



**Arbitration CAS 2017/A/5306 Guangzhou Evergrande Taobao FC v. Asian Football Confederation (AFC), award of 5 March 2018 (operative part of 15 January 2018)**

Panel: Mr Anthony Lo Surdo (Australia), President; Mr Efraim Barak (Israel); Mr Marco Balmelli (Switzerland)

*Football*

*Disciplinary sanctions for improper conduct of spectators*

*Discriminatory conduct under the AFC Code*

*Liability for spectators conduct under the AFC Code*

*Distinction between the *lex specialis* and the *lex generalis**

*Determination of the applicable sanction*

1. Conduct will be considered to be “discriminatory” for the purposes of Article 58 of the AFC Disciplinary and Ethics Code (AFC Code) if it *“offends the dignity of a person or groups of persons through contemptuous, discriminatory or denigratory words or actions”* concerning, relevantly, political opinion or national origin. A banner displayed in a stadium on the date of a match containing the words *“Annihilate British Dogs, Exterminate Hong Kong Independence Poison”* are statements that constitute “discrimination” within the meaning of Article 58.1 of the AFC Code. Understood in context, the words contained in the banner are clearly contemptuous and denigratory of the people of Hong Kong and their historical connection to Great Britain. The words are also discriminatory of people of Hong Kong origin and the reference to “Independence” in the context of Hong Kong’s recent history is an opinion of a political character.
2. Article 65 of the AFC Code provides for the liability for spectator conduct. If, having regard to the competing contentions and the evidence, the banner is found to have been displayed by spectators supporting the appellant club, it is of no consequence, if it be the case that the persons who actually raised the banner were not registered fans of the club. Articles 58 providing for the discrimination offence and 65 providing for the liability of spectators of the AFC Code are not exempted from the operation of the principle of strict liability in Article 5 of the AFC Code. Accordingly whilst the club may not have intended to commit any offence and on the contrary acted admirably and responsibly in providing guidelines to its travelling supporters, these matters are not relevant to nor are they exculpatory of liability.
3. CAS jurisprudence describes the manner in which the *lex specialis* and the *lex generalis* are to be determined in any particular circumstance. Properly construed, Articles 58 and 65 of the AFC Code each provide circumstances in which a club or member association may be sanctioned for misconduct undertaken by supporters. Article 58, by its terms, specifically prohibits discriminatory conduct by individuals

(players and officials), clubs, member associations, and spectators and provides for minimum penalties in such cases, whilst Article 65 generally prohibits improper conduct by spectators. Therefore, Article 58 is the *lex specialis* and Article 65 is the *lex generalis*.

4. The AFC Code provides that where misconduct causes concurrent infringements of the AFC regulations, the sanction shall be based on the most serious infringement, and increased as appropriate, depending on the specific circumstances. Furthermore, where concurrent infringements occur, the sanction is already and fully covered by the *lex specialis*, compared to any general provision. The gravity with which discriminatory conduct is viewed is reflected both by the strict liability nature of the offence and the sanctions against clubs and member associations for violations which may extend to suspension or expulsion from the AFC. Having regard to the seriousness with which the AFC Code views discrimination by spectators, the minimum fine should be considered appropriate. Furthermore, the existence of three previous spectator conduct incidents in the five years preceding the charges are aggravating circumstances justifying a modest increase in the fine stipulated in Article 58.3 of the AFC Code.

## I. INTRODUCTION

1. Guangzhou Evergrande Taobao Football Club (the “Appellant”) brings an appeal against the Asian Football Confederation (the “AFC” or the “Respondent”) challenging the decision of the AFC Appeal Committee (the “Appeal Committee”) rendered on 8 August 2017 by which it confirmed the decision of the AFC Disciplinary and Ethics Committee (the “D & E Committee”) to impose on the Appellant sanctions consisting of playing two matches without spectators with such sanction to be suspended for a probationary period of two years and to pay a fine totalling USD 22,500 relating to conduct of its spectators at an AFC Champions League 2017 fixture on 25 April 2017.

## II. THE PARTIES

2. The Appellant is a football club domiciled in Guangzhou, People’s Republic of China (the “CPR”) and affiliated to the Chinese Football Association (the “CFA”).
3. The AFC is the governing body for football, futsal and beach soccer in Asia, a society domiciled in Kuala Lumpur, Malaysia, in accordance with section 7 of the *Societies Act, 1966* (Malaysia). It is the owner of all rights vesting in the AFC Champions League (the “Competition”).

### III. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

#### A. Overview

5. The dispute between the parties arises from an incident which occurred in the concluding stages of an away fixture in the AFC Champions League 2017 on 25 April 2017 between Eastern SC (HKG) and the Appellant at the Mong Kok Stadium in Hong Kong (the "Stadium"). In about the 85<sup>th</sup> minute of the game, a banner was unfurled by spectators located in the away section of the Stadium, a section that had been quarantined for Chinese Nationals including supporters of the Appellant. The banner was in the Chinese language and when translated to English read as follows: "*Annihilate British Dogs, Exterminate Hong Kong Independence Poison*".
6. On 26 April 2017, the Appellant was charged under Article 120.5 of the AFC Disciplinary and Ethics Code (January 2017 Edition) (the "AFC Code") with violating Articles 58.1 and 65.1 of the AFC Code (the "Charges").

#### B. Proceedings before the D & E Committee

7. At issue before the D & E Committee was whether the banner displayed in the away supporter's section of the Stadium constituted a violation of Articles 58.1 and 65.1 of the AFC Code.
8. Articles 58 and 65.1 of the AFC Code were, until amended on 28 November 2017 (to which we refer further below) in the following terms:

**"58. Discrimination**

- 58.1. *Anyone who offends the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions concerning race, skin colour, gender, language, religion, political opinion, wealth, birth, sexual orientation, or ethnic, national, or social origin has committed an offence.*

***Penalty: for an individual:***

***ban on taking part in any football-related activity for at least two (2) months; and***

***fine of at least USD 10,000.***

***for a Club or Member Association:***

***an order to play at least two (2) future Matches without spectators;  
and fine of at least USD 10,000.***

58.2. [...]

58.3. *The offence is aggravated where supporters of a team commit the offence.*

***Penalty: for a Club or Member Association:***

***an order to play at least two (2) future Matches without spectators;  
and fine of at least USD15,000.***

***for a spectator:***

***Stadium ban of at least two (2) years.***

58.4. [...]

***65. Liability for spectator conduct***

65.1. *Improper conduct undertaken by spectators is an offence.*

65.1.1. *Improper conduct includes without limitation violence towards persons or objects, letting off incendiary devices, throwing missiles, displaying insulting, religious, or political slogans in any form, uttering insulting words or sounds, or invading the pitch.*

65.1.2. *The home Member Association or home Club is liable for improper conduct among spectators, regardless of the question of culpable conduct or culpable oversight.*

65.1.3. *The visiting Member Association or visiting Club is liable for improper conduct among its own group of spectators, regardless of the question of culpable conduct or culpable oversight. Supporters occupying the away sector of a Stadium are regarded as the visiting Member Association or visiting Club supporters, unless proven to the contrary.*

***Penalty: please refer to Appendix 1".***

9. In its response to the Charge Notice, the Appellant:

- (a) admitted that the display of the banner caused offence to people of Hong Kong origin in that it specifically identified national and political elements (references to “British Dogs” and “Independence”);
- (b) asserted that the display of the banner was undertaken by random spectators in the away section and not by the Appellant’s supporters; and
- (c) asserted that the display of the banner was provoked by the home club spectators displaying the “Colonial Flag of Hong Kong” (that is, the Hong Kong independence flag).

10. In construing Article 58.1 of the AFC Code, the D & E Committee concluded that it contained an implied liability for a Club or Member Association for the actions of its supporters: *“Although not expressed in the same manner as Article 65, the meaning is obvious from the text of Article 58, and in particular, the aggravation provided in Article 58”*.
11. The D & E Committee found that both the express and implied meaning of the banner was in violation of Article 58.1 of the AFC Code, its wording was discriminatory or denigratory, as it denoted people of Hong Kong origin as “British Dogs” and expressed an intention to “annihilate” and “exterminate” them.
12. Furthermore, the D & E Committee found that the banner clearly referred to elements of political opinion and national origin, taking into account the context of the match being played between a Hong Kong club and a Chinese club on the territory of Hong Kong. The D & E Committee noted that the banner had a strong political context as Hong Kong was previously part of the United Kingdom (until 1997) and now a Special Administrative Region of the CPR and had experienced significant political unrest in 2016 when members of the public strongly protested against and called for independence from China.
13. The D & E Committee was not satisfied on the evidence that the banner was raised by random spectators in the away section. It found that the video of the incident (from 0:09 to 0:20) clearly demonstrated that those persons who raised the banner were all wearing shirts displaying the insignia of the Appellant and that the supporters around them were cheering, applauding and chanting simultaneously in a passionate manner in response to the banner being raised.
14. It found that Article 65.1 of the AFC Code provides that *“improper conduct undertaken by spectators is an offence”*. Article 65.1.1 of the AFC Code provides that *“displaying political slogans ... in any form”* falls squarely within the definition of *“improper conduct”*. Article 65.1.3 renders the visiting Member Association or visiting Club liable for improper conduct among its own group of spectators, *“regardless of the question of culpable conduct or culpable oversight”*.
15. The D & E Committee concluded that the wording of the banner was clearly a *“political slogan”* within the meaning of Article 65.1 of the AFC Code for which the Appellant was liable.
16. In considering the appropriate sanction for the violation of Articles 58 and 65 of the AFC Code, the D & E Committee was mindful that the same facts caused concurrent infringements of Articles 58 and 65. In determining sanction, the D & E Committee accordingly had regard to Article 41 of the AFC Code which provides that where more than one infringement has been committed as a result of the same misconduct, *“the sanction shall be based on the most serious infringement, and increased as appropriate, depending on the specific circumstances”*. The D & E Committee considered the most serious offence, Article 58 of the AFC Code, as the *lex specialis* (or law governing a specific subject matter) and, consistent with the approach in CAS 2014/A/3665, 3666 & 3667, proceeded to deal with sanction under Article 58.

