CAS 2022/A/9296 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 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 a Member and the President of the Italian Swimming Federation ("**FIN**"), which is a member, in good standing, 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 19 July 2022 (the "**Second Referral Decision**"). In the Second Referral Decision, the FINA Ethics Panel (the "**Ethics Panel**") found that the Appellant had acted negligently having failed to immediately resolve a double-invoice or double-payment issue, pursuant to the generally accepted accounting principles, and banned the Appellant for a fixed period from participating in any Aquatic-related activities under the auspices of FINA or its members.

5. The pertinent facts and allegations based on the Parties' written submissions and on the CAS files are summarized below. References to additional facts and allegations found in the Parties' written 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 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. On 18 March 2005, the Italian Ministry of Economy and Finance awarded FIN a public grant of EUR 2,100,000. The grant was awarded, among other things, for renovating Rome's Foro Italico swimming pool ("**Foro Italico**").

10. Since FIN had received the grant, a reporting obligation arose on its part. FIN was to report to the Italian Ministry of Economy and Finance ("**Ministry of Economy**") on how it had used the grant.

11. FIN reported that it had used some of the funds, EUR 845,729.94, to pay for renovating Foro Italico.

12. On 9 March 2008, FIN entered into an agreement with CONI Servizi S.p.A. ("**CONI Servizi**"), a company wholly controlled by the Ministry of Economy and having links with the Italian Olympic Committee (the "**Agreement**"). Under the Agreement, FIN was granted exclusive operation rights of the Foro Italico swimming pool and some other aquatic facilities for six years. In exchange, FIN was to pay CONI Servizi an annual fee of EUR 430,000. Moreover, under the Agreement, FIN undertook to maintain the facility and cover the costs of all regular maintenance works, while CONI Servizi was to cover the costs of all "extraordinary maintenance interventions".

13. The Agreement led to a dispute between FIN and CONI Servizi. The dispute concerned the parties' (FIN's and CONI Servizi's) liability for various Foro Italico maintenance costs.

14. On 9 April 2013, FIN and CONI entered into a settlement agreement to resolve the dispute ("**Settlement Agreement**"). In the Settlement Agreement, FIN requested that CONI Servizi recognize a credit of EUR 825,978.70 to FIN regarding the Foro Italico renovations.

15. However, during an internal audit, CONI Servizi discovered that the Foro Italico renovation costs had already been covered by the Ministry of Economy by way of the grant awarded to FIN in 2005. CONI Servizi informed the relevant Italian authorities about this incident and filed a complaint. The competent Public Prosecutor of the Italian Court of Auditors ("*Corte dei Conti*") brought an action against the Appellant requesting that he be held liable, in his capacity as President of FIN, to personally compensate CONI Servizi for the undue reimbursement of EUR 825,978.70 made by the latter to FIN.

16. On 26 February 2020, the Judicial Section for the Lazio Region of the Italian Court of Auditors ("**First Instance Court of Auditors**") decided with judgment no. 113/220 ("**Decision no. 113/220**") that the Appellant was not liable for the public accounting charge levelled against him because, among other things, the alleged damage caused to CONI Servizi was "*amply compensated by the advantage achieved as a result of countless interventions carried out on other plants [swimming pools], to the point that of concluding that no diversion of public funding would have occurred*".

17. On 10 March 2022, the Italian Court of Auditors – Section II Central Jurisdiction Appeal (the "**Appeals Court of Auditors**"), seized on appeal by the Public Prosecutor, found with judgment no. 181/2022 (the "**Decision no. 181/2022**") that the Appellant, acting on behalf of FIN, had in fact caused CONI Servizi pecuniary damage by claiming reimbursement of the expenses which had already been covered by the Italian Ministry of Economy and Finance grant. The Appeals Court of Auditors in the Decision no. 181/2022 partially upheld the Public Prosecutor's appeal and, as a result, the Appellant was sentenced to pay CONI Servizi EUR 495,587.22 in damages. In particular, the Appeals Court of Auditors held that it was irrelevant that FIN had carried out with its own funds construction works for a total amount of EUR 4,414,431.31 on other public swimming pools in the area of Rome (specifically the new swimming pools in Ostia, Pietralata and Valco Sanpaolo), because the 2006 agreement between FIN and CONI Servizi only concerned the "extraordinary maintenance works" on the Foro Italico swimming pools (para 4.1 of the Decision no. 181/2022). In other words, the Appeals Court of Auditors found that the overall benefit that FIN had generated in terms of public assets could not offset the excessive reimbursement obtained by FIN for the Foro Italico swimming pools, because they were legally separate accounting items. In fact, the high expenses incurred by FIN on the other public swimming pools "*concerned the 'construction' of the new swimming pools, and could never have identified themselves in the 'extraordinary maintenance works' referred to in the said 2006 Convention: by definition the concept of 'maintenance' involves existing assets*" (para 4.1 of the Decision no. 181/2022).

