



Arbitration CAS 2007/A/1384 Olympiacos Sports Club v. Ligue Européenne de Natation (LEN), award of 20 December 2007

Panel: Mr Patrick Lafranchi (Switzerland), Sole Arbitrator

Water Polo

Disciplinary sanction against a club following supporter's behaviour during a match

Notification of a decision

CAS' power of review (de novo)

Responsibility of the club for the behaviour of its supporters

Determination of the applicable sanction

1. According to Swiss case law as well as the general principles of law, the burden of proof of the notification and of the date of the notification of a decision is in principle on the authority intending to draw a legal consequence from this fact. A federation in charge of disciplinary matters and running proceedings leading to disciplinary sanctions imposed on clubs, bears the responsibility of the notification of its decisions. Any doubt as to the date of notification of the decision has in consequence to be interpreted in favour of the admissibility of the appeal.
2. A CAS panel has the power under Art. R57 of the Code to fully review the facts and the law and to issue a new decision which replaces the decision challenged. In consequence, any procedural irregularity as regards the right to be heard of the appellant is deemed to have been cured in the appeal proceedings before the CAS. This conclusion is in line with the case law of the Swiss Supreme Court which admits that any violation of the right to be heard can be cured in front of an appeal authority if this authority has a similar power to review the facts and the law as the body having issued the appealed decision.
3. According to the applicable rules, a club is responsible for the attitude of its supporters. In this respect, a club has the obligation to be proactive and to be in touch with the organizers to inform them that potentially violent supporters would be present at a match. By not collaborating with the organizers, a club clearly does not fulfil its duties to meet responsibility for security both inside and around the venue before, during and after the event.
4. An incident causing an important amount of material damage is not minor, even if no physical injuries were reported. It has to be considered serious and has to be classified as an offence of a grave nature and of some consequence for which the applicable code of discipline provides a fine up to Euros 3.000,- and a suspension from playing home for up to four matches and up to four points of deduction.

The Olympiacos Sports Club of the Water Polo Team of Piraeus (the “Appellant” or “Olympiacos”) is a Greek Water Polo Club affiliated to the Hellenic Swimming Federation, which is a member of the Ligue Européenne de Natation.

The Ligue Européenne de Natation (the “Respondent” or “LEN”) is the European governing body for Water Polo, Swimming, Synchronised Swimming, Open Water Swimming and Diving. It is an association established in accordance with Art. 60 ss of the Swiss Civil Code, in Geneva, Switzerland. It has its administrative headquarters in Roma, Italy. The Respondent runs the “Euro League”, which is a European club Water Polo competition.

On 22 and 23 June 2007, the Respondent organized the final phase of the “Euro League” which is designed as the “EURO LEAGUE FINAL FOUR” (the “Final Four”). This competition was staged at the *Centro Balneare Scarioni* in Milan, Italy.

The Final Four represents the culmination of the European Club Water Polo competition. For the season 2006/2007 the Appellant participated in the Final Four, together with “Pro Recco”, which is an Italian club, “Partizan Raiffeisen Belgrad”, which is a Serbian club and “VK SUG Croatia”, which is a Croatian club.

Olympiacos was allocated three hundred tickets for the competition. All the tickets allocated to Olympiacos have been sold to Greek supporters. According to the Appellant, supporters wanting to buy tickets were requested to give their names, so that a written list of the supporters was available. According to the Appellant, a number of around fifty to sixty “Category C” supporters have been registered and have bought tickets to attend the Final Four Competition. It can be deduced from the explanation of the Appellant that the supporters classified as “Category C” supporters are more likely to cause troubles. The officials of Olympiacos therefore placed these supporters as far away from the pool area as possible on the day of the first game of the “Final Four”.

The Respondent had concerns about possible clashes between Serbian and Croatian supporters during the Final Four event. In order to deal with this matter, a meeting took place on 18 June 2007 in Milan between Marco Birri, the LEN Water Polo Manager, and the representatives of the Croatian and Serbian Embassies in Italy. Following this meeting, Marco Birri inspected the venue of the Final Four matches and discussed security arrangements with private security representatives and the Italian police. It was decided that several security measures would be taken, such as sufficient police and security personnel around the main entrance areas. On 22 June 2007, prior to the commencement of the matches, representatives of all participating clubs attended a meeting to discuss organizational matters and security issues.