17. Having found that the Appellant had violated Article 58 of the AFC Code, the D & E Committee found no reason to depart from the statutory minimum sanction prescribed by Article 58.3. Mindful of the fact that this was the first such offence by the Appellant and that it had undertaken various efforts (e.g., request for approval to display banners and an announcement to its official supporters' groups on banners which are disallowed) to ensure that no violations of the AFC Code occurred, the D & E Committee ordered that in accordance with Article 34.3 of the AFC Code, the sanction of two matches to be played without spectators was to be suspended for a probationary period of two years.
18. The D & E Committee noted that the Appellant had three prior violations for spectator misconduct since December 2013 and that pursuant to Article 40 of the AFC Code, it was therefore open to the D & E Committee to increase the sanction for recidivism as the Appellant had been sanctioned for similar infringements within the previous five years. Having regard to the three previous decisions involving disciplinary issues for spectator misconduct, the D & E Committee considered it justifiable to increase the fine by 50%, that is, by an additional USD 7,500 (totalling, USD 22,500).
19. Accordingly, the D & E Committee ordered that the Appellant:
  - (a) play two matches without spectators with the order to apply to the next matches in AFC Club Competitions hosted by the Appellant in China, suspended for a probationary period of two years; and
  - (b) pay a fine totalling USD 22,500 within 30 days of notification.

### **C. Proceedings before the Appeal Committee**

20. On 30 June 2017, the Appellant lodged its intention to appeal and on 8 July 2017, the Appellant provided its reasons for appeal.
21. The Appellant conceded in its reasons for appeal that it would "*bear its part of liability for the misconduct carried out by the spectators who were occupying the away sector*". Further, the Appellant:
  - (a) admitted violating Article 58.1 of the AFC Code and argued that it was the *lex specialis* (having argued the contrary position before the D & E Committee);
  - (b) submitted that Article 65.1 of the AFC Code was not applicable and therefore was inaccurately applied by the D & E Committee and that accordingly recidivism with respect to Article 65.1 should not have been applied; and
  - (c) argued that the sanction imposed by the D & E Committee should be reduced, taking into account the various mitigating factors and that no additional sanction should be imposed with respect to recidivism for a breach of Article 65.1 of the AFC Code. The Appellant submitted that the sanctions were excessive and disproportionate in circumstances where:
    - Eastern SC (HKG) permitted supporters with home section tickets to enter the away sector;

- Its spectators were provoked by home spectators that displayed the “Colonial Flag of Hong Kong” and by home spectators using provocative language and displaying their middle finger throughout the match at the Appellant’s supporters;
  - Eastern SC (HKG) was responsible for guaranteeing the security and safety during the match and poor security checks allowed the banner to enter the stadium; and
  - Jurisprudence from the Court of Arbitration for Sport (the “CAS”), FIFA and UEFA provided sanctions which were much lower in similar fact cases.
22. As to Article 58.1 of the AFC Code, the Appeal Committee concluded that, when considered in context, the display of the banner at a match between clubs from China and Hong Kong by supporters of a Chinese club *“was clearly a contemptuous, discriminatory or denigratory reaction concerning a political opinion and/ or national origin which offended the dignity of the home supporters and/ or persons of Hong Kong origin”*. (at [39]). It was comfortably satisfied that the Appellant had violated Article 58.1 and concluded that there was no error by the D & E Committee in its determination which was upheld in full.
23. As to Article 65.1, the Appeal Committee took note that the Appellant alleged that Article 65 of the AFC Code was not applicable as the actions of its supporters had already violated Article 58. The Appeal Committee *“noted that the Code (through Article 41) anticipated scenarios where the same misconduct could cause multiple offences to occur. Furthermore, certain types of misconduct (such as that undertaken by the Appellant’s supporters) would very clearly violate multiple sections of the Code”* (at [47]).
24. The Appeal Committee was comfortably satisfied that the Appellant’s actions also violated Article 65.1 of the AFC Code.
25. As to sanctions for violation of Articles 58 and 65 of the AFC Code, the Appeal Committee referred to the decision of the CAS in the case CAS 2012/A/2762, where, at [122] it stated that, *“... the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rule can be reviewed only when the sanction is evidently and grossly disproportionate to the offence”*.
26. The Appeal Committee examined the way the D & E Committee had approached the question of sanction for a breach of Article 58 and found that it had correctly identified Article 58 as the *lex specialis* and issued the minimum sanction specifically provided by Article 58.3 of the AFC Code for breach. It found no error in such an approach.
27. The Appeal Committee then considered the way the D & E Committee increased the sanction on account of recidivism; that is, in circumstances where the Appellant had three prior violations for spectator misconduct since December 2013. In light of Article 41, the Appeal Committee found no error in the D & E Committee’s approach to increasing the sanction issued for a violation of both Article 58 and Article 65 of the AFC Code. It concluded that

the Appellant had not demonstrated that the sanction imposed by the Disciplinary Committee was *“evidently and grossly disproportionate to the offence”*.

28. The Appeal Committee dismissed the appeal by reasons for determination delivered on 8 August 2017.

#### **IV. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

29. On 29 August 2017, the Appellant filed a Statement of Appeal in accordance with Article R48 of the Code of Sports-related Arbitration (2017 Edition) (the “CAS Code”) with respect to the decision rendered by the Appeal Committee on 8 August 2017.
30. On 5 September 2017, the CAS Court Office acknowledged receipt of the Statement of Appeal and informed the parties that pursuant to Article S20 of the CAS Code, the arbitration had been assigned to the Appeals Arbitration Division of the CAS.
31. On 8 September 2017, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.
32. On 2 October 2017, the Respondent filed its Answer in accordance with Article R55 of the CAS Code. In the Answer, the Respondent submitted that no hearing was necessary in this matter.
33. By letter dated 5 October 2017, the CAS Court Office requested that the Appellant inform it by 12 October 2017 whether it preferred a hearing to be held or for the Panel to issue an award based solely on the parties’ written submissions. In that letter, the parties were also informed that under Article R56 of the CAS Code, the parties shall not be authorised to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely, after the submission of the Appeal Brief and of the Answer unless the parties agree or the President of the Panel otherwise orders on the basis of exceptional circumstances.
34. After consultation with the parties, on 12 October 2017, the CAS Court Office granted an extension to the Appellant for seven days, that is, until 23 October 2017, to inform the CAS Court Office, whether it preferred the hearing to be held or for the Panel to issue an award based solely on the parties’ written submissions.
35. By letter dated 19 October 2017, the Appellant indicated to the CAS Court Office that it shared the Respondent’s position that no hearing was necessary. It also requested that it be permitted to file a second round of written submissions, *“in order to clarify certain aspects of the Respondent’s answer”*.
36. On 19 October 2017, the CAS Court Office invited the Respondent to state, by 24 October 2017, whether it agreed with the Appellant’s request to have a further round of written

submissions. The letter noted that in the case of objection or in the absence of an answer from the Respondent within the prescribed time frame, it will be for the Panel, once constituted, to decide the issue pursuant to Article R56 of the CAS Code.

37. By letter dated 23 October 2017, the Respondent informed the CAS Court Office that it objected to the Appellant's request for a further round of written submissions. By letter of the same date, the CAS Court Office noted the Respondent's objection to the Appellant's request for a further round of written submissions and advised that it would be for the President of the Panel, once constituted, to decide this matter pursuant to Article R56 of the CAS Code.
38. By letter dated 30 October 2017, the CAS Court Office notified the parties of the Constitution of the Panel and that the case file was being transferred to the Panel by separate letter that day.
39. On 3 November 2017, the CAS Court Office wrote to the parties on behalf of the Panel, noting that it was unclear from the terms of the Appellant's letter of 19 October 2017, whether the Appellant's consent to the appeal being heard solely on the papers was conditioned upon being permitted to file a second round of written submissions. The Appellant was accordingly requested to clarify, by no later than 7 November 2017, whether it would still consider that no hearing was necessary should its request to file additional submissions be denied by the Panel.
40. By letter dated 7 November 2017, the Appellant confirmed that its consent to not hold a hearing was not conditioned upon being permitted to file a second round of written submissions. In other words, the Appellant maintained that the appeal should be determined solely on the papers, regardless of whether it be permitted to file a second round of written submissions.
41. By letter dated 16 November 2017, the CAS Office wrote to the parties advising that, pursuant to Article R57 of the CAS Code, the Panel had decided to hold a hearing in this matter and suggested that the hearing take place at the CAS Alternate Hearing Centre in Shanghai, alternatively, at the seat of the CAS in Lausanne. The parties were requested to indicate their consent to Shanghai and Lausanne as the venue, although it would be ultimately a question for the President of the Panel under Article R28 to determine where to hold the hearing. As to the Appellant's request for a second round of written submissions, if, notwithstanding that a hearing would take place, the Appellant maintained its request for a second round of written submissions, it was directed to indicate what particular issues in the Respondent's Answer it sought to clarify by further submissions. The Respondent was then invited to indicate whether despite the matters referred to in the Appellant's response, it maintained its objection to a second round of written submissions.
42. On 20 November 2017, the Respondent informed the CAS Office that it consented to the hearing being held in Lausanne and objected to Shanghai as a venue. On 21 November 2017,

the Appellant informed the CAS Office that it consented to either Shanghai or Lausanne as a venue although it expressed a preference for Shanghai.

