

WADA Legal Note on the CAS Award in WADA v. RUSADA (CAS 2020/O/6689)

A. Background leading to the CAS proceedings

1. The WADA-commissioned McLaren Reports ([Part I](#) and [Part II](#)), published in 2016, exposed a centralized doping and anti-detection scheme that had operated in Russia in the period from at least 2011 to 2015. In particular, the scheme involved the misreporting of positive samples as clean – the so-called Disappearing Positives Methodology - and subsequent urine swapping to avoid the misreporting being discovered through retesting.
2. In order to be able to prosecute doping cheats that had benefited from the Disappearing Positives Methodology, WADA sought access to the Laboratory Information Management System (LIMS) of the Moscow Laboratory for the relevant period, as well as the underlying analytical data (chromatograms, raw data etc.). For years, access to the data was consistently refused by the Russian authorities on the basis that they were sealed as part of criminal investigations by the Investigative Committee of the Russian Federation (ICR).
3. In [September 2018](#), WADA decided to reinstate RUSADA as a compliant Signatory.¹ That reinstatement was subject to a specific post-reinstatement condition (Post-Reinstatement Condition) which required the provision of authentic LIMS and underlying analytical data from the Moscow Laboratory for the period from 2011-2015 (the Moscow Data).
4. WADA made clear to RUSADA and the Russian authorities from the outset that a failure to meet the Post-Reinstatement Condition would be treated as an act of Critical non-compliance under the [World Anti-Doping Code](#) (Code) and the new [International Standard for Code Compliance by Signatories](#) (ISCCS), which had come into force on 1 April 2018.
5. WADA obtained a copy of the Moscow Data in January 2019. After a thorough [forensic investigation](#) by WADA's Intelligence and Investigations department (WADA I&I), the independent WADA Compliance Review Committee (CRC), chaired by Jonathan Taylor QC, concluded that the Russian authorities had, after the imposition of the Post-Reinstatement Condition, deliberately manipulated and deleted parts of the Moscow Data.
6. The manipulations included the planting of fabricated Forum Messages in the LIMS that were designed to frame Dr. Rodchenkov for the manipulations that had been laid bare by the McLaren Reports. More particularly, the planted and fabricated Forum Messages were drafted to support the Russian counter narrative that the various manipulations and cover-ups exposed by Professor McLaren were part of a private scheme operated by Dr. Rodchenkov to extort money from athletes rather than being part of a centralized doping and anti-detection scheme.
7. In its [recommendation](#) of 21 November 2019, therefore, the CRC recommended that RUSADA be declared non-compliant (for failing to meet the Post-Reinstatement Condition)

¹ RUSADA had been declared non-compliant in November 2015 further to a recommendation of the Pound Independent Commission, which investigated allegations of systemic doping in Russian athletics.

and that a suite of consequences be imposed for a period of four years pursuant to the ISCCS. The recommended consequences, in summary, were as follows:

