CAS 2023/A/9519 Paolo Barelli v. FINA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Prof. Dr. Eligiusz Krześniak, Attorney-at-Law in Warsaw, Poland

Arbitrators: Prof. Massimo Coccia, Attorney-at-Law and Law Professor in Rome, Italy

Alexander McLin, Attorney-at-Law, Lausanne, Switzerland

in the arbitration between

Paolo Barelli, **Rome, Italy**

Represented by Étienne Campiche and Fabien Hohenauer, Attorneys-at-Law, HDC, Lausanne, Switzerland

Appellant

v.

World Aquatics (formerly Fédération Internationale de Natation), Lausanne, Switzerland

Represented by Emanuel Cortada, Attorney-at-Law, Bär & Karrer, Zurich, Switzerland

Respondent

I. PARTIES

1. Mr. **Paolo Barelli** (the "**Appellant**" or "**Mr. Barelli**") is the President of the Italian Swimming Federation ("**FIN**"), which is a member of World Aquatics.

2. **World Aquatics** (formerly Fédération Internationale de Natation or FINA[1]) (the "**Respondent**" or "**FINA**") is an international sports federation recognized by the International Olympic Committee ("**IOC**") as the sole and exclusive world governing body for aquatic sports. FINA is an association established and organized in accordance with Article 60 et seq. of the Swiss Civil Code.

3. The Appellant and FINA are hereinafter jointly referred to as the "**Parties**".

II. FACTUAL BACKGROUND

A. Introduction

4. The present dispute revolves around the decision rendered by the FINA Ethics Panel on 28 February 2023 (the "**First Referral Decision**"). In the First Referral Decision, the FINA Ethics Panel (the "**Ethics Panel**") found that the Appellant had committed corrupt practices and failed to declare a personal interest to the Ethics Panel, in violation of the FINA Code of Ethics, and banned the Appellant for a fixed period of one year from participating in any aquatics-related activities under the auspices of FINA or its members. Furthermore, the Ethics Panel also ordered the Appellant to reimburse FINA for EUR 297,540.

5. The pertinent facts and allegations based on the Parties' written and oral submissions and evidence are summarized below. References to additional facts and allegations found in the Parties' submissions and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in its award only to those submissions and evidence it deems necessary to explain its reasoning.

B. Background facts

6. The Appellant was elected President of FIN in 2000 and continues to serve in that capacity.

7. The Appellant was elected President of Ligue Européenne de Natation ("**LEN**") in September 2012 and held that position until February 2022.

8. The Appellant was also the Honorary Secretary of FINA between September 2009 and July 2017, and the Vice-President of FINA between 2017 and 2021.

[1] According to Article 1 of the World Aquatics Constitution, in effect from 1 January 2023, FINA has been renamed World Aquatics.

9. Between September 2009 and July 2015, the Appellant was providing FINA with invoices, usually amounting to EUR 3,000 per month, issued by an Appellant's assistant, Mr. Franco Concordia, for reimbursement of costs related to secretarial services performed in favour of the Appellant in connection with his role as Honorary Secretary of FINA. FINA representatives would pay such invoices to Mr. Concordia by delivering to the Appellant the corresponding amounts in cash, at irregular intervals, usually coinciding with sporting events held by FINA. Those payments (i) were made by the FINA employee Ms. X. based on the instructions received from the then Executive Director of FINA, and (ii) were then regularly recorded in the FINA's accounts and ledger.

10. As of 2016, FINA started making payments in the same amounts, i.e. EUR 3,000.00, to C.I.R.AUR s.r.l. (the "**Company**"), an entity in which the Appellant holds a majority stake. These payments were made by wire transfers to the Company's bank account against invoices issued by the latter.

11. FINA's direct cash payments to the Appellant and wire transfers to the Company, as reimbursement for costs of secretarial services totalled EUR 297,540, VAT inclusive.

C. Proceedings before FINA Executive and FINA Ethics Panel

12. On 1 April 2022, the FINA Executive referred the present matter, as well as other allegations of wrongdoing, to the FINA Ethics Panel for investigation and adjudication as per FINA Rules (the "**First Referral**"). In particular, the Ethics Panel was asked to investigate whether the Appellant had in any way violated the FINA regulations in relation to:

    i. payments from FINA for secretarial expenses in relation to the Appellant's role of the Honorary Secretary of FINA;

    ii. payments to the Company, which the Appellant partially owns, as reimbursement for his expenses;

    iii. payments to other companies in relation to renewing sponsorship and broadcasting agreements; and

    iv. payments to a Member Federation to cover the costs of its respective appeals to the Court of Arbitration for Sport against FINA.

13. In the First Referral, the FINA Executive indicated that the Appellant may have allegedly violated Article C.4 of the 2013 FINA Code of Ethics ("**FEC**" or "**FINA Code of Ethics**") and/or Article D.7 of FEC and/or any other FINA Rules. According to the First Referral:

> "*In light of the above, the FINA Executive, based on FINA Rule C 24.5, decided to refer the case of Mr. Barelli to the FINA Ethics Panel for investigation and adjudication as per FINA Rules. In particular, the FINA Executive requested a determination on whether Mr. Barelli*

> *and/or any other person committed a violation of Article C.4 and/or D.7 of the FINA Code of Ethics and/or any other FINA Rules*".

14. Article C.4 of FEC reads as follows:

> "*Betting on Aquatics and other corrupt practices relating to the sport of Aquatics by any person being subject to this Code, including improperly influencing the outcomes and results of an event or competition are prohibited. Any person being subject to this Code is forbidden from having stakes, either actively or passively, in any entity or, organization that promotes, brokers, arranges or conducts such activities or transactions.*"

15. Article D.7 of FEC reads as follows:

> "*No Official shall, directly or indirectly, solicit, accept or offer any concealed remuneration, commission, benefit or service of any nature connected with their participation in Aquatics or with their function as an Official.*"

16. On 20 May 2022, the Appellant informed the Ethics Panel that criminal proceedings were underway in Switzerland in relation to the allegations against him, and he requested that this matter be held in abeyance until an outcome of those proceedings has been received.

17. On 30 May 2022, the Ethics Panel granted the request and suspended the proceedings until 30 November 2022, on the proviso that, should the criminal proceedings be concluded prior to that date, the proceedings could be resumed earlier.

18. On 30 November 2022, the Appellant informed the Ethics Panel that the investigative phase of the Swiss criminal proceedings had finished, but no decision had been received yet. He asked the Ethics Panel to further suspend the proceedings until 15 January 2023.

19. On 5 December 2022, the Ethics Panel informed the Respondent that the proceedings had been further suspended until 15 January 2023, on the proviso that, should the Swiss criminal proceedings be concluded prior to that date, the proceedings could be resumed earlier.

20. On 28 November 2022, the Swiss criminal proceedings against the Appellant concluded without any charges having been brought against the Appellant. The Ethics Panel obtained a copy of the Swiss authorities' reasoned decision, notified on 7 December 2022, in this respect. The reasoned decision addressed the allegations also made in the First Referral, except the payments from FINA for the expenses in relation to the Appellant's role as the Honorary Secretary of FINA.

