). Both types of damage can be specified in figures, meaning that the financial damage can be proven. With physical injury, for instance, at least the healing costs can be considered as a damage position; with damage to property (damage to the coat) the costs for the purchase of a new coat. If the damaged party succeeds in finding out the personal details of the perpetrator of the damage, he or she can proceed against him/her and file a lawsuit for compensation. If he or she does not succeed in doing so (or if he or she does not want to), the spectator who has incurred damage may possiblye have a lawsuit arising from the contract against the organising club if the club has not taken the necessary precautionary safety measures with the appropriate care[63].

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60 Rostock District Court, loc. cit. sheet 10.

61 Art. 41 et seq. of the Swiss Code of Obligations (OR).

62 Cf. above Chapter 3.2.

63 Cf. in this regard Chapter 4.1.3. above.