The first day of the Final Four entailed two semi-final matches. The first match was between the Appellant and the Italian club Pro Recco. During the final quarter of this match, a certain number of the Appellant’s supporters began to remove the plastic bucket seats from the seating area and threw them towards Serbian supporters who were entering the pool in order to attend the next match. According to Marco Birri, the LEN Water Polo manager, around one hundred Greek supporters were involved. According to Laszlo Szakadati, executive director of the LEN who was attending the match between Olympiacos and Pro Recco, fifty to sixty Greek supporters were involved. The Team

Manager of the Appellant, Diomidis Logothetis, who also attended the match between Olympiacos and Pro Recco, expressed the opinion that the number of Greek supporters involved in the incident is to be estimated to thirty. On the basis of the witness statements and of the photographs of the incident produced by the Respondent, the Sole Arbitrator is of the opinion that several dozens of Greek supporters were involved in the incident.

It is undisputed by the Appellant that several plastic bucket seats were ripped up and thrown towards Serbian supporters. The Appellant alleged that this incident was caused by the attitude of the Serbian fans and provocations from those fans towards the Greek supporters. There is however no evidence as to the existence of such provocation. The Team Manager of the Appellant admitted at the hearing held in front of the CAS on 20 November 2007 that he had not been standing at the moment of the incident in a place from which he could have witnessed personally any provocation from the Serbian fans.

When the incident arose, around twenty Italian policemen were present in the area of the swimming pool, fully equipped with helmets, plastic shields and truncheons. The policemen quickly intervened and the disturbance subsided after a few minutes. The match was not interrupted.

It results from the photographs produced by the Respondent that at least a dozen of plastic bucket seats have been removed from their place. It also results from these photographs that important damage was caused to the Greek supporters' stands.

Later during the evening, Greek supporters caused disturbances in the city of Milan. As a result of this, around one hundred to one hundred and fifty Greek supporters were not allowed to enter the pool on the following day.

On 4 August 2007, the LEN bureau referred the matter of the spectators' misconduct to the LEN Panel for Disciplinary Matters and Disputes (the "LEN Panel"). On 21 August 2007, Laszlo Szakadati, executive director of the LEN, sent a fax to the Appellant, to inform that the LEN Panel for Disciplinary Matters and Disputes would hold a hearing in Bratislava, on 1 September 2007, to deal with the incident that took place on 22 June 2007 between the supporters of Olympiacos and Partizan Raiffeisen Belgrad during the Final Four. A representative of the Appellant was invited to attend this hearing and provisional accommodation had been arranged in this perspective. In this letter, the Respondent invited the Appellant to give notice of its attendance to the hearing, as a party involved, the latest by Monday 27 September 2007. There was obviously a misprint in this letter and the intention of the Respondent was to have an answer as to the attendance of the representative of the club by 27 August 2007.

The Appellant submits that this misprint confused its administrative staff which did not identify this call as an urgent matter.

The Appellant's Team Manager, Diomidis Logothetis, was informed on 27 August 2007 at the latest that a hearing was scheduled on 1 September 2007. Diomidis Logothetis had a phone conversation with Marco Birri, the LEN Water Polo manager, concerning this hearing on 23 August 2007.

On 30 August 2007, the Appellant sent a memorandum to the LEN Panel. The Appellant submitted that the call dated 21 August 2007 was invalid, due to the lack of exact definition of the act for which it has been issued and the lack to mention the regulatory provisions allegedly breached. Subsidiarily, the Appellant submitted that it had no responsibility for the incident that took place at the end of the match between Pro Recco and Olympiacos, since it did not participate in the planification of the security measures.

On 1 September 2007, the LEN Panel issued a decision (the “Decision”), stating as follows in relevant parts:

“(…)

During the match between Pro Recco and Olympiacos, Serbian supporters arriving later were followed by the police to their stands. To avoid any contact with the Croatian supporters, they used the way behind the stands for Greek supporters. That was a reasonable decision by the police.

