

## Arbitration - Switzerland

When an offer to arbitrate is binding on the offering party

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[Facts](#)  
[Decision](#)  
[Comment](#)

Consent to arbitrate is the fundamental basis for arbitration. Without this consent, arbitrators lack jurisdiction. In the event of controversy about the existence of an arbitration agreement, it is for the arbitral tribunals to interpret the parties' declarations based on general principles of contract law.

### Facts

South Africa-born athlete Gert Thys was disqualified and temporarily suspended from all competitions after testing positive for a banned steroid at the 2006 Seoul International Marathon. Thys had consistently denied any wrongdoing and rejected an offer made on April 10 2008 by the anti-doping administrator of the International Association of Athletics Federations (IAAF) to settle the matter for a two-year ban, subject to Thys's acknowledgement of his offence.

The settlement offer letter read:

*"I would remind you that the decision that will ultimately be taken by the relevant disciplinary commission...will still be subject to an appeal to the Court of Arbitration for Sport in Lausanne, on your initiative if you disagree with it or on the initiative of IAAF, if the decision is not in accordance with the IAAF Rules. This will inevitably lead to a costly and lengthy arbitration procedure until the final award is rendered by CAS."*

The reference to an appeal to the Court of Arbitration for Sport (CAS) was inaccurate, as neither the constitution of Athletics South Africa (ASA) nor IAAF anti-doping rules provide for a direct appeal against ASA disciplinary commission decisions to the CAS.

On December 11 2008, after a long-delayed hearing, the disciplinary commission of ASA (itself a member of the IAAF) imposed, among other things, a 32-month competitive ban on Thys. Thys challenged the ASA disciplinary commission's decision before the CAS. The CAS found that the April 10 2008 settlement proposal contained a valid "offer to arbitrate", implicitly endorsed by ASA, and accepted by Thys when filing his appeal with the CAS.<sup>(1)</sup>

The CAS considered that in light of the circumstances of the case, and in particular the length of the disciplinary proceeding before ASA and the lack of any indication of the appeal procedure in ASA disciplinary commission decision, Thys, in good faith, could rely on the anti-doping administrator's offer to arbitrate the dispute without prior exhaustion of domestic challenge procedures in place. CAS upheld Thys's appeal and set aside the decision of the ASA disciplinary commission. ASA challenged the CAS award before the Supreme Court,<sup>(2)</sup> invoking the lack of jurisdiction of the CAS to adjudicate the matter.

### Decision

The court could not establish the parties' actual exchange of consent to arbitrate. Consequently, the court examined how the April 10 2008 letter should have been understood in good faith, considering its wording and context. More particularly, the court had to decide whether, based on good-faith considerations, the letter should have been understood as a binding offer to arbitrate – that is, whether it contained both the declaration of an undertaking and the intention to be bound therewith. The court considered – against the CAS's own appreciation – that neither the wording nor the context of the letter lent support to the allegation of a binding offer to arbitrate under

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Swiss law.

The wording of the letter indicated that the IAAF anti-doping administrator intended to draw Thys's attention to the costs and duration of the disciplinary proceeding and those of an appeal proceeding before the CAS (erroneously perceived as applicable) should the settlement offer be turned down. No reference could be read herein to any offer to arbitrate, or indeed to any undertaking in relation to procedural matters. The same can be inferred from the context in which the letter was written – namely, the attempt to put an immediate end to the dispute. In such context, the reference to the CAS's jurisdiction could not be construed, in good faith, as an offer to continue the dispute and refer it to arbitration.

The court thus concluded that there was no binding offer to arbitrate, and hence no room for any acceptance of such an offer and ultimately no valid arbitration agreement that allowed Thys to refer the decision of the disciplinary commission to the CAS, and the CAS to adjudicate the matter.

## Comment

Sport arbitration has become so common that it sometimes leads to the erroneous assumption that all sport-related disputes are to be arbitrated.<sup>(3)</sup> Yet the golden rule remains: no arbitration without consent.

Second, the peculiarities of the consent to arbitrate in sport arbitration compared to standard commercial arbitration have long been recognised. Athletes routinely adhere to standard arbitration clauses contained in statutory rules and regulations at the various levels of the sporting world as a prerequisite to their becoming members of a sporting association or federation and, ultimately, participating in sporting competitions. These clauses are in principle valid and binding,<sup>(4)</sup> although one might question the contractual freedom left to athletes when consenting to arbitration.

Perhaps as a way to restore some balance and preserve athletes' right to a judicial process, the anticipatory waiver of the right to challenge an arbitral ruling also commonly contained in such standard clauses (or sometimes stated in more specific documents), has been repeatedly declared inefficient by the Supreme Court.<sup>(5)</sup>

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## Endnotes

(1) The theory of a standing offer to arbitrate and acceptance through filing for arbitration is best known in the context of foreign investment disputes with reference to arbitration clauses contained in bilateral investment treaties (standing offer from the state, acceptance from the investor); see the Supreme Court's unpublished decision of September 7 2006 in 4P.114/2006, *Tschechische Republik, handelnd durch das Finanzministerium, c/ X.*, *Schiedsgericht UNCITRAL Genf*, extracts in *Bull ASA*, 2007.123.

(2) Supreme Court's unpublished Decision 4A\_456/2009, in *X c/ A*.

(3) The phenomenon is such that the number of arbitration awards referred to the Supreme Court has nearly doubled over the past six years, one-third of which are CAS arbitration awards; see for example, *Tschanz/Fellrath*, *Chronique de jurisprudence étrangère (Suisse)*, Rev arb, 2009.827: 827-829.

(4) Supreme Court's unpublished decision of March 25 2004 in 4P.253/2003, *A c/ B et TAS*, ground 5.4; unpublished decision of February 7 2001, in 4P.230/2000, ground 2a, excerpts in *Bull ASA*, 2001.523.

(5) See leading case in that respect: Supreme Court's decision of March 22 2007 in 4P.172/2006, *X c/ ATP TOUR (Cañas case)*, published in the ATF, 133 III 235, excerpts in *Bull ASA*, 2007.592.

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