21. On 15 December 2022, the Ethics Panel informed the Appellant that the proceedings had been resumed.

22. On 30 December 2022, the Appellant submitted his defence in the matter and asked for additional documentation related to it. He also requested an opportunity to supplement his explanations once he has received the documentation.

23. On 3 January 2023, the Ethics Panel provided the Appellant with the requested documentation and afforded him an opportunity to supplement his defence.

24. On 24 January 2023, the Appellant provided the Ethics Panel with his supplemented defence.

25. On 28 February 2023, the Ethics Panel issued a decision (the "**First Referral Decision**") holding that the Appellant had committed corrupt practices and failed to declare a personal interest to the Ethics Panel, thus violating Articles C.4 and F.12 of FEC.

26. Article C.4 of FEC has been cited above under para. 14.

27. Article F.12 of FEC reads as follows:

> "*When performing an activity for FINA or being elected or appointed, the candidate or Official shall disclose to the Ethics Panel any personal interests that could be linked with their prospective FINA activities (…)*"

28. The Ethics Panel banned the Appellant for a fixed period of one year from participating in any aquatics-related activities under the auspices of FINA or its members. Furthermore, the Ethics Panel ordered the Appellant to reimburse FINA the amount of EUR 297,540.

29. The operative part of the First Referral Decision reads as follows:

> "*The Ethics Panel considers that the violations of the Code of Ethics for corrupt practices and for his failure to report a personal interest to the Ethics Panel are serious violations which tarnish the image and reputation of Aquatics. This even more when such violations are committed by such an experienced and high official as Respondent. Thus, the Ethics Panel has decided to impose on the Respondent a suspension for a fixed period of one year from taking part in any Aquatic-related activities under the auspices of World Aquatics or any of its members. Such suspension shall commence at the end [of] the period of suspension currently being served by the Respondent, i.e. 14 September 2024. In accordance with the applicable rules, any appeal filed against the present decision shall not have any suspensive effect.*
>
> *The Ethics Panel also orders the Respondent to reimburse to World Aquatics (formerly FINA) the totality of the undue payments received i.e. net EUR 297'540. The one-year ban imposed on the Respondent shall remain in force even after its expiry if the amount of net EUR*

297'540 has not been reimbursed in full to World Aquatics (formerly FINA.)

Any procedural costs determined now by the World Aquatics (formerly FINA) administration shall also be borne by the Respondent".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

30. On 21 March 2023, the Appellant filed with the Court of Arbitration for Sport (CAS) the Statement of Appeal against the First Referral Decision and appointed Prof. Massimo Coccia as an arbitrator. The Appellant also requested that the First Referral Decision be stayed (the "**Request for Stay**").

31. On 24 March 2023 the CAS Court Office acknowledged receipt of the Statement of Appeal of 21 March 2023 and served its copy on the Respondent, which was, *inter alia*, invited to appoint a CAS arbitrator.

32. On 29 March 2023, FINA appointed Mr. Alexander McLin as an arbitrator; FINA also accepted English as the language of the proceedings.

33. On 3 April 2023, the Appellant filed his Appeal Brief pursuant to Article R31 and Article R51 of the Code of Sports-Related Arbitration (the "**CAS Code**").

34. On 4 April 2023, the CAS Court Office served a copy of the Appeal Brief on FINA, which was invited to submit its answer.

35. On 5 April 2023, the Parties were informed that both Prof. Coccia and Mr. McLin had made their respective disclosures. They were also duly reminded that, pursuant to Article R34 of the CAS Code, an arbitrator may be challenged within seven days after the grounds for the challenge had become known.

36. On 18 April 2023, the CAS Court Office noted and communicated to the Parties that the nominations of Prof. Coccia and Mr. McLin had not been challenged.

37. On 27 April 2023, the CAS Court Office informed the Parties, on behalf of the Deputy President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Eligiusz Krześniak, President of the Panel; Prof. Massimo Coccia and Mr. Alexander McLin, Arbitrators.

38. On 11 May 2023, the Appellant submitted the following three new documents: (i) the Decision no. 7/2023 issued on 3 May 2023 by the Italian General Prosecutor for Sports within the Italian Olympic Committee (CONI), (ii) the Decision sent on 8 May 2023 by the FIN Prosecutor to the FIN General Secretary, and (iii) a press release dated 10 May 2023.

39. On 15 May 2023, the CAS Court Office acknowledged receipt of these documents and set the Respondent the deadline of 19 May 2023 to state its position on the admissibility of these documents.

40. On 19 May 2023, the Respondent objected to admitting the above documents to the CAS file and requested that, should they nonetheless be admitted, the Respondent be afforded time to comment on them.

41. On 22 May 2023 and within the relevant time-limit, the Respondent filed the Answer to the Appeal Brief pursuant to Article R55 of the CAS Code. The Answer was notified on 23 May 2023 and the Parties were invited to provide their position on the holding of a hearing and of a case management conference.

42. On 25 May 2023, the Panel accepted the documents submitted by the Appellant on 11 May 2023 and invited the Respondent to provide its comments. The Parties were further invited to express their position on the holding of a hearing.

43. On 26 May 2023, the Respondent informed that it neither wished to hold a hearing in this matter, nor to have a case management conference.

44. On 9 June 2023, the Appellant informed CAS that he wished for the Panel to hold a hearing and a case management conference.

45. On the same day, the Respondent provided his comments to the documents filed on 11 May 2023

46. Between 16 and 29 June 2023, the CAS Court Office and the Parties exchanged letters agreeing on the date of the case management conference and the hearing.

47. The case management conference was held on 5 July 2023 with Counsel for both Parties, the President of the Panel and Ms Carolin Fischer, Counsel to the CAS.

48. On 6 July 2023, the CAS Court Office notified the Parties that the hearing had been scheduled for 26 September 2023 at 10:30 am.

49. On 22 September 2023, the CAS Court office sent the Order of Procedure to the Parties, which was returned duly signed by both Parties within the prescribed deadline.

50. On 26 September 2023, the scheduled hearing was held in Lausanne in the presence of the President of the Panel, while the two other Panel members joined remotely via Webex. Apart from the Panel and Ms. Pauline Pellaux, Counsel to the CAS, the following participants attended the hearing:

For the Appellant:

Mr Paolo Barelli (the Appellant) and Mr Étienne Campiche (Counsel to the Appellant)

For the Respondent:

Mr Emanuel Cortada, Mr Jonáš Gürtler and Ms Corina Quirighetti (Counsels to the Respondent) and Mr Justin Lessard (FINA Manager).

Witness (called by the Respondent)*:*

Ms X.

51. The witness was invited by the President of the Panel to tell the truth, subject to sanctions of perjury. The Parties and the Panel had the opportunity to examine and cross-examine the witness.

52. At the conclusion of the hearing the Parties expressly stated that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings.