43. Following a tele-conference between counsel for each of the parties and the Panel (represented by the President) on 28 November 2017, by letter of the same date, the CAS Office informed the parties that the hearing would be held in Lausanne on 11 January 2018.
44. On 30 November 2017, the CAS Court Office issued an order of procedure, which was signed and returned to the CAS by the parties on 1 and 4 December 2017, respectively.
45. By letter dated 26 December 2017, the Appellant made application pursuant to Article R56 of the CAS Code to supplement their argument and to admit into evidence and rely upon a version of the AFC Disciplinary and Ethics Code amended in November 2017 (the “AFC November 2017 Code”) which it submitted had the effect of modifying Articles 58.1 and 58.3 of the AFC Code by reducing, in part, the sanction for breach of those provisions. It did so relevantly by removing the sport related minimum sanction imposed on a Club or Member Association for a breach committed by supporters of a team of playing at least two future matches without spectators. It asserted that when read with Article 4.2 of the AFC November 2017 Code, the amendments applied with immediate effect and applied to infringements that occurred prior to it coming into effect “*if this Code is equally favourable or more favourable to the perpetrator of the facts*”.
46. On 3 January 2018, the Respondent indicated that it opposed the Appellant’s request that the Panel consider the AFC November 2017 Code. In summary, the Respondent contended that:
  - (a) the AFC November 2017 Code does not constitute an “exceptional circumstance” for the purposes of Article R56 of the CAS Code which justifies the Panel exercising its discretion to permit the admission, supplementation, or amendment of arguments or exhibits;
  - (b) the parties agreed that the applicable regulations as described in Article R58 of the CAS Code are, inter alia, the AFC Code (January 2017 edition), the AFC Champions League 2017 Regulations and the AFC Statutes (May 2017 edition);
  - (c) the AFC Code does not act retrospectively where decisions have already been made by AFC judicial bodies. As such, through the operation of Article 4 of the AFC Code, it both respects and applies the principles of *tempus regit actum* and *lex mitior*;
  - (d) the case was prosecuted pursuant to the procedural and substantive rules set out in the January 2017 edition of the AFC Code. As such, the principle of *tempus regit actum* has been respected by the decision-making bodies at such time and the *lex mitior* principle cannot apply; and
  - (e) regulatory amendment can have no impact upon a procedure already commenced under specific rules relating to a specific provision with a specific penalty.

47. By letter dated 5 January 2018, the CAS Office informed the parties that the Appellant's application of 26 December 2017, to supplement their argument and to admit into evidence and rely upon the AFC November 2017 Code would be deferred for consideration as a preliminary question at the commencement of the hearing.
48. On 11 January 2018, a hearing took place at the CAS Court Office in Lausanne, Switzerland.
49. The Panel was assisted by Ms Delphine Deschenaux-Rochat, Counsel to the CAS, and joined by the following:
- Mr Giandonato Marino and Mr Tomas Pereda, on behalf of the Appellant;
  - Mr James Kitching, on behalf of the Respondent.
50. At the outset of the hearing, the parties confirmed that they did not have any objection as to the constitution and composition of the Panel. The Appellant confirmed that it pursued its application in light of the matters contained in the Respondent's reply of 3 January 2018.
51. Having considered the parties' written and oral submissions, pursuant to Article R56 of the CAS Code, the Panel determined that it would permit the Appellant to supplement its argument and to admit into evidence and rely upon the AFC November 2017 Code. The Panel's reasons for its determination appears at paragraph 140 of this Award.
52. The Panel also determined to admit into evidence a document consisting of a single folio produced by the Respondent which contained a summary of the five cases determined by various AFC judicial bodies under the AFC Code (January 2017 Edition) which, the Respondent contended would be relevant to the issue of proportionality of sanction in the event that the Panel found that the Appellant should be entitled to rely upon the AFC November 2017 Code (the "Respondent's Proportionality Summary"). The Appellant did not object to that course. Contemporaneous with its application to rely upon the Respondent's Proportionality Summary, that party also contended that in the event that the Panel upheld any part of the appeal in reliance upon the contents of the AFC November 2017 Code, it should remit the question of sanction to the Appeal Committee for further consideration. The Panel addresses this submission at paragraphs 193-196 of this Award.
53. Before the hearing was concluded, each of the parties expressly confirmed that they did not have any objection with the procedure and that their right to be heard and to be treated equally in the present proceedings before the Panel had been fully respected.

## **V. SUBMISSIONS OF THE PARTIES**

54. What follows is a summary of the parties' submissions. To the extent that it omits any contentions, the Panel notes that it has considered all of the evidence and arguments submitted by the parties.

**A. The Appellant's Submissions**

55. In its Appeal Brief, the Appellant invokes Article R57 of the CAS Code and seeks, in effect, that the Panel review the facts and the law and that it issues a new decision which replaces that the subject of the appeal.

56. The Appellant relies on the following broad grounds by way of a merits review.

**a) *The Club never intended to commit any offence***

57. The Appellant contends that:

- (a) it was allocated 325 tickets from Eastern SC and the Hong Kong Football Association (the "HKFA") for distribution to its supporters;
- (b) there were in excess of 700 people occupying the away section of the Stadium, each of whom were mainly Chinese because Eastern SC prevented the entry of people without Hong Kong identification from occupying seats in the home sector;
- (c) therefore, approximately 400 spectators had no direct relationship with the Club;
- (d) the Appellant provided specific guidelines to supporters travelling to the game in relation to the conduct expected of them. Those guidelines included a prohibition on the use of any slogan or banner with words or pictures that were politically sensitive, humiliating, malicious, slanderous, defamatory or harmful to social custom; and
- (e) the Appellant distributed a large quantity of official merchandise at the entrance to the Stadium which explains why the spectators in the away section of the Stadium wore Appellant Club colours.

58. Accordingly, the Appellant argued that the Panel should be comfortably satisfied that the "*extra spectators located at Evergrande FC's sector could have been only placed by Eastern SC*" and that, in accordance with the provisions of Article 65.1.3 of the AFC Code, it cannot be liable for the conduct of spectators in that sector. The Appellant further relied on a "Joint Statement" by a number of Evergrande Supporter Groups that indicates that the four men responsible for raising the banner are "*not register member of our club fan groups*" (sic).

**b) *Erroneous application of the AFC Code***

59. The Appellant asserts that the D & E Committee and the Appeal Committee erroneously applied Article 58 of the AFC Code in circumstances where Article 65, expressly and specifically regulates and creates a liability for spectator conduct and so is the *lex specialis* and should have been the applicable provision; whereas, Article 58 is the *lex generalis*.

60. The Appellant relies upon the CAS decision in the case CAS 2014/A/3665, 3666 & 3667 which concerned the interpretation of Articles 48 & 57 of the FIFA Disciplinary Code (the "FIFA DC"), and in which the CAS commented upon the nature of those articles and, in

particular, as between them which it considered to be the *lex specialis* and which the *lex generalis*. In that decision, the CAS found that where a code proscribes particular misconduct that any relevant charge should be brought under that provision as the *lex specialis* and not under a provision which may also apply more generally. It reasoned that any provision which prohibits certain specific or defined conduct is intended to cover the field, or be exhaustive of the sanction applicable to that conduct.

61. The Appellant contends that the error in the D & E Committee's interpretation of Articles 58 and 65 of the AFC Code is evident from the fact that it was able to conclude that the conduct in question by spectators was "*clearly a political slogan within the meaning of Article 65.1 of the Code*" for which the Appellant as a club was liable, whereas the finding that the Appellant breached Article 58 required the D & E Committee to find that the Appellant was impliedly liable under Article 58 for the actions of its supporters. The D & E Committee found that although not expressed in the same manner as Article 65, the meaning was obvious from the text of Article 58, and, in particular, the aggravation provided in Article 58.3.
62. It is submitted that the manner in which the D & E Committee and the Appeal Committee construed Article 58 offended the principles of legality, equal treatment and good governance. The Appellant contended that:
  - (a) a reasonable onlooker would "*clearly BELIEVE that any sanction committed by the spectators is to be determined according to the terms established by Article 65 of the AFC Code*";
  - (b) to the extent that there are any inconsistencies in the rules of a federation they should be construed against that federation (in accordance with the *contra proferentem* principle of construction) and consistent with the approach in CAS 2014/A/3765; and
  - (c) the AFC not only imposed two different articles for the same offence but sanctioned the Appellant imposing the aggravating level in both cases as well.
63. The Appellant further submitted that the conduct should have been dealt with under Article 65 of the AFC Code because:
  - (a) the Match Report completed by the Match Commissioner (the "MC") made reference to the banner containing "*offensive words towards Hong Kong people*";
  - (b) Article 102 of the AFC Code presumes match officials' reports to be accurate; and
  - (c) had the MC considered the banner to have contained comments of a discriminatory nature, he would have recorded it as such.
- c) *Proportionality of the sanction and mitigating factors***
64. The Appellant submitted that it should not be liable for the misconduct of spectators that were placed at its sector and had no connection with the 325 fans that were under the organisation of the Appellant.
65. The severity of the sanction must be proportionate to the violation committed.

66. A sanction stipulated in a code should not automatically be applied. It must always yield to the specific circumstances of a case.
67. Article 39.5 of the AFC Code entitles a judicial body to impose a sanction lower than the minimum after having considered all of the relevant circumstances including any relevant mitigating and aggravating factors in a case and the degree of guilt of the party when imposing a sanction. Even in the case of a strict liability offence, such liability can be overturned if reasonable mitigating factors exist.
68. The Appellant points to the following general mitigating factors which, it asserts, is either exculpatory of liability or impacts upon the sanction that should have been imposed and, in particular, that should have militated in favour of a reduction in any minimum sanction that may otherwise have applied:
- (a) approximately 54% of the total capacity of the away sector assigned to the Appellant was occupied by spectators other than those registered supporters of the Appellant;
  - (b) the Appellant took all appropriate measures and fulfilled its obligations with respect to the behaviour of its registered supporters, including posting an announcement on its website requesting that its fans adhere to certain behaviour, prohibiting any banner, poster or flag with any political content and prohibiting any banner from entering the stadium unless approved in advance;
  - (c) the banner was displayed only after the 85<sup>th</sup> minute and withdrawn after a very short period of time;
  - (d) the banner was displayed subsequent to the constant provocation of Eastern SC fans showing Hong Kong independence flags during the entire game;
  - (e) the action taken towards the removal of the banners was not occasioned with any violence or arrests (cf. CAS 2013/A/3090);
  - (f) the display of the banner did not interrupt the smooth running of the game (cf. CAS 2007/A/1217);
  - (g) no infringement was committed in the Appellant's stadium in the first leg despite having a capacity of 50,000 spectators and 6,000 Eastern SC supporters in attendance;
  - (h) the offending banner was different in style and design from that approved and used by the Appellant's supporters;
  - (i) fans immediately apologised and showed remorse for the conduct (cf. CAS 2014/A/3665, 366 & 3667); and
  - (j) insofar as Article 58 of the AFC Code applies, it was the Appellant's first and only offence of this nature as found by the D & E Committee.
69. The Appellant places special emphasis on the submission that much of the responsibility for the conduct should be laid at the feet of Eastern SC for its failure to provide adequate security

measures. It asserts that given its size, the banner should have been discovered by a routine search of spectators entering the stadium and confiscated. The fact that the banner was not found, checked and confiscated means that inadequate security measures had been deployed. The Appellant relies upon the decisions in CAS 2015/A/3875 and CAS 2013/A/3090 in support of its submission.