18. The Appellant filed an appeal for revocation against the Decision 181/2022 and a request for the suspension of its enforceability. While, on 18 October 2022, the Appeals Court of Auditors accepted to suspend the enforceability of the Decision 181/2022; by judgement of 19 January 2023 (the "**Judgment of 19 January 2023**"), it deems the appeal for revocation inadmissible.

C. Proceedings before FINA Executive and FINA Ethics Panel

19. The Decision no. 181/2022 against the Appellant, regarding his duty to personally repay the double-reimbursement of certain costs to FIN, was brought to the FINA Executive's attention. On 19 July 2022, the FINA Executive referred the matter to the Ethics Panel for investigation and adjudication as per the FINA Rules (the "**Second Referral**").

20. In the Second Referral, the FINA Executive indicated that the Appellant may have allegedly violated Article C.4 of the 2013 FINA Code of Ethics ("**FEC**") and/or Article C.12.1.3 of the 2013 FINA Constitution and/or any other FINA Rules. According to the Second Referral:

> "*In the light of the above, the FINA Executive, based on FINA Rule C 24.5, decided to refer this matter to the FINA Ethics Panel for investigation and adjudication as per FINA Rules. In particular, the FINA Executive would request a determination on whether Mr. Barelli committed a violation of Article C.4 of the 2013 FINA Code*

> *of Ethics and/or Article C.12.1.3 of the 2013 FINA Constitution, and/or any other FINA Rules*".

21. Article C.4 of the 2013 FINA Code of Ethics 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.*"

22. Article C.12.1.3 of the 2013 FINA Constitution so reads:

> "*Any Member, member of a Member, or individual member of a Member may be sanctioned: […] for bringing the sport into disrepute.*"

23. On 26 October 2022, the Ethics Panel convened and conducted a hearing regarding the Second Referral and the Appellant's written submissions.

24. On 2 August 2022, FINA thus informed the Appellant that the Ethics Panel would "*now determine if* [he has] *committed a violation of Article C.4 of the 2013 FINA Code of Ethics and/or Article C.12.1.3 of the 2013 FINA Constitution, and/or any other FINA Rules*" and invited him to provide his response to these allegations, which he did.

25. On 8 November 2022, the Ethics Panel issued a decision, which follows the Second Referral (the "**Second Referral Decision**"). In the Second Referral Decision, the Ethics Panel found that the Appellant had acted negligently having failed to immediately resolve a double-invoice or double-payment issue, pursuant to the generally accepted accounting principles.

26. The operative part of the Second Referral Decision reads as follows:

> "*The FINA Ethics Hearing Panel unanimously, in applying the provisions of Article C.24.9(d) imposes 'A ban for fixed period of one year from taking part in any Aquatic-related activities under the auspices of FINA or its members.' Such ban shall commence from the date of the provisional suspension previously imposed by the FINA Ethics Hearing Panel on 14 September 2022*".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

27. On 18 November 2022, the Appellant filed with CAS the Statement of Appeal against the Second Referral Decision pursuant to Article R47 of the Code of Sports-Related Arbitration (the "**CAS Code**"), appointing Prof. Massimo Coccia as arbitrator. Also in it, the Appellant requested that the Second Referral Decision be stayed

(the "**Request for Stay**") as well as the consolidation of the present procedure with the procedure *CAS 2022/A/9297 Paolo Barelli v. FINA.*

28. On 1 December 2022 the CAS Court Office acknowledged receipt of the Statement of Appeal of 18 November 2022, served its copy on the Respondent, which was, *inter alia*, invited to appoint a CAS arbitrator and to submit its observation on the requested stay and consolidation.

29. On 6 December 2022, FINA agreed with the requested consolidation. The CAS Court Office took note of this agreement on the same day. It specified that since two decisions were appealed, it would be for the Panel to decide the scope of the consolidation but that the Parties were authorized to submit one written submission for both cases.

30. On 9 December 2022, the Appellant filed its Appeal Brief pursuant to Article R51 of the CAS Code.

31. On 13 December 2022, the CAS Court Officer served a copy of the Appeal Brief on FINA, which was invited to submit its answer.

32. On 29 December 2022, FINA replied to the Request for Stay (the "**Answer to the Request for Stay**") and nominated Mr Alexander McLin as arbitrator.

