



**Arbitration CAS 2020/A/7247 Guillermo Bertola v. Fédération Internationale de Natation (FINA), consent award of 25 January 2021**

Panel: Ms Carine Dupeyron (France), President; Mr Rui Botica Santos (Portugal); Mr Jordi López Batet (Spain)

*Aquatics (swimming)*

*Doping (blood doping)*

*Right of a CAS panel to issue a consent award and purpose of it*

*Duty of the CAS panel to verify the bona fide of the settlement agreement*

- 1. In accordance with Article R56 para. 2, second sentence, of the CAS Code, a CAS panel is expressly allowed to issue an award embodying the terms of a settlement if all parties to the dispute agree. The panel's endorsement of the settlement agreement and incorporation in an award serves the obvious purpose of rendering it easier for the parties to enforce the settlement agreement.**
- 2. As any settlement "may" be embodied in an award, it is up to the CAS panel to verify the *bona fide* of the settlement agreement, so that the consent award mechanism is not manipulated by the parties as an instrument of fraud, and to acknowledge that the settlement terms are not contrary to public policy principles or mandatory rules.**

## **I. PARTIES**

1. Mr Guillermo Bertola ("the Athlete" or "the Appellant") is a swimmer from Argentina.
2. The Fédération Internationale de Natation ("FINA" or "the Respondent") is the international federation which promotes the development of five disciplines of aquatic sports throughout the world, including swimming. FINA is responsible for carrying out, *inter-alia*, a doping control program for both in-competition and out-of-competition testing.

## **II. FACTUAL BACKGROUND OF THE DISPUTE**

3. Between 21 July 2013 and 28 September 2019, the Athlete underwent out-of-competition blood testing as a member of FINA's registered testing pool, involving the collection of four samples.
4. In line with the International Standard for Testing and Investigations of the World Anti-Doping Agency ("WADA"), the Athlete's blood profile was submitted to an Expert Panel for initial review on an anonymous basis. The Expert Panel concluded that it was highly likely that a

prohibited substance or prohibited method had been used. A typical OFF constellation was visible in sample 2, obtained on 31 January 2018, which was four days prior to a competition. The OFF constellation was consistent with blood manipulation.

5. The Athlete was notified of a potential anti-doping rule violation (“ADRV”) on 2 December 2019, based on the Expert Panel’s Report and the blood profile results.
6. The Athlete provided a response to the notification on 11 December 2019. In this first response, the Athlete provided different justifications to explain the results, including altitude training, use of hypoxic devices, and illness on the day of sample collection. He stated that his blood profile was completely normal.
7. The Expert Panel considered the Athlete’s response and provided an evaluation on it, dated 27 December 2019. The Athlete’s explanations were found to be highly unlikely to have caused the abnormal values in the blood profile. The Expert Panel maintained their unanimous opinion from the original report.
8. On 20 January 2020, FINA charged the Athlete with a violation of Article 2.2 of the FINA Doping Control Rules (“the FINA DCR”), viz. *“Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method”*. The Athlete was also provisionally suspended on the same date.
9. By way of a letter dated 9 February 2020 and sent on 10 February 2020, the Athlete wrote to FINA in response to FINA’s notice of charge letter. Within this second response, the Athlete did not dispute having committed an ADRV. He admitted to having received a blood transfusion from his mother, who had the same blood type as him.
10. FINA wrote to the Athlete on 18 February 2020, noting that he admitted to the prohibited method (per the WADA Code) of blood manipulation and that his matter would be forwarded to the FINA Doping Panel for consideration.
11. FINA provided written submissions dated 26 February 2020 to the FINA Doping Panel. FINA submitted that the ADRV was intentional and that a period of ineligibility of four years was appropriate, as well as disqualification of results.
12. On 2 March 2020, the FINA Doping Panel asked the Athlete whether he requested a hearing and whether he wished to file any further documents in his defence.
13. On 4 March 2020, the Athlete’s mother emailed FINA and WADA, attaching a letter written by her on 2 March 2020. In that letter, she admitted to providing a blood transfusion to her son.
14. On 23 March 2020, the Athlete wrote to the FINA Doping Panel and restated his admission of a forbidden blood transfusion. He requested a video hearing.
15. The hearing took place via teleconference on 27 May 2020.