70. The Appellant notes that Eastern SC was sanctioned by the AFC for violation of Articles 64 and 65 of the AFC Code. Article 64 requires a Member Association or Club that hosts matches to, inter-alia, assess the degree of risk posed by matches and notify the AFC bodies of those that are especially high risk, and to take every safety precaution demanded by the circumstances before, during and after the Match and to ensure that law and order is maintained in the Stadium and immediate surroundings and that Matches are organised properly. The Appellant therefore further argues that the finding that Eastern SC had violated Article 64 evidences that it failed to implement appropriate security measures.
  71. Finally, on this point, the Appellant argued that the AFC failed to raise any objections to the security measures put in place by Eastern SC for the match (cf. CAS 2015/A/3875).
  72. The Appellant accordingly submits that having regard to each of the mitigating factors including, more particularly, the failure by Eastern SC to implement adequate security measures, it cannot be sanctioned for conduct over which it had no control.
- d) *The sanctions imposed were not consistent with those imposed in other circumstances***
73. The Appellant refers to four CAS decisions involving misconduct by spectators (CAS 2014/A/3578; CAS 2013/A/3047; CAS 2015/A/3875; and CAS 2013/A/3090) which, it contends dealt with circumstances which were much more serious than those the subject of the charges against it, but in which the sanctions were comparable to those imposed on the Appellant. The Appellant relies on each of these examples to provide some guidance to the CAS Panel so as to evaluate a proportional and just sanction to apply to the Appellant, if any.
  74. The Appellant refers to Article 34.3 of the AFC Code which permits a judicial body to suspend or partially suspend the implementation of a sanction to a probationary period of between six months and two years. The Appellant submitted that the probationary period in relation to the sporting sanction should be reduced from two years to a minimum of six months or in the alternative to a maximum of one year. In support of this submission, the Appellant refers to a decision of the UEFA Disciplinary Committee in a matter involving *Olympic Lyon* in the UEFA Champions League 2017.
  75. The UEFA Disciplinary Code at the time of the *Olympic Lyon* decision provided a probationary period of a minimum of one year and a maximum of five years. *Olympic Lyon* was found guilty of having committed gross infringements including crowd disturbances, setting off fireworks, the blocking of stairways, and field invasion and had its sanction subject to a two-year

probationary period, which, it was submitted, was at the lower end of the probationary period range. The Appellant accordingly contended that the probationary period should be reduced as submitted.

**e) *Recidivism and similar previous sanctions***

76. The Appellant contends that the fine imposed by the D & E Committee and upheld by the Appeal Committee should not have included an increase for recidivism as an aggravating circumstance under Article 40 of the AFC Code because it will only apply in the case of conduct which is either the same or substantially the same in nature and effect as a previous offence. The Appellant argued that whilst the previous sanctions imposed on it related to spectator misconduct, it had not previously been charged with offences of the specific nature in issue and accordingly the D & E Committee erred in increasing the sanction on account of recidivism.
77. The Appellant referred to a number of recent decisions by the UEFA Control, Ethics and Disciplinary Body arising from the UEFA Champions League 2017 in which it imposed monetary penalties for offences concerning misbehaviour by supporters, including field invasion, the throwing of objects, the use of a laser pointer and the setting off of fireworks. It submitted that the misconduct in issue in each of those cases was more serious than that involving the Appellant and, yet they were each addressed by the imposition of monetary sanctions only.

**f) *Conclusion and Relief Sought***

78. The Appellant concludes that no sanction should be imposed or, if a sanction is to be imposed, it should be minimal.
79. The Appellant seeks the following by way of relief:
- “1. Accept this appeal and consequently, to adopt an award declaring that:*
- a) The decisions of the AFC Disciplinary Committee dated 3 May 2017 and Appeal Committee dated 19 July 2017 are annulled;*
  - b) Evergrande FC shall be exonerated from any sanction.*
- Alternatively,*
- c) Determine that the sanction, if any, shall be fixed according to Article 65 of the AFC Code under the “Appendix 1: Scale of fines for spectator misconduct” which shall amount to USD 2,000 (two thousand US dollars) since there was only one banner displayed.*
- Alternatively,*
- d) Determine that, if the action is considered as discriminatory and therefore as an aggravating factor, Evergrande FC shall be sanctioned in accordance with Article 65 of the Code under the*

*“Appendix 1: Scale of fines for spectator misconduct” and more concretely following paragraph 1.3.6 of the said Appendix.*

e) *Determine that the mitigating factors shall be also taken into account*

*Alternatively,*

f) *Declare that any sanctions to be imposed to Evergrande FC shall be greatly reduced to its maximum extent possible, as per its lack of fault and negligence as well as the mitigation factors.*

g) *Declare that, if applicable, the stadium ban shall be reduced to at least 1 (one) match as per the mitigation factors.*

h) *Declare that, if applicable, the probationary period shall be reduced to at least 6 (six) months or, alternatively, to 1 (one) year as per the mitigation factors.*

2. *Order that Respondent shall reimburse the Appellant for legal expenses to be determined ex aequo et bono by the Panel, added to any and all CAS administrative and procedural costs eventually incurred by the Appellant.*
3. *To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees.*
4. *Awarding any such other relief as the Panel may deem appropriate”.*

## **B. The Respondent’s Submissions**

### **a) Overview**

80. By way of general observation, the Respondent asserts that lying at the heart of the Appeal are the following simple and incontrovertible propositions:
- (a) on 25 April 2017, supporters of the Appellant displayed a banner with the words *“Annihilate British Dogs, Exterminate Hong Kong Independence Poison”*;
  - (b) regarded in context, it was a discriminatory statement regarding national origin and political opinion, particularly given the fact that the banner was displayed by the supporters of a Chinese club at a football match between a Hong Kong club and a Chinese club played in the territory of Hong Kong;
  - (c) the conduct of displaying the banner containing the discriminatory statement was a violation of Article 58 and Article 65 of the AFC Code; and
  - (d) the sanction was proportionate and appropriate in all the circumstances, having regard to all mitigating and aggravating factors.

### **b) Applicable Regulations**

81. The Respondent submitted that the AFC Statutes and, in particular, Articles 3.2 and 3.3 provide the underlying legal basis for the prohibition against discriminatory conduct and the requirement to maintain political neutrality in all AFC activities.

82. The AFC Code provides two Articles under which a Club or Member Association may be held liable and sanctioned for the misconduct undertaken by their group of supporters: Article 58, which specifically prohibits discriminatory conduct by individuals (players and officials), clubs, Member Associations, and spectators; and Article 65, which generally prohibits improper conduct by spectators. The same distinction is evident in the FIFA DC.
83. CAS jurisprudence mandates that sports governing bodies respect the principles of legality and predictability within their disciplinary regulations and decisions (CAS 2008/A/1545; CAS 2011/A/2670; CAS 2014/A/3765; CAS 2007/A/1363), which require that offences and sanctions be clearly defined and precludes the “adjustment” of existing rules to enable their application to situations or conduct that were not clearly intended to be penalised. Thus, it was submitted, there must be a clear connection between the misconduct, the relevant rules and the sanction imposed.
84. The Respondent submitted that the construction of Article 58 of the AFC Code is clear. Anyone who offends the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions has committed an offence. Article 3.1.10 of the AFC Code extends its application to spectators.
85. Articles 58.1 and 58.2 provide minimum sanctions for individuals (players and officials), Clubs or Member Associations that directly engage in discriminatory conduct. Article 58.3 provides minimum sanctions for Clubs or Member Associations whose spectators engage in discriminatory conduct and minimum sanctions for identified spectators that engage in discriminatory conduct.
86. It is submitted that the construction of Article 58 in this manner thus respects the principles of legality and predictability. It demonstrates that the AFC intended to specifically legislate against discriminatory conduct undertaken by the supporters of a Club or Member Association. Its regulatory context, to sanction discriminatory conduct undertaken by a team’s supporters, by holding the relevant Club or Member Association liable is clear. There is no requirement to “adjust” Article 58 (as alleged by the Appellant) to capture conduct that was not originally intended to be penalised; the Article plainly and obviously provides otherwise. It is submitted that the same construction is provided in the equivalent section of the FIFA DC.
87. The Respondent submitted that Article 65 provides with absolute clarity that the AFC intended to create a general prohibition against improper conduct committed by supporters at matches. Its regulatory context, to sanction improper conduct by a team’s supporters by holding the Club or Member Association liable is clear. The language of Article 65 also respects the principles of legality and predictability. It creates minimum sanctions for clubs or Member Associations which are set out in Appendix 1 to the AFC Code.

88. Discriminatory conduct, a specific offence, would self-evidently fall within the meaning of improper conduct, a general offence.