33. On 29 December 2022, the CAS Court Officer served a copy of FINA's Answer to the Request for Stay on the Appellant.

34. Since Prof. Coccia made a disclosure, the Parties were informed accordingly on 10 January 2023. 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.

35. By communication dated 20 January 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.

36. On 27 January 2023, the Respondent filed the Answer to the Appeal Brief pursuant to Article R55 of the CAS Code.

37. On 30 January 2023, the CAS Court Officer served a copy of FINA's Answer on the Appellant.

38. On 31 January 2023, the Respondent informed the CAS Court Office of its preference for the issuance of an award based on the Parties' written submissions, without the need of a hearing. On 2 February 2023, the Appellant shared this position.

39. On 2 February 2023, the Respondent filed a new exhibit in support of its Answer to the Request for Stay and of its Answer to the Appeal Brief, the Judgment of 19 January 2023.

40. On 3 February 2023, a disclosure statement from Mr. McLin was forwarded to the parties, which were reminded that a challenge could be brought within seven days. Pursuant to Article R57 of the CAS Code, the Respondent was further invited to submit a copy of its complete previous instance file and the Parties were informed that, in view of their agreement, they were authorized to address only one communication/submission for both the cases *CAS 2022/A/9296* and *CAS 2022/A/9297* but that since both appeals were directed against different decisions, two awards would be issued.

41. On 10 February 2023, and with the Appellant's consent, the CAS Court Office entered the Judgement of 19 January 2023 into the CAS files and, on behalf of the Panel, invited the Appellant to submit its comments on this document. The Appellant did so on 16 February 2023.

42. On 14 February 2023, the CAS Court Office noted that no challenge had been timely brought against Mr. McLin's appointment.

43. On 17 February 2023, the Respondent submitted its complete case file, which was served on the Appellant on 21 February 2023.

44. On 16 March 2023, the CAS issued an order on the Appellant's Request for a Stay. The CAS ordered that:

> "*The Request for a Stay of the Second Referral made by FINA Ethics Panel on 8 November 2022 filed by Mr Paolo Barelli in the arbitration CAS 2022/A/9296 Paolo Barelli v. FINA, is dismissed.*"

45. On 20 March 2023, both Parties confirmed that they deemed that the holding of a hearing was unnecessary in this case.

46. On 4 April 2023, the Parties were informed that, pursuant to Article R57 of the CAS Code, no hearing would be held in this case and that, unless an objection that would be sent by 11 April 2023, it would be understood that the Parties did not request a case management conference either. The Parties were further invited to return a signed copy of the Order of Procedure.

47. The Parties returned a duly signed copy of the Order of Procedure on 5, respectively 11, April 2023.

48. On 11 May 2023, the Appellant submitted three new documents, the Decision n. 3/2023 issued on 3 May 2023 by the Italian Attorney General for Sports within the Italian Olympic Committee (CONI), the Decision sent on 8 May 2023 by the FIN Prosecutor to the FIN General Secretary and a press review dated 10 May 2023.

49. On 22 May 2023, the Respondent objected to their admission in the CAS file and, requested that, in the event these documents would nonetheless be admitted, it be granted a deadline to comment them.

50. On 25 May 2023, the Panel accepted the documents submitted by the Appellant on 11 May 2023 and invited the Respondent to provide their comments.

51. On 9 June 2023, the Respondent provided its comments to these documents.

IV. SUBMISSIONS OF THE PARTIES

52. 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 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

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

(a) The Appellant contested the Second Referral Decision issued by the Ethics Panel on 8 November 2022, as it was fundamentally flawed and in breach of the law. The Appellant quoted several legal arguments.

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

(c) On that note, the Appellant pointed out that the Decision no. 181/2022 refers to the accounting inconsistencies in the period from 2006 to 2013, when the FEC had not yet been adopted.

(d) Furthermore, the Appellant emphasized that the Second Referral Decision does not indicate which FINA rule the Appellant would have breached. According to the Appellant, FEC neither addresses the situation presented in the Decision no. 181/2022 nor the accounting irregularities. The Ethics Panel's decision does not rely on any specific FINA Constitution provisions. Violations of the FINA Constitution are not within the Ethics Panel's purview. Therefore, the FINA Constitution cannot apply.

(e) The Appellant also stated that the Second Referral Decision is contradictory. In the Second Referral Decision, the Ethics Panel explained that the Appellant had acted negligently having failed to immediately resolve a double-invoice or double-payment issue, pursuant to the "generally accepted accounting principles". At the same time, the Second Referral Decision fails to explain the term "generally accepted accounting principles". In this regard, the Appellant states the following:

> "*In this context, we fail to understand how "GENERAL ACCEPTED ACCOUNTING PRINCIPLES" would eventually*

> *be applicable, especially in the absence of any reference to specific provisions.*
>
> *It shall be noted also that a simple negligence cannot be construed as an unethical behavior without explanation. A negligence is not a matter of ethics, in the absence of any specific provision to that extent in the 2013 FINA Code of Ethics*".

