

# RED CARD RACISM: USING THE COURT OF ARBITRATION FOR SPORT (CAS) TO PREVENT AND PUNISH RACIST CONDUCT PERPETRATED BY FANS ATTENDING EUROPEAN SOCCER GAMES

*Alexander Wynn\**

## INTRODUCTION

Imagine playing professional soccer in Spain in front of tens of thousands of fans. You are paid millions of Euros because you are one of the best players in the world—your team’s fans love you; the fans of other teams hate you. You are accustomed to receiving the adulation of spectators who support your team and to being reviled by other groups of spectators who hope to see you fail, or at least not score a goal against their team. Normally, the cheers and jeers that greet you in every stadium are just background noise; when you step onto the soccer field the only sounds you hear are the advice of your teammates, the crunching sound of a hard tackle and the thump of the soccer ball. But this is not a normal day. At some point during this game, the rival fans suddenly erupt in a cacophony of noise. It takes you only seconds to recognize that the fans sound like a troop of monkeys and that they are directing the noise at you.

This is exactly what happened to Samuel Eto’o<sup>1</sup>—a native of Cameroon then playing professionally for Barcelona Football Club—in 2005. Early in the second half of a ninety minute soccer game against Real Zaragoza Football Club, virtually every Real Zaragoza fan began chanting monkey noises at Eto’o in unison.<sup>2</sup> Eto’o became so upset that he walked off the soccer field and had

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\* B.A., Wesleyan University, College of Social Studies; Senior Notes Editor, *Cardozo Journal of Conflict Resolution*. J.D. Candidate, Benjamin N. Cardozo School of Law, June 2012. The author would like to thank his adviser, Anthony J. Dreyer, for his helpful comments and guidance.

<sup>1</sup> *Samuel Eto’o Profile*, ESPN SOCCERNET, [http://soccernet.espn.go.com/player/\\_id/11718/samuel-eto%27o?cc=5901](http://soccernet.espn.go.com/player/_id/11718/samuel-eto%27o?cc=5901) (last visited Jan. 11, 2012).

<sup>2</sup> Donald McRae, *World Cup 2010: Samuel Eto’o on His Incredible Journey*, THE GUARDIAN (June 8, 2010), available at <http://www.guardian.co.uk/football/2010/jun/08/samuel-etooworld-cup-2010> (the Spanish Soccer Federation fined Real Zaragoza 600 Euros).

to be restrained by his teammates from leaving the stadium.<sup>3</sup> Unfortunately, similar incidents have occurred during professional soccer games throughout Europe. Despite the staggering wealth that European soccer clubs generate and the loyalty that clubs command,<sup>4</sup> as well as the increase in the number of black<sup>5</sup> players in elite European leagues over the past two decades,<sup>6</sup> European soccer remains plagued by racism.<sup>7</sup> One might expect that fans would be most concerned with how their team performs on the soccer field and, above all else, with winning rather than the race of any player. However, success on the soccer field has not been a panacea for prejudice.<sup>8</sup> This is so despite the efforts of the Union des Associations Européennes de Football [hereinafter “Uefa”], which is responsible for managing European soccer and implementing procedures through its Disciplinary Regulations<sup>9</sup> and Uefa Statutes<sup>10</sup> to combat racism and punish its perpetrators.

Although there is no definitive explanation for why Uefa’s enforcement of its Regulations and Statutes has not been more effective in eliminating racism from European soccer, it is likely that soft enforcement of these bylaws has allowed this blight to flourish. It may be that because the bodies endowed by Uefa with the authority to enforce its rules are not independent of Uefa, a conflict

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<sup>3</sup> Tonikboy7, *Racism Towards Eto’o*, YOUTUBE (Aug 31, 2006), [http://www.youtube.com/watch?v=GO\\_z3GTmUQI](http://www.youtube.com/watch?v=GO_z3GTmUQI).

<sup>4</sup> UEFA, THE EUROPEAN CLUB FOOTBALLING LANDSCAPE: CLUB LICENSING BENCHMARKS REPORT FINANCIAL YEAR 2008 (2008), available at [http://en.uefa.com/MultimediaFiles/Download/Publications/UEFAorg/Publications/01/45/30/45/1453045\\_DOWNLOAD.pdf](http://en.uefa.com/MultimediaFiles/Download/Publications/UEFAorg/Publications/01/45/30/45/1453045_DOWNLOAD.pdf). During the 2008-2009 season, top division domestic championship matches drew 105 million fans to stadiums around Europe and clubs earned 11.2 billion Euros. As a result, elite European teams are able to afford to import the best soccer players from around the world.

<sup>5</sup> See UEFA, TACKLING RACISM IN CLUB FOOTBALL: A GUIDE FOR CLUBS (2006), available at <http://en.uefa.com/newsfiles/459063.pdf>. In the context of literature on racism in soccer, “black” players refers to players of African descent.

<sup>6</sup> George Vecsey, *England Battles the Racism Infesting Soccer*, N.Y. TIMES Feb. 2, 2003, available at <http://www.nytimes.com/2003/02/02/sports/soccer-england-battles-the-racism-infesting-soccer.html?pagewanted=1>.

<sup>7</sup> *Real Sports with Bryant Gumbel: Episode 159* (HBO television broadcast June 22, 2010), available at <http://itunes.apple.com/us/podcast/real-sports-bryant-gumbel/id117667899>.

<sup>8</sup> TACKLING RACISM IN CLUB FOOTBALL: A GUIDE FOR CLUBS, *supra* note 5.

<sup>9</sup> UEFA, UEFA DISCIPLINARY REGULATIONS, art. 11bis (2008), available at <http://en.uefa.com/Uefa/footballfirst/index.html> (last visited Feb. 16, 2011).

<sup>10</sup> UEFA, UEFA STATUTES: RULES OF PROCEDURE OF THE UEFA CONGRESS REGULATIONS GOVERNING THE IMPLEMENTATION OF THE UEFA STATUTES, at art. 56, 59(3), and 60 (2010), available at [http://www.uefa.com/MultimediaFiles/Download/Regulations/UEFAorg/General/01/47/69/97/1476997\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Regulations/UEFAorg/General/01/47/69/97/1476997_DOWNLOAD.pdf). These clauses establish the power of Uefa’s Disciplinary Committee to impose sanctions on teams and football associations involved in Uefa competitions.

of interest is institutionalized that discourages these bodies from assessing the types of severe penalties provided for in the Disciplinary Regulations.<sup>11</sup> Uefa is comprised of member associations who elect representatives to the Uefa Congress.<sup>12</sup> The Uefa Congress is responsible for electing the Executive Committee, the “supreme controlling organ of Uefa,” which elects the members of the Organs for the Administration of Justice [hereinafter “adjudicative organs”].<sup>13</sup> Because Uefa’s Disciplinary Regulations expressly state that teams and member associations are liable for the conduct of their fans,<sup>14</sup> the imposition of sanctions is a cost of doing business that teams and member associations have contractually agreed to accept. However, if Uefa were to impose severe sanctions on teams or member associations whose fans engage in racist conduct, penalized member associations or teams might repudiate their Uefa membership. If member associations withdrew from Uefa, the amount of revenue that Uefa earns from membership fees and broadcast licensing agreements would decrease dramatically, which would have a profound effect on the staging of European soccer tournaments and on Uefa’s efforts to promote soccer throughout Europe.<sup>15</sup>

Alternatively, or in addition to this conflict of interest, it may be that Uefa’s adjudicative organs strategically do not impose severe penalties on football associations and teams whose fans engage in racist behavior for one of at least two reasons. The first possibility is that Uefa’s legal counsel interpreted European statutory and case law as having exempted decisions of Uefa’s adjudicative organs from judicial review because disciplinary decisions are the product of contractual agreements between private parties, which may not be subject to judicial review under European Union [hereinafter “E.U.”] case law.<sup>16</sup> Under these circumstances, acts, rules and decisions of Uefa would be insulated from the institutional pressure that courts could apply through judicial review to Uefa to compel it to enforce the Disciplinary Regulations to their fullest extent. Thus, Uefa may be at liberty to impose only nominal

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<sup>11</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 11bis.

<sup>12</sup> *About Uefa: Organization*, UEFA, <http://en.uefa.com/Uefa/aboutUEFA/organisation/index.html> (last visited Feb. 16, 2011).

<sup>13</sup> UEFA STATUTES, *supra* note 10, at art. 12.

<sup>14</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 6.

<sup>15</sup> NEVILLE COX ET AL., *SPORTS AND THE LAW* 419 (First Law 2004). See also UEFA STATUTES, *supra* note 10, at art. 47.

<sup>16</sup> See *Modahl v. British Athletic Ass’n*, [2001] 1 W.L.R. 1192; *Wos v. Poland*, [2007] 45 Eur. Ct. H.R. 28.

finer on those entities that violate the Uefa Statutes through racist conduct.

The second possibility is that Uefa's legal counsel is unsure about whether a decision to severely punish a member association or team that violates its Disciplinary Regulations could be challenged in court. In response, the members of Uefa's adjudicative organs may strategically under-enforce Uefa's rules to keep disputes out of the courts. Such a claim might be founded on the allegation that imposing more severe penalties conflicts with E.U. law—for example, by hindering the development of an internal market within Europe—rendering such penalties invalid.<sup>17</sup> If the penalties imposed by Uefa's adjudicative organs were found to contravene E.U. law, court orders would precipitate the altering of the terms by which Uefa governs European soccer. Motivated to avoid costly litigation and wanting to prevent players, member association and teams from appealing to the courts for relief, Uefa may be strategically disposed to refusing to impose penalties beyond minimal fines.

This Note will argue that Uefa should make Alternative Dispute Resolution<sup>18</sup> [hereinafter “ADR”]—specifically mediation and arbitration—available to professionals playing in European soccer leagues<sup>19</sup> to prevent and punish acts of racism<sup>20</sup> performed by groups of fans. To ensure that member associations and teams are sanctioned when their fans engage in racist behavior, Uefa's members should vote to divest Uefa of the authority to adjudicate these types of disputes and agree to vest jurisdiction over such complaints in the Court of Arbitration for Sport [hereinafter “CAS”]. Agreeing to automatically refer disputes involving racism to CAS would ensure that instances of racism are appropriately and proportionately punished, promote the efficient resolution of

<sup>17</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Eur. Union, Dec. 13, 2007, 2007 O.J. (C 306). [hereinafter Treaty of Lisbon]; *Wos v. Poland*, 45 Eur. Ct. H.R. at ¶ 72.

<sup>18</sup> BLACK'S LAW DICTIONARY 33 (3d pocket ed. 2006) (“A procedure for settling a dispute by means other than litigation, such as arbitration or mediation.”).

<sup>19</sup> *Uefa Member Associations*, UEFA, <http://en.uefa.com/memberassociations/index.html> (last visited Sept. 13, 2011). Uefa defines “top division” football as games between the 732 football clubs that comprise the 53 Uefa member football associations.

<sup>20</sup> FIFA, FIFA DISCIPLINARY CODE: 2009 EDITION, art. 58 (2009), available at <http://www.fifa.com/aboutfifa/documentlibrary/index.html>. Given that this Note deals with soccer, I use the definition of “discrimination” adopted by Fédération Internationale de Football Association [hereinafter “Fifa”]—the governing body of international soccer—which Fifa defines as, “[O]ffend[ing] the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions concerning race.”

such disputes, conserve Uefa's disciplinary resources and protect Uefa's interest in maintaining working relationships with its member associations.

This system of dispute resolution would also ensure that mediators and arbitrators who possess expertise in matters related to sports and racism would preside over a given mediation proceeding or arbitration hearing. This expertise could help parties formulate mutually beneficial solutions or be leveraged by arbitrators to decide better results.<sup>21</sup> Meanwhile, Uefa's disciplinary resources could be reallocated to resolving disputes about the rules and business of soccer, both issues to which Uefa, as the body responsible for "safeguarding the development of professional [European] soccer . . . and for promoting unity among all interested stakeholders in European football,"<sup>22</sup> is institutionally competent to address. Finally, because CAS is not beholden to member associations or teams, mediators and arbitrators using CAS' procedures could facilitate the negotiation of an agreement between or decide an appropriate penalty to be imposed by Uefa upon the parties without being concerned that a certain outcome or decision might cause member associations or teams to refuse to deal with Uefa, thereby jeopardizing Uefa's very existence.<sup>23</sup>

This Note proceeds in three sections. Part I describes the extent to which racism infects European soccer, the processes by which Uefa addresses violations of the Uefa Statutes and CAS' contributions to sports mediation and arbitration. Part II contextualizes Uefa's governing authority within statutory and case law from the E.U. and the United Kingdom [hereinafter "U.K."] as legal frameworks through which to explore possible reasons why Uefa rarely imposes substantial sanctions on member associations or teams whose fans perpetrate racist acts. Finally, Part III explores the reasons why CAS is better able to address and punish racism in European soccer than Uefa's adjudicative organs. Each section will serve to support the argument that mediation and arbitration are better adapted to addressing racism in European soccer because 1) both forms of ADR are suited to resolving disputes between parties who are likely to be involved in repeat transactions

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<sup>21</sup> Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Guide for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 28–29 (1996).