When the group passed behind the stands for the Greek supporters, these were breaking the plastic buckets and started to throw them towards the Serbians. There is no information from the police or from the hearing that there were any provocations. After a few minutes, the police re-established order.

On Sunday 23 June 2007, most of Greek supporters involved in the incident the day before were not allowed to enter the pool area.

(…)

Based on the facts and findings, as well as in accordance with the rules and regulations set out herein, the LEN Panel has taken the following decisions:

1. *Olympiacos Piraeus is suspended as follows:*

- *The next three home matches of the Water Polo Euro League shall not be played in their home pool.*
- *These matches shall be played without any spectators.*

(…)

2. *There are no sanctions against other parties involved in the incident”.*

According to Marco Birri, the LEN Water Polo manager, this Decision was sent by fax to the Appellant on the day it was made, at the beginning of the evening. There is however no other material evidence of the transmission of the Decision to the Appellant on 3 September 2007. In particular, the Respondent has not been able to produce a fax report confirming the transmission of a fax to the Appellant.

On 21 September 2007, the Appellant filed a Statement of Appeal with the CAS. It challenged the Decision and requested that the CAS admit the Appeal, set aside and annul the Decision of the LEN Panel in its entirety, and cancel the sanction of suspension for the next three home matches of the Water Polo Euro League against Olympiacos Sports Club, or to modify the Decision to impose a sanction at a minimum level.

On 4 October 2007, the Appellant filed its Appeal Brief, which contains critics on the Decision challenged, accompanied by documents produced as evidence.

On 6 November 2007, the parties agreed to an Expedited Procedure according to Art. R44.4 of the Code of Sports - Related Arbitration (the "Code").

On 15 November 2007, the Respondent filed an Answer.

On 20 November 2007, a hearing took place at the headquarters of the CAS, in Lausanne.

In its Statement of Appeal, the Appellant requested that the CAS set aside and annul the Decision of the LEN Panel and cancel the sanction of suspension for the next three home matches of the Water Polo Euro League against Olympiacos Sports Club, or to modify the Decision to impose a sanction at the minimum level.

In its Answer dated 15 November 2007, the Respondent requests the Sole Arbitrator to dismiss the Appeal.

LAW

CAS Jurisdiction

1. Art. R27 of the Code provides that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such dispute may arise out of a contract containing an arbitration clause, or be the part of a later arbitration agreement. *In casu* the jurisdiction of CAS is based on Art. C 9.2.2 of the LEN Constitutional Rules, which provides that an appeal may be submitted against a decision taken by the LEN Panel according to C 9.2.1 a) and b) to the CAS in Lausanne within twenty-one days after notification. The jurisdiction of the CAS is furthermore confirmed by the signature by the parties of the Order of Procedure on 16 and 19 November 2007. The objection raised by the Respondent as to the lack of jurisdiction of the CAS is connected with the question of the admissibility of the appeal and will be dealt with hereunder.
2. The mission of the Sole Arbitrator follows from Art. R57 of the Code, according to which the Panel has full power to review the facts and the law of the case. Furthermore, Art. R57 of the Code provides that the panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

Applicable Law

3. Art. R58 of the Code provides the following:

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

4. In the present matter, the parties have not agreed on the application of any particular law. Therefore, the Rules and Regulations of LEN shall apply primarily. The applicable regulations are in the present case the LEN Constitutional Rules of 1 October 2006, the General Events Rules of 1 October 2006, the Code of Conduct of 9 December 2006 and the Code of Discipline for Water Polo of 13 June 2003. As the Respondent is an association established in Geneva according to art. 60 ff of the Swiss civil Code, Switzerland, which has not been disputed by the Appellant, Swiss law shall apply complementarily.