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

(g) The Ethics Panel had ignored the fact that the Italian Court in charge of the appeal ruled by revocation that the Decision no. 181/2022 was ineffective and could not be used as grounds for a sanction. Therefore, the Ethics Panel sanctioned the Appellant under the State Court Decision that had been formally and officially suspended.

(h) The Second Referral Decision also contradicts the *in dubio pro reo* principle. It may not be in line with the final ruling to be eventually issued by the judicial authority in charge of the pending appeals against the Decision no. 181/2022.

(i) Third, the Appellant alleged that the Second 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 what was considered by FINA Ethics Hearing Panel as a mere 'negligence'*".

(j) Fourth, in his submission dated 16 February 2023, the Appellant considers that the Judgment of 19 January 2023 does not affect the grounds of his appeal. The Appellant deems that the FEC "*did not contemplate a situation or a conduct that could even extensively apply to the accounting issues decided by the* [Appeals Court of Auditors]". He further notes that this new judgement confirms CONI Servizi's share responsibility but that no one within this entity was sanctioned or even criticized. He should not be treated differently. The Appellant finally emphasizes that this judgement confirmed that the criminal action initiated against him had been "*declared impracticable*". If this Italian court deemed that it was still possible to rule on his administrative liability without breaching the principle *ne bis in idem*, the Appellant notes that the present procedure has a sanctioning and not a compensatory, nature. He thus contends that, since the

Italian courts decided that he shall not be sanctioned, FINA or CAS cannot sanction him without violating this principle.

(k) 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. They would both consider that Mr Barelli did not breach any ethical or disciplinary rules and that no sanctions were warranted against him. Although it is not entirely clear what the Appellant infers from the above fact in the context of the Third Referral Decision and the current proceedings, it seems that the Appellant intends to argue that there must be somewhat of a unified front between the Italian authorities and the FINA authorities since they should share the same interpretation of the Olympic value such as ethics. In other words, the Appellant seems to argue that if the Italian authorities drop the charges against him, the CAS Panel should follow suit.

54. In his Appeal Brief, the Appellant submitted the following requests for relief [verbatim transcription]:

> "*Pursuant to Articles R47 et seq. of the CAS Code, and for the reasons developed in this Appeal Brief and in the Statement of Appeal, Appellant requests that the Panel to be constituted in this case or the President if the Appeals Arbitration Division, at the case may be, issue an award:*
>
> *[…]*
>
> ***Additionally***
>
> *d. holding that the Appeal is admitted;*
>
> *e. 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 FINA or its member is annulled for violating utmost fundamental rights of the Appellant, together with FINA's non-compliance with its internal regulations.*
>
> ***Subsidiarily***
>
> *f. holding that the Appeal is admitted;*
>
> *g. 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***

h. 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

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

(a) The Respondent stated that the Appellant had clearly violated Article IV.C.4 of the 2013 FEC by claiming the Foro Italico renovation costs from both the Ministry of Economy and CONI Servizi. According to the Respondent, such a behaviour is clearly dishonest and constitutes a corrupt practice relating to aquatic sports.

(b) The Respondent emphasized that the Appellant must also be sanctioned under Article C.12.1.3 of the 2013 FINA Constitution, since it brought the sport of Aquatics into disrepute.

> "*This, of course, led to the public opinion of Aquatics being diminished. His violations gave the public impression that the administration of the sport of Aquatics was corrupt and required immediate action by Respondent to maintain credibility and trust (which is very easily lost) in the global Aquatics and sports community*".

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

(d) 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 partially, after FEC came into force on 22 February 2013, which was confirmed by the Italian Court of Auditors – Section II Central Jurisdictional Appeal. For instance, the Appellant's violations occurred during the settlement phase up until when the Settlement Agreement was signed, i.e. 9 April 2013. Article IV.C of the 2013 FEC was further not only mentioned in the Second Referral Decision but also in the Second Referral and in FINA letter of 2 August 2021 to the Appellant.

(e) As follows from the Respondent's position, the Appellant has failed to explain how the Second Referral Decision could be contradictory. Moreover, in its written submission of 2 February 2023, the Respondent referred to the Judgment of 19 January 2023, which confirmed the Decision no. 181/2022.

(f) The Respondent also noted that the Second Referral Decision does not violate the Appellant's fundamental rights, nor is it arbitrary. This is for several reasons.

