

T · M · C · A S S E R P R E S S

ASSER International Sports Law Series

Introduction to International and European Sports Law

Capita Selecta

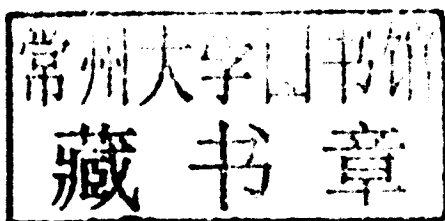
Robert C.R. Siekmann

 Springer

R. C. R. Siekmann

Introduction to International and European Sports Law

Capita Selecta



T · M · C · A S S E R P R E S S

 Springer

Prof. Dr. R. C. R. Siekmann
International and European Sports Law
Erasmus University Rotterdam
Erasmus School of Law
Burg. Oudlann 50
3062 PA Rotterdam
The Netherlands

ISSN 1874-6926

ISBN 978-90-6704-851-4

ISBN 978-90-6704-852-1 (eBook)

DOI 10.1007/978-90-6704-852-1

Library of Congress Control Number: 2012935673

© T.M.C. ASSER PRESS, The Hague, The Netherlands, and the author 2012

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl

Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. The use of general descriptive names, registered names, trademarks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Series Information

Books in the *ASSER International Sports Law Series* chart and comment upon the legal and policy developments in European and international sports law. The books contain materials on interstate organisations and the international sports governing bodies, and will serve as comprehensive and relevant reference tools for all those involved in the area on a professional basis.

The Series is developed, edited and published by the ASSER International Sports Law Centre in The Hague. The Centre's mission is to provide a centre of excellence in particular by providing high-quality research, services and products to the sporting world at large (sports ministries, international—intergovernmental—organisations, sports associations and federations, the professional sports industry, etc.) on both a national and an international basis. The Centre is the co-founder and coordinator of the Hague International Sports Law Academy (HISLA), the purpose of which is the organisation of academic conferences and workshops of international excellence which are held in various parts of the world. Apart from the Series, the Centre edits and publishes *The International Sports Law Journal*.

Series Editors

Prof. Dr. Robert C. R. Siekmann, Director Asser International Sports Law Centre
e-mail: r.siekmann@asser.nl

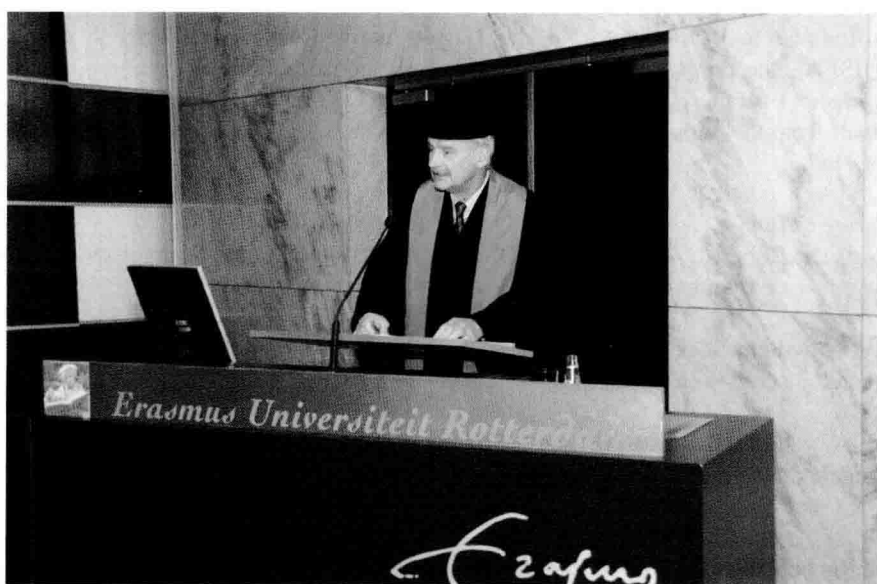
Dr. Janwillem Soek
e-mail: J.soek@asser.nl

M. A. van der Harst LL.M.
e-mail: m.van.der.harst@asser.nl

Editorial Office

ASSER International Sports Law Centre
T.M.C. Asser Institute
P.O. Box 30461
2500 GL, The Hague
The Netherlands
www.sportslaw.nl





Foreword

The interlocking rings of the Olympic Movement also constitute a suitable emblem of Robert ("Rob") Siekmann's unique linkage of scholarship, editorial leadership, organizational activity, global outreach, and practical counsel in advancing international sports law. It is entirely appropriate that his base of operations is in the world's international law capital, The Hague (and more recently nearby Rotterdam), for Professor Siekmann himself serves as a kind of capital of scholarly developments. He is liked and respected throughout the world of international sports law.