16. By way of a summary decision dated 29 May 2020 and a reasoned decision dated 17 June 2020 (the “Appealed Decision”), the FINA Doping Panel: found the ADRV under Article 2.2 of the FINA DRC proven against the Athlete; sanctioned him with a four-year period of ineligibility in accordance with Article 10.2.1.1 of the FINA DRC, to commence on 20 January 2020; and disqualified all of his results from 23 January 2018.

### III. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 8 July 2020, the Athlete submitted a Statement of Appeal before the Court of Arbitration for Sport (“CAS”), in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (2020 edition) (the “Code”). In his Statement of Claim, the Appellant nominated as arbitrator Mr Rui Botica Santos, Attorney-at-law in Lisbon, Portugal.
18. On 27 July 2020, the Respondent nominated as arbitrator Mr Jordi López Batet, Attorney-at-law in Barcelona, Spain.
19. On 3 September 2020, after several extensions, the Appellant filed the Appeal Brief further to Article R51 of the Code.
20. On 22 September 2020, the CAS Court Office informed the Parties, further to Article 54 of the Code and on behalf of the Deputy President of the Appeals Arbitration Division, that the Panel appointed to decide on the present matter had been constituted as follows:

<u>President:</u>	Ms Carine Dupeyron, Attorney-at-law, Paris, France
<u>Arbitrators:</u>	Mr Rui Botica Santos, Attorney-at-law, Lisbon, Portugal Mr Jordi López Batet, Attorney-at-law, Barcelona, Spain

21. On 23 September 2020, the Respondent communicated to the CAS Court Office that the Parties’ had agreed to suspend the deadline of the Respondent’s Answer “*until further notice*”, which the Appellant confirmed agreement with on the same day.
22. On 24 September 2020, the CAS Court Office confirmed, in light of the Parties’ agreement, that the deadline for the Answer was suspended until further notice.
23. On 30 October 2020, the Athlete sent the CAS a letter informing of the Parties’ settlement along with a Settlement Agreement dated 28 October 2020 entered into between them, requesting “*a consent award in the present matter as established in the Settlement Agreement ...*”.
24. On 2 November 2020, the Respondent confirmed the Settlement Agreement and the request for a Consent Award.

### IV. THE SETTLEMENT AGREEMENT

25. In the context of the appeal proceedings, and as regards the factual circumstances of the case, the Parties have come to the following agreement:

- Given the intentional nature of the ADRV, it is agreed that a period of ineligibility of four years remains appropriate.
  - However, it is accepted that the Athlete, having admitted the violation immediately upon its assertion, could benefit from a backdating of the sanction pursuant to Article 10.11.2 of the FINA DCR.
  - Accordingly, it has been agreed that the commencement of the period of ineligibility could be backdated by 15 months to 20 October 2018.
  - The backdating of the ineligibility formally reduces the period during which disqualification based on Article 10.8 of the FINA DCR is applicable. Such disqualification now covers the period between 23 January 2018 and 19 October 2018.
  - For the avoidance of doubt, results achieved from 20 October 2018 are disqualified, by effect of the backdated ineligibility commencing from that date.
  - In conclusion, the Parties agree that the appropriate sanction is a four-year period of ineligibility backdated to commence on 20 October 2018, and a period of disqualification of results between 23 January 2019 and 19 October 2018.
26. The Settlement Agreement was signed by both Parties on 28 October 2020.
27. The Panel has been requested to ratify the Settlement Agreement and embody it in a Consent Award further to Article R56 of the Code.
28. The terms of the Settlement Agreement concluded between the Parties are as follows:

*“This Settlement Agreement (the “**Agreement**”) between the Athlete and FINA describes the terms upon which the parties are willing to apply for a consent award to be issued in the appeal proceedings currently pending before the Court of Arbitration for Sport (“CAS”) in case number CAS 2020/A/7247 (the “**CAS Appeal**”).*

*The parties intend this to be a legally binding document.*

**WHEREAS:**

- (a) *The Athlete is an Argentinian swimmer.*
- (b) *The Athlete underwent out-of-competition blood testing as a member of FINA’s registered testing pool, involving the collection of four samples between 21 July 2013 and 28 September 2019.*
- (c) *In line with the WADA International Standard for Testing and Investigations, the Athlete’s blood profile was submitted to an Expert Panel for initial review on an anonymous basis. The Expert Panel concluded that it was highly likely that a prohibited substance or prohibited method had been used. A typical OFF constellation was visible in sample 2, obtained on 31 January*

2018, being four days prior to a competition. The OFF constellation was consistent with blood manipulation.