**c) *The Appellant violated Article 58.1 of the AFC Code***

89. The Appellant was charged by the AFC with a violation of Article 58.1 of the AFC Code in the following terms:

*“whereas the Defendant was the away team for the AFC Champions League 2017 (Group Stage) match Eastern SC (HKG) vs. Guangzhou Evergrande FC (CHN) on 25 April 2017, spectator(s) supporting the away team displayed a banner which stated (translation): “Annihilate British Dogs, Exterminate Hong Kong Independence Poison” an action undertaken to offend the dignity of: (i) home team supporters; and/or (ii) the people of Hong Kong origin, through the use of contemptuous, discriminatory or denigratory words concerning a political opinion and/or national origin, and therefore the Defendant has committed an offence”.*

90. To prove the Charge, the Respondent asserts that it must demonstrate to the comfortable satisfaction of the Panel, that:

- (a) spectators supporting the Appellant displayed the banner;
- (b) the words stated in the banner were “*contemptuous, discriminatory or denigratory*” and concerned “*a political opinion and/or national origin*”; and
- (c) such words “*offended the dignity*” of “*home team supporters*” or “*persons of Hong Kong origin*”.

91. The Respondent points to the following facts in support of its assertion that spectators supporting the Appellant displayed the banner:

- (a) the match officials’ reports which, by virtue of Article 102.1 of the AFC Code are presumed to be accurate, and, in particular, the MC’s Report which recorded that supporters of the Appellant displayed the banner;
- (b) the spectators were situated within the away sector of the Stadium;
- (c) the incident video demonstrates that the spectators who displayed the banner were wearing clothing with the insignia of the Appellant, whilst the supporters standing around them simultaneously cheered, applauded and chanted in a passionate manner in response to the banner being raised;
- (d) according to social media reports in February 2017, supporters of the Appellant were able to buy tickets in the away sector of the Stadium for the match;
- (e) security reports provided by the HKFA to the AFC noted that 765 tickets were purchased by away fans, that the away sector was enlarged to hold 800 persons and that an identification check conducted at the outer perimeter of the Stadium directed Chinese nationals to the away sector; and
- (f) the Appellant provided no evidence to support its assertion that spectators within the away sector were not supporters. Further, its explanation that individuals were wearing “official equipment” because Club staff brought such equipment to give out to

supporters in the away sector supports the assertion that the banner was displayed by its own group of spectators.

92. The Respondent contended that when considering the context of the match being played in the territory of Hong Kong between a Hong Kong club and a Chinese club and recent geopolitical tensions, the display of the banner was plainly and objectively contemptuous, discriminatory and denigratory (as those terms are defined in the Cambridge English Dictionary) and through reference to “British Dogs” and “Hong Kong Independence Poison” a political opinion or a reference to national origin.
93. The Respondent further contended that the words deployed in the banner very visibly offended the dignity of persons of Hong Kong origin and would also have offended the dignity of home team supporters.
94. The Respondent accordingly asserted that it has satisfied each element of the offence to the comfortable satisfaction of the Panel.

**d) *The Appellant violated Article 65.1 of the AFC Code***

95. The Appellant was charged by the AFC with a violation of Article 65.1 of the AFC Code in the following terms:  
*“whereas the Defendant was the away team for the AFC Champions League 2017 (Group Stage) match Eastern SC (HKG) vs. Guangzhou Evergrande FC (CHN) on 25 April 2017, spectators supporting the away team displayed a political banner bearing the words (translation); “Annihilate British Dogs, Exterminate Hong Kong Independence Poison”, an act of improper conduct, and therefore the Defendant has committed an offence”.*
96. To prove the Charge, the Respondent asserted that it must demonstrate to the comfortable satisfaction of the Panel, that:
  - (a) spectators supporting the Appellant displayed the banner; and
  - (b) the display of the “political banner” was an act of “improper conduct”.
97. As to the first of these elements, the Respondent repeats and relies upon the submissions that it made in relation to the violation of Article 58.1 of the AFC Code.
98. Further, the Respondent relies upon Article 65.1.3 which it contends provides a rebuttable presumption that supporters occupying the away sector of a stadium are regarded as the visiting club supporters, unless proven to the contrary, and that the Appellant has provided no credible evidence to rebut that presumption.
99. As to the second element of the charge, the Respondent contended that when considering the context of the match being played in the territory of Hong Kong between a Hong Kong club and a Chinese club and recent geopolitical tensions, the display of the banner with the subject

phrase was clearly a “political slogan” and therefore an act of “improper conduct” within the meaning of Article 65.1.1 of the AFC Code.

100. The Respondent accordingly submitted that it has proven to the comfortable satisfaction of the Panel that the Appellant, through the actions of its supporters, violated Article 65.1 of the AFC Code and should be sanctioned accordingly.

**e) *The sanction in the Appealed Decision is lawful, proportionate to the offence and should be upheld***

101. The Respondent submitted that, in accordance with CAS jurisprudence, Panels must show restraint when reviewing the level of sanctions imposed by a disciplinary body and that a sanction imposed by a disciplinary body in the exercise of its discretion can only be reviewed “where the sanction is evidently and grossly disproportionate to the offence” (CAS 2012/A/2762, applied, *inter alia*, in CAS 2009/A/1870; CAS 2011/A/2645; CAS 2007/A/1217; CAS 2015/A/3944; CAS 2013/A/3139; CAS 2015/A/3875; CAS 2015/A/3874).

102. The Respondent contended that this restraint meant that a Panel would naturally pay respect to a fully reasoned and well evidenced decision in pursuit of a legitimate and explicit policy (CAS 2011/A/2645, applied, *inter alia*, in CAS 2015/A/3875; CAS 2015/A/3874).

103. The Respondent accordingly submitted that the sanction provided in the decision the subject of the appeal was neither “evidently or grossly disproportionate” and was a “fully-reasoned and well-evidenced decision in pursuit of a legitimate and explicit policy”, that is, to prevent discriminatory conduct from occurring during AFC activities. Accordingly, the sanction the subject of the appeal was said to be lawful, proportionate to the offence and should be upheld.

**f) *Lawfulness of the sanction - the application of Article 41 of the AFC Code***

104. Article 41 of the AFC Code provides that where misconduct causes concurrent infringements of the AFC regulations that “the sanction shall be based on the most serious infringement, and increased as appropriate depending on the specific circumstances”.

105. The concept of concurrent infringements, in the context of the FIFA DC, was considered and interpreted by the Panel in CAS 2014/A/3665, 3666 & 3667, which held (at [77]-78]) to the effect that where concurrent infringements occur, the sanction is “already and fully covered by ... the *lex specialis*, compared to [any] general provision”. Since then, the AFC judicial bodies have consistently interpreted “the most serious infringement” to mean that which is the *lex specialis*.

106. The AFC Code provides two articles for which a Club or Member Association may be sanctioned for misconduct undertaken by the supporters: Article 58, which specifically prohibits discriminatory conduct by individuals (players, officials), clubs, Member Associations, and spectators; and Article 65, which generally prohibits improper conduct by spectators.

107. If, as the Appellant asserts, Article 58.3 is “covered” and “consumed” by the general prohibition against improper conduct within Article 65, then the inclusion of Article 58.3 in the AFC Code would serve no purpose and be meaningless. Accordingly, the Respondent submitted that the Appeal Committee lawfully applied Article 41 of the Code by finding that Article 58 was the “*most serious infringement*” and correctly based the sanction on the “Penalty” section in Article 58.3 of the AFC Code.
108. Article 41 of the AFC Code permits a base sanction to be increased depending on the specific circumstances. The “specific circumstances” relied upon by the Appeal Committee to increase the base sanction was the fact that the Appellant had been previously sanctioned on three occasions for the improper conduct of its supporters in violation of Article 65 of the Code. The Respondent accordingly submitted that Article 41 of the AFC Code was correctly applied by the Appeal Committee in increasing the sanction in this case.

***g) Proportionality of the sanction***

109. The principle of proportionality requires that there be a reasonable balance between the nature of the misconduct and the sanction. Each situation must be evaluated on a case-by-case basis and the interests at stake have to be balanced.
110. Article 3.3 of the AFC Statutes prohibits discriminatory conduct in AFC activities. The gravity with which such conduct is viewed is reflected in the sanctions against Clubs and Member Associations for violations which may extend to suspension or expulsion from the AFC. Article 58 of the AFC Code reflects the seriousness with which discriminatory conduct is viewed by the AFC. The mandatory sporting sanctions justifiably and necessarily act as a deterrent against discriminatory conduct.
111. The sanction imposed by the Appeal Committee for the violation of Article 58 reflected the seriousness of the Respondent’s aim to prevent and eliminate this conduct from AFC activities. The Appeal Committee paid due regard to the mitigating factors submitted by the Appellant and, in effect, provided a base sanction lower than the minimum penalty identified in Article 58.3.
112. The Respondent submitted that the only appropriate probationary period to provide both the necessary deterrent effect and achieve the envisaged goal of the Respondent to eliminate the discriminatory conduct from AFC activities is two years, especially having regard to the following matters:
- (a) a six-month probationary period, as requested by the Appellant, renders the sanction meaningless, given that the Appellant has already been eliminated from the 2017 Competition; and
  - (b) a one-year probationary period similarly provides little deterrent effect as there is no certainty that the Appellant will qualify for or receive a license to enter the 2018

Competition and, even if it does, a significant amount of time will be lost during the AFC off-season.

113. The Respondent also submitted that the fine was proportionate, having regard to the fact that it represents the minimum for the violation and that in circumstances where there had been three prior indiscretions by the Appellant's supporters, an increase in the fine by USD 7,500 was also justified.

***h) The arguments raised in the Appeal Brief are without merit and should be dismissed***

114. The Respondent submitted that the Appellant was correctly sanctioned by the Appeal Committee in a lawful and proportionate manner and that the arguments submitted on its behalf in the Appeal Brief had no merit and should be dismissed.

***i) The Appellant never intended to commit any offence***

115. The Respondent first submitted that Article 5 of the AFC Code provides that unless otherwise specified, the principle of strict liability applies. Therefore, infringements are punishable regardless of whether they have been committed intentionally, recklessly and/or negligently. Articles 58 and 65 of the AFC Code are not exempted from the operation of the principle of strict liability.

116. Secondly, the Respondent submitted that it has demonstrated that the supporters who displayed the banner were part of the Appellant's group of spectators.

117. Lastly, the Respondent, whilst conceding that there was a minor security failure of the HKFA and Eastern SC to detect the offending banner in the pre-Match search, for which each was sanctioned, submitted that the security breach neither caused nor contributed to the discriminatory conduct undertaken by the Appellant's supporters.