The essays in this book span an impressive array of topics that Professor Siekmann has either addressed in his own scholarship, published as an Asser Institute book, edited in the seminal *International Sports Law Journal* (ISLJ) that he founded and of which he is Editor-in-Chief, discussed at sports law meetings, or offered expert advice on, often to institutions of the European Union. It is difficult to think of any significant topic of sports law concerning which Professor Siekmann has not been pivotal. It is also difficult to think of more significant issues surrounding the sports arena today than those covered by the lectures in this collection.

Professor Siekmann is well-respected as an expert on European, especially Dutch football. One of the undersigned, however, based as he is in the United States, has attempted to deflect his attention from the world's premier sport by reminding Professor Siekmann of such exotic alternatives on the playing field and in legal practice as North American-style football and baseball. It is a tribute to his intellectual curiosity and generosity that he eagerly acknowledges their place on his agenda for the progressive development of international sports law. The other of the undersigned adds only that Dutch football is the most graceful, elegant and imaginative version of the game to be found on the European continent.¹ Professor Siekmann's scholarly work is similarly and firmly in the same tradition of grace, elegance and imagination.

¹ Cf., David Winner, *Brilliant Orange—The Neurotic Genius of Dutch Football* (2000).

As traditional distinctions fade between amateur and professional athletes and between private and public law, Professor Siekmann's enthusiasm for professional, club-organized football never obscures the clarity of his larger vision encompassing non-professional sports activity and the merger of public and private processes of law. For evidence, one need only turn to his own scholarship, the pages of the ISLJ that he edits, and the numerous books for whose publication he has been responsible at the Asser Institute. He is truly a leader and an inspiration. We are delighted and honored to be given the opportunity to pay tribute to Rob Siekmann by providing this Foreword.

Salem and Oxford, December 2011

J. A. R. Nafziger
Thomas B. Stoel Professor of Law
Willamette University College of Law
Salem Oregon
USA

S. Weatherill
Jacques Delors Professor of European Law
Law Faculty and Somerville College
University of Oxford
London
UK

Preface

*Je gaat het pas zien als je het doorhebt*¹

Johan Cruyff

This book is an introduction to sports law, in particular International (world-wide) and European (EU) sports law. The opening contribution is the starting and departure point for all others. It is the full text of the author's inaugural lecture on 10 June 2011 on *What is Sports Law?*, when he was officially appointed Professor of International and European Sports Law at the School of Law of Erasmus University Rotterdam. The Introductions and Conclusions (Summaries) of all articles where applicable are put in the perspective of the sports law doctrine that is developed and proposed in the inaugural lecture. And in the articles on European Sports Law (ESL) the sport specificity test is applied where applicable. In the 'sports betting' article a new, systematic method of jurisprudential analysis is presented and applied by this author, which in principle might be used for studying also other, non-EU jurisprudence.

Capita selecta in the book's subtitle also means *miscellanea*, not only in the meaning of the main themes dealt with in the book, but also regarding the emphases made and the examples given in individual contributions. So, for example the EU competition law side of sports betting is dealt with, but not the aspects of organized crime, sporting fraud and match-fixing that accompany sports betting and which now is an emerging theme in sports law. A crucial legal aspect of international football transfers ('buy-outs') is discussed, but not the specific role and function of agents with regard to transfers. And also the very special issue of sports taxation is not incorporated in this book. *Lex Olympica*, the law of the Olympic Games, does not get a separate treatment, but is represented via the 'sports boycotts' article and the 'passport shopping' theme in the 'sport and

¹ 'You will see it not until you have grasped it' is the title of a Dutch book (2004) by Pieter Winsemius (subtitle: *Over Cruijff en leiderschap* ['About Cruyff and Leadership']).