- (d) *The Athlete was notified of a potential ADRV on 2 December 2019, on the basis of the Expert Panel's report and the blood profile results.*
- (e) *The Athlete provided a response to the notification on 11 December 2019. In this first response, the Athlete provided different justifications to explain the results, including altitude training, use of hypoxic devices, and illness on the day of sample collection. He stated that his blood profile was completely normal.*
- (f) *The Expert Panel considered the Athlete's response and provided an evaluation on it, dated 27 December 2019. The Athlete's explanations were found to be highly unlikely to have caused the abnormal values in the blood profile. The Expert Panel maintained their unanimous opinion from the original joint report.*
- (g) *By way of a letter dated 20 January 2020, FINA charged the Athlete with a violation of Article 2.2 of the FINA Doping Control Rules ("the **FINA DCR**"), viz. "Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method". The Athlete was also provisionally suspended on the same date.*
- (h) *By way of a letter dated 9 February 2020 and sent on 10 February 2020, the Athlete wrote to FINA in response to FINA's notice of charge letter.*
- (i) *Within this second response, the Athlete did not dispute having committed an anti-doping rule violation. He admitted a transfusion of blood from his mother, who had the same blood group as him.*
- (j) *FINA wrote to the Athlete on 18 February 2020, noting that he admitted to the prohibited method (as per the WADA Code) of blood manipulation. His matter was to be forwarded to the FINA Doping Panel for consideration.*
- (k) *FINA provided written submissions dated 26 February 2020 to the FINA Doping Panel. FINA submitted that the ADRV was intentional. FINA submitted that a period of ineligibility of four years was appropriate, as well as disqualification of results.*
- (l) *On 2 March 2020, the FINA Doping Panel asked the Athlete whether he requested a hearing and whether he wished to file any further documents in his defence.*
- (m) *On 4 March 2020, the Athlete's mother emailed FINA and WADA, attaching a letter written by her on 2 March 2020. Within that letter, she admitted providing a blood transfusion for her son.*
- (n) *On 23 March 2020, the Athlete wrote to the Doping Panel and restated his admission of a forbidden blood transfusion. He also requested a video hearing.*

- (o) *The hearing took place via teleconference on 27 May 2020.*
- (p) *By way of a summary decision dated 29 May 2020 and a reasoned decision dated 17 June 2020, the FINA Doping Panel: found the ADRV under Article 2.2 proven against the Athlete; sanctioned him with a four year period of ineligibility in accordance with FINA DC 10.2.1 .1, to commence on 20 January 2020; and disqualified all of his results from 23 January 2018 (“**the Appealed Decision**”).*
- (q) *The Athlete appealed to CAS by way of a Statement of Appeal sent on 8 July 2020 and then an Appeal Brief dated 3 September 2020. The Athlete submitted that the sanction was not proportionate.*
- (r) *The Athlete notably argued that the sanction should be reduced from four years to two years due to prompt admission, and that alternatively the sanction should begin in January 2018 due to timely admission.*
- (s) *On 24 September 2020, the deadline for the Answer brief was suspended by the CAS until further notice.*
- (t) *In the context of these appeal proceedings, the parties have come to the following agreement, with regard to the overall factual circumstances of this case.*
- (u) *Given the intentional nature of the ADRV, it is agreed that a period of ineligibility of four years remains appropriate.*
- (v) *However, it is accepted that the Athlete, having admitted the violation immediately upon its assertion, could benefit from a backdating of the sanction pursuant to Article 10.11.2 of the FINA DCR.*
- (w) *Accordingly, it has been agreed that the commencement of the period of ineligibility could be backdated by 15 months, to 20 October 2018.*
- (x) *The backdating of the ineligibility formally reduces the period during which disqualification based on Art. 10.8 is applicable. Such disqualification now covers the period between 23 January 2018 and 19 October 2018.*
- (y) *For the avoidance of doubt, results achieved from 20 October 2018 are disqualified, by the effect of the backdated ineligibility commencing from that date.*
- (z) *In conclusion, the parties agree that the appropriate sanction is a four year period of ineligibility backdated to commence on 20 October 2018, and a period of disqualification of results between 23 January 2018 and 19 October 2018.*