(g) First, the Ethics Panel is not bound by the Italian State Court's Decision.

> "*The two proceedings may relate to the same facts, but they are completely separate. The Court of Auditor's proceeding is an Italian state court dispute, while the proceeding before the Ethics Panel is a sport disciplinary dispute related to violations of Swiss association's Constitution and Ethics Code.*"

(h) Second, the Ethics Panel has full discretion in evaluating and assessing the evidence in the case.

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

(j) The Respondent finally noted that documents submitted by the Appellant on 11 May 2023 are irrelevant to establish the facts. The Respondent noted that they concern separate proceedings against the Appellant, initiated by the prosecutor of the Italian Swimming Federation while the current CAS proceedings refer to decisions of the FINA Ethics Panel. What is said, stated or done in another country and in other proceedings should have no impact on decisions of FINA Ethics Panel and on the current CAS proceedings.

56. In the Answer to the Appeal Brief, the Respondent submitted the following requests for relief for both the cases CAS 2022/A/9296 and CAS 2022/A/9297:

> "*On behalf of Respondent, the undersigned respectfully request this honorable CAS Panel:*
>
> *1. To dismiss the Appeals and to confirm the Appealed Decisions;*
>
> *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 Respondent."*

V. JURISDICTION OF THE CAS

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

58. Article R47 of the CAS Code states that:

> "*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*."

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

Article C.12.13.2 of the FINA Constitution provides that:

> "*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 the FINA Ethics Panel Procedural Guidelines provides that:

> "*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*".

60. Neither Party has questioned the jurisdiction of the CAS in these proceedings.

61. As a result, CAS has jurisdiction to hear and adjudicate the present case.

VI. ADMISSIBILITY OF THE APPEAL

62. 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*."

63. The FINA Constitution and the FINA Ethics Panel Procedural Guidelines are silent on any time limit for appealing against decisions issued by the FINA Ethics Panel. Therefore, the default 21-day deadline provided for in the above Article R49 of the CAS Code applies.

64. The Second Referral Decision was issued on 8 November 2022 and the Appellant filed its Statement of Appeal on 18 November 2022.

65. Therefore, the Appeal is admissible.

VII. MERITS

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

67. First, ("**Question no. 1**"), it must be determined whether the indicated Appellant's actions took place after 22 February 2013. In the present matter, FINA has alleged that the Appellant breached the FEC and the FINA Constitution. It however based its right to sanction the Appellant exclusively on the FEC. The FEC came 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 conduct which violates a rule in force at the time of alleged violation can be sanctioned. By way of an example, in the award CAS 2017/A/5086 the panel 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*."

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

69. Second ("**Question no. 2**"), one ought to consider whether the Appellant is subject to the FINA Rules, including the FEC. This should be the underlying assumption for considering whether the Appellant's past actions may be deemed as breaching these norms.

70. Third ("**Question no. 3**"), one ought to ascertain what kinds of actions (*in abstracto*) may be considered as breaching the FEC norm indicated by the Ethics Panel (i.e. Article C.4, quoted *supra* at para. 21), while at the same time bringing aquatic sports into disrepute (under Article C 12.1.3 of the 2013 FINA Constitution, quoted *supra*

at para. 22); in particular, given the content of Article C.4 and the obvious fact that here we are not dealing with "*betting*" practices, which actions may qualify as "*corrupt practices*". The Panel is aware that identifying all such actions will be impossible; nonetheless at least some common denominator characterizing such negative behaviour should be identified.

71. Fourth ("**Question no. 4**"), one ought to assess particular actions which the Appellant took against the characteristics of the breaches of Article IV.C.4 of FEC. This will enable the Panel to determine whether the Appellant's actions may be deemed as breaching a given norm.

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

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

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

74. In the Second Referral, i.e. in the first letter which initiated the first instance proceedings, the Respondent used the following language to describe the Appellant's actions: "*claiming it reimbursement of expenses which had already been paid for by a grant of the Ministry of Economy and Finance of Italy*".

75. The FINA Ethics Panel, in the Second Referral Decision, did not specify what the Appellant's actions may have consisted of, being content with merely a quote from the Second Referral's allegation, and stating that the FINA Ethics Panel "*rejects the contentions as set out in [Mr. Barelli's] attorney's correspondence*", unfortunately failing to indicate what - in that case - it accepts as evidenced.

76. In its Answer, the Respondent described the Appellant's conduct as "*the double claiming of costs to the Italian Ministry of Economy and Finance and to the CONI Servizi S.p.A.*"

77. However, in the Answer, the Respondent also quoted the judgement issued by the Italian Court of Auditors – Section II Central Jurisdictional Appeal, indicating that therein a reference is made to FIN declaring to CONI Servizi that the former, in the years prior to 2013, bore the costs in excess of EUR 800,000 "*incurred […] on the swimming pools under concession and which, - instead – […] had been hedged with the MEF funds received between 2005 and 2008*".