nationality' contribution. Sports image rights are not treated, although the ASSER International Sports Law Centre (hereafter: AISLC) in The Hague, the 'legal capital of the world,' produced a country studies book on the subject as was the case with players' agents, sports betting and other topics. Nevertheless, most relevant, 'hard core' aspects and themes are covered in the book, which is based on more than ten years of theoretical and practical experience on the part of the author in this field, in his capacity of the AISLC's Director (editor in cooperation with Dr. Janwillem Soek, of the *Asser International Sports Law Series* of book publications and of *The International Sports Law Journal* (ISLJ); project manager of applied research reports and studies for, in particular, the European Commission, mostly in the form of comparative legal country studies; organizer of conferences at home and abroad—the most recent addition being the annual conference of the Hague International Sports Law Academy (HISLAC) which was established in Djakarta (Indonesia), September 2010; and individual, private fundamental research). The 'comparative sports law' article represents a good example of what the Centre in cooperation with learned colleagues at home and abroad such as Professor Stefaan van den Bogaert (Leiden University) accomplished in the area of applied research. See for example also, on G-14 and EPFL in the 'Social Dialogue' article, or on the EU non-nationals issue in the 'sport and nationality' article. In the 'competition law and sport' article there is an—anonimised—example of the Asser legal advisory services included which was delivered by Professor Parrish (United Kingdom) (*Dutch Equestrian case*). The author himself was directly involved as a disciplinary arbitrator in the *Dutch Billiard case* (see the article on 'anti-doping law in sport').

In this book association football ('soccer') is the sport that is by far most on the agenda. It is the largest sport in the world, most popular all over the globe. It may be described as a *perpetuum mobile*: the elite football in Europe is a day-to-day commercialised and professionalised industry, which makes it a perfect subject of study from a EU Law perspective. The institutional 'Big Four' of global sports governing (judicial) bodies are specifically represented in this book: IOC, FIFA, CAS and WADA, to which for Europe UEFA must be added. American Sports Law is not treated in this publication, nor the sports laws of other regions in the world.

The way of writing and composing the articles can be characterised further as follows. First, the method of *close reading* was systematically used. It means that primarily the presentation of material is based on what the law, the jurisprudence and other documents of a legal nature exactly provide for. See for example, in particular the 'sport specificity' and 'sports betting' contributions in this book. Secondary comments and learned opinions were not systematically studied, also because the international sports law literature is very diversified and varied. There are leading authors like Professor Jim Nafziger (USA) for the universal, global part of sports law, and Professor Steve Weatherill (UK) for the EU sports law part, but there is only one issue that was and still is hotly debated worldwide in academic sports law circles and where one may find some line of developing reasoning over the years. That is—not very surprisingly—the fundamental topic of what sports

law is, where it consists of. In European Sports Law the hotly debated topic remains the core issue of ‘sport specificity,’ that is the sporting exceptions which are acceptable under EU Law.

Secondly, with regard to European Sports Law, the European Commission’s White Paper of Sport (2007) and its 2011 follow-up, the so-called ‘White Paper plus’ (‘Developing the European Dimension in Sport’) turned out to be of crucial importance, because both documents most neutrally and objectively describe the *status juris* (and of policy) in European Sports Law, in particular *re* freedom of movement and competition law issues. So, in some cases the Commission’s authority was heavily relied on by this author (see for example: on sport specificity; on TV rights in the ‘competition law’ article; the Social Dialogue in sport article).

Prof. Dr. R. C. R. Siekmann

Abbreviations

AALS	The Association of American Law Schools
ACT	Association of Commercial Television
AER	Association of European Radios
AIGCP	Association Internationale des Groupes Cyclistes Professionnels
AISLC	ASSER International Sports Law Centre
CAS	Court of Arbitration for Sport
CC	Civil Code
CEEP	Centre of Enterprises with Public Participation and Enterprises of General Economic Interest
CEPI	European Coordination of Independent Producers
CFI	Court of First Instance
CFK	Stichting Contractspelersfonds KNVB
CFO	Comité français d'organisation de la Coupe du monde de football
CFSP	Common Positions in the Field of Foreign and Security Policy
CIETT	International Confederation of Private Employment Agencies
CONI	Comitato Olimpico Nazionale Italiano
COSEM	Committee on Olympic Games and Human Rights (Netherlands)
CPA	Cyclistes Professionnels Associés
CPSU	Communist Party of the Soviet Union
CSCE	Helsinki process of détente
DFB	German Football Association
DFL	Deutsche Fussball Liga GmbH
DRC	Dispute Resolution Chamber
DTCs	Data Transmission Centres
EASE	European Association of Sport Employers
EBU	European Broadcasting Union
ECA	European Club Association
ECHR	European Court of Human Rights

ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice (now: Court of Justice of the EU)
EEIG	European Economic Interest Grouping
EFFAT	European Federation of Trade Unions in the Food, Agriculture and Tourism Sectors
EFFC	European Federation of professional Football Clubs
EL	European Lotteries
ELPA	The Automobile and Touring Club of Greece
EPCT	International Professional Cycling Teams
EPFL	Association of European Professional Football Leagues
ETUC	European Trade Union Confederation)
EU	European Union
EUROFEDOP	International Federation of Employees in the Public Service
FA	Football Association
FAPL	FA Premier League
FBO	Netherlands Federation of Professional Football Clubs
FIA	International Automobile Foundation
FIBA	International Basketball Federation
FIFA	Federation of International Football Associations
FIFPRO	International Federation of Professional Footballers
FINA	International Swimming Federation
GLA	German Leage Association
GlüStV	State treaty on games of chance (Germany)
HCC	Host state Contract
ICAS	International Council for Arbitration in Sport
ICCPR	International Covenant on Civil and Political Rights
IFs	International Federations
INEA	Institute for European Affairs
INGO	International Non-Governmental Organization
IOC	International Olympic Committee
IPC	International Paralympic Committee
KNBB	Royal Dutch Billiards Association
KNHS	Dutch National Federation of Equestrian Sports
KNVB	Royal Dutch Football Association
LottStV	State treaty concerning lotteries (Germany)
NADO	Doping Authority Netherlands
NOCs	National Olympic committees
NSF	Dutch Sports Federation
NSF	Netherlands Sports Federation
NVoD	Near Video on demand
PPV	Pay-per view
RWLG	Law on Racing Bets and Lotteries (Germany)

StGB	Criminal Code (Germany)
TEU	Treaty on European Union
UCI	International Cycling Union
UCPF	Employers' Union of Professional Football Clubs (France)
UEFA	Union of European Football Associations
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICE	Union of Industrial Employers' Confederation of Europe
UNIRE	National Union for the Betterment of Horse Breeds (Italy)
USOC	American Olympic Committee
VVCS	General Players' Union (Netherlands)
WADA	World Anti-Doping Agency

Contents

1	What is Sports Law? <i>Lex Sportiva</i> and <i>Lex Ludica</i>:	
	A Reassessment of Content and Terminology	1
1.1	Introduction	2
1.2	Does Such a Thing as ‘Sports Law’ Exist?	3
1.2.1	Assessment Framework	5
1.3	What Is ‘Sports Law’?	8
1.3.1	Lex Sportiva	8
1.3.2	Global Sports Law	10
1.3.3	Transnational Sports Law	12
1.3.4	Lex Ludica	12
1.3.5	Public International Sports Law	13
1.3.6	European Sports Law	14
1.3.7	Summary	15
1.4	A Reassessment of Content and Terminology	15
1.4.1	Content	15
1.4.2	Terminology	20
1.5	The Hard Core of Sports Law	24
1.6	Conclusion.	27
1.6.1	Postscript.	27
1.7	Annex	28
1.7.1	An Etymology of the Termini Technici <i>Lex Sportiva</i> and <i>Lex Ludica</i> : Where Do They Come From?	28
	References	31
2	Towards a Typology of (International) Comparative Sports Law (Research)	35
2.1	Introduction	36
2.2	Studies and Reports: A Survey.	41
2.2.1	Public Studies and Reports	41
2.2.2	Private Studies and Reports	46
2.2.3	Private/Public Studies and Reports	55

2.3	Summary and Conclusion	63
	References	65
3	The Specificity of Sport: Sporting Exceptions in EU Law	67
3.1	Introduction	68
3.2	Sport not in European Treaties	70
3.3	Treaty of Amsterdam: 1997 Declaration on Sport	70
3.4	Treaty of Nice: 2000 Declaration on Sport	71
3.4.1	Comment	72
3.5	The Declarations on Sport (Amsterdam, Nice) in the Jurisprudence of the European Court of Justice and Commission Decision-Making	73
3.6	The 2007 White Paper on Sport	75
3.7	The Specificity of Sport in the White Paper	78
3.8	Sport in the Constitutional and Reform (Lisbon) Treaties	79
3.9	Sport Specificity in the 2011 ‘White Paper Plus’	81
3.10	The Practical Application of the ‘Sport Specificity’ Concept in Commission Practice and ECJ Jurisprudence	82
3.10.1	The Application of Internal Market Freedoms (Movement and Services) to Sport	82
3.10.2	The Application of EU Competition Law to the Organisation of Sport	85
3.11	Summary and Conclusion	94
	References	96
4	EU Competition Law and Professional Sport: The Collective Selling of TV Rights in Europe and the Dutch Equestrian Case: How The <i>Meca Medina</i> ‘Test’ for Organisational Sporting Rules is Applied	97
4.1	Introduction	98
4.2	Testing Organisational Sporting Rules Under EU Competition Law	99
4.2.1	General Principles	99
4.3	The Collective Selling of Sports Media Rights	105
4.3.1	Introduction	105
4.3.2	Market Definitions	106
4.3.3	Competition Concerns Resulting from the Behaviour of Sellers	107
4.3.4	Conclusion	114
4.4	The Dutch Equestrian Case	114
4.4.1	The Contested Procedure	114
4.4.2	The EU Competition Law Provisions	115