<sup>22</sup> UEFA, MEMORANDUM OF UNDERSTANDING BETWEEN THE UNION DES ASSOCIATIONS EUROPÉENNES DE FOOTBALL (UEFA) AND THE ASSOCIATION OF EUROPEAN PROFESSIONAL FOOTBALL LEAGUES (EPFL), at 1 (Mar. 13, 2009), available at [http://en.uefa.com/Multimedia/Files/Download/Uefa/KeyTopics/88/17/84/881784\\_DOWNLOAD.pdf](http://en.uefa.com/Multimedia/Files/Download/Uefa/KeyTopics/88/17/84/881784_DOWNLOAD.pdf).

<sup>23</sup> UEFA STATUTES, *supra* note 10, at art. 66.

in the future and 2) neither mediation nor arbitration yields binding precedent and thus both methods possess inherent flexibility with respect to the spectrum of possible outcomes.<sup>24</sup>

## I. KICK OFF: RACISM IN EUROPEAN SOCCER AND CURRENT DISCIPLINARY PROCEDURES

### A. *Racism in European Soccer*

Because this Note addresses racism in the context of soccer, it is reasonable to use the definition of racism adopted by the Fédération Internationale de Football Association [hereinafter “Fifa”], the international body responsible for governing soccer worldwide.<sup>25</sup> Racism in European soccer is defined as conduct that “offend[s] the dignity of a group of persons.”<sup>26</sup> It should be noted that racism has consistently been a problem in European soccer.<sup>27</sup> A number of recent examples illustrate both the prevalence of racism in European soccer and the ways in which such conduct manifests. In 2001, fans of the Italian soccer team Treviso painted their faces black to protest Treviso signing black players to professional contracts.<sup>28</sup> In 2002, fans of the Slovakian national team directed noises imitating monkeys at black players playing for the English national team.<sup>29</sup> In 2004, at a soccer game in Madrid between the national soccer teams of England and Spain, the majority of the Spanish fans in attendance began shouting, “Jump up if you’re not black,”<sup>30</sup> which was clearly directed at England’s black players; the Spanish team did not consist of any players of African descent. These are just a few examples of racism in European soccer.<sup>31</sup>

<sup>24</sup> JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW*, 47–48, 52 (2004).

<sup>25</sup> FIFA, *FIFA STATUTES: AUGUST 2009 EDITION*, art. 2(d) (2009), <http://www.fifa.com/aboutfifa/documentlibrary/index.html>. One of Fifa’s objectives is to “control every type of [soccer].”

<sup>26</sup> FIFA *DISCIPLINARY CODE: 2009 EDITION*, *supra* note 20, at art. 58(a).

<sup>27</sup> *TACKLING RACISM IN CLUB FOOTBALL: A GUIDE FOR CLUBS*, *supra* note 5; SIMON KUPER & STEFAN SZYMANSKI, *SOCCERNOMICS: WHY ENGLAND LOSES, WHY GERMANY AND BRAZIL WIN, AND WHY THE U.S., JAPAN, AUSTRALIA, TURKEY—AND EVEN IRAQ—ARE DESTINED TO BECOME THE KINGS OF THE WORLD’S MOST POPULAR SPORT*, 97 – 101 (2009).

<sup>28</sup> Vecsey, *supra* note 6.

<sup>29</sup> *Id.*

<sup>30</sup> *Real Sports with Bryant Gumble*, *supra* note 7.

<sup>31</sup> See also David Hills, *Said and Done*, *THE OBSERVER* (Apr. 10, 2010), available at <http://www.guardian.co.uk/football/2010/apr/10/said-and-done-premier-league>; David Hills, *Said and Done*, *THE GUARDIAN* (Mar. 28, 2010), available at <http://www.guardian.co.uk/football/2010/mar/28/said-and-done-premier-league>; Paul Doyle, *French Government Gets Tough on Football*

Frequently, when racist incidents occur, the response from teams, member associations and Uefa does not evidence a willingness to punish racist acts sufficiently so as to prevent them from reoccurring. One anecdotal example illustrates the typical response of soccer's governing bodies. At the beginning of the 2010-2011 soccer season in Russia, fans of Lokomotiv Moscow displayed a large banner directed at Peter Odemwingie, a Nigerian soccer player playing for Lokomotiv, with a banana depicted on it.<sup>32</sup> In response to the incident a Fifa spokesperson said, "This [incident] is not for Fifa [to address]. It is a matter for the Russian FA or Uefa [to address]." A Uefa spokesperson responded, "This issue does not come under Uefa's jurisdiction. It is up to the national association [to respond]," only for a representative of the Russian Football Association to claim that, "There was nothing racial in [the banner]."<sup>33</sup>

When Uefa imposes fines, its decisions do not bear the hallmark of consistency. In 2009, Uefa fined the Croatian Football Association £9,000 as punishment for its fans directing "gross racist gestures" at the English national team's black players.<sup>34</sup> In 2010, during a Europa Cup<sup>35</sup> qualifying match, FK Rabotnicki fans aimed "gross racist gestures" at non-white Liverpool Football Club players and Rabotnicki was fined only £8,000 by Uefa.<sup>36</sup> Extrapolating from these examples, there appears to be either willful blindness to racism on the part of Uefa officials or a reluctance to impose substantial sanctions on perpetrators of racist conduct.

Regardless of what Uefa officials believe, the fact that racist incidents occur in spite of Uefa fining perpetrators demonstrates that fines are not a sufficient incentive for member associations

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*Hooligans*, THE GUARDIAN (May 2, 2010), available at <http://www.guardian.co.uk/football/2010/may/02/french-government-tough-football-hooligans>.

<sup>32</sup> John Sinnott, *Fifa & Uefa Powerless to Act on Racist Russian Flag*, THE BBC (Sept. 23, 2010), <http://news.bbc.co.uk/1/hi/football/europe/9027968.stm>; *West Bromwich Albion*, THE OFFICIAL ALBION WEBSITE, <http://www.wba.co.uk/page/ProfilesDetail/0,,10366~33181,00.html> (Odemwingie's contract has since been sold to West Bromwich Albion Football Club, a team playing in the English Premier League). See also FIFA, *FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS* (2010), available at <http://www.fifa.com/aboutfifa/documentlibrary/doclists/laws.html#tranferts>.

<sup>33</sup> David Hills, *Said and Done*, THE GUARDIAN (Sept. 26, 2010), <http://www.guardian.co.uk/football/2010/sep/26/said-and-done-fifa-warner>.

<sup>34</sup> David Hills, *Said and Done*, THE GUARDIAN (Aug. 22, 2010), <http://www.guardian.co.uk/football/2010/aug/22/said-and-done-greg-clarke>.

<sup>35</sup> *Uefa Europa League: Format*, UEFA, <http://en.uefa.com/UEFAeuropaleague/competition/format/index.html> (last visited Feb. 16, 2011).

<sup>36</sup> Hills, *supra* note 33.

and teams to remove racist fans and to refuse to give such fans a platform to perform their racist acts. It is well known that even popular teams located in cosmopolitan cities are supported by groups of fans, such as Real Madrid's "Ultras" and AS Roma's "Untouchables," who are not only regularly sold tickets to games where they display racist banners and make racist chants, but who also sell team merchandise to finance their demonstrations.<sup>37</sup> Racist acts are not confined to the fringes of European soccer, but are regularly perpetrated by fans of some of the most well known soccer teams in the world.

### B. *The Origins of Uefa's Disciplinary Authority*

Uefa is defined as a "confederation" by Fifa, which means that the member associations from around Europe formed Uefa to protect and advance their collective interests *vis-à-vis* the Fifa Executive Committee.<sup>38</sup> Uefa has a mandate to "set up the bodies necessary to fulfil[l] the duties incumbent upon [Uefa]," which include "comply[ing] with and enforc[ing] compliance with the Statutes, regulations and decisions of Fifa" and "organi[zing] [Uefa's] own inter-club competitions."<sup>39</sup> To that end, in 1954, Uefa was formed as a company domiciled and registered in Switzerland pursuant to Article 60 of the Swiss Civil Code.<sup>40</sup>

One of Uefa's primary objectives is to promote soccer, "without any discrimination on account of . . . race."<sup>41</sup> This objective is particularly important because it is one upon which other objectives are contingent. For example, Uefa is obligated to "prevent all methods or practices which might jeopardi[z]e the regularity of matches or competitions or give rise to the abuse of football, ensur[ing] that sporting values always prevail over commercial interests and respect the interests of Member Associations"<sup>42</sup> and to "settle disputes between Member Associations."<sup>43</sup> It is easy to see that combating racism could compel Uefa, depending on the circumstances, to make decisions for the benefit of sporting values

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<sup>37</sup> *Real Sports with Bryant Gumble*, *supra* note 7.

<sup>38</sup> FIFA, *FIFA STATUTES: AUGUST 2010 EDITION*, art. 20(c), available at [http://www.fifa.com/mm/document/affederation/generic/01/29/85/71/fifastatuten2010\\_e.pdf](http://www.fifa.com/mm/document/affederation/generic/01/29/85/71/fifastatuten2010_e.pdf).

<sup>39</sup> *Id.* at art. 20(3)(a), (c).

<sup>40</sup> UEFA *STATUTES*, *supra* note 10, at art. 1(1-2).

<sup>41</sup> *Id.* at art. 2(1)(b).

<sup>42</sup> *Id.* at art 2(1)(e-f).

<sup>43</sup> *Id.* at art. 2(1)(n).

and to ensure the regularity of soccer games that may conflict with Uefa's commercial interests.

Because achieving any one of these objectives requires coordinated action among and the financial support of member associations, Uefa claims the authority to "implement any measure it deems appropriate, such as setting down rules, entering into agreements or conventions [and] taking decisions or adopting [programs]." <sup>44</sup> To resolve disputes between member associations, Uefa created three adjudicative organs—the Control and Disciplinary Body, the Appeals Body and the Disciplinary Inspector—which are responsible for enforcing Uefa's statutory rules. <sup>45</sup> For the purposes of this Note, the Control and Disciplinary Body and the Appeals Body are most important because they adjudicate and enforce Uefa's rules—the disciplinary inspectors represent Uefa's interests at hearings and are less involved in making determinations about the administration of Uefa's rules. <sup>46</sup> By the terms of the Uefa Statutes, the Control and Disciplinary Body and the Appeals Body have the authority to impose any one or combination of sanctions on a member association, team, official or player that violates Uefa's rules. <sup>47</sup> However, as the aforementioned examples of racist conduct demonstrate, these organs rarely assess the most severe penalties provided for in the Disciplinary Regulations. <sup>48</sup>

### C. Uefa's Disciplinary Procedures

The manner in which Uefa can impose sanctions on legal or natural entities that violate the Uefa Statutes is governed by the Disciplinary Regulations. <sup>49</sup> Among its disciplinary powers, Uefa may impose penalties on "anyone who insults the human dignity of a person or group of people on the basis of ethnicity, race, or

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<sup>44</sup> *Id.* at art 2(2).

<sup>45</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 21.

<sup>46</sup> *Id.* at art. 30, 30(2), 38(1–4), 46. *See also* UEFA STATUTES, *supra* note 10, at art. 21–47. Disciplinary Inspectors represent Uefa in disciplinary proceedings and serve as quasi-prosecutors who can initiate proceedings and lodge appeals and cross-claims. Disciplinary inspectors are also responsible for investigating violations of Uefa's statutes, regulations and directives and conducting written inquiries, which can then be drafted into a formal report and submitted to the competent adjudicative organ for a decision about whether to halt proceedings, to acquit, or to convict a given party.

<sup>47</sup> UEFA STATUTES, *supra* note 10, at art. 55(2).

<sup>48</sup> *Juventus to Play Behind Closed Doors After Chants*, ESPN SOCCERNET (Apr. 20, 2009), <http://soccernet.espn.go.com/news/story?id=638815&cc=5901>.

<sup>49</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 1(1), 17–18.

color.”<sup>50</sup> The Disciplinary Regulations provide for the suspension of “anyone who insults the human dignity of a person or a group of persons,” fines of up to 100,000 Euros against teams whose fans violate a person’s or people’s human dignity, as well as “the playing of one or more [games] behind closed doors, a stadium closure, awarding of a [game] by default, deduction of points or disqualification from [a] competition.”<sup>51</sup> These penalties could have both short and long-term effects on teams and member associations and thereby equip Uefa with a large “stick” with which to enforce compliance with the Statutes. However, given the small fines typically imposed,<sup>52</sup> Uefa’s adjudicative organs appear to prefer to wield a mere “twig.”

The Disciplinary Regulations make member associations and teams liable for the conduct of their fans,<sup>53</sup> such as the performance of racist gestures or acts at or during soccer games. Member associations and teams are “responsible for order and security both inside and around the stadium . . . . *They are liable for incidents of any kind*, and may be rendered subject to disciplinary measures and directives.”<sup>54</sup> In theory, then, the penalties enumerated in the Disciplinary Regulations should be sufficient to deter fans from engaging in racist conduct and to motivate member associations and teams to be vigilant in their regulation of fan behavior. However, although each member association is required to include in its governing statute a provision “whereby [the member association], its leagues, clubs, players and officials agree to respect . . . the Statutes, regulations and decisions of U[efa]” and each member association is responsible for ensuring that its leagues, clubs and officials accept these obligations,<sup>55</sup> member associations are granted considerable discretion with respect to disciplining legal or natural persons who violate the Uefa Statutes.<sup>56</sup> Nevertheless, by mandating

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<sup>50</sup> *Id.* at art. 11bis.

<sup>51</sup> *Id.* at art. 11bis(1–3), 14–15.

