



Universiteit
Leiden
The Netherlands

Liability of football clubs for supporters' misconduct. A study into the interaction between disciplinary regulations of sports organisations and civil law

Kleef, R.H.C.van

Citation

Kleef, R. H. Cvan. (2016, May 19). *Liability of football clubs for supporters' misconduct. A study into the interaction between disciplinary regulations of sports organisations and civil law*. Meijers-reeks. Eleven International Publishing, Den Haag. Retrieved from <https://hdl.handle.net/1887/39683>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/39683>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/39683> holds various files of this Leiden University dissertation.

Author: Kleef, R.H.C.van

Title: Liability of football clubs for supporters' misconduct. A study into the interaction between disciplinary regulations of sports

Issue Date: 2016-05-19

Liability of football clubs for supporters' misconduct

Liability of football clubs for supporters' misconduct

A study into the interaction between disciplinary regulations of sports organisations and civil law

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op donderdag 19 mei 2016
klokke 15.00 uur

door

Rosmarijn Heleen Carolien van Kleef

geboren te Alphen aan den Rijn

in 1987

Promotoren:

prof. dr. A.G. Castermans

prof. dr. A. Rigozzi (Universiteit van Neuchâtel, Zwitserland)

Promotiecommissie:

prof. dr. I.S. Wuisman

prof. dr. U.G. Haas (Universiteit Zürich, Zwitserland)

prof. dr. B. Van Rompuy (Vrije Universiteit Brussel, België/ Asser
Instituut, Den Haag)

Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

Omslagontwerp: PrimoStudio – Delft

ISBN 978-94-6236-670-1

ISBN 978-94-6274-530-8 (E-book)

© 2016 R.H.C. van Kleef | Eleven International Publishing

*Published, sold and distributed by Eleven International
Publishing*

P.O. Box 85576
2508 CG The Hague
The Netherlands
Tel.: +31 70 33 070 33
Fax: +31 70 33 070 30
e-mail: sales@budh.nl
www.elevenpub.com

*Sold and distributed in USA and Canada
International Specialized Book Services*

920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786, USA
Tel: 1-800-944-6190 (toll-free)
Fax: +1-503-280-8832
orders@isbs.com
www.isbs.com

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

This publication is protected by international copyright law.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

Printed in The Netherlands

Voor papa

Acknowledgements

Academic research is often a lonely and individual endeavor. On the other hand, it is also impossible to succeed without the help from others. There are many people that deserve to be mentioned here. Some have inspired, others encouraged, but all have played a crucial part in the completion of this book.

First of all, I would like to express my sincerest gratitude to my supervisors Alex Geert Castermans and Antonio Rigozzi. Alex Geert, thank you for your unwavering belief in my project and in me, especially when I decided to complete my research as an external candidate. Every discussion about the project has been not only inspiring but fundamental to the end-result. It has not been easy, but we made it work and I'm very proud of that. Antonio, thank you for your guidance throughout the process and for sharing the insightful words that 'the only reason one should complete a thesis is to teach'. It is this thought that ultimately led me to the completion of this work.

Sincere thanks also goes to the members of the reading committee: prof. dr. Iris Wuisman, prof. dr. Ulrich Haas and prof. dr. Ben Van Rompuy. Thank you for your time and effort, and for your insightful comments.

Thank you to prof. Carel Stolker, for the inspiring discussions during our short collaboration and for reassuring me that it is ok to take a non-conventional path. A big thank you to my fabulous colleagues at TSE for your encouragement, flexibility, and for never allowing a dull day in the office. Thank you also to my (former) colleagues at the Leiden and Neuchâtel law faculties – you know who you are – for your insightful input at various stages, your practical help, and the fun discussions during coffees and *borrels/apéros*. I am also greatly thankful to the Swiss Institute of Comparative Law in Lausanne for kindly providing (all-hour) access to their fantastic library.