***j) Erroneous application of the Code by the AFC Appeals Committee***

118. For the reasons already submitted, the Respondent contended that it has demonstrated that Article 58 of the AFC Code, which specifically sanctions discriminatory conduct of individuals, Clubs, Member Associations and spectators and provides for minimum penalties in such cases is the *lex specialis*.

119. The Respondent also submitted that the Appellant is estopped by the principle of *venire contra factum proprium* (a doctrine, recognised by Swiss law, providing that where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party) from contending, as it now does, that Article 58 of the AFC Code is not the *lex specialis* and from denying or putting in issue that the statement contained in the banner was discriminatory in violation of that Article, as it purports to do in the proceedings before the Panel. It relies, in particular, on previous

awards of the CAS which have recognised and applied the relevant principle (CAS 2015/A/4195; CAS 2008/O/1455).

120. The Respondent argued, for the reasons already submitted, that the offending banner was discriminatory in violation of Article 58 of the AFC Code.

***k) The sanction was disproportionate***

121. The Respondent relies upon and repeats submissions already made in relation to the proportionality of the sanction. In addition, it argued that the disciplinary decisions of other sports governing bodies, whilst potentially persuasive, are ultimately irrelevant to the decision in question in the current appeal procedure as those decisions are subject to different regulatory regimes, legal frameworks, procedural rules and the treatment of evidence. Case-by-case circumstances naturally differ in each matter. The Respondent asserted that the only relevant matter for the Panel to consider when reviewing the sanction issued by the AFC Appeals Committee is whether it is “*evidently and grossly disproportionate*”. The Respondent has demonstrated that the sanction was lawful and proportionate and should accordingly be upheld.

***l) Recidivism and similar previous sanctions***

122. The Respondent notes that the Appellant’s contentions are premised upon Article 65 of the AFC Code being the *lex specialis* and that, for the reasons outlined elsewhere in its Answer, Article 58 is the *lex specialis* and that the Appellant is estopped from arguing otherwise. Furthermore, in any event, the Respondent submitted that the AFC Appeals Committee correctly applied the AFC Code when considering the prior misconduct of the Appellant’s supporters.

***m) Conclusion and Relief Sought***

123. The Respondent submitted that the Panel should find that:
- (a) the Appellant is liable for the violation of Article 58.1 of the AFC Code by its supporters and should be sanctioned accordingly;
  - (b) the Appellant is liable for the violation of Article 65.1 of the AFC Code by its supporters and should be sanctioned accordingly;
  - (c) the sanction provided in the decision the subject of the appeal is lawful, proportionate to the offence, and should be upheld; and
  - (d) the arguments raised in the Appeal Brief are without merit and should be dismissed.
124. Due to the complexity of the matter, the Respondent contends that it was required to engage external counsel to defend its position and, as such, it submitted that, in the event that it

succeeds, the Appellant should be ordered to make a contribution towards its legal costs in an amount no less than USD 15,000.

125. The Respondent requests that the Panel:
- 138.1 dismiss the appeal in full;*
  - 138.2 confirm the Appealed Decision in full;*
  - 138.3 in the alternative, confirm the sanction provided in the Appealed Decision; and*
  - 138.4 order the Appellant to pay the legal costs and expenses of the Respondent, of a sum no less than USD 15,000”.*

## **VI. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW**

### **A. Jurisdiction**

126. The jurisdiction of the CAS derives from Article R47 of the CAS Code, Article 65 of the AFC Statutes, Edition 2017, Article 130 of the AFC Code and Article 60 of the AFC Champions League 2017 Competition Regulations (the “AFC Competition Regulations”).
127. According to Article R47 of the CAS Code, “[a]n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.
128. Under Article 65 of the AFC Statutes, Edition 2017:
- “1. Any final decision made by an AFC body may be disputed exclusively before CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration.*
  - 2. Recourse may only be made to CAS after all other internal AFC channels have been exhausted. Appeals shall be lodged with CAS within twenty-one (21) days of notification of the decision in question ...”.*
129. Article 130 of the AFC Code provides that the AFC Statutes stipulate which decisions passed by the judicial bodies may be appealed to the CAS and that the relevant competition regulations may contain further stipulations.
130. Article 60 of the AFC Competition Regulations, provides, relevantly, that once internal channels have been exhausted at the AFC, the sole recourse for any disputes shall be to the CAS and the language of the arbitration shall be English. Further, the jurisdiction of the CAS is only available where it has not been expressly excluded or a decision is declared as final and binding and not appealable.

131. In pursuing its appeal to the Appeal Committee, the Appellant has exhausted all internal AFC channels in accordance with Article 65 of the AFC Statutes. Further, the Panel is aware of no other stipulations in the AFC Statutes, the AFC Code or the AFC Competition Regulations relevant to or which may impact upon its jurisdiction nor did any party make any relevant submission in this regard.
132. Neither party contested the jurisdiction of the CAS. Indeed, by signing the Order of Procedure, each confirmed that the CAS has jurisdiction.
133. The Panel accordingly holds that the CAS has jurisdiction to hear the appeal.

#### **B. Admissibility**

134. On 19 July 2017, the Appeal Committee, in accordance with Article 111 of the AFC Code notified the terms of its decision by which the appeal was dismissed.
135. On 8 August 2017, the Appeal Committee delivered its grounds for the decision dismissing the appeal pursuant to a request for grounds made by the Appellant pursuant to Article 111 of the AFC Code. Article 111.2 of the AFC Code provides that the time limit to lodge an appeal begins upon receipt of the grounds for a decision, referred to in Article 111 as the “motivated decision”.
136. According to Article R49 of the CAS Code, “[i]n the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against ...”.
137. Article 65 of the AFC Statutes and Article 111.2 of the AFC Code each provide that an appeal to the CAS shall be lodged within 21 days of notification of the decision in question.
138. The appeal to the CAS was filed on 29 August 2017, that is, within 21 days from the receipt of the motivated decision from the Appeal Committee for the filing of an appeal. Accordingly, the Appellant’s appeal is admissible.

#### **C. Applicable Law**

139. Pursuant to Article R58 of the CAS Code, “[t]he Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
140. Under Article 61 of the AFC Statutes, the CAS is to “apply the various regulations of the AFC, and additionally where relevant, the Laws of Malaysia”. The “various regulations” encompass the laws comprised in and by the AFC Statutes (Edition 2017), the AFC November 2017 Code and

the AFC Competition Regulations, 2017. The Panel concluded that the AFC November 2017 Code applies because:

- (a) the hearing before the CAS is *de novo*. It accordingly has full power to review the facts and the law (Article R57 of the CAS Code) which, subject to any contrary intention being shown in any applicable law, includes any amendments to that law effected after the pronouncement of the decision the subject of any appeal to the CAS;
- (b) Article 146 of the November 2017 Code provides that it was ratified by the AFC Executive Committee on 28 November 2017 and came into immediate effect.
- (c) Article 4.2 of the November 2017 Code provides that it applies “*to infringements that have occurred prior to it coming into force if this Code is equally favourable or more favourable to the perpetrator of the facts. In other cases, the version of the Code in force at the time of the infringement is applicable*”. This provision accordingly recognises and gives effect to the principle of *lex mitior* (by virtue of which when the criminal law in force at the time an offence is committed is subsequently changed before a final judgment, the court must apply the provisions of the law most favourable to the accused (decision of the Swiss Federal Tribunal 4A\_620/2009 of 7 May 2010); and
- (d) the sanctions prescribed for a breach of Article 58.3 of the AFC November 2017 Code are more favourable to a perpetrator of the facts than its predecessor.

141. Accordingly, the Panel determines that it must decide the appeal in accordance with the AFC Statutes (Edition 2017), the AFC November 2017 Code and the AFC Competition Regulations, 2017 and subsidiarily, Malaysian law.

## VII. MERITS

### A. Overview – Issues for Determination

142. Having regard to the *de novo* nature of the appeal, the arguments advanced by the Appellant, the submissions made by the Respondent and the evidence upon which each of the parties rely, these proceedings give rise to the following broad issues:
- (a) whether the contents of the banner displayed in the away sector of the Stadium on 25 April 2017 contained statements that constituted “discrimination” within the meaning of Article 58.1 of the AFC November 2017 Code;
  - (b) whether the contents of the banner displayed in the away sector of the Stadium on 25 April 2017 contained statements that comprised “improper conduct” within the meaning of Article 65.1 of the AFC November 2017 Code;
  - (c) whether the banner was displayed by spectators supporting the Appellant;
  - (d) whether the Appellant violated Article 58.1 of the AFC November 2017 Code;
  - (e) whether the Appellant violated Article 65.1 of the AFC November 2017 Code;

- (f) in the event that the Appellant violated both Articles 58.1 and 65.1 of the AFC November 2017 Code, which of those provisions is the *lex specialis* and which the *lex generalis*;
- (g) whether the sanction imposed by the D & E Committee and upheld by the Appeal Committee was, in all the circumstances, including having regard to any aggravating or mitigating facts, lawful and proportionate to the offence; and
- (h) the extent to which the parties should be awarded their legal costs and expenses in the event that either prevail.

143. The Panel addresses each of these issues below. In doing so, it has had regard to the submissions made by each of the parties. The Panel will refer to such of those submissions and supporting material as is necessary to dispose of the issues the subject of this appeal.

**B. Did the subject banner contain statements that constituted “discrimination” within the meaning of Article 58.1 of the AFC November 2017 Code?**

144. Article 3 of the AFC Statutes enshrines the commitment of the AFC to, inter alia, remain neutral in matters of politics and religion, and to strictly prohibit and punish, if necessary, by suspension or expulsion, discrimination of any kind against a country, private person or group of people on account, amongst other things, of race, skin colour, ethnic, national or social origin, gender, disability, language, religion, political opinion or any other opinion.

145. Article 58.1 of the AFC November 2017 Code gives effect to the objects of Article 3 of the AFC Statutes by providing that “[a]nyone who offends the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions concerning race, skin colour, gender, language, religion, political opinion [...] or ethnic, national or social origin has committed an offence”.