<sup>52</sup> Hills, *supra* note 33.

<sup>53</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 6.

<sup>54</sup> *Id.* (emphasis added).

<sup>55</sup> UEFA STATUTES, *supra* note 10, at art. 59(1–2).

<sup>56</sup> THE FOOTBALL ASSOCIATION, RULES OF THE ASSOCIATION AND LAWS OF THE GAME: SEASON 2010-2011, available at [http://www.thefa.com/TheFA/~media/Files/PDF/TheFA/Rules\\_Regs/FA\\_Handbook\\_2010-11\\_FINAL.ashx/FA\\_Handbook\\_2010-11\\_FINAL.pdf](http://www.thefa.com/TheFA/~media/Files/PDF/TheFA/Rules_Regs/FA_Handbook_2010-11_FINAL.ashx/FA_Handbook_2010-11_FINAL.pdf) (last visited Feb. 16, 2011). For example, in England, violations of the Uefa Statutes or Disciplinary Regulations are addressed by the English Football Association’s (“EFA’s”) internal disciplinary body. See also Jefferson C. Taylor, *The War on Soccer Hooliganism: The European Convention on Spectator Violence and “Misbehavior” at Sports Events*, 27 VA. J. INT’L L. 604, 642 (1986) (discussing the European Convention on Spectator Violence and Misbehavior at Sports Events and

that member associations include this provision, Uefa entrenches its position atop the institutional hierarchy of European soccer.<sup>57</sup>

In enforcing the Disciplinary Regulations, the Control and Disciplinary Body provides for a hearing and decision on the record with respect to complaints against teams, member associations, players and officials accused of violating the Uefa Statutes.<sup>58</sup> Any party to the initial proceeding—defined as “(a) Uefa, (b) the accused or the individual/body directly concerned, or (c) the individual/body entitled to protest and the opponent to the protest”<sup>59</sup>—may then appeal a decision rendered by the Control and Disciplinary Body by paying 1,000 Euros and filing a formal written pleading that consists of the legal relief requested, a recitation of the facts, the evidence and a plea for relief.<sup>60</sup> The Appeals Body has jurisdiction to hear appeals in all matters except for a warning or reprimand issued to a player, official, team or member association, a one-match suspension of a player or official following a red-card and disorderly conduct penalties.<sup>61</sup> That is to say, if the initial dispute involved allegations of racism, any party “directly concerned,”<sup>62</sup> including Uefa, may appeal the decision reached by the Control and Disciplinary Body. The Appeals Body then examines the issue(s) on appeal *de novo*<sup>63</sup> and presides over the taking of evidence, the presentation of witnesses, the making of oral pleadings by either or all parties and, ultimately, issues a binding written decision that must be enforced by Uefa.<sup>64</sup> The procedures for resolving disputes relating to the contravention of the Uefa Statutes are formalized and evoke the procedures adopted by courts constituted under the rule of law.

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in Particular at Football Matches, Nov. 1, 1985, EUROPE T.S. No. 120 (explaining that perspectives on the severity of the problem of fan misbehavior will vary across countries and, therefore, enforcement may differ among signatories)).

<sup>57</sup> Mark Meadows, *Eto'o Silences Racist Chants in Inter Win*, REUTERS, Oct. 18, 2010, available at <http://af.reuters.com/article/sportsNews/idAFJJOE69H01820101018>. The Italian Soccer Federation recently gave referees the authority to suspend games when racist chanting occurs in response to the fact that Italian soccer has a history of fans engaging in racist conduct. However, because the Italian soccer federation is a member of Uefa, Uefa already has the authority to suspend soccer games and, indeed, to impose harsher penalties. Notwithstanding this authority, Uefa has generally refused to take such action.

<sup>58</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 42–48.

<sup>59</sup> *Id.* at art. 28(a–c).

<sup>60</sup> *Id.* at art. 50, 52–53.

<sup>61</sup> *Id.* at art. 49.

<sup>62</sup> *Id.* at art. 50(1).

<sup>63</sup> *Id.* at art. 62(1).

<sup>64</sup> *Id.* at art. 57–60, 64, 67.

Based on the forgoing discussion of the rules governing fan behavior, team and member association liability and disciplinary authority and procedure, one might conclude that European soccer executives, officials and players perceive racism as being a problem that demands an institutional response. Indeed, there are a number of organizations that formally advocate for better enforcement of Uefa's rules intended to combat racism and which are supported by many players. Football Against Racism in Europe [hereinafter "FARE"], a pan-European organization founded in 1999 devoted to promoting grassroots efforts to combat racism, has advocated for stricter penalties and improved reporting and enforcement.<sup>65</sup> In England, Kick it Out was launched in 1997 to promote racial tolerance and understanding in the U.K.<sup>66</sup> Despite the English Football Association's [hereinafter "EFA"] efforts to combat racism over the past two decades, Kick It Out maintains that there is much more that must be done to remove racism from British football.<sup>67</sup>

Clearly, then, racism in European soccer is not only seen as a problem by outside observers or by a minority of persons involved in soccer. It must be acknowledged that many of the aforementioned cases of racism, after which the responsible team was fined as punishment for the behavior of its fans, could have been appealed to CAS by the player-complainant or the responsible team, but no appeal was taken.<sup>68</sup> Therefore, in addition to Uefa's soft enforcement of its Statutes and Disciplinary Regulations, the lack of appeals filed suggests that parties directly concerned with the outcome of a given decision rendered by one of Uefa's adjudicative organs may perceive the fines as being of such little import as to not merit an appeal. Still, given the demand on the part of a significant number of members of the public and of those involved in the organization and production of European soccer for means to eliminate racism from the stadiums across Europe, as well as the rules that explicitly state that racism has no place in European soccer, it

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<sup>65</sup> *Racism in Football: It's Still an Issue*, FOOTBALL AGAINST RACISM IN EUROPE, <http://www.farenet.org/default.asp?intPageID=40> (last visited Sept. 1, 2011).

<sup>66</sup> KICK IT OUT, <http://kickitout.org> (last visited Sept. 1, 2011).

<sup>67</sup> Matt Scott, *FA Told Racism Must Cost Clubs Points or "Moral Authority" Will be Lost*, THE GUARDIAN (Feb. 10, 2010), available at <http://www.guardian.co.uk/sport/2010/feb/10/fa-racism-taskforce>; Doyle, *supra* note 31. See also Steve Greenfield & Guy Osborn, *When the Whites go Marching In: Racism and Resistance in English Football*, 6 MARQ. SPORTS L.J. 315, 323, 329 (1996) (discussing the partnership between the English government and the Football Association to prevent English hooliganism, as well as the gradual diluting of provisions intended to punish those who engaged in racist behavior).

<sup>68</sup> UEFA STATUTES, *supra* note 10, at art. 62(1).

is important to understand how disputes can be addressed outside of Uefa's adjudicative organs.

#### D. *The Court of Arbitration for Sport ("CAS")*

CAS' jurisdiction may be invoked in two circumstances. When a dispute arises between Uefa and a member association, league, club, player or official or when a dispute arises between member associations, leagues, clubs, players or officials—known as “disputes of a European dimension”—CAS has exclusive jurisdiction over the matter.<sup>69</sup> In addition, after Uefa's internal procedures and remedies have been exhausted, “any decision taken by a[n] . . . [adjudicative organ] may be disputed exclusively before CAS<sup>70</sup>—an independent court domiciled in Switzerland created in 1984 by the International Olympic Committee that was intended to become a “supreme court for world sport” that resolves legal disputes through mediation and arbitration.<sup>71</sup>

CAS was formed to fill what was perceived by leading global sports organizations, particularly the International Olympic Committee, to be a void in sports dispute resolution.<sup>72</sup> CAS conducts formal mediation and arbitration proceedings, which are governed by rules that allow parties to submit disputes to mediation or arbitration if a written agreement between the parties so provides.<sup>73</sup> CAS defines mediation as an informal procedure whereby parties seek to resolve their disputes amicably with the help of a third party but without relinquishing control over the procedure itself and that cannot yield any legally enforceable agreement.<sup>74</sup>

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<sup>69</sup> *Id.* at art. 61(1)(a–b).

<sup>70</sup> *Id.* at art. 60–61, 66.

<sup>71</sup> *General Information: What is the Court of Arbitration for Sport?*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/20question> (last visited Jan. 11, 2012). See also Mathew J. Mitten & Hayden Opie, *Sports Law: Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 TUL. L. REV. 285 (2010).

<sup>72</sup> *General Information: Origins [of CAS]*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/history> (last visited Jan. 11, 2012). See also Bruno Simma, *The Court of Arbitration for Sport*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004* 21 (Ian S. Blackshaw et al. eds., 2006).

<sup>73</sup> *Mediation Guidelines*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/guide.asp/4-3-276-1088-4-1-1/7-0-1088-13-0-1/5-0-1080-7-1-1/6-0-1037-3-0-1> (last visited Feb. 16, 2011).

<sup>74</sup> *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/rules> (last visited Feb. 16, 2011).

CAS does not allow disputes of a disciplinary nature to be submitted to mediation.<sup>75</sup> The reason for this exclusion appears to be that disciplinary matters are not regarded by CAS as being “related” to sport.<sup>76</sup> This is a mistake that should be corrected given that, in relation to the Uefa Statutes, disputes involving racism satisfy one of the other requirements for CAS-performed mediation i.e., that the dispute have a “contact surface” to sport.<sup>77</sup> Disputes involving racism possess the requisite “contact surface” because the relationship between Uefa and its member associations and constituent teams may be defined as a relationship arising from an employment contract.<sup>78</sup> The argument for why disputes about racism should be allowed to be addressed through mediation will be discussed in greater detail in Part III, although it is beyond the scope of this Note to discuss the type of coalition building and compromise that such an amendment might require to be passed by Uefa’s Executive Committee.

Aside from mediation, pursuant to a written agreement between the parties, a dispute may be submitted to arbitration before a single judge or a panel of up to three judges selected from a list of 150 arbitrators maintained by the International Council of Arbitration for Sport [hereinafter “ICAS”].<sup>79</sup> ICAS is responsible for governing the administration and finances of CAS.<sup>80</sup> In Uefa’s case, this written agreement takes the form of articles 61 and 62 of the Uefa Statutes that give CAS exclusive jurisdiction over disputes of a “European dimension”<sup>81</sup> and over appeals of certain decisions rendered by one of Uefa’s adjudicative organs and article 59, which requires each member association to formally recognize CAS’ jurisdiction.<sup>82</sup> Arbitration consists of one or more arbitrators—selected by written agreement between the parties or, if not, by the President of the relevant division of CAS<sup>83</sup>—reading written sub-

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<sup>75</sup> *CAS Mediation Rules, art. 1*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/mediation-rules> (last visited Feb. 16, 2011).

<sup>76</sup> *Mediation at the Court for Arbitration of Sport (CAS)*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/guideline> (last visited Feb. 16, 2011).

<sup>77</sup> Ousmane Kane, *The CAS Mediation Rules*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, *supra* note 72, at 194, 194–99.

<sup>78</sup> See *Law v. Nat’l Greyhound Racing Club*, [1983] 1 W.L.R. 1302.

<sup>79</sup> *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, COURT OF ARBITRATION FOR SPORT, *supra* note 74, at art. C(2)(S13).

<sup>80</sup> *Id.* at art. A(S2).

<sup>81</sup> Uefa STATUTES, *supra* note 10, at art. 61(1)(a–b).

<sup>82</sup> *Id.*, at art. 59, 61–62.

<sup>83</sup> *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, *supra* note 74, at art. A(R) 40.2.

missions from each party, or a party's Statement of Appeal, and the respondent's Answer if the dispute is an appeal<sup>84</sup> and presiding, if the Panel of arbitrators deems appropriate, over an oral hearing.<sup>85</sup> The Panel then issues a written award, which is legally binding.<sup>86</sup>

CAS' jurisdiction is expansive. Disputes may involve matters of "principle relation to sports, or matters of pecuniary or other interests brought into the development and practice of sports and, generally speaking, any matter relating or connected to sports."<sup>87</sup> "Any natural person or corporate body having the capacity or power to compromise" has standing to submit a case to CAS.<sup>88</sup> Along with its expansive jurisdiction, CAS' Appeals Body issues decisions according to:

[T]he applicable regulations and the rules of law chosen by the parties or, if the parties have not previously made a choice of law agreement, according to the law of the country in which the [body that] issued the decision [appealed] is domiciled or according to the rules of law that the panel deems appropriate.<sup>89</sup>

This rule affords parties the opportunity, before a dispute arises, to specify *ex ante* what substantive law will shape the decision that CAS will render. The amount of control parties retain during CAS proceedings, the simplicity of CAS' procedures and CAS' cost-effectiveness—initial filing fees are 500 Swiss Franks, although costs can increase depending on the number of witnesses and the types of evidence offered<sup>90</sup>—are just a few of the advantages of resolving disputes through mediation or arbitration proceedings conducted by CAS, which are explored in greater depth below.

Given Uefa's expansive authority and its mandate to achieve its objectives, as well as the capacity for players, teams and member associations to appeal decisions of Uefa's adjudicative organs to CAS, Uefa appears to have the procedural tools and institutions at its disposal to have made more progress with regards to eradicat-

<sup>84</sup> *Id.* at art. A(R51, R55).