- (i) Russian government officials would be prevented from sitting on the boards/committees of WADA Signatories.
 - (ii) Russian government officials would be prevented from attending or participating in the Youth Olympic Games (summer and winter), the Olympic Games and Paralympic Games (summer and winter), World Championships and the events of Major Event Organizations (together, the “Covered Events”).
 - (iii) Russia would be prevented from hosting, being granted the right to host or even bidding for Covered Events. In addition, Russia could not bid for the 2032 Olympic and Paralympic Games, whether during or after the four-year period.
 - (iv) Russia’s flag could not be flown at the Covered Events.
 - (v) High-ranking officials of the Russian Olympic Committee (ROC) and Russian Paralympic Committee (RPC) could not attend or participate in the Covered Events.
 - (vi) Russian athletes and support personnel could only participate in the Covered Events if they could demonstrate that they were not implicated by the non-compliance, and then only as neutrals.
 - (vii) A fine equal to the lower of (i) 10% of RUSADA’s income in 2019 or (ii) 100,000 USD would be imposed.
8. The CRC also recommended a number of reinstatement conditions aimed *inter alia* at ensuring RUSADA’s continuing operational independence, facilitating the prosecution of covered-up doping cases and recovering the substantial costs in investigating the non-compliance and, going forward, monitoring the implementation of the consequences.
9. The WADA Executive Committee unanimously [adopted](#) the CRC recommendation pursuant to a decision on 9 December 2019.
10. Under the terms of the ISCCS, RUSADA exercised its right, on [27 December 2019](#), to dispute the assertion of non-compliance as well as the proposed consequences and reinstatement conditions. This led to WADA, in turn, referring the case to the Court of Arbitration for Sport (CAS) on [9 January 2020](#) so that the CAS Panel could determine whether RUSADA was non-compliant and, if so, impose the appropriate consequences and reinstatement conditions pursuant to the ISCCS.
11. WADA named RUSADA as respondent to the CAS proceedings. A number of other parties *viz.* the ROC, RPC, 43 Russian athletes, the Russian Ice Hockey Federation, the International Olympic Committee (IOC), the International Paralympic Committee (IPC), the European Olympic Committees (EOC) and the International Ice Hockey Federation were admitted as intervening parties.

B. CAS proceedings – the positions of the parties²

12. WADA's case before CAS was that RUSADA was non-compliant as a result of its failure to meet the Post-Reinstatement Condition. WADA's case did not cover the broader Russian doping scheme that included, in particular, the 2014 Sochi Winter Olympic and Paralympic Games. This is a critical point given that the ISCCS – along with a number of amendments to the Code focusing on Signatories' compliance – came into force on 1 April 2018 and cannot be applied retroactively. Prior to 1 April 2018, WADA did not have proper legal basis to pursue this matter.
13. In its case, WADA alleged in particular that the Moscow Data had been subject to significant and deliberate manipulation and deletion in the period from November 2018, including in January 2019 while the data was being copied in the presence of a WADA retrieval delegation.
14. RUSADA and other Russian parties put forward a series of arguments that the ISCCS was invalid and, in any event, not binding upon them:
- (i) The ROC (supported by a number of other Russian parties) argued that the compliance framework set out in the ISCCS exceeded the scope of WADA's Foundation Statutes and was therefore invalid. The argument was premised on the allegation that the WADA Foundation Statutes conferred no authority to impose sanctions in connection with Signatory non-compliance.
 - (ii) A number of the Russian parties (including RUSADA, RPC and ROC) contended that the ISCCS and related provisions in the Code were not binding on them. They relied on Swiss contract law to argue that, in view of the (allegedly) unforeseeable nature of the changes introduced under the ISCCS, they were not validly incorporated into the contract between WADA and its Signatories under the modification provisions in the Code.³ Within this context, RUSADA specifically sought to rely on the fact that, at the time when the ISCCS was put out for consultation to World Anti-Doping Code Signatories, it was preoccupied with other matters relating to its compliance situation.
 - (iii) RUSADA (supported by a number of other Russian parties) submitted that the system foreseen by the ISCCS breached fundamental principles of due process, citing article 6 of the European Convention on Human Rights (ECHR). In particular, it was argued based on expert evidence that all parties potentially affected by the consequences should have been individually heard during the investigation and subsequent arbitral process.
 - (iv) The Russian athletes argued that the requirement, as a condition to compete in the Covered Events, to demonstrate that they were not implicated by the non-

² This section is not intended to be an exhaustive summary of all arguments made by WADA, RUSADA and the intervening parties but rather a summary of the parties' key arguments. In particular, this section does not deal with the various procedural and jurisdictional objections that were made by RUSADA and the Intervening Parties.

³ More particularly, the relevant Russian parties argued that the ISCCS (i) amounted to unforeseeable, and therefore unenforceable, general terms and conditions and (ii) breached article 27.2 of the Swiss Civil Code by exposing World Anti-Doping Code Signatories to arbitrary sanctioning authority on the part of WADA.

compliance, as well as the obligation to participate as neutrals in those events, were sanctions based on provisions in the ISCCS that were not binding on them. They relied, in particular, on the argument that the new compliance-related provisions in the Code (providing for the ISCCS) had not been integrated into the Russian Anti-Doping Rules (ADR) or the ADR of the relevant International Federations.