146. The Panel notes that the use of the term “Discrimination” as the header of this Article may be a misnomer or misleading because the conduct that constitutes a violation under this Article goes beyond that which is commonly understood to constitute discrimination. Conduct will be considered to be “discriminatory” for the purposes of Article 58 of the AFC November 2017 Code if it “offends the dignity of a person or groups of persons through contemptuous, discriminatory or denigratory words or actions” concerning, relevantly, political opinion or national origin.

147. The Respondent submitted and the Panel accepts that the words “contemptuous”, “discriminatory” and “denigratory” have well understood definitions in the English language. Those terms are defined in the Cambridge English Dictionary as follows: “contemptuous” as “expressing contempt” - “a strong feeling of disliking and having no respect for someone or something”; “discriminatory” - “unfairly treating a personal particular group of people differently from others”; “denigrate” - “to say that someone or something is not good or important”. The conduct must also concern, relevantly, political opinion or national origin. The Panel accepts that the words have to be considered in context.

148. Germane to context is the fact that the match was being played in the territory of Hong Kong between a Hong Kong club and a Chinese club. Hong Kong was, of course, until 1 July 1997, a colony of the United Kingdom. On 1 July 1997, Hong Kong was returned to China and became its first Special Administrative Region under the principle of “one country, two systems”.
149. There have, from time to time, been some well documented political tensions between residents of Hong Kong and residents of mainland China especially in the aftermath of a decision by the Committee of the National People’s Congress in 2014 regarding proposed reforms to the Hong Kong electoral system.
150. Understood in context, the words contained in the banner “*Annihilate British Dogs, Exterminate Hong Kong Independence Poison*” are clearly contemptuous and denigratory of the people of Hong Kong and their historical connection to Great Britain. The words are also discriminatory of people of Hong Kong origin and the reference to “Independence” in the context of Hong Kong’s recent history is an opinion of a political character.

**C. Did the subject banner contain statements that comprised “improper conduct” within the meaning of Article 65.1 of the AFC November 2017 Code?**

151. “Improper conduct” is defined in Article 65.1.1 as including “*without limitation violence towards persons or objects, letting off incendiary devices, throwing missiles, displaying insulting, religious, or political slogans in any form, uttering insulting words or sounds, or invading the pitch*”.
152. Understood in context (see paragraphs 148 to 150 of this Award), the Panel finds that the banner contained words that constituted a “political slogan” and was thus improper conduct for the purposes of Article 65.1 of the AFC Code.

**D. Was the banner displayed by spectators supporting the Appellant?**

153. Having regard to the competing contentions and the evidence, the Panel finds that the banner was displayed by spectators supporting the Appellant. The banner was displayed in the away section of the Stadium. It is clear from the photographs and the video footage that the spectators who displayed the banner were wearing clothing with the colours and insignia of the Appellant, whilst the supporters standing around them simultaneously cheered, applauded, chanted in a passionate manner in response to the banner being raised.
154. It is of no consequence, if it be the case that the persons who actually raised the banner were not registered fans of the Appellant, in respect of which the Panel makes no finding. Further and in any event, there was no evidence adduced by the Appellant which rebutted the legal presumption contained in Article 65.1.3 of the AFC Code (for the purposes of establishing a breach of Article 65) that “[s]upporters occupying the away sector of a Stadium are regarded as the visiting Member Association or visiting Club supporters, unless proven to the contrary”. What is tolerably clear is that those persons who raised the banner identified with the Appellant and that others around

them provided encouragement and support for their actions. In the circumstances, the Panel concludes that those persons were part of a spectator group which supported the Appellant.

**E. Did the Appellant violate Article 58.1 of the AFC November 2017 Code?**

155. The Appellant contended that it never intended to commit any offence and that it had provided specific guidelines to supporters travelling to the game in relation to the conduct expected of them. Those guidelines included a prohibition on the use of any slogan or banner with words or pictures that were politically sensitive, humiliating, malicious, slanderous, defamatory or harmful to social custom.
156. However, as the Respondent submitted, Article 5 of the AFC November 2017 Code provides that “[u]nless otherwise specified, the principle of strict liability applies. Therefore, infringements are punishable regardless of whether they have been committed intentionally, recklessly, and/or negligently”. Articles 58 and 65 of the AFC November Code are not exempted from the operation of the principle of strict liability in Article 5 of the AFC Code. The Panel accordingly finds that whilst the Appellant may not have intended to commit any offence and that it acted admirably and responsibly in providing guidelines to its travelling supporters, these matters are not relevant to nor are they exculpatory of liability.
157. For the reasons referred to in paragraphs 144-150 of this Award, the Panel concludes that the words deployed by the banner were contemptuous, discriminatory or denigratory of the people of Hong Kong and their historical connection to Great Britain and contained political comment.
158. Further, and for the reasons referred to in paragraphs 153 and 154 of this Award, the Panel finds that the banner was displayed by spectators supporting the Appellant.
159. In these circumstances, the Panel is comfortably satisfied that the Appellant violated Article 58.1 of the AFC Code and the Panel so finds.

**F. Did the Appellant violate Article 65.1 of the AFC November 2017 Code?**

160. For the reasons referred to in:
- (a) paragraphs 151 & 152 of this Award, the Panel concludes that the banner contained words that constituted improper conduct for the purposes of Article 65.1 of the AFC November 2017 Code;
  - (b) paragraphs 153 & 154 of this Award, we find that the banner was displayed by spectators supporting the Appellant; and
  - (c) paragraph 156 intent is not a relevant consideration.
161. In these circumstances, the Panel is comfortably satisfied that the Appellant violated Article 65.1 of the AFC November 2017 Code and the Panel so finds.

**G. In the event that the Appellant violated both Articles 58.1 and 65.1 of the AFC November 2017 Code, which of those provisions is the *lex specialis* and which the *lex generalis*?**

162. As a preliminary matter, we note that the Respondent submitted that the principle of *venire contra factum proprium* prevents the Appellant from contending, as it now does, that Article 58 of the AFC Code is not the *lex specialis*, in circumstances where it made the contrary submission in the proceedings before the Appeal Committee. It relies, in particular, on previous awards of the CAS which have recognised and applied the principle (cf. CAS 2015/A/4195; CAS 2008/O/1455).
163. Whilst it is the case that the Appellant has chosen to take a different course in the CAS to that taken before the Appeal Committee, given the *de novo* nature of the proceedings in the CAS, that was, subject to what follows, an option available to it.
164. What is evident from the CAS awards upon which the Respondent relies is that the principle of *venire contra factum proprium* requires the satisfaction of two essential elements. First, that there has been a change in position by a party. That element has been satisfied in the present circumstances. Second, that the Respondent will suffer detriment if the Appellant is permitted to rely upon a change in position. By all accounts, the Respondent has been able to meet the arguments raised by the Appellant and so has suffered no discernible procedural prejudice. Further, the Respondent has not identified any detriment from the Appellant's change in position. In any event, given the findings of the Panel in relation to the *lex specialis*, the point is somewhat moot, and it is a matter upon which the Panel is not therefore required to express a concluded view.
165. The Appellant contends that the D & E Committee and the Appeal Committee erroneously applied Article 58 of the AFC November 2017 Code in circumstances where Article 65 expressly and specifically regulates and creates a liability for spectator conduct and so is the *lex specialis* whereas Article 58 is the *lex generalis*.
166. In considering this issue, the Panel has had regard to the decision in CAS 2014/A/3665, 366 & 3667 which describes the manner in which the *lex specialis* and the *lex generalis* are to be determined in any particular circumstance.
167. It appears that the Appellant's submissions in this regard proceed on an erroneous premise that Article 58 is concerned with misbehaviour committed by clubs, players and associations only and Article 65 is concerned with the conduct of spectators.
168. Article 58.1 prohibits "[a]nyone" from engaging in the conduct referred to in that provision. There are no words limiting "anyone" to clubs, players and associations as the Appellant contends. Further, Article 3 of the AFC Code makes plain that "spectators" are bound by its provisions. To read words of limitation into Article 58.1 as the Appellant contends would be contrary to the object or regulatory context of the provision being, when read with Article 3 of the AFC Statutes, to discourage and eliminate discriminatory conduct in the sport by

sanctioning the relevant Club or Member Association, as the case may be, for the conduct of its supporters.

169. Article 58.3 then relevantly provides that the offence is “*aggravated where supporters of a team commit the offence*”. An aggravating circumstance is generally understood to be a circumstance surrounding the commission of an offence that renders an offence more serious and, therefore, subject to a greater penalty. Consistent with this understanding of the term “aggravation”, Article 58.3 prescribes sanctions where an offence is committed by supporters of a team. Notably, the most serious offence that can be imposed on a Club or Member Association for breach is in the instance where the offence is committed by supporters of a team.

170. The Panel finds that, properly construed, Articles 58 and 65 of the AFC November 2017 Code each provide circumstances in which a Club or Member Association may be sanctioned for misconduct undertaken by supporters. Article 58, by its terms, specifically prohibits discriminatory conduct by individuals (players and officials), Clubs, Member Associations, and spectators, whilst Article 65 generally prohibits improper conduct by spectators. Therefore, Article 58 of the AFC November 2017 Code, which specifically sanctions the discriminatory conduct of individuals, clubs, Member Associations and spectators and provides for minimum penalties in such cases is the *lex specialis* and Article 65 is the *lex generalis*.

**H. Was the sanction imposed by the D & E Committee and upheld by the Appeal Committee lawful and proportionate to the offence having regard to any aggravating or mitigating circumstances?**

**a) Approach**

171. In considering this issue, the Panel is mindful that, in accordance with CAS jurisprudence (see, for example, CAS 2012/A/2762, applied inter alia, in CAS 2009/A/1870; CAS 2011/A/2645; CAS 2007/A/1217; CAS 2015/A/3944; CAS 2013/A/3139; CAS 2015/A/3875; CAS 2015/A/3874), it must show restraint when reviewing the level of sanctions imposed by a disciplinary body and that the sanction imposed by that body in the exercise of its discretion can only be reviewed “*where the sanction is evidently and grossly disproportionate to the offence*”.