**NOW THEREFORE IT IS AGREED AS FOLLOWS:**

1. *The Parties apply for a consent award amending the Appealed Decision as follows:*

- (a) *The Athlete's admitted use of a prohibited method, namely blood transfusion, constitutes an anti-doping rule violation pursuant to Article 2.2. of FINA DCR.*
  - (b) *The Athlete shall be sanctioned with a period of ineligibility of four years, backdated to commence on 20 October 2018. The period of ineligibility shall therefore end on 19 October 2022 included.*
  - (c) *Any competitive results of the Athlete from and including 23 January 2018 to 20 January 2020, including any medals points and prizes, shall be disqualified.*
  - (d) *Each party bears their own legal costs and other expenses in connection with the CAS Appeal".*
2. *As soon as reasonably practicable following the execution of this Agreement by all of the Parties, the Athlete shall send a letter in the form set out in **Annex 1** to the CAS Court Office, enclosing a signed copy (or, if signed in counterparts, copies) of this Agreement and seeking the ratification of the terms of paragraph 1, and an integration of the factual recitals, of this Agreement in a CAS Arbitral Award rendered by consent of the Parties in accordance with R56 of the CAS Code ("**Consent Award**").*
  3. *Without limitation to paragraph 2 above, the Parties shall do all things reasonably necessary in order to procure, as soon as reasonably practicable following execution of this Agreement, that the substantive terms of their agreement, as set out at paragraph 1 above, shall be embodied in a Consent Award.*
  4. *Without prejudice to the foregoing, each of the Parties agrees to waive any claim it may have to costs or other expenses in connection with the CAS Appeal.*
  5. *For the convenience of the parties and to facilitate execution, this Agreement may be executed in counterparts.*
  6. *The Parties agree that any dispute related to this Agreement should be exclusively governed by Swiss law and shall be submitted to the Court of Arbitration for Sport.*

***IN WITNESS WHEREOF**, the Athlete and FINA execute this Settlement Agreement, which is legally binding on the Parties as of the date on which the last Party executes the same" (emphasis in original).*

## V. JURISDICTION

29. The jurisdiction of CAS, which is not disputed, derives from Article 13.2.1 of the applicable FINA DCR and Article R47 of the Code.
30. It follows that the CAS has jurisdiction to decide on the present dispute and to issue this Consent Award.

## VI. RATIFICATION AND INCORPORATION OF THE SETTLEMENT AGREEMENT BY CAS

31. In accordance with Article R56 para. 2, second sentence, of the Code “[...] *Any settlement may be embodied in an arbitral award rendered by consent of the parties*”.
32. Therefore, the Panel is expressly allowed to issue an award embodying the terms of the settlement if all parties to the dispute agree. The Panel’s endorsement of the Settlement Agreement and incorporation in an award serves the obvious purpose of rendering it easier for the Parties to enforce the Settlement Agreement.
33. All Parties to the present dispute have agreed to embody part of the Settlement Agreement in a consent award. However, as any settlement “*may*” be embodied in an award, it is up to the Panel to verify the *bona fide* of the Settlement Agreement, so that the consent award mechanism is not manipulated by the Parties as an instrument of fraud, and to acknowledge that the settlement terms are not contrary to public policy principles or mandatory rules.
34. The Panel, having reviewed the text of the Settlement Agreement and the evidence on file, finds no reason to object to or disapprove of the terms of the Settlement Agreement and is satisfied that the agreement constitutes a *bona fide* settlement of the dispute brought to its attention.
35. Accordingly, by consent, an award is made directing the Parties to fully comply with all the terms of the Settlement Agreement. The Settlement Agreement and Consent Award terminate the CAS arbitration *CAS 2020/A/7247 Guillermo Bertola v. Fédération Internationale de Natation*.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules that:

1. The Settlement Agreement submitted to the CAS Court Office by the Parties on 30 October 2020 is hereby ratified by the CAS with the consent of the Parties and its relevant terms are incorporated into this arbitral award.
2. The terms of the Settlement Agreement modify Items 6.2 and 6.3 of the decision of the Anti-Doping Panel of the Fédération Internationale de Natation of 17 June 2020.
3. Each Party is hereby ordered to perform the obligations and duties as per the Settlement Agreement referred to above.
- (...)
6. All other motions or prayers for relief are dismissed.