15. RUSADA disputed that there had been deliberate manipulations of the Moscow Data. Indeed, RUSADA espoused the position that had been advanced by experts engaged by the Russian Ministry of Sport during the WADA I&I investigation i.e. that the various deletions and changes to the Moscow Data had resulted from activities that were undertaken within the context of routine operations and in reaction to system instabilities.
16. RUSADA (supported by ROC and RPC in particular) argued that, even if it were established that (deliberate) manipulations had taken place, it could not be held liable for activities undertaken by unknown persons in the Moscow laboratory in which it was not involved and over which it had no control. RUSADA (and other Russian parties) put forward arguments based on Swiss law and the case law of the CAS to contend that it could not be held strictly liable in these circumstances.
17. RUSADA and other Russian parties argued that, even if it were found that the ISCCS regime was valid (and binding on them) and even if it were found that RUSADA was non-compliant, the proposed consequences in this case breached fundamental principles of law. For example:
 - (i) It was argued that the system foreseen by the ISCCS breached fundamental principles of human rights. In particular, it was argued that (i) the requirement for athletes, as a condition of eligibility for the Covered Events, to demonstrate that they were not implicated by the non-compliance breached the presumption of innocence and (ii) the imposition of consequences on a range of Russian parties in connection with the alleged data manipulations amounted to illegal collective punishment. It was also argued, in particular by the Russian athletes, that the imposition of the proposed consequences would breach their human rights, including human dignity and the right to private and family life.
 - (ii) The Russian athletes (supported by other Russian parties) argued that the consequences breached European and Swiss competition law as both an abuse of dominant position and illicit agreement restraining trade.
 - (iii) The Russian parties also argued that the consequences breached their personality rights and infringed the principle of proportionality. They contended, in particular, that WADA had failed to identify the relevant perpetrators of any data manipulation and failed to establish how the imposition of consequences on innocent third parties could achieve a legitimate purpose related to the fight against doping.

C. CAS Decision

18. The CAS Panel dismissed RUSADA's argument that, based on its specific factual circumstances, it was not bound by the ISCCS and related provisions in the Code. The Panel found that RUSADA had clearly consented to the ISCCS by its conduct. In any event, the Panel held that the ISCCS was neither undeterminable nor unforeseeable and

that it had been properly implemented in accordance with the Code. In particular, the Panel made the following findings:

- (i) *“There is much force in the WADA submission that acceptance of the RUSADA argument would mean that a Signatory who had never objected to the ISCCS, never commented on it nor voiced concerns and not sought to terminate its Signatory status could simply, when faced with a compliance action, say that it was not bound. If that were right, there would be no certainty as to what rules the Signatories were bound by and, moreover, different Signatories would perhaps be bound by different rules depending on their factual circumstance”* (para. 554)
- (ii) *“If different Signatories were to be bound by different versions of the [Code] or International Standards, there would not be a level playing field for athletes. This would undermine the purpose of the [Code] [...]”* (para. 555).
- (iii) *“[...] there is no evidence in support of [RUSADA’s] proposition that “in light of its priorities at the time, RUSADA had neither the time nor the resources to be involved in the fast track consultation process initiated by WADA [...]”* (para. 556).
- (iv) *“The Panel therefore does not accept that the 2018 [Code] and the ISCCS were neither determinable nor foreseeable having regard to the 2015 [Code]”* (para. 569).
- (v) *“Article 27(2) of the Swiss Civil Code is only engaged where one of the parties is left to the arbitrary actions of the other party. That has not occurred in the present circumstances. Therefore, there is no violation of Article 27(2) of the Swiss Civil Code”* (para. 570).
- (vi) *“Prof. Mueller’s characterization of the [Code] as “general terms and conditions” is not fit for purpose in the context of contracts whose parties are pursuing a common objective or purpose”* (para. 572).