Admissibility

5. The Statement of Appeal is to be submitted within the deadline provided by Art. C 9.2.2 of the LEN Constitutional Rules, that is within twenty-one days after notification of the decision. The Respondent argues that the Decision has been notified on 1 September 2007, on the day it was made. It asserts that it is standard practice for decisions of the LEN Panel to be notified to the relevant parties on the same day as the decision is reached and relies on the declarations of Marco Birri, which has exposed in his witness statement dated 15 November 2007 that he had been requested to fax the final copy of the written Decision to Olympiacos, Partizan and Pro Recco on 1 September 2007, which he duly did. At the hearing held by CAS on 20 November 2007, Marco Birri explained that the Decision was sent by fax to several clubs and federations, amongst which were the Appellant, from a hotel in Bratislava.
6. Even if one accepts that a fax has been sent on the day of 1 September 2007 to the Appellant, it is doubtful to affirm that it is sufficient to consider that the Decision is deemed to have been notified on that day. The Sole Arbitrator accepts the argument of the Respondent that the fiction of the notification is not connected with the Decision of the addressee to consider or not to consider a decision that has been sent by fax. However, one cannot admit that a decision received by fax at any time of the day or any day of the week should be considered by the addressee. For decisions sent on a non business day, for instance on a Saturday evening as in the present case, it cannot be deemed that a representative of the Appellant was present at the office and had the possibility to materially consider the Decision. In such a case, the earliest moment at which the notification could be deemed to have occurred is the next business day, that is to say in the present case on 3 September 2007.
7. The Appellant submits that it received the Decision on the 4 September 2007, apparently on the day when it was resent from the LEN offices in Roma to the parties concerned. It is not

disputed that if the Decision has been notified on 4 September 2007, the Appeal has been filed within due time.

8. According to Swiss case law, which can be considered on this point as being similar to the general principles of law, the burden of proof of the notification and of the date of the notification of a decision is in principle on the authority intending to draw a legal consequence from this fact (see decision of the Swiss Supreme Court dated 26 November 2002, published in DTF 129 I 8). The Sole Arbitrator is of the opinion that this general principle has to be applied to the Respondent in the present case. Being a federation in charge of disciplinary matters and running proceedings leading to disciplinary sanctions imposed on clubs, the Respondent bears the responsibility of the notification of its decisions. Any doubt as to the date of notification of the decision has in consequence to be interpreted in favour of the admissibility of the Appeal.
9. The Sole Arbitrator is of the opinion that there remains a doubt as to the exact date of notification of the Decision. In that respect, the witness statement of Marco Birri is not sufficient. Even if one admits that this witness statement is correct and that Marco Birri duly faxed the Decision to Olympiacos on 1 September 2007, it cannot be excluded that a technical problem arose during the transmission, especially considering that this transmission took place in peculiar conditions, from the fax of a hotel. In these circumstances and in absence of any other document as a fax report, it cannot be excluded that the Decision reached the Appellant on 4 September 2007 at the earliest.
10. Finally, the argument that it is common practice to notify the decisions of the LEN Panel on the day these decisions are reached has to be rejected. A disciplinary body as a federation cannot impose on a private body to have a proactive attitude and to seek whether a decision has been made or not after a hearing, even if a club was aware that a hearing was to take place.
11. It follows that the Appellant presented its appeal in front of the CAS in due time and that the Sole Arbitrator has jurisdiction to deal with this appeal.

The Appellant's procedural arguments

12. The Appellant raises several objections connected with the way the proceedings have been led by the Respondent and submits that its right to be heard has consequently been violated.
13. It has to be admitted that the hearing held by the LEN Panel has been called at short notice. The call results from a letter dated 21 August 2007 from the LEN Director to Olympiacos. It can be deducted from the copy of this letter produced by the Respondent in front of the CAS that the call has been sent by fax to Olympiacos on 22 August 2007, that is to say just ten days before the hearing. Considering that this hearing was to take place in a foreign country, it would have been very difficult for the Respondent to make all necessary arrangements to attend the hearing. It would have been even more difficult to attend the hearing with a lawyer briefed about the case. Even if the Respondent was aware of the probability of a hearing concerning the consequences of the incident that occurred during the Final Four, the deadline set to appear

in front of the LEN Panel might have been considered as too short to respect the principles of the right to be heard.