<sup>85</sup> *Id.* at art. A(R44.1)

<sup>86</sup> *Id.* at art. A(R46, 59). See also JAMS Arbitration, Mediation, and ADR Services, <http://www.jamsadr.com/arbitration-defined/> (last visited Feb. 16, 2011).

<sup>87</sup> *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, *supra* note 74, at art. A(R27).

<sup>88</sup> *General Information*, *supra* note 71.

<sup>89</sup> *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, *supra* note 74, at art. A(R58).

<sup>90</sup> *Id.* at art. 60, 64.

ing racism than it has to date. Violations of the Uefa Statutes, such as offending the human dignity of any person or group of persons, can not only be severely penalized by Uefa's adjudicative organs, but can also precipitate disputes of a "European dimension" that fall exclusively within CAS' jurisdiction.<sup>91</sup> Therefore, it is possible for CAS to play a large role in fostering or deciding the outcome of disputes concerning racist conduct, which can then be imposed by Uefa itself to more effectively punish perpetrators of racism in European soccer.

By assuming the adjudicative functions of the adjudicative organs, CAS can free Uefa to more vigorously enforce the provisions in its Statutes and Disciplinary Regulations prohibiting and punishing the perpetrators of racist conduct while simultaneously protecting Uefa from potential institutional backlash by member associations and teams who are "harmed" by tougher sanctions. The fact that Uefa only softly enforces these particular rules suggests that panelists serving on the adjudicative organs do not, at present, feel empowered to impose tougher sanctions. This begs the question: why has Uefa failed to hold member associations and teams accountable for the racist acts perpetrated by their fans? This question is explored in greater depth in Part II.

## II. THE LEGAL PLAYING FIELD OF EUROPEAN SOCCER GOVERNANCE: UEFA AND THE UNCERTAIN SCOPE OF JUDICIAL REVIEW

### A. *Non-Reviewability of Uefa's Adjudicative Organs*

Uefa's adjudicative organs may intentionally not impose severe penalties on football associations and teams whose fans engage in racist behavior for one of at least two reasons. First, because the law is not clear in this area, as will be discussed below, Uefa may have interpreted European statutory and case law as having insulated Uefa's disciplinary decrees from judicial review, meaning that Uefa is protected from institutional pressure that could be supplied by European courts to enforce its Disciplinary Regulations to their fullest extent. Alternatively, reacting to the same legal uncertainty, Uefa may be weary of punishing teams and member associations to the extent provided for in the Statutes and

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<sup>91</sup> UEFA STATUTES, *supra* note 10, at art. 61(b).

Disciplinary Regulations for fear of spurring teams and member associations to invoke the jurisdiction of European courts and appeal decisions. In response, Uefa may strategically engage in soft enforcement of its Disciplinary Regulations based on a determination that whatever pressure members of the public, stakeholders and players bring to bear on Uefa to respond to racist behavior more forcefully is outweighed by Uefa's objective of promoting European football, which appears to have been successful to date<sup>92</sup> despite the continued prevalence of racism.

### 1. E.U. Reports and Declarations

E.U. declarations support the general proposition that sports governing bodies are not subject to government control aside from being obligated to abide by the laws of the E.U.<sup>93</sup> This proposition can be traced to *The Helsinki Report on Sport*, which the Commission of the European Communities<sup>94</sup> issued in 1999.<sup>95</sup> Although the Commission acknowledged that sports, to the extent that they constitute economic activity, are subject to the laws of the E.U.,<sup>96</sup> the Commission noted that the rules created by sports governing bodies, "which are necessary for [the governing body's] organization or . . . the organization of competitions," might be exempt from E.U. laws governing competition,<sup>97</sup> specifically article 101 and 102 of the Treaty of Lisbon concerning competition.<sup>98</sup> The Treaty of Lisbon explicitly acknowledges the unique position of sport in

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<sup>92</sup> THE EUROPEAN CLUB FOOTBALLING LANDSCAPE: CLUB LICENSING BENCHMARKS REPORT FINANCIAL YEAR 2008, *supra* note 4.

<sup>93</sup> WHITE PAPER ON SPORT COMMISSION OF THE EUROPEAN COMMUNITIES, July 11, 2007, at ¶ 4, available at [http://ec.europa.eu/sport/document/wp\\_on\\_sport\\_en.pdf](http://ec.europa.eu/sport/document/wp_on_sport_en.pdf).

<sup>94</sup> Lloyd Freeburn, *European Football's Home-grown Players Rules and Nationality Discrimination Under the European Community Treaty*, 20 MARO. SPORTS L. REV. 177, 185 (2009) (describing the purpose of the Commission).

<sup>95</sup> THE HELSINKI REPORT ON SPORT, COMMISSION OF THE EUROPEAN COMMUNITIES, Dec. 10, 1999, at 8, available at <http://eur-lex.europa.eu/lexuriserv/lexuriserv.do?uri-com:1999:0644:FIN:EN:PDF>.

<sup>96</sup> Treaty of Lisbon, Dec. 13, 2007 O.J. (C306). See B.N.O. Walrave v. Ass'n Union Cycliste Internationale, 1974 E.C.R. 1405, ¶ 4, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61974J0036:EN:NOT>; Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC, 2010 E.C.R. I-02177, ¶ 27.

<sup>97</sup> THE HELSINKI REPORT ON SPORT, *supra* note 95, at 8. But see Dirk-Reiner Martens, *CAS Landmark Decisions*, in THE COURT OF ARBITRATION FOR SPORT 1984-2004, *supra* note 72, at 235, 240. More recently, CAS held that Uefa is "an association of undertakings" and thus subject to EC competition law. COX ET AL., *supra* note 15, at 49 (an "undertaking" is defined as any party engaged in, tangentially or indirectly, in economic activity).

<sup>98</sup> Treaty of Lisbon, Dec. 13, 2007 O.J. (C306) 101, 102 (concerning anti-competitive agreements).

European society in Article 149, which states that “The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport.”<sup>99</sup> In 2000, the European Council adopted the *Declaration on the Specific Characteristics of Sport*, which reaffirmed the Council’s support for the “independence of sports organizations and their right to organize themselves through appropriate associative structures . . . particularly with regards [to] the specific[ ] sporting rules applicable.”<sup>100</sup> More recently, in 2005, the European Parliament issued the *Written Declaration on Tackling Racism in Football*. In this document, Parliament, in addition to affirming that soccer players have a right to work in a racism-free environment,<sup>101</sup> applauded Uefa for its anti-racism efforts<sup>102</sup> and encouraged Uefa to “consider . . . imposing sporting sanctions on national football associations and clubs whose supporters or players commit serious racist offenses, including . . . remov[ing] persistent offenders from their competitions.”<sup>103</sup>

Through these formal pronouncements the E.U. Commission, Council and Parliament lent credence to the view that Uefa has considerable discretion in terms of implementing its own rules and regulations so long as they do not violate E.U. law.<sup>104</sup> In its *Written Declaration on Tackling Racism in Football*, by doing no more than asking Uefa to consider taking stronger action to combat racism, the E.U. Parliament implicitly acknowledged that it could not compel Uefa to penalize member associations or teams whose fans engage in racist conduct.<sup>105</sup> So long as Uefa’s soft enforcement of its own rules does not constitute a violation of E.U. law, it could be that Uefa’s rules regarding the punishment of racism are construed by the E.U. governing bodies as being outside the scope of E.U. law.

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<sup>99</sup> *Id.* at art. 149.

<sup>100</sup> Council Declaration 13948/00, Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should Be Taken in Implementing Common Policies, Art. 7–10, 2000 J.O. (EC) (Dec. 2, 2000).

<sup>101</sup> Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L303).

<sup>102</sup> FOOTBALL AGAINST RACISM IN EUROPE, *supra* note 65. In 1999, Uefa partnered with Football Against Racism in Europe (“FARE”) to promote grassroots efforts aimed at increasing tolerance and reducing racism in football.

<sup>103</sup> Written Declaration on Tackling Racism in Football, EUR. PARL. DOC. PE 365.440v01-00 (2005).

<sup>104</sup> Mitten & Opie, *supra* note 71, at 297.

<sup>105</sup> *Id.*

## 2. E.U. Case Law

Case law from the European Court of Justice [hereinafter “ECJ”] reflects the E.U.’s and European Commission’s policy of allowing sports organizations to govern their own affairs.<sup>106</sup> Among E.U. courts, judicial review of a decision reached by a domestic tribunal is limited to analyzing the criteria used by the tribunal to reach its conclusion and determining whether those criteria were “manifestly arbitrary or blatantly inconsistent with the fundamental principles of the [European] Convention.”<sup>107</sup> This inquiry is similar to the *Datafin* test employed by courts in the U.K. to determine whether the body at issue is a “public body”—evaluating both the source and the nature of the tribunal’s authority<sup>108</sup>—and thus subject to judicial review, which is discussed below. The similarity is revealed in that both tests can be described as designed to determine whether the objective of the claim is to enforce a right against a private party.<sup>109</sup> Uefa’s authority to determine the extent to which it will impose severe sanctions on member associations or teams arises out of a contract, which is an act in private law.<sup>110</sup> Therefore, applying the *Wos* test, if a party seeks judicial review of a decision rendered against it by another party and that party’s decision is found to be not inconsistent with the E.U. Convention or the nature and source of the complainant party’s authority are found not to be quasi-public, the relationship between the parties will be found to arise in private law and judicial review is not available.

Uefa may also construe the decisions of its adjudicative organs as being exempt from judicial review because E.U. case law is unsettled with respect to how much deference courts are required to show to “sporting rules”. “Sporting rules” that restrict the free movement of goods and services on the basis of nationality have been upheld when challenged on the grounds that they violate

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<sup>106</sup> James A. R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT’L L. 489, 509 (1992).

<sup>107</sup> *Wos v. Poland*, 45 Eur. Ct. H.R. at ¶ 72; See also *Gestoras Pro Amnist and others v. E.U. Council (Spain and another, intervening)*, [2008] All ER (EC) 65, ¶ 77, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0354:EN:HTML>.

<sup>108</sup> *R v. Panel on Take-overs and Mergers, Ex parte Datafin PLC.*, (1987) 1 Q.B.815; See David McArdle, *Judicial Review, “Public Authorities” and Disciplinary Powers of Sports Organizations*, 30 CAMBRIAN L. REV. 31, 36 (1999).

<sup>109</sup> Compare *Wos v. Poland*, 45 Eur. Ct. H.R. at ¶ 105 and *R v. Panel on Take-overs and Mergers* (1987) 1 Q.B. 815. See RICHARD GORDON, EC LAW IN JUDICIAL REVIEW 26 (2007).

<sup>110</sup> See *Modahl v. British Athletic Ass’n*, [2001] 1 W.L.R. 1192.

E.U. law.<sup>111</sup> However, E.U. jurisprudence has not yielded a bright-line rule or even a standard that determines what rules are considered “sporting rules” and thus possibly exempt from the Treaty’s competition rules.<sup>112</sup>

Courts have tended to define the “sporting rule” exception very narrowly: “the [rule] must be [implemented] for non-economic reasons, and it must be limited to and relate to the particular nature and context of certain matches, thus being of sporting interest only.”<sup>113</sup> This narrow construction has implications for how an E.U. court might review a decision by Uefa to order that penalties be imposed on a team or member association whose fans engaged in racist behavior.<sup>114</sup> Without clarification from Europe’s courts or legislature, it could be that a penalty such as a suspension or stadium closure that has economic consequences would be held not to be a “sporting rule” or found to relate to the nature and context of the specific soccer game in which the racist conduct occurred to a sufficient extent as to be exempt.

Given that courts have only explored selected facets of the “sporting rules” exception in the context of restrictions imposed on the basis of nationality, counterarguments to this position are readily available. For example, banning a member association’s teams from playing soccer for ten games because some of the association’s fans were found to have displayed racist banners during a soccer game might be regarded as being non-economic in nature, but what about the ban’s economic impact on the member association, the fans and players? Furthermore, does a decision to punish a member association or team for “offending the human dignity of a person or group of persons”<sup>115</sup> necessarily relate to the particular nature and context of certain soccer games? On one hand, the rule prohibiting racism and providing for the punishment of perpetra-

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<sup>111</sup> COX ET AL., *supra* note 15, at 380. *See also* B.N.O. Walrave v. Ass’n Union Cycliste Internationale, 1974 E.C.R. 1405 at ¶ 4.

<sup>112</sup> Freeburn, *supra* note 94, at 207.

<sup>113</sup> *Id.*, at 204–05.

<sup>114</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 11bis (“Anyone who insults the human dignity of a person or group of persons, by whatever means, including on grounds of color, race, religion or ethnic origin, shall incur a suspension for five matches or for a specified period. 2) Any member association or club whose supporters engage in the behavior described in paragraph 1 shall incur a minimum fine of EUR 20,000. 3) If *particular circumstances so require*, the disciplinary body *may* impose additional sanctions on the member association or club responsible, such as the playing of one or more matches behind closed doors, a stadium closure, awarding of a match by default, deduction of points or disqualification from the competition”) (emphasis added).

<sup>115</sup> *Id.*

tors of racist conduct relates only to conduct occurring during the course of a soccer game. On the other hand, what if fans displayed racist banners outside a stadium before a game? Of course, such conduct by fans could run afoul of other laws, but would a Uefa rule punishing the member association or team responsible for the conduct of these fans be upheld under the “sporting rule” exception? Until such cases arise, the answers to these questions will remain unknown.