78. The above offers little clarity as to what the specific allegations against the Appellant were. It follows from the array of the Respondent's positions that its allegation may be construed as at least twofold.

79. First, the Appellant may be at fault for FIN (the organization he presides) receiving renovation funds for one and the same facility from two different sources.

80. Second, the Appellant may be at fault for FIN - under the Appellant's presidency - misleading CONI Servizi by including, in the Settlement Agreement dated 9 April 2013, the provisions which had caused the receivables claimed by CONI Servizi from FIN to have been unduly reduced by EUR 845,729.94, i.e. by the amount previously secured by FIN from another institution - the Ministry of Economy.

81. If one were to accept the former of the two constructions of the allegation against the Appellant referenced above, one would have to deem these actions - if not entirely, then likely to a significant extent - to have been taken prior to 2013. This is corroborated by the fact that FIN received funding from one of the above institutions in the years 2005-2008. Hence the funds must have been spent prior to 2013.

82. The Panel's position is that the latter of the above allegation constructions is accurate. It is not merely FIN's spending of the funds that alone gave rise to the Second Referral Decision, but rather arranging - in the Settlement Agreement with CONI Servizi - the terms which CONI Servizi would not have accepted, had it only been fully aware at the time what FIN's accounting matters had been.

83. The Panel notes, therefore, that the Appellant undertook his actions, being the subject of these proceedings, after 22 February 2013, i.e. in the settlement phase, lasting until 9 April 2013, when FIN and CONI Servizi signed the actual Settlement Agreement.

84. The Appellant's submission that the Respondent breached the *nulla poena sine lega certa* principle by penalizing the Appellant under a document which entered into force in February 2013 (FEC) for actions which the Appellant took beforehand must thus be rejected.

Ad. 2 Is the Appellant subject to the FINA Rules, and in particular the FEC?

85. As regards the FINA Rules, the Appellant's position is vague.

86. On one hand, the Appellant does not challenge that the FEC does not apply to him.

87. On the other hand, the Appellant asserts that the FINA Constitution "cannot apply".

88. As it appears, in the latter case, what the Appellant had in mind was not so much to generally challenge the jurisdiction of the FINA authorities, including the FINA Ethics Panel, over the Appellant's actions, but rather to allege no jurisdiction on the part of the FINA Ethics Panel over violations of the FINA Constitution.

89. The Panel accepts the Appellant's view to the extent it confirms he is bound by the FEC.

90. In the Panel's assessment, the Appellant is subject - broadly speaking - to the FINA Rules, including the FEC.

91. First, the Appellant - as the head of FIN - should be considered an Official as provided for in the FINA Constitution. As per that definition, the term Official "*shall mean any person elected or appointed to any position within FINA, the Continental*

Organizations, the FINA Member Federations […]." The Member Federations, in turn, are "*national federations affiliated to FINA in a country […] recognized by FINA in accordance with FINA Rule* […]".

92. Moreover, according to the Code of Ethics "*Words used in this Code of Ethics shall have the same meaning as set out in the FINA Constitution and the FINA Rules, unless specified otherwise*".

93. It is beyond any reasonable doubt that FIN is one of the FINA Member Federations referred to above.

94. FEC (the 2013 version), in turn, regulates the activities of "*all FINA members, FINA staff, persons elected or appointed to any position within the organization of FINA or the Continental Organizations (collectively referred to herein as "Officials"), and other individuals engaged in FINA activities*". As the head of FIN, i.e. an organization within FINA, the Appellant should have been - in the Panel's assessment - treated as an "Official" as provided for in that document.

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

95. Corruption takes on many faces. This is true in any business and maybe even more so in sports. Corruption incidents in sports may, conventionally, fall into two categories.

96. First, actions directly affecting competition outcomes. By way of an example, facilitating a third party to make a bet on the outcome or any other aspect of a sporting event by unlawfully impacting the result of that event (match fixing) or by manipulating scores inputted into the electronic scoring device by a referee (as in the case between Mr. Daniel Zeferino and the International Tennis Integrity Agency, reported on the website of ITIA on 10 May 2022).

97. Second, corruption may also occur if the actions are not directly linked to athletic competition. Such corrupt behaviour is found rather in the "business of sport", no different to corrupt behaviour known to business operations unrelated to sports.