I am grateful to Axel Brunk and Ines Hassissene for taking time out of their busy schedules to review the manuscript. Special thanks go Dorine Verhey, for agreeing to be my *paranimf* and for reviewing the manuscript – but mostly for being a truly great friend. Thank you, Jaap Maarleveld, for your friendship, for never ceasing to challenge my viewpoints, and for also being my *paranimf*.

I want to thank all my friends for the necessary distractions and entertainment (shout-out to the Lausanne crew), for taking marathon phone calls, and for your patience with my lack of time for you these last few years. Rian, I feel so lucky we met all those years ago. Thank you for never getting off the

train. Noëllie, thank you for your enthusiasm and reassuring words – and, of course, for the *crêpes*.

Finally, I want to thank my parents Jan-Willem and Diana van Kleef, and my brothers Robbert-Jan, Wessel and Percy. I am incredibly grateful for your support; of my skiing, my studies and my professional career – I would not be where I am today without you. But most of all thank you for always being there.

Lausanne, February 2016

Table of Contents

PREVIEW	1
1 INTRODUCTION AND CONTEXT	3
1.1 Introduction	3
1.2 Research and scope	5
1.3 Methodology and definitions	7
1.4 Structure of the thesis	10
1.5 Added value and objective of the research	12
FIRST HALF – Disciplinary regulations in sport and their connections to civil law	15
2 THE LEGAL STATUS OF DISCIPLINARY REGULATIONS IN SPORTS	17
2.1 Introduction	17
2.2 The Regulatory Framework of Sports Organisations	18
2.3 Limits	26
2.4 The Binding Nature of Disciplinary Rules	31
2.5 Indirect membership	40
2.6 Changing rules and dynamic reference	45
2.7 Enforcing the Rules: Definition, Purpose, and Justification of the Disciplinary Sanction	49
2.8 Requirements for Application of a Disciplinary Sanction	53
2.9 Concluding Remarks	57
3 REVIEWING DISCIPLINARY SANCTIONS IN SPORTS	61
3.1 Introduction	61
3.2 The scope of review of disciplinary sanctions before national courts	62
3.2.1 The Netherlands	62
3.2.2 England	64
3.2.3 Germany	66
3.2.4 Switzerland	68
3.2.5 France	69
3.2.6 Summarising remarks	70
3.3 Arbitration of disputes relating to disciplinary sanctions in sports	71
3.3.1 Requirements for arbitration in sports-related matters	71
3.3.1.1 The arbitration law	72

3.3.1.2	The arbitration agreement	73
3.3.1.3	Arbitrability	76
3.3.1.4	Applicable procedural rules	78
3.3.1.5	Applicable substantive rules	78
3.3.1.6	The scope of review in CAS cases and the arbitral precedent	81
3.3.2	Challenging the arbitral award	82
3.3.2.1	Grounds for overturning an arbitral award	83
3.3.2.2	A restrictive review of the merits of the award	84
3.3.2.3	The Swiss Federal Supreme Court: the final instance in CAS cases	85
3.3.3	Summarising remarks	87
3.4	Concluding Remarks	88
SECOND HALF – Disciplinary and civil liability of football clubs for supporters’ misconduct		91
4	DISCIPLINARY LIABILITY OF FOOTBALL CLUBS FOR SUPPORTERS’ MISCONDUCT	93
4.1	Introduction	93
4.2	Liability rules in the regulations of football federations	94
4.2.1	Liability rules in the regulations of FIFA and UEFA	94
4.2.2	The rule in the regulations of national federations	96
4.3	The application of disciplinary liability by the CAS and national courts	99
4.3.1	Application of the rule by CAS	99
4.3.1.1	PSV Eindhoven/UEFA	99
4.3.1.2	Feyenoord Rotterdam/UEFA	102
4.3.2	Application of the rule by national courts	104
4.3.2.1	France: Tribunal Administratif in Paris St. Germain/FFF	105
4.3.2.2	France: Conseil d’Etat in Lille Olympic Sporting Club/FFF	106
4.3.2.3	France: Tribunal Administratif of Paris and Conseil d’Etat in FFF/Paris Saint-Germain (2)	107
4.3.2.4	Germany: Dynamo Dresden/DFB	108
4.4	The conceptual lawfulness of disciplinary strict liability	110
4.4.1	Justifying disciplinary liability without fault	111
4.4.2	Analogy with liability for risk	113
4.4.3	Analogy with liability for the acts of others	115
4.5	Concluding remarks	116