14. The Appellant however did not raise any objection as regards the deadline set to appear in front of the LEN Panel and as regards any violation of its right to be heard in that respect. Furthermore, the Appellant chose to file in written submissions, although being perfectly aware that a hearing was scheduled on 1 September 2007. It appears that the Appellant was satisfied with this manner of presenting its case, as it did not request to have the hearing rescheduled, at a more convenient time or in a more convenient venue. It has to be concluded that the Appellant waived its right to give oral explanations to the LEN Panel, so that its claim on this point has to be rejected.
15. The Appellant asserts that the reasoning of the appealed Decision is not adequate or sufficient. The Sole Arbitrator considers that the reasoning of the Decision is sufficient, at least as regards the right to be heard of the Appellant. Even if the Decision is short, one understands clearly the reasons underlying it. The facts are set out properly, the LEN Panel mentioned the evidence taken into consideration and finally there is clear reference to the regulations applied. Furthermore, the Appellant does not indicate which lack of reasoning would have a material consequence on the results of the appealed decision. The claim made by the Respondent in connection with the reasoning of the decision thus has to be rejected.
17. The Appellant also submits that it did not have access to the file. This objection was not raised in front of the LEN Panel. For the reasons set out here above, the Appellant is deemed to have waived its right to be heard and its right to have access to the file during the proceedings leading to the appealed decision. As regards the arbitral award, the Appellant had full access to the file and to the evidence produced by the Respondent, amongst which a witness statement of one of the members of the LEN Panel. At the end of the hearing, the Appellant confirmed that it had no objection regarding its right to be heard in front of the CAS. In consequence, this procedural argument also has to be rejected.
18. Finally, as submitted by the Respondent, it has to be noted that the Sole Arbitrator has the power under Art. R57 of the Code to fully review the facts and the law and to issue a new decision which replaces the decision challenged. In consequence, any procedural irregularity as regards the right to be heard of the Appellant is deemed to have been cured in the Appeal proceedings before the CAS. This conclusion is in line with the case law of the Swiss Supreme Court which admits that any violation of the right to be heard can be cured in front of an appeal authority if this authority has a similar power to review the facts and the law as the body having issued the appealed decision (see DTF 126 I 68). Based on these considerations, the Sole Arbitrator finds that there is no valid ground to annul the Decision on the basis of the arguments made by the Appellant as regards the violation of the right to be heard.

Error in evaluation of facts and law

19. The Appellant submits that the Decision failed to assess the degree of responsibility of the organizers and of the Italian police in the incident.
20. There is absolutely no indication that the incident was caused by an error of the organizers or of the Italian police. As regards the organizers, it is undisputed that the question of the security has been taken into account and that meetings have been held before the matches, in order to take preventive measures. The police was involved in these meetings and it has to be considered that the organizers could rely on the experience of the Italian police. It is notorious that the police in Milan is very often involved in the organization of football matches with important gathering of football fans which can potentially cause trouble. After considering the elements of the file and the witness statements, the Sole Arbitrator is of the opinion that the Respondent has been particularly careful as regards the security in the organisation of the Final Four 2007 edition.
21. The Appellant cannot blame the police for having guided the Serbian supporters behind the stands of the Greek supporters. It was the primary concern of the Italian police to avoid the contacts between the Croatian supporters and the Serbian supporters. In that respect, the decision made by the police to escort the Serbian fans and to direct them to the stands through an alternative way seemed to be reasonable. Emphasis has been put on the potential problems between the Croatian supporters and the Serbian supporters and the police cannot be blamed for not having suspected sudden attack of the Greek supporters on the Serbian fans.
22. On the top of that, the Sole Arbitrator considers that it is of little help for the Appellant to reject the responsibility of the incident on other parties. There is no provision in the applicable regulations providing for a mitigation of the sanction due to the lack of diligence of the organizers or of the police.
23. The Appellant also submits that the attitude of the Greek supporters was triggered by provocation from the Serbian supporters. As set out here above, there is no evidence supporting this point. In particular, the Team Manager of the Appellant has admitted at the hearing held in front of the CAS that he was not in a position to witness any provocation from the Serbian fans. The Sole Arbitrator has not been convinced by the declarations of the Team Manager of the Appellant that the Serbian fans have thrown stones to the Greek supporters. The Sole Arbitrator is thus of the opinion that the Greek fans have not been provoked.
24. The argument made by the Appellant that no incident has occurred during the second day of the Final Four is not more convincing. The absence of incident probably does not result from any reinforcement of the security measures, but from the fact that around one hundred Greek supporters were not permitted to enter the pool and directly deported to the city of Ancona, to be embarked on a boat to Greece.
25. Finally, the Sole Arbitrator underlines that the Appellant can be blamed for his attitude with regard to security concerns. Hence, the Appellant admits that a part of the Greek supporters