**b) The application of Article 41 of the AFC November 2017 Code**

172. Article 41 of the AFC November 2017 Code provides that where misconduct causes concurrent infringements of the AFC regulations that “*the sanction shall be based on the most serious infringement, and increased as appropriate, depending on the specific circumstances*”.

173. The concept of concurrent infringements, was considered by the CAS Panel in CAS 2014/A/3665, 3666 & 3667, which held (at [77]-[78]) that where concurrent infringements occur, the sanction is “*already and fully covered by ... the ‘lex specialis’, compared to [any] general provision*”.

174. Given this Panel's finding that Article 58 is the *lex specialis*, we conclude that there was no error evident in the manner in which both the D & E Committee and the Appeal Committee applied Article 41. It proceeded on the correct premise that the sanction is to be based upon the most serious infringement, in this case, the violation of Article 58, and increased as appropriate depending upon the specific circumstances.

**c) Was the sanction evidently and grossly disproportionate?**

175. The Panel accepts that the principle of proportionality requires that there be a reasonable balance between the nature of the misconduct and the sanction. Each situation must be evaluated on a case-by-case basis and the interests at stake have to be balanced. "*Account must be taken of the seriousness of the facts and other related circumstances as well as of the damage that the penalised conduct entails for the parties involved, for the federation in question and for its sport. In the same way, the disciplinary bodies may evaluate any aggravating and/or extenuating circumstances that might be related to the infringement*" (CAS 2013/A/3358).

176. The Appellant submitted that a sanction stipulated in the AFC November 2017 Code should not be automatically applied. It must always yield to the specific circumstances of the case. It points to Article 39.5 of the AFC November 2017 Code which entitles a judicial body to impose a sanction lower than the minimum after having considered all of the relevant circumstances including any apposite mitigating and aggravating factors in the case and the degree of guilt of the party when imposing a sanction. It contended that even in the case of a strict liability offence, such liability can be overturned if reasonable mitigating factors exist.

177. The Appellant referred the Panel to a number of general mitigating factors which it asserted were either exculpatory of liability or impacted upon the sanction that should have been imposed and, in particular, that should have militated in favour of a reduction in any minimum sanction that may otherwise have applied. The Panel has summarised those matters at paragraph 68 of this Award.

178. The Appellant also referred the Panel to a number of cases which it contended dealt with circumstances which were much more serious than those the subject of the charges against it, but in which the sanctions were comparable to those imposed on the Appellant (see paragraph 73 of this Award).

179. However, none of these cases involved violations of provisions of the nature of Article 58. Three of the cases (CAS 2014/A/3578; CAS 2015/A/3875; and CAS 2013/A/3090) concerned, in part, Article 67 of the FIFA DC which, in common with Article 58 of the AFC November 2017 Code imposed strict liability, nevertheless and in contrast to Article 58 of the AFC Code, empowered FIFA with a discretion not to impose a fine.

180. The fourth case referred to by the Appellant (CAS 2013/A/3047) like the present case involved a strict liability offence but relating to the use by spectators of a pyrotechnic device

in contravention of Article 114 of the RFU Disciplinary Regulations and Competition Regulations. A breach of that Article mandated the payment of a fine in accordance with Paragraph 37 of Appendix 1 to the Regulations and in the case of pyrotechnic items thrown at and which made contact with players, club officials or match officials, was punishable by a fine in accordance with Paragraph 37 of Appendix 1 of the Regulations and/or by playing one to three matches behind closed doors or playing one to three games at a neutral stadium in a different city.

181. The Panel is accordingly of the view that none of the cases referred to by the Appellant provide it with any relevant guidance on the propriety of the sanction imposed by the D & E Committee and upheld by the Appeal Committee in this case.
182. The Respondent argued that the sanction imposed by the Appeal Committee for the violation of Article 58 reflected the seriousness of the Respondent's aim to prevent and eliminate discriminatory conduct from AFC activities consistent with the objectives of Article 3.3 of the AFC Statutes. It submitted that, even allowing for the mitigating factors referred to by the Appellant, the sanctions imposed were proportionate. It argued that the fine was proportionate having regard to the fact that it represented the minimum for the violation and that in circumstances where there had been three prior indiscretions by the Appellant's supporters over the preceding five-year period, an increase in the fine by USD 7,500 pursuant to Article 40.1 was warranted.
183. The Respondent also submitted by reference to the Respondent's Proportionality Summary that whilst Article 58.3 of the AFC November 2017 Code no longer contains a minimum penalty of two matches without spectators in addition to a fine, that the circumstances of the case when considered in the context of other discrimination cases determined by AFC judicial bodies during 2017 under the AFC Code (January 2017 Edition) would, by operation of Article 39.5 of the AFC November 2017 Code, justify the imposition of a sporting sanction as found by the Appeal Committee.
184. Article 3.3 of the AFC Statutes prohibits discriminatory conduct in AFC Activities. The gravity with which such conduct is viewed is reflected both by the strict liability nature of the offence and the sanctions against Clubs and Member Associations for violations which may extend to suspension or expulsion from the AFC.
185. Article 58 of the AFC November 2017 Code reflects the seriousness with which discriminatory conduct is viewed by the AFC. Indeed, as the Panel noted in CAS 2015/A/3875, the principle of strict liability for supporters' misbehaviour "*is a fundamental facet of the current football regulatory framework and one of the few legal tools that football authorities have at their disposal to deter hooliganism and, more in general, supporters' improper conduct*".
186. It is the opinion of the Panel that having regard to the seriousness with which the AFC Code views discrimination by spectators, the minimum fine was appropriate and that the mitigating

factors upon which the Appellant relies are of insufficient weight to justify any reduction under Article 39.5 of the Code.

187. The Appellant argued that the D & E Committee and the Appeal Committee erred in increasing the monetary penalty by USD 7,500 pursuant to Article 40 because it only applies in the case of conduct which is either the same or substantially the same in nature and effect as a previous offence and that whilst the previous sanctions imposed on it related to spectator misconduct, it had not previously been charged with a breach of Article 58.
188. The objective of Article 40 is self-evidently to discourage persons from repeat offending. It is not, by its language, restricted to conduct of *“the same or substantially the same in nature and effect as a previous offence”* as the Appellant contends nor, in the opinion of the Panel, is such a narrow construction justified having regard to the regulatory aim of Article 40. It should be contrasted with the provision considered in CAS 2015/A/3875, in which the Panel was required to consider the issue of recidivism in the context of determining whether it was an aggravating factor. In that case, Article 19 of the UEFA Disciplinary Regulations, Edition 2014 defined recidivism as occurring *“if another offence of a similar nature is committed”* within the specified timeframe. Neither the language nor the context requires that Article 40 be restricted in its operation as the Appellant submits.
189. Whilst the Panel accepts that none of the previous incidents involved a violation of Article 58, nevertheless, they each involved aspects of spectator misbehaviour of which the violation of Article 58 was the latest of a series and of a serious nature. In the opinion of the Panel, the three previous spectator conduct incidents in the five years preceding the Charges were aggravating circumstances justifying the modest increase in the fine above that stipulated in Article 58.3 of the AFC Code.
190. In the result, the Panel is not persuaded that the fine is *“evidently and grossly disproportionate to the offence”*.
191. We now turn to consider that part of the sanction which relates to the playing of two matches without spectators suspended for a probationary period of two years. We have not been assisted by the cases referred to in the Respondent’s Proportionality Summary. Whilst we accept that the document discloses a proportionality of approach by the AFC judicial bodies when dealing with charges of discrimination by spectators, each case understandably is based on the premise that there was a “statutory minimum” sanction which included two matches without spectators. That sporting sanction is no longer part of the “statutory minimum”.
192. The sporting sanction imposed by the Appeal Committee was the statutory minimum prescribed by Article 58.3 of the AFC Code but suspended for a period of two years. That sanction is no longer sustainable given the terms of Article 58.3 of the November 2017 AFC Code.

193. The Respondent submitted that in the event the Panel upheld the appeal in reliance upon the AFC November 2017 Code that it should remit the matter to the Appeal Committee for it to consider the question of sanction under Article 58.3 of that Code. In support of its application, the Respondent relied upon the case CAS 2012/A/2919. The Panel has, for the reasons that follow, determined not to take the course urged by the Respondent.
194. First, the case CAS 2012/A/2919 is distinguishable on the facts from those the subject of this appeal. In that case, FIFA did not address the merits of the matter based on an erroneous decision relating to the admissibility of the issues for determination. The Sole Arbitrator found that FIFA had erred as to admissibility and further that as the matter involved an important question of principle with worldwide effect, it should be remitted to FIFA for determination. Similar considerations do not, in the opinion of the Panel, arise in the present appeal.
195. Secondly, it is important that, wherever possible, a procedure before the CAS brings finality and closure to the parties.
196. Thirdly, Article 58.3 of the AFC November 2017 Code, provides clear, cogent and relatively uncontroversial guidance as to the minimum sanction that applies to its breach. Of course, the actual sanction that will be applied in any given case will invariably depend upon the prevailing facts and circumstances and will include a consideration of Articles 39 and 40 of the AFC November 2017 Code.
197. It is the opinion of the Panel that the fine as imposed by the Appeal Committee is an adequate and appropriate sanction in all the circumstances. It represents the “statutory minimum” prescribed under Article 58.3 of the AFC November 2017 Code but with an increase under Article 40.1 for recidivism.
198. This approach is, in the view of the Panel consistent with that taken by the Appeal Committee when addressing the issue of sanction under the version of Article 58.3 in force at the time of its decision.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules that:**

1. The appeal filed by Guangzhou Evergrande Taobao FC on 28 August 2017 is upheld in part.
2. Paragraph 3 of the Decision of the AFC Appeal Committee, dated 19 July 2017, is deleted (2 matches without spectators).

3. The remainder of the Decision of the AFC Appeal Committee is confirmed.
4. (...).
5. (...).
6. All other motions or prayers for relief are dismissed.