Certain sporting rules may be exempted from judicial review by E.U. courts if either the rule is shown to be “inherent to the organization of sport” or if the rule is proven to be objectively justified.<sup>116</sup> Proving that a rule is not “inherent to the organization of sport” and violates the Treaty of Lisbon’s rules prohibiting anti-competitive agreements<sup>117</sup> requires a showing that the challenged rule is not “proportion[ate] to the achievement of its objectives.”<sup>118</sup> On this basis, Uefa’s adjudicative organs might regard a decision about whether to sanction a member association or team for racist conduct perpetrated by its fans as being inherent to the organization of soccer given the history of racism in European soccer. Alternatively, the adjudicative organs might regard the same decision as being objectively justified because Uefa is legally obligated to provide players with a racism-free work environment, which could not be achieved through less restrictive means.<sup>119</sup> The members of Uefa’s adjudicative organs might further conclude that fining member associations or teams is proportionate to the achievement of its objectives, and thus not likely to be subject to challenge under E.U. law.<sup>120</sup> By imposing fines rather than more severe penalties,

<sup>116</sup> Freeburn, *supra* note 94, at 208.

<sup>117</sup> Treaty of Lisbon, Dec. 13, 2007 O.J. (C306) 101.

<sup>118</sup> Freeburn, *supra* note 94, at 208.

<sup>119</sup> Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, O.J. (L303), *supra* note 101. See Freeburn, *supra* note 94, at 208. See also UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 14–5 (The adjudicative organs may also issue “warnings” and “reprimands,” neither of which would be sufficient to incentivize member associations and clubs to take affirmative steps to eliminate racism from their stadiums and competitions).

<sup>120</sup> *But see* Enderby Town Football Club Ltd. v. Football Ass’n Ltd., [1971] Ch. 591 (“The rules of a [sports governing] body like this are often said to be a contract. So they are in legal theory. But it is a fiction—a fiction created by the lawyers so as to give the courts jurisdiction . . . Putting the fiction aside, the truth is that the rules are nothing more nor less than a legislative code—a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such regulations . . . are subject to the control of the courts. If they are in unreasonable restraint of trade, they are invalid . . . If they unreasonably shut out a man from his right to work, they are invalid . . . If they lay down a procedure which is contrary to the principles of natural justice, they are invalid”).

as Uefa did in the examples cited in Part I,<sup>121</sup> Uefa may be protecting itself from judicial review.

### 3. U.K. Case Law

Case law from the U.K. is sometimes consistent with ECJ jurisprudence. U.K. case law is instructive because the U.K. courts have created more common law dealing with sport compared to courts of other European nations. In the U.K., courts have repeatedly evaluated their ability to review disciplinary decisions made by sports governing bodies and have generally held that unless a sports governing body is found to be a “public body,”<sup>122</sup> its decisions can only be reviewed for their adherence to the principles of natural justice—<sup>123</sup> whether the accused had notice of the charges against her, whether the accused had an opportunity to testify in her own defense and whether the tribunal acted in good faith.<sup>124</sup> In one of the foundational cases addressing this issue, *R v. Football Association Limited*, the court held that the EFA was not a public body because although the EFA had virtually monopolistic power over decisions concerning the governance of soccer, which were “vitally” important to many members of the public, the EFA did not derive its authority over soccer from any “organ” of the government and there was no evidence that but for the EFA’s existence the state would create a public body to govern soccer in the U.K.<sup>125</sup> Instead, the EFA was deemed a “domestic body whose powers arise from the duties [that] exist in private law only” and thus judicial review, a principle “honed for the control of the abuse of power by government,” was not available.<sup>126</sup> *R v. Football Association Limited* might also have encouraged Uefa to regard the decisions of its adjudicative organs as not being subject to judicial review by courts if petitioned by soccer player-complainants to reverse a decision by the Control and Disciplinary Body or the Appeals Body. On this basis, Uefa’s officials may have concluded that

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<sup>121</sup> See *supra* Part I, p. 8–9.

<sup>122</sup> Case C-188/89, *Foster v. British Gas*, 1990 E.C.R. I-3313 at ¶ 18 (“[A] body . . . which has been made responsible pursuant to a measure adopted by the State for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals”).

<sup>123</sup> *R v. Football Ass’n Ltd.*, (1993) 2 All ER 833 (Q.B.).

<sup>124</sup> *Enderby Town Football Club Ltd. v. Football Ass’n Ltd.*, *supra* note 120, at ch. 596.

<sup>125</sup> *Football Ass’n Ltd.*, (1993) 2 All ER 833 (applying the *Datafin* test for “public bodies”). See also DAVID McARDLE, FROM BOOT MONEY TO BOSMAN: FOOTBALL, SOCIETY AND THE LAW 173–76 (2000).

<sup>126</sup> *Football Ass’n Ltd.*, (1993) 2 All ER 833.

imposing fines on member associations or teams whose fans performed racist acts was sufficiently responsive but did not risk precipitating institutional opposition to Uefa's authority.

When a sports governing body is found to derive its authority from the private codes and rules governing the sport, rather than from a statute, U.K. courts have interpreted this organizational structure to be a wholly private relationship based on contract law, and thus not subject to judicial review.<sup>127</sup> In *Law v. National Greyhound Racing Club*, a greyhound trainer, who was found to have given at least one of his greyhounds performance-enhancing drugs, appealed his dismissal from the Racing Club.<sup>128</sup> The trainer challenged the Rules of Racing, which purported to give Stewards the power to enforce the Rules. One condition for racing greyhounds as part of the Club was that the trainer was deemed to have read the Rules and submitted to their authority.<sup>129</sup> The Court held that judicial review did not lie because the Racing Club's authority "to perform judicial or quasi-judicial functions in respect of persons holding licenses from [the Racing Club was] not derived from statute or . . . from the Crown. It [was] derived solely from contract."<sup>130</sup> More recently, courts in the U.K. have held that when a contract exists between the plaintiff and the defendant that allows the defendant to exercise its authority over the plaintiff, disciplinary decisions of sports governing body can only be reviewed to determine whether the result reached by the governing body was fair.<sup>131</sup>

#### 4. E.U. and U.K. Integration

If not directly influenced by these cases, both *The Helsinki Report on Sport* and the *Declaration on the Specific Characteristics of*

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<sup>127</sup> McArdle, *supra* note 108, at 36. See *Law v. Nat'l Greyhound Racing Club*, [1983] 1 W.L.R. at 1311 ¶ 14 (Judicial review is confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character, and appellant's dispute depends on an employment contract with appellee, thus judicial review did not lie); *Modahl v. British Athletic Ass'n*, [2001] 1 W.L.R. at 1209 ¶ 52 (court implied a contract in order to exercise judicial review over the controversy, but found no abuse of natural justice compelling the Court to overturn appellant's suspension imposed by the appellee).

<sup>128</sup> *Law v. Nat'l Greyhound Racing Club*, [1983] 1 W.L.R. at 1311 ¶ 14.

<sup>129</sup> *Id.* at ¶ 5-7.

<sup>130</sup> *Id.* at ¶ 30.

<sup>131</sup> *Modahl v. British Athletic Ass'n*, [2001] 1 W.L.R. 1192 at ¶ 61, 65. ("Fairness" was determined by court applying the following test: "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a danger, the two being the same, that the tribunal was biased.").

*Sport* reflect the general principle for which the aforementioned cases stand: decisions of domestic tribunals arising out of a private contract between the parties are not subject to judicial review except to the extent that the decision can be reviewed to determine whether the result reached was fair.<sup>132</sup> Both documents suggest that the E.U. Commission and Parliament did not intend for sports governing bodies to be considered public authorities because when the drafters used the term “public authorities” they specifically excluded sport governing bodies.<sup>133</sup> Under this interpretation of the relevant government documents and case law in the E.U. and the U.K., the disciplinary penalties imposed by a sports governing body on natural or legal persons with whom the governing body has a contract appear to be largely insulated from judicial review.

As the foregoing demonstrates, in the context of sports governing bodies, the limits on judicial review in the E.U. and the U.K. may have led Uefa’s bureaucrats to conclude that soft enforcement of Uefa’s Disciplinary Regulations could protect Uefa from judicial review. By only fining member associations or teams whose fans engage in racist conduct, rather than imposing sanctions that were agreed to *ex ante* by the parties and memorialized in a contract, Uefa may be keeping itself out of the courts by leaving potential player-complainants with very few legal arguments by which to raise a colorable claim for judicial review.<sup>134</sup> Imposing harsher sanctions, Uefa’s leaders may have reasoned, might enable member associations and teams to portray the sanctions as decisions made by quasi-public bodies or to argue that such decisions violate the Treaty of Lisbon by precipitating anti-competitive consequences on the business of soccer within the E.U.

### B. *Possible Judicial Review of Uefa’s Adjudicative Organs*

Alternatively, Uefa’s Executive Committee and adjudicative organs may be wearier of judicial review than the previous analysis suggests. Indeed, the present uncertainty about the reviewability

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<sup>132</sup> See *Law v. Nat’l Greyhound Racing Club*, [1983] 1 W.L.R. 1302; *R. v. Football Ass’n Ltd.*, (1993) 2 All ER 833; *Modahl v. British Athletic Ass’n*, [2001] 1 W.L.R. 1192.

<sup>133</sup> Council Declaration 13948/00, Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should be Taken in Implementing Common Policies, *supra* note 100; THE HELSINKI REPORT ON SPORT, *supra* note 95, at 3.2. See McArdle, *supra* note 108, at 31.

<sup>134</sup> Mitten & Opie, *supra* note 71, at 300.

of Uefa's actions by E.U. courts has been acknowledged by Uefa<sup>135</sup> and has been recently documented by two scholars.<sup>136</sup> It has been held that "individuals are . . . entitled to effective judicial protection of the rights they derive from the [European] Community legal order."<sup>137</sup> Thus, E.U. law potentially affects soccer in a number of ways relevant to determining the scope of Uefa's authority to discipline member associations or teams that violate Uefa's Disciplinary Regulations.

### 1. Challenging the Authority of Sports Governing Bodies on the Basis of the Freedom to Provide Goods and Services

One way in which the Treaty of Lisbon affects Uefa regulations is by codifying the freedom to provide and receive services.<sup>138</sup> Article 49 of the Treaty states that "restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended" even if the restriction applies without regard to the nationality of the legal or natural person concerned.<sup>139</sup> In the case of a dispute of European dimension,<sup>140</sup> if one of Uefa's adjudicative organs were to suspend a team because its fans were found to have engaged in

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<sup>135</sup> See GIANNI INFANTINO, UEFA, *MECA-MEDINA: A STEP BACKWARDS FOR THE EUROPEAN SPORTS MODEL AND THE SPECIFICITY OF SPORT?* (2006), available at [http://www.uefa.com/MultiMediaFiles/Download/Uefa/KeyTopics/480391\\_DOWNLOAD.pdf](http://www.uefa.com/MultiMediaFiles/Download/Uefa/KeyTopics/480391_DOWNLOAD.pdf) (discussing the uncertainty of Uefa's authority, particularly with respect to the "sporting rules" exception). Infantino describes the ECJ in *Meca-Medina* as having, "shown little interest in defining more clearly the scope of the sporting exception and [instead] . . . moved in the opposite direction in such a way that is likely to increase the scope for legal uncertainty . . ." Infantino locates the origin of the resulting uncertainty in the ECJ's continued adherence to a "case-by-case" approach to resolving legal claims in this area.

<sup>136</sup> Mitten & Opie, *supra* note 71, at 295–97.

<sup>137</sup> *Ocalan v. E.U. Council*, [2007] E.C.R. ¶ 109.

<sup>138</sup> Freeburn, *supra* note 94, at 191. See Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 2, 49. See also Taylor, *supra* note 56, at 612 n. 33–34. But see Taylor, *supra* note 56, at 613 n. 37–38 (the free movement of recipients of services "can be curtailed for reasons of public policy." However, this public policy exception might not apply to private sports governing bodies like Uefa). See also EUROPEAN COMMISSION ON ENTERPRISE AND INDUSTRY, *FREE MOVEMENT OF GOODS: GUIDE TO THE APPLICATION OF TREATY PROVISIONS GOVERNING THE FREE MOVEMENT OF GOODS* (2010), available at [http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art34-36/new\\_guide\\_en.pdf](http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art34-36/new_guide_en.pdf) ("Following the entry into force of the Lisbon Treaty, the EC Treaty has been amended and renamed the Treaty on the Functioning of the European Union (TFEU). The provisions on the free movement of goods (ex Articles 28–30 EC) have remained unchanged, but received a new numbering as Articles 34–36 TFEU.").

<sup>139</sup> See Freeburn, *supra* note 94, at 192; Treaty of Lisbon, Dec. 13, 2007 O.J. (C306), at art. 49.