IV. SUBMISSIONS OF THE PARTIES

53. This section of the Award does not exhaustively list the Parties' contentions, its aim being to summarize the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Panel has accounted for and carefully considered all of the oral and written submissions made and evidence adduced by the Parties, including the allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Position

54. The Appellant's submissions may, in essence, be summarized as follows:

(a) The Appellant contested the First Referral Decision issued by the Ethics Panel on 28 February 2023, as it was fundamentally flawed and in breach of the law. The Appellant quoted several legal arguments in support of his claim.

(b) First, the Appellant emphasized that the First Referral Decision violates the Appellant's fundamental rights, because it was issued arbitrarily, which infringes Article 9 of the Swiss Constitution.

(c) In the Appellant's view, the Ethics Panel had ignored the fact that for the most part, the payments were being received by Mr. Franco Concordia, and in the last year (mid-2016 to mid-2017), by the Company. Therefore, the Ethics Panel had erroneously considered that it had been the Appellant that had been receiving EUR 3,000 per month as reimbursement for secretarial expenses between September 2009 and July 2017, totalling EUR 297,540, VAT inclusive.

(d) Moreover, the Appellant stated that he had neither ordered nor instructed FINA to pay for these services, nor had he claimed and accepted any payments for such services. The Appellant also noted that the FINA Ethics Panel did not provide evidence showing that a mismanagement issue was investigated within FINA.

(e) The Appellant pointed out that the First Referral Decision fails to provide any evidence to the contrary and, pursuant to Article 8 of the Swiss Civil Code, the burden of proof rests with the Respondent. It was the Respondent that had decided on its own to pay for logistical and secretarial services directly to Mr. Franco Concordia and then to the Company.

(f) Second, the Appellant stated that the First Referral Decision violates the *nulla poena sine lege certa* principle in many ways.

(g) On that note, the Appellant pointed out that the First Referral Decision refers to the facts transpiring between September 2009 and July 2017, whereas the FEC took effect on 22 February 2013 and, therefore, the FINA Ethics Panel had no competence to rule on anything that happened before that date.

(h) Furthermore, the Appellant emphasized that the FINA Ethics Panel considered that the Appellant had violated Article C.4 of the FEC, which is inapplicable to the circumstances of the present matter, since it pertains to bets and competitions. Even if the Appellant had received payments from the Respondent, this would not have qualified as a corrupt practice because the payments had been made as reimbursement for actual services rendered and not in relation to any competition. The Appellant also pointed out that the First Referral Decision fails to provide any evidence to the contrary, or even to the mismanagement issue regarding the payments concerned.

(i) In addition, the Appellant stressed that the allegation of breaching Article F.12 of the FEC for failure to report his 80% ownership of the Company is misconceived, because the information about the Appellant's ownership stake in the Company had been publicly available.

(j) Therefore, the Appellant concludes that the FINA Ethics Panel has failed to establish that the Appellant had breached any specific rules.

(k) Third, the Appellant indicated that the order to reimburse the Respondent for the "*totality of the undue payments received i.e. net EUR 297.540*", is without merit, as the Appellant never received that money. Moreover, the request to repay the money lacks any legal basis, given that Article VI.9 of FEC in effect in 2013 and Article C 12.2 of the FINA Constitution in effect from 2014 to 2017 exhaustively list all possible sanctions. Reimbursement is not among them.

(l) The Appellant also raised an objection to the reimbursement order, claiming that Respondent's actions could even qualify as blackmail in the terms of Article 156 of the Swiss Criminal Code.

(m) Moreover, the Appellant pointed out the inadmissibility of the Respondent's reservation of the right "*to further investigate and take a decision at a later stage on such other allegations that are not determined*", stated in the First Referral Decision. In the Appellant's view, the FINA Ethics Panel cannot reserve the

right to decide upon further sanctions in the future, since there is no legal basis for issuing a partial decision. According to Appellant, the Award to be issued by the CAS Panel will close the matter definitively, and all facts referred to the Ethics Panel will have a *res judicata* effect.

(n) Third, the Appellant also alleged that the First Referral Decision violates the proportionality principle, because:

> "*it fails to explain for what reason a warning or a reprimand was not considered. The ban is the heaviest sanction in the catalogue. It cannot be an appropriate and balanced way to punish a situation created by the Respondent itself*".

(o) Finally, in his submission dated 11 May 2023, the Appellant notified that the General Prosecutor for Sports appointed by the Italian Olympic Committee authorised the Prosecutor for the Italian Swimming Federation to drop all the charges held against the Appellant. Both the General Prosecutor for Sports appointed by the Italian Olympic Committee and the Prosecutor for the Italian Swimming Federation consider that Mr. Barelli did not breach any ethical or disciplinary rules and that no sanctions were warranted against him. The Appellant seems to argue that since the Italian authorities dropped the charges against him, the CAS Panel should follow suit.

55. In his Appeal Brief, the Appellant submitted the following prayers for relief:

> "*Pursuant to Articles R47 et seq. of the CAS Code, and for the reasons developed in this Appeal Brief, Appellant requests that the Panel to be constituted in this case issue an award:*
>
> ***Primarily***
>
> *a. holding that the Appeal is admissible;*
>
> ***Additionally***
>
> *b. holding that the Appeal is admitted;*
>
> *c. holding that the decision of the FINA Ethics Panel to ban the Appellant for a fixed period of one year from taking part in any Aquatic-related activities under the auspices of World Aquatics (formerly FINA) or its members is annulled for violating basic rules of law and utmost fundamental rights of the Appellant, as well as World Aquatic's (formerly FINA's) internal regulations;*
>
> *d. holding that the decision of the FINA Ethics Panel to order the Appellant to reimburse to World Aquatics (formerly FINA) a net amount of EUR 297'540, the one-year ban imposed remaining in force even after its expiry if the amount of net EUR 297'540*

has not been reimbursed in full to World Aquatics, is annulled for violating basic rules of law and fundamental rights of the Appellant, as well as World Aquatic's (formerly FINA's) internal regulations;

Subsidiarily

holding that the Appeal is admitted;

b. re-evaluating the situation thoroughly with all available evidence and most importantly with the defence of the Appellant in order to produce a sanction that is proportionate to circumstances of the case at hand;

In any event

c. ordering FINA to bear and reimburse the Appellant for all costs arising out of this appeal arbitration procedure before the CAS, including but not limited to legal and expert fees, arbitration costs and translation costs."

B. The Respondent's Position

56. The Respondent's submissions may be summarized as follows:

(a) The Respondent stated that the Appellant had clearly violated Article C.4 of the FEC by claiming and accepting from World Aquatics undue reimbursement for costs of alleged secretarial services that had never been incurred. According to the Respondent, such behaviour is clearly dishonest and constitutes a corrupt practice relating to aquatic sports.

(b) The Respondent further stated that the Appellant must also be sanctioned under Article F.12 of FEC, due to his failure to comply with the obligation to report his personal interest to the Ethics Panel when, in connection with his role of the Honorary Secretary of FINA, from 2016 onwards, he requested, received and accepted payments from World Aquatics to the Company, in which the Appellant has an 80% (eighty percent) ownership interest.

(c) The Respondent stated that it is in the sole discretion of the FINA Ethics Panel to decide which sanction to impose from the wide range of sanctions.