5	CONTRACT AND FAULT LIABILITY OF FOOTBALL CLUBS FOR SUPPORTER'S MISCONDUCT	119
5.1	Introduction	119
5.2	Contract liability of organising football clubs	120
5.2.1	Contractual obligations of the parties	121
5.2.1.1	The obligation of safety	121
5.2.1.2	Other contractual duties of care	123
5.2.2	Requirements contract liability	124
5.2.2.1	Obligation of result or obligation of means?	124
5.2.2.2	Culpable breach or force majeure?	126
5.2.3	Intermezzo: contractual exclusion of liability	130
5.2.3.1	Exclusion clause in general contract terms	131
5.2.3.2	Exclusion of liability for personal injury	132
5.2.4	Summarising remarks	133
5.3	Fault liability of organising football clubs	134
5.3.1	Protected interests in tort law	135
5.3.2	Requirements for fault liability	136
5.3.2.1	Fault	136
5.3.2.2	The standard of care: a transnationally uniform applicable standard	139
5.3.3	The standard of care owed by organising clubs according to the courts	140
5.3.3.1	France	141
5.3.3.2	England	144
5.3.3.3	Germany	145
5.3.4	In summary: the relevant factors to establishing the scope of the standard of care	149
5.4	Situations where establishing liability is problematic	150
5.4.1	The standard of care owed by visiting clubs	150
5.4.2	The standard of care owed outside the stadium	152
5.4.3	Liability for racist acts	154
5.5	Concluding Remarks	158
6	THE DISCIPLINARY STANDARD AND CIVIL LAW – INTERACTION, RATIONALE AND LIMITATIONS	161
6.1	Introduction	161
6.2	The influence of private regulations on the standard of care	162
6.2.1	Private regulations	163
6.2.2	Technical and safety standards	164
6.2.3	Professional standards	167
6.2.3.1	Netherlands: towards a direct application of professional standards	168
6.2.3.2	France: progressive development reverted	170
6.2.4	Regulations of sports organisations	171
6.2.5	Summarising remarks	175

6.3	Applying the disciplinary strict liability rule in civil law	176
6.3.1	The disciplinary strict liability rule deconstructed from a civil law perspective	176
6.3.2	The shared goal connecting disciplinary liability and civil liability	178
6.3.3	The legitimacy of interaction between disciplinary law and civil law	181
6.4	Towards a civil-law strict liability for supporters misconduct	183
6.4.1	Concept and development of strict liability	183
6.4.2	Liability for the acts of others	186
6.4.3	Liability for risk: a general strict liability rule	189
6.4.4	Strict liability and the expected safety standard – two sides of the same coin	192
6.5	Opportunities and limitations of a strict liability rule for supporters' misconduct	193
6.5.1	Liability of the visiting club for damage inside the stadium	193
6.5.2	Damage outside the stadium grounds	195
6.5.3	Liability for racist acts	196
6.6	Concluding Remarks	197
	RECAP	199
7	SYNTHESIS AND CONCLUSIONS	201
7.1	Introduction	201
7.2	Disciplinary regulations in sport and their connections to civil law	201
7.3	Disciplinary and civil liability of football clubs for supporters' misconduct	204
7.4	Final thoughts	210
	SAMENVATTING (DUTCH SUMMARY)	213
	ANNEX TO CHAPTER 4	223
	LIST OF REFERENCES	229
	LIST OF CASES	241
	INDEX	249
	CURRICULUM VITAE	255