98. In the Appellant's case, we may only discuss the latter category of corruption. The Appellant's role - as the President of FIN - was to chair this organization akin to the manner of the chair and/or CEO of a corporate enterprise. Hence it stands to reason - while analyzing the present matter - to avail oneself of the case law developed in managerial corruption.

99. There is no one universally accepted definition of corruption. Each legal system develops its own norms in that respect. Particular legal systems differ from one another as to which actions are prosecuted under criminal liability. For instance, not all jurisdictions criminalize managerial corruption (employees of one enterprise bribing representatives of another).

100. At the same time, 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.

101. 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.

102. The Convention further contains a list of acts, carried out for the purpose of committing corruption in the private sector. These are (Article 12.3 of the Convention):

(a) establishing off-the-books accounts;
(b) making off-the-books or inadequately identified transactions;
(c) recording non-existent expenditures;
(d) entering liabilities incorrectly identifying their objects;
(e) using false documents; and
(f) intentionally destroying bookkeeping documents earlier than legally required.

103. Another helpful source for identifying acts which constitute corruption in the private sector is US legislation, including the US Foreign Corrupt Practices Act (FCPA), the Travel Act, as well as the mail and wire fraud statutes. Two examples can be mentioned here.

104. First, if a company pays kickbacks to a private company employee who is not a foreign official, such private-to-private bribery could possibly be charged under the Travel Act (see FCPA A Resource Guide to the US Foreign Corrupt Practices Act, by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission; p. 48; see also p. 49 of the same document for kickback schemes punishable under the mail and wire fraud statutes).

105. Second, the above-quoted materials on FCPA also indicate that FCPA violations are often linked to other illegal or unethical conduct on the part of a company,

such as financial fraud (see FCPA A Resource Guide to the US Foreign Corrupt Practices Act, p. 3).

106. Finally, the Panel notes that the ICC also mentions bribes and kickbacks as two different forms of corruption (see International Chamber of Commerce Anti-Corruption Third Party Due Diligence: A Guide for Small and Medium Size Enterprises, p. 3).

107. And lastly, the Panel 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/).

108. Taking the above into consideration 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.

109. 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 officials entrusted with the management of sports organizations.

110. Consequently, in order to consider whether the Appellant has breached Article IV.C of FEC, his alleged actions should fall within one of the above characteristics.

Ad. 4 Can the Appellant's actions be deemed as corrupt practices in sports under Article IV.C.4 of FEC?

111. The point of departure for this analysis is the language of Article IV.C.4 of FEC.

112. Under this Article, "*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*".

113. Clearly, the primary objective of this provision is to combat certain unlawful (improperly influencing) or legal (betting, having stakes in betting organizations) albeit undesirable behaviour. The common denominator for these different types of actions is their relation to sports betting.

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

115. One may wonder whether such a general reference to "other corrupt practices" should be included among several actions which are clearly related to one form of commercial activities (betting), but this Panel accepts the Respondent's positions that it is in fact a reference to any corrupt practices, whether or not related to betting.

116. 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. Therefore, the Panel will conduct such an analysis.

117. 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 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).

118. 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.

119. The Parties disagree as to the legal qualification of the Appellant's actions in the first half of 2013. 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.

120. In the Panel's assessment, the Appellant's alleged actions - causing FIN to actually be reimbursed for the invested sums from two different sources (the Ministry of Economy and CONI Servizi) by misrepresenting in the April 2012 settlement between FIN and CONI Servizi - 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 first three above referenced forms of corruption. This is for the following reasons.

121. As regards the acts identified in the United Nations Convention against Corruption, the Panel notes that the Appellant's actions may be treated as related to accounting (in the broader sense of the word) – in the same manner as the acts listed in the Convention. Yet, the actions undertaken by the Appellant are not characteristic of any of the unlawful types of behaviour, as listed in the Convention. The Panel notes that the common denominator to all acts listed in Article 12.3 of the Convention is the proactive element intended at misrepresenting reality (as though to paint a false picture) in the books of account (where the actual circumstances are, as a consequence, warped). One can hardly see any signs of that sort of conduct in the measures taken by the Appellant.

122. As regards bribery, the key element is financial or other form of gain, received or promised. The Appellant's receipt of any bribe has neither been evidenced nor alleged in the present matter. Nor did the Appellant benefit FIN through his actions. Indeed, as is clear from the Italian Court of Auditors' first instance and appeal judgments (see *supra* at paras. 16 and 17), FIN actually spent on works on public swimming pools more money than it received from public subsidies. However, in the interpretation of Italian public accounting rules given by the Appeals Court of Auditors, those higher expenses could not be offset against the excessive reimbursements obtained from CONI Servizi because they pertained to different accounting items (the former were for construction works while the latter were for maintenance works) and to different swimming pools (the former were for several swimming pools around Rome while the latter were only for the Foro Italico swimming pools). In short, the formal mistakes in terms of Italian public accounting rules made by FIN, and thus by the Appellant, can be qualified as a form of administrative negligence or of accounting irregularity and not as a form of bribery, given that no undue or dishonest benefit was truly obtained by FIN or the Appellant,

123. For the same reasons, the Appellant may not be considered to have resorted to embezzlement. Nothing has been unearthed as to the Appellant having taken FIN's or public goods or funds for personal gain.