(d) The Respondent indicated that – contrary to Appellant's assertion – the Appellant had been receiving money from FINA, first in cash and then to the account held by the Company, in which he had a majority stake, and that he would request and accept payments, which was corroborated by the testimony of Ms. X. The Respondent also noted that whether or not other individuals within FINA committed wrongdoing by approving these payments falls outside the scope of the present appeal.

(e) The Respondent stated that no evidence supports that Mr. Franco Concordia, the Appellant's presumed secretary, provided any secretarial services. The Respondent also did not receive or obtain any evidence that the Company provided any secretarial services concerning the Appellant's duties as the Honorary Secretary. In view of the Respondent, the burden of proof lies with the Appellant since a negative fact (lack of services) cannot be proven directly.

(f) The Respondent contested the Appellant's allegation of violating the *nulla poena sine lege* principle. According to the Respondent, the Appellant's violations occurred, at least partly, after the FEC took effect, and prior to that (i.e. before 22 February 2013) his actions would have violated Article 2 of the FINA By Laws, which prohibited "acts of misbehaviours" and "acts of misconduct".

(g) Addressing the Appellant's allegations, the Respondent stated that Article C.4 of FEC applies not only to sports betting, but also to other practices of wrongdoing and that it, therefore, applies to the present matter.

(h) The Respondent pointed out that the Appellant's ownership of the company having been public information did not relieve him from his obligation to disclose such personal interest to the Ethics Panel. All personal interests must be disclosed, without exceptions, and even if – pursuant to Article F.12 of FEC – this only "*may draw the attention of the candidate or Official to potential conflicts of interest that it identifies*".

(i) The Respondent also submitted that the ordered reimbursement of EUR 297,540 is in fact a fine, which is listed as a possible sanction.

(j) Moreover, Article C12.10 of the FINA Constitution, which took effect on 23 July 2015, specifically mentions that there is no time limit to take action on corruption violations. As follows from the Respondent's position, the sanction also does not qualify as blackmail, but as a proportionate and fair sanction imposed by an independent FINA body.

(k) The Respondent claimed that nothing in the Ethics Panel Procedural Guidelines, or in any other World Aquatics regulations, prevents the Ethics Panel from taking a decision only with respect to some of the allegations against the Appellant.

(l) The Respondent confirmed that the Ethics Panel had only ruled on the payments from World Aquatics as secretarial expenses in relation to the Appellant's role as the Honorary Secretary of FINA, while leaving the other allegations aside. In the Respondent's view, this is acceptable and gives rise to no negative consequences. Should the Ethics Panel decide in the future to take other action with respect to other allegations, which were not included in the First Referral Decision, it may do so.

(m) The sanction imposed on the Appellant is proportionate, given the Appellant's FEC violations. It is not the most severe sanction possible. A lighter sanction would have been insufficient.

(n) The Respondent finally noted that the documents submitted by the Appellant on 11 May 2023 are irrelevant to establishing the facts of the matter. The Respondent stressed that they concern separate proceedings against the Appellant, initiated by the prosecutor of the Italian Swimming Federation, while the current CAS proceedings refer to the decisions of the FINA Ethics Panel. Hence, the Respondent opposed admitting the documents into the case file.

57. In the Answer to the Appeal Brief, the Respondent submitted the following prayers for relief:

> "*On behalf of World Aquatics, the undersigned respectfully request this honourable CAS Panel:*
>
> *1. To dismiss the Appeal and to confirm the Appealed Decision;*
>
> *2. To order Appellant to bear the arbitration costs in full;*
>
> *3. To order Appellant to pay an amount of no less than CHF 10,000 as contribution to the legal fees incurred by World Aquatics*".

V. JURISDICTION OF THE CAS

58. Pursuant to Article 186(1) of the Swiss Federal Private International Law Act ("**PILA**"), the CAS has the power to decide upon its own jurisdiction.

59. Article R47 of the CAS Code states as follows:

> "*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body*."

60. In this case, the Appellant relies on Article C.12.13.2 of the 2021 FINA Constitution and on Article 20.1 of the FINA Ethics Panel Procedural Guidelines.

Article C.12.13.2 of the FINA Constitution provides as follows:

> "*A Member, member of a Member, or individual sanctioned by the Doping Panel, the Disciplinary Panel or the Ethics Panel may appeal the decision exclusively to the Court of Arbitration for Sport (CAS), Lausanne Switzerland* [...]."

Article 20.1 of the FINA Ethics Panel Procedural Guidelines provides as follows:

> "*A final decision issued by the Hearing Panel is subject to an appeal to the Court of Arbitration for Sport in accordance with art. C12.13.2 FINA Constitution*".

61. The Panel notes that the new Constitution of FINA, now World Aquatics, entered into force on 30 January 2023 (the "2023 Constitution"), that is, prior to the adoption and notification of the First Referral Decision, which occurred on 28 February 2023. The Panel also observes that jurisdictional issues are procedural in nature and that, on the basis of the principle *tempus regit actum* as interpreted and applied by CAS jurisprudence, "*any procedural rule applies immediately upon its entry into force and governs any subsequent procedural act, even in proceedings related to facts occurred beforehand*" (CAS 2017/A/5086, para. 119). Therefore, the Panel finds that the appellate jurisdiction of the CAS in the present case is actually governed by the 2023 Constitution and not by the previous FINA Constitution invoked by the Appellant; however, in practical terms, nothing changes because the 2023 Constitution also "*recognises the Court of Arbitration for Sport (CAS), with seat in Lausanne, Switzerland, as exclusive court to resolve any kind of disputes between World Aquatics, World Aquatics Members, members of World Aquatics Members, Continental Organisations, National Aquatics bodies, Athletes, Officials and any person or organisation subject to this Constitution and/or any World Aquatics rule or regulation*" (Article 31.1) and provides that "*a final decision of World Aquatics imposing a disciplinary sanction or measure can be appealed within twenty-one (21) Days from the date of the decision to the Court of Arbitration for Sport (CAS)*" (Article 30.6).

62. In any event, neither Party has questioned the jurisdiction of the CAS in these arbitration proceedings and both Parties have confirmed it by signing without any reservation the Order of Procedure. As a result, CAS has jurisdiction to hear and adjudicate the present case.

VI. ADMISSIBILITY OF THE APPEAL

63. Pursuant to Article R49 of the CAS Code:

> "*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties*."

64. While the old FINA Constitution and the FINA Ethics Panel Procedural Guidelines were silent on any time limit for appealing against decisions issued by the FINA Ethics Panel, the new 2023 Constitution sets forth (in Articles 30.6 and 31.2) a 21-day time limit which mirrors the default 21-day deadline provided by the above Article R49 of the CAS Code.

65. Given that the First Referral Decision was issued on 28 February 2023 and the Appellant filed its Statement of Appeal on 21 March 2023, the 21-day time limit was complied with.