<sup>140</sup> *Supra* Part I(d).

conduct that “offend[ed] the human dignity of a person or group of persons,”<sup>141</sup> the suspension could be voidable on the grounds that the decisions prevented the team and the players from providing services, in the form of soccer games, within an E.U. member state. This type of “indirect discrimination” has been held to be unlawful unless justified by “objective conditions independent of nationality” or provided that the “discrimination is proportionate to the legitimate aim pursued,” as explored in the preceding section.<sup>142</sup> If its disciplinary measure was challenged by the member association or team directly affected by the suspension, Uefa might attempt to defend itself by analogizing its rules holding member associations and teams liable for the conduct of their fans to rules punishing players for taking performance-enhancing drugs. As is the case with performance-enhancing drugs,<sup>143</sup> Uefa could argue that racism in soccer too can only be prevented by enforcing rules with severe penalties to promote player safety and to ensure that corporate sponsors and television and online broadcasters do not refuse to renew lucrative contracts on the grounds that popular teams or member associations are being suspended from lucrative competitions.<sup>144</sup>

However, this argument would be difficult to substantiate because there is a more direct relationship between the negative effect performance-enhancing drugs have on sports than between racism and sports. The use of performance-enhancing drugs is regarded as being detrimental to sports not only because some drugs endanger the health of athletes but because they tarnish athletes’ professional accomplishments and because they give athletes a non-athlete-performance-based competitive advantage.<sup>145</sup> Conversely, racism has not discouraged the public from consuming soccer goods and services. Teams playing in elite European soccer leagues reportedly earned 11.2 billion Euros during the 2008-2009 season<sup>146</sup> despite repeated instances of racism. Given the relative weakness of this argument in favor of hard enforcement of Uefa’s

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<sup>141</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 11bis.

<sup>142</sup> Freeburn, *supra* note 94, at 207–09.

<sup>143</sup> Mitten & Opie, *supra* note 71, at 275–77.

<sup>144</sup> COX ET AL., *supra* note 15, at 49.

<sup>145</sup> *Id.*, at 100–03.

<sup>146</sup> THE EUROPEAN CLUB FOOTBALLING LANDSCAPE: CLUB LICENSING BENCHMARKS REPORT FINANCIAL YEAR 2008, *supra* note 4. See *News Archive 2008 & 2009*, FOOTBALL AGAINST RACISM IN EUROPE, <http://www.farenet.org/default.asp?intPageID=8&intYear=2009> (last visited Feb. 16, 2011).

rules punishing racism, Uefa's adjudicative organs might be wary of imposing severe penalties on member associations or teams.

## 2. No Defense Under the "Inherency Exception"

If one of Uefa's adjudicative organs imposed severe penalties on a team or member association, it is possible that the decision would not escape judicial review for consistency with the Treaty of Lisbon under the "inherency exception." The "inherency exception" permits restrictions upon the freedom to provide and receive services that would have otherwise violated the Treaty of Lisbon.<sup>147</sup> The ECJ has held that in the case of high-level international sports events, which "necessarily involve[ ] certain select rules or criteria being adopted," such rules cannot be regarded as restricting the freedom to provide services.<sup>148</sup> A disciplinary sanction preventing a member association or team from competing in a soccer competition of a "European dimension"<sup>149</sup> on the basis that certain fans engaged in racist conduct would be unlikely to pass judicial muster under the "inherency exception" because the imposition of such a penalty would "transcend the immediacy of the game."<sup>150</sup>

One prototypical example of a rule that would likely qualify for the "inherency exception" would be a referee's decision to "red card"<sup>151</sup> a player during a soccer game; such a decision would likely be deemed a "technical decision" by a court of law.<sup>152</sup> By contrast, it would be difficult to characterize the imposition of sanctions stemming from fans' racist conduct as a "technical decision" given that the punishment would not originate from the referee. Any punishment resulting from such conduct would be applied *ex post* in that the right of a team or member association to participate in future European soccer games would be altered by one of Uefa's adjudicative organs after the racist incident at issue occurred. Even if Uefa were to successfully argue that a penalty imposed on a member association or team due to the racist conduct of its fans

<sup>147</sup> Freeburn, *supra* note 94, at 207.

<sup>148</sup> *Deliege v. Ligue Francophone de Judo et Disciplines Associees*, 2000 E.C.R. I-2549, p. 63–64, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61996J0051:EN:NOT>.

<sup>149</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 63(1)(a–c).

<sup>150</sup> NAFZIGER, *supra* note 24, at 56.

<sup>151</sup> FIFA DISCIPLINARY CODE: 2009 EDITION, *supra* note 20, at art. 18(1–2) (“(1) An expulsion is the order given by the referee to someone to leave the field of play and its surroundings, including the substitutes’ bench, during a match . . . (2) Expulsion takes the form of a red card for players [and is awarded when a player or official engages in] serious unsporting behavior as defined by Law 12 of the Laws of the Game.”).

<sup>152</sup> NAFZIGER, *supra* note 24, at 56.

was a “technical decision,” the ECJ held in *Meca-Medina v. Commission* that “the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty . . . the body which has laid down [the rule in question].”<sup>153</sup> Thus, it may be that Uefa officials are concerned about the possibility of the decisions of the adjudicative organs being challenged in court to the extent that there is a perceptible chilling effect on imposing sanctions beyond fines.

### 3. *Bosman*’s Impact on a “Private Law” Defense

Uefa could argue that an appeal by player-complainants of a determination made by a judicial organ should be deemed by a court to be a controversy that sounds in private law because the dispute lacks public law elements and is, therefore, not subject to judicial review.<sup>154</sup> However, the ECJ was careful to note in a landmark decision, *Royal Belgian Football Association v. Bosman*, that “the freedom of private associations to adopt sporting rules restrict[ing] the exercise of rights conferred on individuals by the Treaty” could not be tolerated.<sup>155</sup> Indeed, it is possible that if Uefa were to impose severe forms of punishment, such as a suspension or expulsion, a court would hold the punishment to constitute an obstacle to the free movement of players to seek and secure employment.<sup>156</sup> Players contractually bound to the affected member association or team could also argue that the ban places them at a competitive disadvantage compared to other players engaging in equivalent transactions for the purpose of producing a soccer game, which is expressly prohibited by the Treaty of Lisbon.<sup>157</sup> Because most, but not all, obligations codified in the Treaty are “di-

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<sup>153</sup> David *Meca-Medina v. Comm’n of European Communities*, [2006] E.C.R. I-6991 ¶ 27 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0519:EN:HTML>.

<sup>154</sup> Gordon, *supra* note 109, at 25.

<sup>155</sup> *Royal Belgian Football Association v. Bosman*, [1995] E.C.R. I-4921 ¶ 9, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61993J0415:EN:NOT> (prohibiting discrimination against workers in the context of sport on the basis of nationality). This decision is best known for creating free agency for European athletes and is regarded as one of the most important cases about sports ever decided.

<sup>156</sup> *Id.* at ¶ 116. (However, it could also be argued, citing *Bosman*, that fans could be banned from attending certain matches “for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries. [However, the Court in *Dona*] stressed . . . that that restriction on the scope of the provisions in question must remain limited to its proper objective”) (*citing* *Dona v. Mantero*, [1976] E.C.R. 1333). See also Treaty of Lisbon, 2007 O.J. (C 306) 26(2), 45.

<sup>157</sup> See Treaty of Lisbon, 2007 O.J. (C 306) 101(1)(d).

rectly effective,”<sup>158</sup> which they must be in order to create rights that individuals may rely on in court,<sup>159</sup> arguments invoking provisions of the Treaty of Lisbon as a means of seeking judicial review of decisions by one of Uefa’s adjudicative organs might be successful. This Note does not attempt to rationalize these competing views about the reviewability of Uefa’s enforcement of its own Regulations and Statutes. Instead, this Note serves to highlight the fact that this uncertainty in the law exists and to argue that it may be partially responsible for how Uefa holds member associations and teams accountable for the racist conduct of their fans. Interested parties must await a decision by a pan-European court to resolve this doctrinal uncertainty.

Ultimately, as Part II demonstrates, Uefa officials may be unclear about how much deference European courts are likely to display toward rules governing European soccer imposed by Uefa and memorialized through contracts with member associations and teams. It may be that the adjudicative organs engage in strategic soft enforcement of Uefa’s Disciplinary Regulations and Statutes because, based on European pronouncements, as well as E.U. and U.K. case law, Uefa officials believe that the decisions of the adjudicative organs are not subject to judicial review. Alternatively, Uefa officials may be concerned about the possibility of judicial review of disciplinary decisions rendered by the adjudicative organs. Rather than risk incurring challenges to its authority to govern European soccer, Uefa officials elected to serve on one of the adjudicative organs may be inclined to fine teams or member associations rather than order stadium closures, suspensions or expulsions that might be held to violate provisions of the Treaty of Lisbon. Uefa officials may prefer to treat racism as an unfortunate occurrence rather than engage in tougher enforcement that may anger member associations and teams. However, by acknowledging that racism is a problem and by publicizing steps taken to address it,<sup>160</sup> Uefa gives groups like FARE and Kick it Out

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<sup>158</sup> Gordon, *supra* note 109, at 26. In order for a Treaty provision to create a direct effect, the provision must be: “sufficiently clear and precise; unconditional; and [be] one that leaves no scope for discretion as to its implementation” (*citing* NV ALGEMENE TRANSPORT- EN EXPEDITIE ONDERNEMING VAN GEND & LOOS v NETHERLANDS INLAND REVENUE ADMIN., [1963] E.C.R. 1).

<sup>159</sup> Gordon, *supra* note 109, at 15–16. See *Gestoras Pro Amnist and others v. E.U. Council* (Spain and another, intervening), [2008] All ER (EC) 65, at ¶ 77 (“Member states and the institutions are subject to judicial review of the compatibility of their acts with the EC Treaty and with the general principles of law, which include fundamental rights.”).

<sup>160</sup> *Uefa Thanked for Action Week Backing*, UEFA (Nov. 1, 2010), <http://www.uefa.com/Uefa/socialresponsibility/antiracism/news/newsid=1556000.html>.

information by which to hold Uefa accountable to meeting its obligation to reduce instances of racism in European soccer.<sup>161</sup>

### III. THE FOURTH OFFICIAL: THE RESOLUTION OF RACISM DISPUTES THROUGH ADR PROCEDURES

Uefa is obligated to protect the human dignity of any player from being offended on account of a player's race<sup>162</sup> and to make progress toward achieving its goal of significantly reducing instances of racism in European soccer.<sup>163</sup> To meet these objectives, Uefa officials should negotiate an amendment to Articles 59 through 62 of the Uefa Statutes whereby jurisdiction over disputes about fans' racist behavior is vested exclusively CAS. Currently, CAS is a "court of last instance" whose Appeals Panel may review disciplinary decisions by Uefa's adjudicative organs *de novo*.<sup>164</sup> Under the system of dispute resolution being proposed here, players would be able to bypass Uefa's adjudicative organs and compel member associations or teams whose fans engaged in racist conduct to submit to mediation and arbitration proceedings conducted by CAS. At such proceedings the parties would share information or evidence—depending on whether the parties were engaged in mediation or arbitration—to determine whether the punishment apportioned by Uefa was in accordance with the Uefa Statutes and Disciplinary Regulations or, if no punishment was meted out, what the appropriate level of punishment is under Uefa's regulations. Uefa's adjudicative organs would then be responsible solely for imposing and enforcing the solutions agreed to by the parties or the penalties determined by the arbitrators, which are final and binding.<sup>165</sup> This division of responsibilities between two independent bodies would afford parties the opportunity to reach a mutually acceptable solution or to have one determined for them by a panel of CAS panelists that comports with Uefa's rules and is enforceable in a court of law. This procedure would also reduce the likelihood that member associations and clubs would vote to dissolve

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<sup>161</sup> TACKLING RACISM IN CLUB FOOTBALL: A GUIDE FOR CLUBS, *supra* note 5.

<sup>162</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 11bis.

<sup>163</sup> TACKLING RACISM IN CLUB FOOTBALL: A GUIDE FOR CLUBS, *supra* note 5.

<sup>164</sup> UEFA STATUTES, *supra* note 10, at art. 60; *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, *supra* note 74, at R57, <http://www.tas-cas.org/rules> (last visited Feb. 16, 2011).

<sup>165</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 13–14, 67; *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, *supra* note 74, at R46.

Uefa because member associations and teams will be less likely to blame Uefa for the penalties they incur.

A. *Advantages of Mediation in the Context of the Business of European Soccer*

ADR encourages consensus building and the formation of relationships, which is particularly advantageous in the context of sports because the parties involved are likely to be repeat business transactors.<sup>166</sup> ADR affords parties greater informality, autonomy and confidentiality and encourages consensus building while being cost-effective,<sup>167</sup> which helps preserve business relationships.<sup>168</sup> When mediating a dispute about a decision by Uefa not to impose tougher sanctions on a member association, the parties might include representatives of Uefa, the member association as well as any teams or players involved. Among Uefa's member associations and the players, there is a high probability, by virtue of the business in which they are mutually engaged, that these parties will have to interact to produce some facet of professional soccer in the future. These future interactions may involve the sale of players, the staging of soccer competitions or any of a myriad of transactions that arise in the context of professional sports. Thus, if mediation or arbitration can help ensure that at the end of the process, whatever the outcome, the parties will not refuse to deal with one another in the future, this bodes well for the continued operation of Uefa and production of European soccer.

Mediating a dispute involving racism offers parties the opportunity to select the type of mediation to be performed in light of each party's desired outcomes.<sup>169</sup> For example, in the case of a group of players seeking the closure of a team's stadium for one game as punishment for the team's fans having abused the player, the parties might prefer that a mediator adopt an "evaluative-narrow" approach.<sup>170</sup> This approach is intended to help parties understand the relative strengths and weaknesses of their positions and the probable outcome of litigation should mediation not prove suc-

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<sup>166</sup> BLACKSHAW, *supra* note 72, at 9.