124. Also, no allegations of kickbacks have been made against the Appellant.

125. This leaves only fraud, the last and the broadest form of corrupt behaviour to be potentially applied to the Appellant. Dishonest and/or illegal activities perpetrated by individuals or companies in order to provide an advantageous financial outcome to those persons or establishments can vary greatly. This category includes even such behaviour as - for instance - employees of one organization accepting work that is normally unacceptable in terms of quality, performed by another organization. That said, one may theoretically wonder whether causing the same funds spent to be actually reimbursed by two different institutions (with regard to one of these institutions by a set-off) perhaps qualifies as a form of fraud.

126. In the Panel's assessment it does not. The Panel has not found any signs of fraud in the Appellant's actions. This is for the following reasons.

127. First, the Panel notes that there is no criminal ruling against the Appellant for his actions, as specified in the Second Referral Decision. Competent authorities have not deemed the Appellant's actions to have been of a criminal nature. Indeed, with decrees issued on 20 March 2015 and 22 December 2016, the Judge for Preliminary Investigations of the Rome Criminal Tribunal has acquitted the Appellant of any criminal charge for fraud, embezzlement and/or forgery, in relation to the same facts taken into consideration by the Italian Court of Auditors (see the Judgement of 19 January 2023, dismissing the Appellant's request for revision of Decision no. 181/2022).

128. The Panel is, of course aware, that in disciplinary proceedings brought before the CAS there are at least three levels of burden of proof – "balance of probabilities", "comfortable satisfaction" and "beyond a reasonable doubt", with the last one applying in criminal procedures and the second one applying in most CAS disciplinary proceedings. Thus, the mere fact that a given action has not been found to have violated the criminal laws does not, in its own right, mean that no disciplinary sanction can be applied. Yet, the fact that the authorities did not find the Appellant's actions to have violated any criminal laws is one of the elements which weigh in the Appellant's favour.

129. Second, as indicated above (at paras. 121), nothing has been unearthed as to the Appellant's or FIN's overall financial gain due to the use of public funding for the works done on various public swimming pools, and the consequent entering into the Settlement Agreement.

130. Third, accounting irregularities are not uncommon in the business world. CEOs of commercial companies rarely have accounting backgrounds; hence they must rely on appropriately trained staff to help them navigate the various laws and regulations. While a CEO is personally responsible for ensuring compliance with the rules, and they may sometimes have to bear adverse financial ramifications of their actions, it does not automatically follow that they should be found liable for fraud every time an accounting irregularity occurs.

131. Fourth, in the Panel's assessment, the FINA Ethics Panel essentially did not look into what exactly happened, drawing solely on the findings of the Appeals Court of Auditors in its Decision no. 181/2022. However, the Ethics Panel disregarded the fact that the scope of the matters heard by Italian Courts of Auditors is utterly different from that of the Ethics Panel. Italian Courts of Auditors convene to safeguard state funds. Anyone who has anything to do with state funds in the course of their business operations may be brought before that Court – for example, both a CEO of a company using state funding or a university professor managing a public grant. For this reason, the Court of Auditors' findings should not be binding in assessing whether the Appellant had in fact resorted to corrupt practices as provided for in the FINA Rules. They may serve as a point of departure for further analysis and verification, rather than constitute the sole piece of evidence in the matter.

132. Finally, based on the evidence on file (or – more precisely - lack thereof), the Panel does not believe that the Appellant brought the sport into disrepute and therefore no violation of Article C.12.1.3 of the FINA Constitution has been proved (regardless of whether the Ethics Panel is authorised to sanction a violation of FINA Constitution – as opposed to FEC).

133. For these reasons the Panel opines that the Second Referral Decision is faulty and it should be repealed.

VIII. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 18 November 2022 by Mr. Barelli against the decision of the FINA Ethics Panel rendered on 8 November 2022 is hereby upheld.

2. The decision issued on 8 November 2022 by the FINA Ethics Panel is annulled.

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 15 September 2023

COURT OF ARBITRATION FOR SPORT

Eligiusz Krześniak
President of the Panel

Alexander McLin
Arbitrator

Massimo Coccia
Arbitrator