66. Therefore, the Appeal is admissible.

VII. APPLICABLE LAW

67. Article R58 of the CAS Code provides as follows:

> "*The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

68. Since FINA is incorporated in Switzerland, the Panel deems the applicable regulations to be the Statutes and the various regulations of FINA and, subsidiarily, Swiss law. This is confirmed by the 2023 Constitution, which provides that the "*CAS shall resolve any dispute in accordance with the Code of Sports-related Arbitration (the 'CAS Code'), this Constitution, the applicable World Aquatics Rules and subsidiarily Swiss law*" (Article 31.3).

VIII. MERITS

69. In the present matter, there is a confluence of several factual and legal issues which may be pertinent to its resolution.

70. First ("**Question no. 1**"), it must be determined whether the Appellant's indicated actions took place before or after 22 February 2013 (or both before and after), and what bearing – if any – this has on the consequences of Appellant's actions. In the present matter, FINA alleges that the Appellant had breached the FEC, while indicating that the Appellant might have also breached certain non-specific "*other FINA rules*". The Ethics Panel, however, based sanctions on the Appellant exclusively on the FEC. The FEC entered into force on 22 February 2013. According to the *nullum crimen sine lege previa* principle, which is widely accepted in sports disciplinary liability systems and enshrined in CAS jurisprudence, only such conduct that violates a rule in force at the time of the alleged violation can be sanctioned. This Panel has followed the same principle in its

ruling in CAS 2022/A/9296. By way of an example, the Panel refers to the already quoted award CAS 2017/A/5086, which so stated:

> "*according to well-established CAS jurisprudence, intertemporal issues are governed by the general principle* tempus regit actum *or principle of non-retroactivity, which holds that (i) any determination of what constitutes a sanctionable rule violation and what sanctions can be imposed in consequence must be determined in accordance with the law in effect at the time of the allegedly sanctionable conduct, (ii) new rules and regulations do not apply retrospectively to facts occurred before their entry into force (CAS 2008/A/1545, para. 10; CAS 2000/A/274, para. 208; CAS 2004/A/635, para. 44; CAS 2005/C/841, para. 51), (iii) any procedural rule applies immediately upon its entry into force and governs any subsequent procedural act, even in proceedings related to facts occurred beforehand, and (iv) any new substantive rule in force at the time of the proceedings does not apply to conduct occurring prior to the issuance of that rule unless the principle of* lex mitior *makes it necessary*."

71. Therefore, if the Appellant's relevant actions took place prior to 22 February 2013, he may not be held liable under the FEC. Only if the Appellant acted on or after 22 February 2013, will it be possible to ponder his potential liability under the FEC.

72. Second ("**Question no. 2**"), one ought to consider whether the Appellant can be found liable for allegedly breaching Article F.12 of FEC, since this provision was not specified in the First Referral and only surfaced during the proceedings before the Ethics Panel.

73. Third ("**Question no. 3**"), one ought to ascertain what kinds of actions (*in abstracto*) may be considered as breaching the FEC norms indicated by the Ethics Panel (i.e. Article C.4, quoted *supra* at para. 14 and Article F.12, quoted *supra* at para. 27); in particular, given the language of Article C.4 and the obvious fact that here we are not dealing with "*betting*" practices, the Panel must identify which actions may qualify as "*corrupt practices*", given that they are not further qualified or detailed by the FEC. The Panel is aware that identifying all such actions would be impossible; nonetheless, at least some common denominator characterizing such negative behaviour should be identified.

74. Fourth ("**Questions no. 4 and no. 5**"), one ought to assess the particular actions which the Appellant took in view of the characteristics of the breaches of Article C.4 and of F.12 of FEC, while taking into accounts the factual context of those actions. This will enable the Panel to determine whether the Appellant's actions may be deemed as breaching either one or both of those norms. The Panel will first deal with the actions undertaken by the Appellant until July 2015, i.e. personally collecting money for secretarial services (Question no. 4) and then the actions undertaken by the Appellant as of 2016, i.e. allowing the Company to receive wire transfers from FINA while not disclosing the fact that the Appellant controls the Company (Question no. 5)

75. The Panel will address these issues one by one.

Question 1. Did the Appellant undertake his actions before or after February 2013?

76. Before the Panel proceeds to addressing this issue, the actions in question should be indicated.

77. It is undisputed that FINA started paying the Appellant in cash in September 2009, i.e. long before FEC was adopted and took effect.

78. It is, likewise, undisputed that FINA continued to make such payments to the Appellant until July 2015, i.e. long after FEC took effect.

79. It is, finally, undisputed that FINA started paying the Company on 2016, i.e. three years after the FEC became binding.

80. The First Referral Decision, nevertheless, found the Appellant guilty of violating the FEC for the entire period of receiving the payments (both directly by the Appellant and by the Company), i.e. from September 2009. This conclusion follows directly from the very language of the First Instance Decision, as well as from simply adding the amounts which the Appellant had been obliged to refund pursuant to Section 38 of the First Referral Decision.

81. One, thus, must deem a significant portion of the Appellant's actions to have been performed prior to 2013.

82. This can lead to the conclusion that the First Referral Decision found the Appellant guilty of continuously violating – for over three years (between September 2009 and February 2013) – the provisions of a regulation (the FEC) which had not yet been adopted by FINA.

83. In the current proceedings before CAS, the Respondent argues that the *nulla poena sine lege* principle had not been breached for two reasons.

84. First, due to the fact that the Appellant's violations occurred "*at least partly, after the FEC came into force*".

85. Second, since "*prior to its entry into force, i.e. prior to 22 February 2013, [the Appellant's] actions would have constituted a violation of Art. 2 of the FINA By Laws which prohibited "acts of misbehaviours" and "acts of misconduct".*

86. With regard to the first point, the fact that the Appellant's violations occurred, as the Respondent itself has emphasized (which is undisputed in the present matter), "*at least partly, after the FEC came into force*" does not change the fact that some of the Appellant's alleged violations occurred *before* the FEC entered into force, which in its own right renders the First Referral Decision – at least partially – faulty for having applied retrospectively some substantive disciplinary rules in violation of the *nullum crimen sine lege, nulla poena sine lege* principles.

87. With regard to the second point, the Respondent's allegation that the Appellant might have violated Article 2 of the FINA Bylaws in force in 2009 appears to be an attempt at "saving" the faulty First Referral Decision to the extent it pertains to the Appellant's actions taken before February 2013. Nothing stood in the way of both FINA itself (in the First Referral) and the Ethics Panel (in the proceedings resulting in issuing the First Referral Decision) indicating the Appellant's alleged violation of these provisions. The Appellant would have then been able to address the merits of these allegations and defend himself on this point during the disciplinary proceedings conducted by the Ethics Panel.

88. Indeed, CAS panels have constantly stated that, although an appeal to the CAS entails a *de novo* review of the case, it is not available to the parties the possibility to unduly broaden on appeal – especially in disciplinary proceedings – the objective scope of the case that was discussed before the sports body whose decision has been appealed: "*In accordance with well-established CAS jurisprudence, the Panel's power of review is* de novo *but at the same time is limited to the objective and subjective scope of the Appealed Decision. Accordingly, the Panel concurs … that its power of review is limited to the parties, facts and legal issues related to the Appealed Decision*" (CAS 2018/A/6040, para. 79). Accordingly, the Panel has serious doubts that it may deal on appeal with an alleged breach by the Appellant of rules that were not even mentioned, let alone considered or discussed, in the First Referral Decision (also in view of the problematic circumstance that under Article 3 of the old FINA By Laws any sanction had to ultimately be imposed by the FINA Bureau and not by the Ethics Panel).