<sup>167</sup> NAFZIGER, *supra* note 24, at 47.

<sup>168</sup> Alan W. Kowalchuk, *ADR vs. Litigation: Resolving Intellectual Property Disputes Outside of Court: Using ADR to Take Control of Your Case*, AMERICAN ARBITRATION ASSOCIATION, available at <http://www.adr.org/si.asp?id=5003> (last visited Sept. 5, 2011).

<sup>169</sup> Riskin, *supra* note 21, at 19–20.

<sup>170</sup> *Id.*, at 25–27.

cessful.<sup>171</sup> The mediator caucuses with each side privately to inform them of the mediator’s opinion of the relative strengths and weakness of each side’s argument—as they might be understood by the members of one of Uefa’s adjudicative organs—in order to develop a suitable compromise and then attempts to encourage the parties to accept the proposed compromise.<sup>172</sup> Such an approach could allow the hypothetical parties here to limit the number of issues in dispute—focusing on the particular group of fans responsible—and to arrive at a clear understanding of their respective “Best Alternative to a Negotiated Agreement” [hereinafter “BATNA”], which could promote quicker resolution of the dispute.<sup>173</sup>

Alternatively, the parties might prefer that the mediator adopt a “facilitative-narrow” strategy whereby the parties agree to empower the mediator to counsel each side about the strengths and weaknesses of their arguments but rather than making assessments, predictions or proposals or studying documents, the parties themselves retain ultimate decision-making authority.<sup>174</sup> This model might be adopted if the parties desired to develop their own solutions to the given dispute, so long as these solutions did not directly violate a rule embodied in the Uefa Statutes or Disciplinary Regulations. Any conflict between the proposed solution and Uefa’s rules could, for example, be avoided if Uefa amended its Statutes to allow for the private resolution of disputes involving racism provided that Uefa consented to the solution proposed by the parties—such consent not being unreasonably withheld. In this way, by relinquishing some control over the final outcome of the dispute, Uefa could create the institutional flexibility to help facilitate the realization of an outcome to which the parties agree while not being perceived as being responsible for the loss suffered by the party that concedes the most during mediation.

Instead, the parties might prefer to have a more activist mediator facilitate the resolution of their dispute.<sup>175</sup> If the parties prefer a mediator to employ an “evaluative-broad” approach, the mediator would seek to gain as much information about the dispute from the perspective of each party.<sup>176</sup> Based on this information, the

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<sup>171</sup> *Id.* at 25

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 42, 44.

<sup>174</sup> *Id.* at 28–30.

<sup>175</sup> *Id.* at 29–31.

<sup>176</sup> *Id.*

mediator would then help guide the parties toward a solution.<sup>177</sup> This method might afford the player-complainants the opportunity to address their underlying interests in the course of reaching an agreement.<sup>178</sup> For example, perhaps the players want the club to engage in more outreach to minority communities and to work more closely with local police to monitor the activities of racist groups of fans. The evaluative-broad method might promote the development of creative solutions on the part of member associations and team to address the broader issues raised by the players.<sup>179</sup>

These models of mediation, among others, could be adopted by the parties if they were contractually empowered to bring claims about racism to CAS because CAS' mediation rules are flexible<sup>180</sup> and are not obviously biased toward one form of mediation or another.<sup>181</sup> ICAS maintains a list of mediators, any of whom may be selected by mutual agreement of the parties.<sup>182</sup> CAS' institutional flexibility, combined with the fact that mediators often employ a combination of techniques,<sup>183</sup> could help parties to quickly reach a mutually agreeable solution. In fact, even if the solution did not directly comport with the types of sanctions that Uefa is allowed to impose on member associations and teams that violate the Uefa Statutes or Disciplinary Regulations, the parties may be more satisfied with an outcome that they perceive as being the product of and responsive to their declared interests.<sup>184</sup>

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 43.

<sup>179</sup> *Id.*

<sup>180</sup> Compare Uefa Disciplinary Regulations, *supra* note 9, at art. 60–61 and CAS Mediation Rules, COURT OF ARBITRATION FOR SPORT, *supra* note 75. During hearings by the Uefa Appeals Body, the parties are only entitled to two oral pleadings and the Appeals Body deliberates behind closed doors whereas mediation facilitates repeated oral exchanges, and the sharing of written records and other information, between the parties and promotes the open exchange of information.

<sup>181</sup> CAS Mediation Rules, COURT OF ARBITRATION FOR SPORT, *supra* note 75. See also UEFA STATUTES, *supra* note 10, at art. 63; *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, *supra* note 74, at art. (R27). CAS may not hear disputes involving disciplinary action through which a natural person is suspended for up to two matches or up to one month. Therefore, there is no bar to CAS mediating disputes regarding punishment of member associations or teams stemming from racist conduct perpetrated by their fans.

<sup>182</sup> *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, *supra* note 74, at art. 5–6.

<sup>183</sup> Riskin, *supra* note 21, at 37.

<sup>184</sup> *Id.*; See also Christine Rack, *Negotiated Justice: Gender and Ethnic Minority Bargaining Patterns in the Metrocourt Study*, 20 HAMLIN J. PUB. L. & POL'Y 211, 215 (1998).

Mediation is also a suitable procedure for resolving disputes about racism because mediators are not bound by precedent.<sup>185</sup> This allows the affected parties to explicate their respective positions to the mediator who may then take these arguments into account and individualize the nature of the dispute so as to better tailor outcomes to the specific parties to the mediation.<sup>186</sup> Uefa's adjudicative organs do not possess the same freedom. Although they are not bound by precedent, the range of possible outcomes of a given dispute can be predicted because the Disciplinary Regulation explicitly connects certain violations to a limited universe of potential forms of punishment<sup>187</sup> and the procedures are formalized such that parties may reasonably expect a certain level of consistency from decision to decision.

There is reason to believe that Uefa's adjudicative organs do not promote the building of productive relationships between the parties or a willingness on the part of the parties to engage in future transactions. The members of Uefa's adjudicative organs are elected by the Uefa Congress,<sup>188</sup> rather than selected by the parties to the dispute,<sup>189</sup> and, unlike CAS officials, cannot be replaced if one of the parties challenges a member's expertise or impartiality.<sup>190</sup> From the outset, all parties presumably recognize that Uefa is ultimately responsible for deciding the winner and loser of a particular dispute and that future disputes may be decided by at least one of the same panelists.<sup>191</sup> This institutional design may promote resentment of Uefa amongst the parties.

The likelihood that at least one of the parties will oppose Uefa's involvement in the resolution process is increased by the fact that disciplinary inspectors are responsible for investigating al-

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<sup>185</sup> IAN S. BLACKSHAW, *MEDIATING SPORTS DISPUTES: NATIONAL AND INTERNATIONAL PERSPECTIVES* 123 (2002).

<sup>186</sup> Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982).

<sup>187</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 53–54.

<sup>188</sup> *Id.* at art. 22.

<sup>189</sup> *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, *supra* note 74, at art. (R40.2).

<sup>190</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 26. *But see Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, *supra* note 74, at art. (R34) (an arbiter can be removed from a mediation or arbitration proceeding, with a final decision being made by The International Council for Arbitration of Sport).

<sup>191</sup> *See* UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 23(1–2); UEFA STATUTES, *supra* note 10, at art. 32(2). Because the Control and Disciplinary Body is comprised of a Chairman and nine members and the Appeals Body is composed of a Chairman and ten members, and are elected to four year terms and given the finite number of persons whom can be elected to either body, the probability that a party may have multiple disputes before the same panel of members is not small.

leged violations of the Uefa Statutes and Disciplinary Regulations.<sup>192</sup> The inspector's official investigatory report becomes the basis for the Control and Disciplinary Body's initial decision.<sup>193</sup> Parties may regard the central role played in the dispute by the disciplinary inspector, an agent of Uefa, as grounds for being skeptical about the outcome reached by a given judicial organ and may become disinclined to engage in business transactions with their adversary in the future or, in the case of member associations or teams, to question their membership in Uefa.

Despite the advantages of mediation, it poses problems not present in the context of arbitration or litigation. For example, the likelihood of mediation reducing instances of racism in European soccer will vary depending on how broadly or narrowly parties define the parameters of their dispute. Whether parties narrowly or broadly articulate their interests that they want considered in the course of reaching an agreement, neither approach will necessarily yield a desirable outcome. If racially abused players narrowly define the terms of an acceptable settlement and are unwilling to compromise—such as demanding a two-game stadium closure—this may increase the likelihood of reaching an impasse because there is little room for developing alternative solutions.<sup>194</sup> Similarly, the more broadly the parties define the problem at issue—for example, the players refuse to ever play in the stadium of the member association or team again—the likelihood of reaching an impasse will also increase, thus requiring the investment of more time and resources to mitigate the impasse or leading to the breakdown of the mediation process altogether.<sup>195</sup>

Additionally, a particular team or member association—potential parties to the dispute because they are liable for the conduct of their fans<sup>196</sup>—may doubt its ability to reach a compromise with the player-complainants while also protecting their financial and leadership interests in promoting soccer within their local, regional, or national communities.<sup>197</sup> One of the parties may prefer to seek legal redress to vindicate his legal rights, which would prevent mediation from ever occurring, let alone from being successful.<sup>198</sup>

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<sup>192</sup> UEFA STATUTES, *supra* note 10, at art. 38.

<sup>193</sup> *Id.* at art. 38(4), 42.

<sup>194</sup> Riskin, *supra* note 21, at 43.

<sup>195</sup> *Id.* at 43

<sup>196</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 6.

<sup>197</sup> Riskin, *supra* note 21, at 143.

<sup>198</sup> Richard Ingleby, *Court Sponsored Mediation: The Case Against Mandatory Participation*, 56 MOD. L. REV. 441, 447 (1993). See *Real Sports with Bryant Gumble*, *supra* note 7. Oguchi

Some teams or member associations might not feel sufficiently incentivized to reach an amicable settlement with a player or group of players, particularly since Uefa has proved reluctant to impose disciplinary penalties, aside from fines.<sup>199</sup>

Notwithstanding these potential drawbacks, ADR offers additional benefits to those discussed above that make it a method of dispute resolution that offers significant advantages compared to the status quo. ADR is the most effective means the parties can select for ensuring that they, rather than Uefa's adjudicative organs, retain control over the manner in which the proceeding is conducted. In particular, the parties can choose the relevant law to be applied to the facts of the dispute<sup>200</sup> and the parties can select mediators or arbitrators based on their legal pedigree, knowledge of soccer<sup>201</sup> and of issues surrounding race and methods of promoting racial tolerance. This increase in control over the final outcome might yield more creative solutions or penalties rather than simply resulting in agreements or decisions that replicate the types of punishment that one of Uefa's adjudicative organs can presently impose.<sup>202</sup>

Finally, the amount of bargaining power that member associations and teams would retain *vis-à-vis* player-complainants might be sufficiently reduced to give rise to better outcomes from the players' perspective but without causing them to fear the consequences of adopting an amendment to grant CAS jurisdiction over disputes involving racism. Member associations and teams may be more prone to adopting a firm bargaining strategy—characterized by making “costly” initial demands relative to the other party and resistance to making reciprocal concessions—<sup>203</sup> because they will often be the employer of the player or players who initiate the mediation proceeding before CAS. Because of the uncertainty regarding the scope of Uefa's authority to impose sanctions in light of the Treaty of Lisbon<sup>204</sup>, the bargaining power of member as-

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Onyewu, who plays for A.C. Milan in Serie A and for the U.S. Mens National Soccer team, filed a lawsuit in a Belgian court seeking a public apology from an opposing player who allegedly called Onyewu a “dirty monkey.” The lawsuit was filed in the summer of 2009 and is still pending in the Belgian court system.

<sup>199</sup> Ingleby, *supra* note 198, at 451.

<sup>200</sup> *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, *supra* note 74, at art. (R45).

<sup>201</sup> COX ET AL., *supra* note 15, at 22.

<sup>202</sup> *CAS Mediation Rules*, COURT OF ARBITRATION FOR SPORT, *supra* note 75, at art. 9.

<sup>203</sup> Rack, *supra* note 184, at 220.

<sup>204</sup> *See supra* Part II.

sociations and teams may be somewhat diminished by their inability to rely on litigation to achieve more favorable outcomes.<sup>205</sup> To offset this potential imbalance in bargaining power, and because outcomes negotiated through mediation would be controlled by the parties themselves, the member associations and teams might be more willing to propose creative solutions that could avoid even the imposition of a fine.<sup>206</sup> For example, the member association or team could offer to invest in a fund that could be leveraged by Uefa to invest in the promotion of racial tolerance through community outreach or the redevelopment of stadiums to install closed circuit cameras and other methods to better monitor and police fan behavior.<sup>207</sup> The potential to arrive at mutually agreeable terms might increase or decrease depending on the amount of trust the parties have for one another, which affects parties' willingness to make concession and to adopt or discard contentious negotiating positions.<sup>208</sup> Based on the foregoing, member associations and teams may not be so weary of adopting an amendment to allow disputes about racist conduct to be subject to mediation conducted by CAS panelists.

B. *Enforcing Agreements to Mediate and Arbitrate and their Outcomes*

Although the allocation of disputes involving racism to CAS offers clear advantages over the current system of quasi-adjudicatory hearings conducted by Uefa's adjudicative organs, one might reasonably question how agreements to mediate and arbitrate, as well as the results of either of those proceedings, can be enforced. Although building the consensus among the member associations necessary to pass an amendment to the Uefa Statutes would be difficult, and is beyond the scope of this Note, such an agreement could be institutionalized through an amendment to the Uefa Statutes.<sup>209</sup> Uefa's Disciplinary Regulations already dictates that

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<sup>205</sup> Rack, *supra* note 184, at 229.