4.4.3	First Consideration: Is the Sports Association that Adopted the Rule Considered an Undertaking or an Association of Undertakings?	116
4.4.4	Second Consideration: Does the Contested Rule Restrict Competition Within the Meaning of Article 101 TFEU or Constitute an Abuse of a Dominant Position Under Article 102 TFEU?	118
4.4.5	Third Consideration: Is Trade Between Member States Affected?	124
4.4.6	Fourth Consideration: Does the Rule Fulfil the Conditions of Article 101(3) TFEU?	125
4.4.7	The Relevance of Article 165 TFEU	126
4.4.8	Conclusions	127
4.5	Summary and Conclusion	128
	References	130

5 Sports Betting in the Jurisprudence of the European Court of Justice: A Study into the Application of the *Stare Decisis* Principle, or: The Application of the ‘Reversal Method’ of Content Analysis and The Essence of the ECJ Case

	Law on Sports Betting	131
5.1	Introduction	132
5.1.1	Definition of ‘Sports Betting’	134
5.2	Legal and Factual Context of the Case-Law	135
5.2.1	Zenatti (1999)	135
5.2.2	Gambelli (2003)	137
5.2.3	Placanica (2007)	139
5.2.4	Commission v Italy (2007)	143
5.2.5	Liga Portuguesa de Futebol Profissional (2009) (hereafter: Liga Portuguesa)	144
5.2.6	Sporting Exchange Ltd (‘Betfair’) (2010)	148
5.2.7	Ladbrokes (2010)	151
5.2.8	Otto Sjöberg and Anders Gerdin v. Swedish State (2010) (hereafter: Sjöberg/Gerdin)	153
5.2.9	Carmen Media (2010)	155
5.2.10	Summary of the Legal and Factual Context of the Case-Law	160
5.3	The Case-Law Presented According to the ‘Reversal’ Method	162
5.3.1	Carmen Media	162
5.3.2	Sjöberg/Gerdin	164
5.3.3	Ladbrokes	166
5.3.4	Sporting Exchange (‘Betfair’)	168

5.3.5	Liga Portuguesa de Futebol Profissional	170
5.3.6	Commission v Italy.	172
5.3.7	Placanica	173
5.3.8	Gambelli	176
5.3.9	Zenatti.	178
5.3.10	Analysis of the Case-Law	179
5.4	Sports Betting and the Concept of ‘Sports Law’.	186
5.5	Conclusion.	187
	References	189
6	History/Football Politics/Social Dialogue in Sport: Study into the Possible Participation of EPFL and G-14 in a Social Dialogue in the European Professional Football Sector.	191
6.1	Preface	192
6.1.1	Social Dialogue in Sport	192
6.1.2	History: Football Politics (Asser G-14/EPFL Participation Study).	195
6.2	Chapter 1: Introduction	196
6.3	Chapter 2: Mandate, Tasks and Purposes.	198
6.3.1	Summary Concerning the Question of Mandate	206
6.4	Chapter 3: (In)dependence.	206
6.4.1	Summary on (In)dependence	214
6.5	Chapter 4: EU Admissibility Criteria	215
6.6	Chapter 5: Representation in the Context of Present Social Dialogue Committees	218
6.7	Chapter 6: Specificity of Sport.	222
6.8	Chapter 7: Agenda of Topics	224
6.8.1	Artificial Turf.	226
6.8.2	“Home-grown” Players Rule	226
6.8.3	Image Rights	227
6.8.4	International Match Calendar	228
6.8.5	Investment (Player) Funds	229
6.8.6	Non-EU Nationals.	230
6.8.7	Pension Funds	231
6.8.8	Players’ Agents	231
6.8.9	Player Release System.	232
6.8.10	Pyramid Structure.	233
6.8.11	Salary Capping.	234
6.9	Chapter 8: Summary, Conclusions and Recommendations	235
6.9.1	Informal Social Dialogue.	237
6.10	Postscript: New Developments in Football Governance.	237
6.10.1	Specificity of Sport.	239
	References	240