89. Be that as it may, the Panel need not rule on the permissibility of a sanction based on a regulation that was not even mentioned by the sanctioning sports organization in its own disciplinary decision for the following reason. Indeed, even casting aside the Panel's doubts and admitting, *arguendo*, (i) that the Panel might apply the old FINA By Laws to the Appellant's conduct before 22 February 2013, and (ii) that said Article 2 of the FINA By Laws covers and sanctions the same corrupt practices sanctioned by Article C.4 of FEC, the reasoning and outcome of this award would not change, given that the factual pattern under disciplinary scrutiny in this case was exactly the same before and after 2013 and, as will be seen below, the Panel has found on the merits that the Appellant did not misbehave – either before or after 22 December 2013 – and that no sanction is thus warranted for his conduct (see *infra* at paras. 101 ff.).

Question 2. Can the Appellant be found liable for violating a FEC provision which was not expressly referred to in the First Referral?

90. In the present matter, FINA alleges that the Appellant breached the FEC, while indicating that the Appellant might have also breached certain non-specific "*other FINA rules*". The Ethics Panel, however, based its right to sanction the Appellant exclusively on two FEC provisions. Out of those two provisions, only one (C.4) was been expressly referred to in the First Referral, while the other (F.12) was not.

91. The Panel believes that such actions on the part of the disciplinary authorities may – entirely hypothetically and under certain circumstances – raise concerns as to ensuring

the right to defence in disciplinary proceedings. Unequivocally formulating the allegations and providing the proposed legal qualification should be deemed the proper course of action.

92. Nonetheless, the Panel finds that the First Referral was simply an administrative communication on behalf of the FINA Executive to bring the Appellant's conduct to the attention of the appropriate disciplinary body and that the legal qualifications of the actions taken by the Appellant were within the purview of the competent disciplinary authority – in the present matter, the FINA Ethics Panel. At the same time, the Panel fails to see in the present matter any circumstances that may indicate that the Appellant has been deprived of his right to defence. For this reason, it should be deemed that the Appellant may be found in violation of Article F.12 of the FEC even if it was not indicated in the First Referral, but only in the course of the first instance proceedings.

Question 3. What kinds of actions may qualify as "corruption" in sports?

93. As regards this issue, in view of the fact that FINA rules do not define the notion of "corrupt practices" in any manner whatsoever, this Panel already undertook a broad analysis of the definition of corruption in the sporting context in CAS 2022/A/9296. It applies the same reasoning below.

94. First, the Panel wishes to remind that corruption is not solely a local matter – as noted in the United Nations Convention against Corruption (General Assembly Resolution 58/4 of 31 October 2003) – but rather a transnational phenomenon. This allows the Panel to avail itself of various sources when attempting to define corruption.

95. Starting with the above-mentioned Convention against Corruption, which is the only legally binding universal anti-corruption instrument, the Panel notes that the Convention identifies two forms of corruption in the private sector (Article 21). These are:

(i) Bribery – (a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another, in order for him or her, in breach of his or her duties, to act or refrain from acting, (b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another, in order for him or her, in breach of his or her duties, to act or refrain from acting;

(ii) Embezzlement of property in the private sector – embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.

96. The Panel also takes judicial notice – incidentally and without any bearing on its decision – that the recently (in December 2023) adopted ICC Rules on Combating Corruption follow the same principle and confirm the above Panel's findings. According

to the said ICC Rules, corrupt practices in the private sector include commercial bribery and extortion or solicitation as well as laundering the proceeds of bribery, extorsion or solicitation.

97. The Panel further notes that private bribery (both active, i.e., giving, and passive, i.e., receiving) is expressly prohibited under the Swiss Criminal Code (Article 322). Private bribery entails offering, promising or giving an advantage that is not due to an employee, company member, mandatee or agent in the private sector in connection with his or her business-related duties and in exchange for an act or omission violating such duties or in exchange for a discretionary act or omission for the benefit of himself or herself or for the benefit of a third party. On the other hand, acceptance of a bribe in the private sector entails demanding, securing the promise of or accepting an advantage that is not due in connection with business-related duties as an employee, company member, mandatee or agent in the private sector and in exchange for an act or omission violating such duties or in exchange for a discretionary act or omission for the benefit of himself or herself or for the benefit of a third party (see Anti-Corruption in Switzerland by M. Berni, P. Monnier, *www.globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-switzerland/*).

98. The Panel proposes to list and then to address four types of actions which are commonly considered corruption in business: They are:

a) Bribery: accepting items in return for a preferential treatment;

b) Embezzlement: taking the company's goods or funds for personal gain;

c) Kickbacks: payments made to businesses by vendors in exchange for contracts that overinflate the cost of the work performed at the expense of those receiving the services, and paying for the contract;

d) Fraud: dishonest and illegal activities perpetrated by individuals or companies in order to provide an advantageous financial outcome to those persons or establishments.

99. In the Panel's assessment, the above list of potentially corrupt behaviour also applies to the world of sports with regard to the conduct of any officials entrusted with managing sports organizations.

100. Consequently, in order to consider whether the Appellant had breached Article C.4 of FEC (and/or Article 2 of the old FINA By Laws, insofar as applicable, in accordance with the Panel's remarks *supra* at para. 89), its alleged actions should fall within one of the above characteristics.

Question 4. Did the Appellant's acceptance of money for secretarial services breach Article C.4?

101. Article C.4 of FEC reads as follows:

> "*Betting on Aquatics and other corrupt practices relating to the sport of Aquatics by any person being subject to this Code, including improperly influencing the outcomes and results of an event or competition are prohibited. Any person being subject to this Code is forbidden from having stakes, either actively or passively, in any entity or, organization that promotes, brokers, arranges or conducts such activities or transactions.*"

102. The Panel notes that Article C.4 addresses two distinct types of conduct.

103. First, it encompasses acts of corruption, including improperly influencing the outcomes and results of a sporting event.

104. Second, clearly the purpose of Article C.4 was also to render certain conduct – otherwise permissible (i.e. legitimate actions) – punishable under the FEC. In other words, the aim of this provision was not only to eliminate corruption (forbidden under virtually any legal system), but to also "capture" certain perfectly legitimate actions, such as betting on sporting events or holding stakes in entities promoting or arranging for betting, and to render such actions "illegal" in the light of the FEC. While no sports organization or federation can render otherwise legitimate conduct illegitimate in the legal sense (e.g. criminalize such conduct), a sports federation or a sports body can, of course, prohibit its direct and indirect members from participating in such actions in order to maintain sports integrity.

105. The allegations formulated against the Appellant pertain to his conduct that may potentially fall within the part of Article C.4 of the FEC addressing corruption. The Panel will focus on the corruption issues, leaving out of its analysis the aspects concerning gambling in the broad sense of the term.