were potential trouble makers, listed as “Category C fans”. Obviously, these fans are more interested in physical contests with other supporters than in enjoying the show offered by the players. It can be observed on the photographs produced by the Respondent that these fans were wearing football jerseys and adopted an aggressive attitude. Although perfectly aware of the presence of these fans, the Appellant did not approach the organizers in that respect. Furthermore, the Appellant has blamed the organizers during the proceedings for not having been approached. This is not a responsible attitude and the Appellant should have been proactive and have got in touch with the organizers to inform them that potentially violent supporters would be present at the match. By not collaborating with the organizers, the Appellant clearly did not fulfil its duties to meet responsibility for security both inside and around the venue before, during and after the event.

26. The Appellant also asserts that the LEN Panel should have taken into consideration that the incident was isolated and small and that it did not affect the game, order being restored within a few minutes. After considering the photographs produced by the Respondent, the Sole Arbitrator is of the opinion that the incident was not minor. Even if no physical injuries were reported, the amount of damage caused to the stands of the Greek supporters is impressive. The Sole Arbitrator is also convinced that it is due to the quick and efficient intervention of the police that the incident remained under control. It also has to be noted that Bjorn Gran, member of the LEN Panel, declared at the hearing held in front of CAS that the sanction might have been more important if the LEN Panel had the opportunity to consider the photographs produced during the appeal. In view of the above, the Sole Arbitrator is clearly of the opinion that the incident was serious and that it has to be classified under par. 5.2 of the Code of discipline for Water Polo, that is to say as an offence of a grave nature and of some consequence.

Mitigating factors and breach of proportionality principle

27. The Appellant claims that the fact that it has an exemplary record of prior conduct in the European League should have been considered as a mitigating factor.
28. It is undisputed by the Respondent that its records did not contain any indication of previous incident or misbehaviour concerning the supporters of Olympiacos. Such information should have been considered as an aggravating factor. The LEN Panel however obviously did not aggravate the sanction based on the fact that previous incident occurred, so that the argument made by the Appellant is not persuasive.
29. On the top of that, the Sole Arbitrator considers that the asserted mitigating factor is counterbalanced by the attitude of the Appellant which did not collaborate with the organizers and failed to declare that a number of supporters were potentially trouble makers, listed as “Category C fans”.
30. Based on the above considerations, the Sole Arbitrator is of the opinion that the sanction imposed by the LEN Panel is not disproportionate to the incident. As expressed here above, the trouble caused by the Appellant’s supporters can be classified as an offence of a grave nature

and of some consequence, for which Art. 5.2 of the Code of discipline for Water Polo of LEN provides a fine up to Euros 3.000,- and a suspension from playing home for up to four matches and up to four points of deduction.

31. It has to be noted that the LEN Panel considered that the Regulations provide that the Code of Conduct is subordinate and supplementary to the Constitutional Rules and Event Rules. It chose not to apply strictly the provisions of Art. 5.2 of the Code of Conduct and imposed a lighter sanction than what is provided for in the Code of Conduct.
32. The Sole Arbitrator considers that the Appellant is responsible for the attitude of its supporters, according to Art. 2.2.2 (d) of the Constitutional Rules, which has not been disputed by the Appellant. In consequence, it is justified to impose a sanction on the Appellant for the incident that occurred in Milan during the Final Four of 22 June 2007. On the basis of the facts presented during the Appeal, the Sole Arbitrator is clearly of the opinion that the nature and the amount of the sanction imposed on the Appellant is totally appropriate.

The Court of Arbitration for Sport rules:

1. The appeal filed on 25 September 2007 by Olympiacos Sports Club of the Water Polo Team of Piraeus against the decision issued on 1 September 2007 by the LEN Panel for Disciplinary Matters and Disputes is dismissed.
2. The decision issued on issued on 1 September 2007 by the LEN Panel for Disciplinary Matters and Disputes is confirmed.
3. (...)
4. All other prayers for relief are dismissed.