<sup>206</sup> Michael Nicholson, *A Sporting Result?*, 55 MEMBERS' MAG. L. SOC'Y SCOTLAND 52 (2010), available at <http://www.journalonline.co.uk/Magazine/55-6/1008225.aspx>.

<sup>207</sup> Greenfield & Osborn, *supra* note 67, at 323 (discussing Closed Circuit Television (CCTV), the redevelopment of stadiums to provide only seated areas for viewing the game, and ticket segregation to ensure that rival fans are kept apart inside the stadium as methods for reducing crowd violence and increasing crowd control).

<sup>208</sup> Rack, *supra* note 184, at 230.

<sup>209</sup> UEFA STATUTES, *supra* note 10, at art. 7bis(b).

teams and member associations liable for the conduct of their fans,<sup>210</sup> which makes an amendment affording parties the right to mediate and arbitrate disputes about fans' racist conduct enforceable against member associations and teams. Therefore, such agreements could be enforced because every member of Uefa, and by extension every team playing in a league organized by a member association, is required to comply with the Uefa Statutes and Disciplinary Regulations.<sup>211</sup> Given the pressure being applied by the European government,<sup>212</sup> as well as public stakeholders like FARE,<sup>213</sup> it is at least possible that such an amendment, proposed specifically to address racism in soccer, could garner enough votes among the members of the Uefa Congress.

An amendment providing for the mediation and arbitration of disputes between players and member associations or teams in which players attempt to hold these institutions accountable for the racist conduct of their fans would be unlikely to confront the types of legal challenges that potentially affect the strength of decisions rendered by Uefa's adjudicative organs, as discussed in Part II. CAS' arbitration outcomes are reviewable by the Swiss Federal Tribunal pursuant to article S1 and R28 of the CAS Code of Sports-related Arbitration.<sup>214</sup> However, the trend in Switzerland has been toward narrowing the scope of judicial review.<sup>215</sup> Sanctions or rules of sport that constitute an abuse of law, are in violation of legal or statutory requirements or constitute an unacceptable encroachment upon the personal rights of the individual concerned may be lifted by the Tribunal.<sup>216</sup> This standard is not dissimilar to that employed by European courts to determine whether they may review decisions of domestic tribunals for their compatibility with E.U. law.<sup>217</sup> Thus, CAS determinations would probably either not be subject to judicial review or would withstand a legal challenge brought by a dissatisfied party.

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<sup>210</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 6.

<sup>211</sup> *Id.* at art. 13(j).

<sup>212</sup> See THE HELSINKI REPORT ON SPORT, *supra* note 95; Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should be Taken in Implementing Common Policies, *supra* note 100; Written Declaration on Tackling Racism in Football, *supra* note 103.

<sup>213</sup> UEFA, TACKLING RACISM IN CLUB FOOTBALL: A GUIDE FOR CLUBS, *supra* note 5.

<sup>214</sup> Alain Plantey, *Independence of the CAS Recognized by the Swiss Federal Tribunal*, in THE COURT OF ARBITRATION FOR SPORT 1984-2004, *supra* note 72, at 50-51.

<sup>215</sup> Frank Oschütz, *The Arbitrability of Sport Disputes and the Rules of the Game*, in THE COURT OF ARBITRATION FOR SPORT 1984-2004, *supra* note 72, at 200, 203.

<sup>216</sup> *Id.*

<sup>217</sup> *Wos v. Poland*, 45 Eur. Ct. H.R. at ¶ 72.

The enforceability of agreements to arbitrate *vis-à-vis* the Swiss Federal Tribunal appears to be contingent upon the independence of the body from the parties to the dispute. In *Gundel v. The International Equestrian Federation*, the Swiss Federal Tribunal held that decisions of disciplinary bodies were subject to judicial review because they were not “judicial acts.”<sup>218</sup> However, the Court stated that jurisdiction might, “be entrusted to an arbitral tribunal provided that it was ‘a veritable judicial authority and not a mere organ of the association interested in the outcome of the dispute.’”<sup>219</sup> CAS’ pool of arbitrators are selected so as to ensure their independence from sports governing bodies like Uefa<sup>220</sup> and individual members can even be removed from arbitration proceedings.<sup>221</sup> These procedural rules, and others heretofore addressed, would render CAS more than a “mere organ” of Uefa and would support a determination by the Swiss Tribunal that such agreements to arbitrate are enforceable.

Concomitantly, the authority of CAS mediators or arbitrators to determine the penalties to be incurred by member associations or teams would be appropriately limited by the potential for review by the Swiss Tribunal.<sup>222</sup> Because sports governing bodies cannot oust the jurisdiction of courts to review decisions made pursuant to the governing bodies’ rules if the court’s powers of judicial review are properly invoked,<sup>223</sup> CAS would be bound by the choice of laws provision contained in the Uefa Statutes, which states that the Statutes are “in all respects governed by Swiss law” and are binding on all parties.<sup>224</sup> This would mitigate any concern of bias, particularly among member associations and teams, which might encourage a party to oppose an amendment to grant CAS jurisdiction over disputes about fans’ racist behavior.<sup>225</sup>

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<sup>218</sup> Jan Paulson, *Arbitration of International Sport Disputes*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, *supra* note 72, at 45, 49.

<sup>219</sup> *Id.*

<sup>220</sup> *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, *supra* note 74, at art. S14.

<sup>221</sup> *Id.* at art. C(2)(S19), (A)(R34).

<sup>222</sup> Simma, *The Court of Arbitration for Sport*, *supra* note 72, at 30.

<sup>223</sup> Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, *supra* note 72, at 31.

<sup>224</sup> *UEFA STATUTES*, *supra* note 10, at art. 7bis, 64(1).

<sup>225</sup> See Andrea Pinna, *The Trials and Tribulations of the Court of Arbitration for Sport: Contribution to the Study of the Arbitration of Disputes Concerning Disciplinary Sanctions*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, *supra* note 72, at 386, 399. *But see* BLACKSHAW, *supra* note 184, at 118–19 (parties may be reluctant to grant CAS jurisdiction when the stakes

C. *The Potential of CAS to Reduce Racism in European Soccer*

Arguably, the aspect of CAS that makes it more likely than Uefa's adjudicative organs to reduce instances of racism in European soccer is CAS' independence from Uefa. As discussed previously, the members of Uefa's adjudicative organs are elected by the Uefa Executive Committee,<sup>226</sup> which is comprised of individuals elected by the member associations themselves.<sup>227</sup> Not only might the members of the adjudicative organs experience a conflict of interest in terms of disciplining member associations or teams,<sup>228</sup> but Uefa's legal counsel may be unsure of the ability of the decisions of the adjudicative organs to escape judicial review by European courts.<sup>229</sup> CAS is not subject to any such conflict of interest or legal uncertainty. Mediation presents an opportunity for the parties themselves to control the terms, issues and resolution, if any, of their dispute.<sup>230</sup> There is no third-party, such as a judicial organ, presiding over an investigation or a hearing and issuing a decision. With respect to arbitration, so long as the decision rendered does not contravene E.U. law or rely on criteria "manifestly arbitrary or blatantly inconsistent with the fundamental principles of the [European] Convention,"<sup>231</sup> the scope of judicial review of disciplinary sanctions imposed by sports governing bodies is very limited.<sup>232</sup> Given their freedom from these constraints, CAS' panelists can promote the settlement of disputes or accurately enforce the provisions of Uefa's Disciplinary Regulations and Statutes without fear of becoming victims of politically motivated reprisal.

As more disputes are arbitrated, CAS' arbitration decisions can become a foundation for the development of a *lex sportiva* and will incentivize member associations and teams to take steps *ex*

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are high, and thus might form a coalition to oppose the vote to amend the Uefa Statutes to give CAS jurisdiction over disputes relating to racism).

<sup>226</sup> *About Uefa: Organization*, *supra* note 12.

<sup>227</sup> UEFA STATUTES, *supra* note 10, at art. 12

<sup>228</sup> After all, why would the representatives of member associations elect persons to serve on the Uefa Executive Committee who will vote for persons to serve as members of the adjudicative organs who will impose sanctions on member associations and team?

<sup>229</sup> See *supra* Part II.

<sup>230</sup> Rodney A. Max & Joshua A. Campbell, *Formal Mediation in Professional Sports*, 1 AM. J. MED. 27, 32 (2007), available at <http://www.acctm.org/docs/Formal%20Mediation%20in%20Professional%20Sports%20-%20MAX-CAMPBELL-Final%2012-6-06.pdf>.

<sup>231</sup> *Woś v. Poland*, 45 Eur. Ct. H.R. at ¶ 72.

<sup>232</sup> See Pinna, *The Trials and Tribulations of the Court of Arbitration for Sport: Contribution to the Study of the Arbitration of Disputes Concerning Disciplinary Sanctions*, in THE COURT OF ARBITRATION FOR SPORT 1984-2004, *supra* note 72, at 404.

*ante* to reduce the likelihood that any of their fans will exhibit racist behavior.<sup>233</sup> The increase in the severity of sanctions imposed on member associations and teams will create a positive feedback-loop whereby other member associations and teams will take preemptive action to remove racist fans from their stadiums, which will reduce the need for arbitration. Until this feedback-loop is set in motion, to reduce the likelihood of CAS' arbitration procedures ossifying into quasi-judicial proceedings, CAS' Code for Settling Sports Related Disputes "discourages the approximation of litigation."<sup>234</sup> By restricting the discovery of evidence, guaranteeing the parties' autonomy with respect to choice of law provision, allowing parties to challenge and remove members of the arbitration panel and providing for a quicker and less expansive means of resolution,<sup>235</sup> arbitration proceedings will not become nuisances that players, member associations and teams alike avoid for fear of becoming trapped in a time-consuming dispute.

Finally, a significant advantage of allocating jurisdiction over disputes about fans engaged in racist conduct to CAS is that arbitration awards are enforceable in court. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") incentivizes the resolution of disputes relating to racist abuse in that it requires signatories "to recognize decisions as binding and to enforce them."<sup>236</sup> This agreement ensures that all member associations, which, by definition, "are based in a country which is recognized by the United Nations as an independent state" and are signatories of the New York Convention, are bound to enforce arbitration decisions issued by CAS.<sup>237</sup> The New York Convention can promote compliance among all parties involved in the dispute and can help ensure that the winning party is not dependent on Uefa to enforce CAS' decisions.<sup>238</sup>

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<sup>233</sup> NAFZIGER, *supra* note 24, at 51.

<sup>234</sup> *Id.* at 52.

<sup>235</sup> *Id.*

<sup>236</sup> Andrew Goldstone, *Obstruction of Justice: The Arbitration Process for Anti-Doping Violations During the Olympic Games*, 7 CARDOZO J. CONFLICT RESOL. 361, 386 (2007). *But see Id.* at 387 n.225 (citing Alec Van Vaerenbergh, *Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime*, IILJ WORKING PAPER 2005/11 (2005) (suggesting that The Council of Europe has observed an increase in instances of judicial review of arbitration decisions because of "their significant effect on athletes' fundamental rights.").

<sup>237</sup> UEFA STATUTES, *supra* note 10, at art. 5(1).

<sup>238</sup> Mitten & Opie, *supra* note 71, at 302.

## CONCLUSION

This Note does not pretend to argue that the proposal contained herein—that the Uefa Congress amend its Statutes to give CAS exclusive jurisdiction to mediate and arbitrate disputes involving racist conduct perpetrated by fans that offends the human dignity of a player or group of players<sup>239</sup>—is the ideal solution. Rather, the purpose of this Note is to present a viable alternative to the status quo in which the members of Uefa’s adjudicative organs are either unwilling or unable to make a significant impact in removing racism from the sport. CAS’ mediators, because they are appointed by ICAS and selected by the parties themselves, would not be pressured to favor the member association or team whose fans engaged in racist behavior. Because CAS is independent of Uefa and hears disputes from across the spectrum of sports, it is not beholden to the Uefa Congress for its continued existence. CAS’ mediators would help parties arrive at their own unique solutions to disputes apart from those provided for in Uefa’s Disciplinary Regulations.

Alternatively, when arbitration is necessary, CAS’ arbitration proceedings could result in a member association or team being sanctioned by CAS for racist conduct that would otherwise go unpunished under Uefa’s current adjudicative system. In the wake of an arbitral decision, Uefa would be uniquely responsible for imposing and enforcing the decision. This separation of adjudicative functions, the increase in independent adjudicative capacity and the increased predictability of enforcement would make it more likely that acts of racism would be met with appropriate punishment. Sanctions such as stadium closures, suspensions or expulsion would no longer be simply empty threats issued by Uefa. The prospect of severe penalties might then incentivize member associations and teams to invest more resources in policing and mitigating the expression of racism among their fans. By voting to amend the Uefa Statutes to provide for mediation and arbitration proceedings to be conducted by CAS to resolve disputes about racist conduct, Uefa’s member associations and teams can make significant progress toward affirming the human dignity of their players and, by extension, their fans.

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<sup>239</sup> UEFA DISCIPLINARY REGULATIONS, *supra* note 9, at art. 11bis.