106. The point of departure for this analysis is the language of Article C.4 of FEC, already quoted *supra* at para. 101.

107. Clearly, the main purpose of this provision is evidently to address specific illicit actions (improperly influencing) or lawful but undesirable conduct (betting, having stakes in betting organizations). The common denominator for these different types of actions is their relation to sports betting.

108. On top of that, Article C.4 also prohibits "other corrupt practices" relating to sports.

109. As this Panel has already noted in CAS 2022/A/9296, one may wonder whether such a general reference to "other corrupt practices" should be included among the several actions clearly related to one form of commercial activities (betting), but this Panel

accepts the Respondent's position that it is in fact a reference to any corrupt practices, whether or not related to betting.

110. Having said that, the Panel notes that a general prohibition of "other corrupt practices" renders it impossible to unequivocally identify what kind of actions fall within the scope of that term without referring to the general rules of the law and the commonly followed business practices. The same consideration applies to the old FINA By Laws' prohibition of "misbehaviour" and "misconduct" in reference to corruption. This Panel has already conducted such an analysis in CAS 2022/A/9296, and will do so again in this Award, while looking at the Appellant's actions as specified in the First Instance Decision.

111. The Panel also notes that the present matter differs substantially from other sports corruption cases, in that in most corruption cases, also those brought before other CAS panels, evidence is substantially scarce. As the CAS Panels noted "[…] *while assessing the evidence, a panel will have in mind that corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing*" (Arbitration CAS 2010/A/2266 award of 5 May 2011 and, CAS 2010/A/2172, award of 18 January 2011, § 21).

112. In the matter at hand, nothing appears to have been concealed. The facts of the matter, albeit complex, are known and unchallenged by either Party. As a formality, the Panel notes, then, that the burden of establishing that a corruption offence has been committed rests with the Respondent.

113. Further on in this Award, the Panel will analyze the Appellant's actions and assess whether they fall within any of the above-referenced corruption categories.

114. In the Panel's assessment, the Appellant's alleged actions – collecting, at irregular intervals, EUR 3,000 per month toward secretarial costs – may neither be deemed to constitute any of the acts, carried out for the purpose of committing corruption in the private sector (as defined in the United Nations Convention against Corruption), nor any of the four above-referenced forms of corruption. This is for the following reasons.

115. As regards the acts identified in the United Nations Convention against Corruption, the Panel notes that the Appellant's actions do not fall into either form of bribery, since bribery (the promise, offering, giving, soliciting or accepting of an undue advantage to or from any person who directs or works for an entity, for the person himself or herself or for another) requires that this is done in order for that person or another person to breach his or her duties by acting or refraining from acting. This is clearly not the case here, since the payments for secretarial services were not provided or accepted in order for the Appellant or another person to breach his duties or refrain from acting (despite being obligated to do so). Indeed, no evidence whatsoever was presented to this Panel of situations in which the Appellant, or another person instigated by the Appellant, breached any duties to act or to refrain to act.

116. For the same reasons, the Appellant's collecting payments for secretarial services cannot be treated as violating Article 322 of the Swiss Criminal Code, which also requires a connection between an undue advantage received and an omission or acts violating the recipient's duties. Here, there is no evidence on file of any violation of the Appellants' duties as Honorary Secretary of FINA (see the list of those duties *infra* at para. 124) and, therefore, no corruption can be surmised.

117. Moving on to the four types of actions which are commonly considered corruption in business, the Panel would like to observe the following.

118. As regards bribery (accepting items in return for preferential treatment), the two key elements are financial or other form of gain, received or promised, and some preferential treatment. While one may try to claim that the Appellant had been receiving financial gain (payments of EUR 3,000 per month for secretarial services), these proceedings have failed to demonstrate that such payments had been made in exchange for any preferential treatment. Indeed, no evidence whatsoever was submitted in this case which could hint that the Appellant accepted said reimbursements in return for granting a preferential treatment to somebody.

119. No allegations of kickbacks have been made against the Appellant.

120. This leaves only embezzlement (taking the company's goods or funds for personal gain) or fraud (dishonest and illegal activities perpetrated by individuals or companies in order to provide an advantageous financial outcome to those persons or establishments) as the only two potential forms of corruption that the Appellant might have committed. However, the Panel is of the opinion that Appellant's actions can neither qualify as embezzlement nor as fraud for at least several reasons.

121. First, the amounts received by the Appellant were paid upon the instructions of the FINA Director General and were recorded on FINA's books. The financial statements were subsequently approved by FINA's competent bodies (in particular by the FINA Congress) and therefore well known within FINA. FINA itself would consider these payments as legitimate spending for technical (secretarial) services.

122. Second, as has been demonstrated during these proceedings (through some FINA documents and the testimony of Ms X.), cash withdrawals from the FINA bank account and cash reimbursements to FINA executives were not uncommon. In particular, similar reimbursement for secretarial services were also being collected by other individuals serving in executive capacities at FINA, such as the then President of FINA (as was testified at the hearing by Ms X.). This indicates that such practices were not uncommon FINA at the time and were decided by FINA itself.

123. Third, such payments were always approved by FINA management. As testified by Ms X., she would each time seek and receive her line manager's approval for disbursing the amounts for secretarial services directly to the Appellant.

124. Fourth, life experience leads one to conclude that EUR 3,000 for secretarial services seems to be a reasonable amount, particularly in consideration of the many relevant tasks that the Honorary Secretary had to perform in compliance with Article C 18.3 of the FINA Constitution of 2013, as also reminded by the Appellant himself at the hearing:

> "C 18.3 *The Honorary Secretary shall have the following roles and duties:*
>
> *C 18.3.1 in the absence of the President conduct the Congresses and FINA Bureau meetings with all the rights and duties,*
>
> *C 18.3.2 represent FINA in the absence of the President at FINA Competitions, ceremonies or other activities requiring the presence of the highest FINA authority, and*
>
> *C 18.3.3 coordinate in cooperation with the FINA Executive Director:*
>
> *a) the FINA relations with the Continental Organisations,*
>
> *b) the World Competition Calendar in coordination with the Continental Organisations,*
>
> *c) the FINA Committees agendas,*
>
> *d) finalizing the minutes from the meetings of Congress, Bureau and Executive*".

125. Fifth, the Panel is not convinced by the Respondent's argumentation that said secretarial services had never actually been rendered. The Panel is of course aware of the fact that, in principle, direct evidence of a negative fact is not to be provided. The Panel notes, however, that the Respondent itself clearly recognized at the time of the payments, through its own actions and written documents, that the payments were done for secretarial services that were actually rendered to Mr. Barelli. In particular:

(i) in the documents on FINA stationery prepared by the FINA accounting department and having as references "*RECEIPT FO-06793*", "*RECEIPT FO-10077*", "*RECEIPT FO-I4979*" and "*RECEIPT FO-14982*", all addressed to Mr. Franco Concordia, the deliveries by FINA of, respectively, EUR 18,000, EUR 33,000, USD 39,960 and EUR 36,000, were done for "*Mr. Paolo Barelli secretary services*", for "*agreed monthly allowance for secretarial services Assistant FINA Honorary Secretary*", and for "*Monthly allowance for secretarial expenses, Assistant FINA Honorary Secretary*";

(ii) in all the invoices issued by Mr Franco Concordia (and accompanied by his Identity Card) it was clearly indicated that they were for secretarial services performed for the FINA Honorary Secretary, and FINA itself approved all of them by printing on them "*comptabilisé*" (i.e., registered in the accounting books) and by paying the invoiced amounts (Exhibits R-2, R-3, R-5, R-6, R-8);

(iii) in the invoices issued by the Company it was clearly indicated that they were for "*Logistic and secretarial services and other activities provided to the FINA Honorary Secretary*", and FINA itself approved all of them by printing on them

"*comptabilisé*" and paying the invoiced amounts through bank transfers (Exhibits R-10, R-12);

(iv) in the email sent by FINA to Mr. Barelli on 12 April 2016, the subject of the email was clearly indicated as "*Secretarial services Mr. Franco Concordia*" (Exhibit R-9).

126. The above evidence clearly shows that, at the time of the facts under scrutiny (thus *in tempore non suspecto*), the Respondent itself had no doubts that secretarial services were in fact rendered for Mr. Barelli and, by its own volition and in all officiality, FINA was paying for those services without casting any doubts whatsoever on the fact that they were actually performed. Indeed, the Respondent had ample opportunities during the time when the Appellant served as the Honorary Secretary of FINA and later to request proof that such services had been truly provided. It has not been demonstrated during these proceedings that such requests were ever made. The only reference to an actual request for additional documentation regarding Mr. Concordia's services on file is the already mentioned email from FINA to the Appellant dated 12 April 2016 (Exhibit R-9); yet, even in this email FINA merely quoted administrative requirements from international agreements between the European Union and Switzerland and asked for Mr. Concordia's bank details. The Panel notes that the current Respondent's contention – many years after the facts – that those services were not truly performed is an extraordinary case of *venire contra factum proprium* that the Panel cannot allow (it is indeed well known that the prohibition of *venire contra factum proprium* is enshrined in Swiss law and frequently applied in CAS jurisprudence).

127. In light of the above, the Panel finds all the considerations made by the Respondent on the personal or professional qualities of the provider of the secretarial services (Mr. Concordia) to be irrelevant. The fact that the person to render such services is not fluent in English and is not that young anymore does not automatically preclude him from rendering such services. Obviously, in order to serve in a secretarial capacity for another individual, what one first and foremost needs is the command of that individual's usual language. In this case both the Appellant and the person hired to render secretarial services could speak in their mother tongue: Italian. Furthermore, the age beyond 70 by no means stands in the way of working as a secretary or – broadly speaking – of doing intellectual work, as many political leaders around the world have demonstrated.

128. Drawing on all the above evidence, the Panel deems that the Appellant's collecting EUR 3,000 per month for paying secretarial services linked to his role as Honorary Secretary of FINA may not in these circumstances be considered corruption under Article C.4 of the FEC or misbehaviour/misconduct under Article 2 of the old FINA By Laws (insofar as applicable).

Question 5. Should the Appellant's actions leading to FINA making wire transfers to the Company, which is under the control of the Appellant, be regarded as a corrupt practice in sports in accordance with Article C.4 of the FEC? Furthermore, should his omission to disclose his controlling interest in the Company be considered a violation of his obligation to disclose conflicts of interest under Article F.12?

129. As regards the first of the above grounds (causing FINA to make wire transfers to the Company), the Panel believes the Company's receipt of wire transfers from FINA does not detrimentally differ from the situation described above when analyzing Question no. 4. If anything, such difference would rather be in the Appellant's favour. If we consider it permissible – under these specific circumstances and given the facts described in great detail above – for the Applicant to collect EUR 3,000 per month in cash toward secretarial services rendered by a third party, then it should be all the more permissible for the same amount to be collected via wire transfers to a commercial company against duly issued invoices.

130. As regards the second of the above grounds (failure to disclose the Appellant's controlling stake in the Company), the Panel opines that it may not be considered a breach of Article F.12 of the FEC. This is for two reasons.

131. First and foremost, regarding the allegation of breaching Article F.12, one may formulate a similar thesis as that concerning the allegation of breaching Article C.4. As FINA had been, for years, reimbursing the Appellant for secretarial services directly and in cash, and the FINA authorities had been approving this seemingly routine practice, then this manner of payment between the Company and the Appellant should not have come as any surprise to FINA.

132. Additionally, the Panel notes that the Appellant's stake in the Company has been disclosed in the relevant registers, available in the public realm. Disclosing a certain fact in a relevant register, i.e. in the public domain, warrants an assumption of general awareness of said disclosed information. Obviously, this does not mean that each and every individual interested in the facts disclosed in such registers (including the FINA employees) will always be familiar with the register entries and the Panel recognizes that in certain situations an individual may be obligated to directly disclose certain facts related to him or her even if they have been recorded in publicly available registers. Yet, as a rule, whether others verify the data disclosed in a register is beyond the control of the individual under the disclosure obligation. The individuals disclosing certain particulars in such registers need not demonstrate that any third party has perused such particulars. It is sufficient for them to demonstrate that they have disclosed the relevant information, particularly in a situation like the one in this case, where the cooperation between the Appellant and the Respondent had been already in place for several years. In fact, as indicated above (at para. 125.iii), it was clearly spelled in the invoices issued by the Company and approved by the Respondent that the payments were done for the secretarial services provided to the Appellant; hence, it was totally transparent and known within FINA that the Company was merely a vehicle used by the Appellant to obtain the agreed reimbursements for the secretarial services provided to him.

133. For the above reasons, the allegation of the Appellant breaching Article F.12 should be deemed misconceived.

134. In conclusion, the Panel holds that the Appellant did not breach Articles C.4 or F.12 of the FEC, nor did he breach Article 2 of the old FINA By Laws (insofar as applicable). As a consequence, the Panel upholds the Appellant's appeal and annuls (i) the decision

of the Ethics Panel to ban the Appellant for a fixed period of one year from taking part in any Aquatic-related activities under the auspices of World Aquatics (formerly FINA) or its members, and (ii) the decision of the Ethics Panel to order the Appellant to reimburse to World Aquatics (formerly FINA) a net amount of EUR 297,540. Any other or further motion or prayer for relief is dismissed.

IX. COSTS

(…)

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 3 April 2023 by Mr. Paolo Barelli against the decision of the FINA Ethics Panel rendered on 28 February 2023 is hereby upheld.

2. The decision issued on 28 February 2023 by the FINA Ethics Panel to ban Mr. Paolo Barelli for a period of one year and to order him to reimburse to World Aquatics a net amount of EUR 297,540 is annulled.

3. (…).

4. (…).

5. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 16 January 2024

THE COURT OF ARBITRATION FOR SPORT

Eligiusz Krześniak
President of the Panel

Alexander McLin
Arbitrator

Massimo Coccia
Arbitrator