19. The Panel gave short shrift to the argument (raised primarily by ROC but espoused by RUSADA) that WADA had exceeded its Foundation Statutes by implementing and applying the ISCCS. It found that it was *“clear that the WADA statutes provide for the possibility to enter into contracts to achieve its objectives (viz. the [Code]). This implies the possibility of establishing frameworks and starting legal proceedings to enforce the [Code]. No part of the Statutes exclude power to monitor and enforce compliance of the [Code] by Signatories. Therefore, the compliance framework in the 2018 [Code] and ISCCS was inherent in the scope of the objects set out in the Statutes”* (para. 576).

20. Having held that the ISCCS was valid and binding on RUSADA, the Panel then dismissed the argument that RUSADA could not be held strictly liable for the actions of third parties that were outside of its control. Rather, the Panel confirmed that the ISCCS plainly provided for strict liability and held that it would be a toothless document if this were otherwise. In particular:

- (i) *“In the Panel’s view, there can be no serious challenge to the proposition put by WADA that if a NADO could avoid a compliance action by blaming the interference of public authorities or other third parties, the system would be toothless. It would mean that countries with unscrupulous governments or sports authorities with the*

power and the will to undermine proper anti-doping regulation would be able to do so without consequences, so that, in effect, the overriding aim of harmonized anti-doping regulation would only be possible in those countries where authorities were willing to play by the rules” (para. 599).

- (ii) *“For WADA and the world sporting movement to be able to prevent these abuses and protect clean sport, it is necessary to effect change by acting through its Signatories, if necessary, on the basis of strict liability.”*

21. The Panel made clear that it had no doubt – regardless of whether one applied the applicable standard of a balance of probabilities or the higher Swiss law standard of strict proof – that the Moscow Data were subject to deliberate manipulation, both before and during the WADA retrieval mission in January 2019.

- (i) *“The Panel finds that, prior to the Moscow Data being retrieved by WADA in January 2019, and during its retrieval, it was subjected to deliberate, sophisticated and brazen alterations, amendments and deletions. Those alterations, amendments and deletions were intentionally carried out in order to remove or obfuscate evidence of improper activities carried out by the Moscow Laboratory as identified in the McLaren Reports or to interfere with WADA’s analysis of the Moscow Data” (para. 614)*
- (ii) *“In what the Panel considers to be a more egregious act of misconduct, the Panel finds that alterations were made to Forum Messages in the Moscow Data in order to deceptively inculcate certain employees of the Moscow Laboratory (Dr Rodchenkov and Dr Sobolevsky) in a contrived extortion scheme while exonerating others (Mr Kudryatsev) from wrongdoing” (para. 615).*
- (iii) *“This conduct, which went well beyond mere deletion of incriminating doping samples or data, was breathtaking in its audacity” (para. 660).*

22. The Panel accepted WADA’s submission (reflecting the CRC recommendation) that the manipulations implicated the Russian authorities:

- (i) It noted that the *“data manipulations in the Moscow Laboratory took place while the laboratory was supposedly a “crime scene” under the supervision of the Russian Investigative Committee, a police agency under the direct control of the President of the Russian Federation” (para. 705).*
- (ii) The Panel explicitly endorsed WADA’s use of the term ‘Russian authorities’ as an “appropriate description *“given the evidence of involvement, at high levels, of the Russian government” (para. 706).*

23. Having found that the Russian authorities were implicated, the Panel noted that *“far from recognizing the opportunity to come clean and draw a line under a scandal that has plagued, and drained resources from, international sport for years, the Russian authorities unfortunately saw it as an opportunity to fraudulently promote their fabricated defense strategy and mitigate or avoid the consequences of the doping scheme” (para. 708)*

24. The Panel also explicitly agreed with WADA and the CRC that *“the non-compliance in this case “could hardly be more serious”, adding that by “manipulating and deleting the*

Moscow Data, the Russian authorities interfered with, and undermined, the anti-doping system in the most cynical and sophisticated manner” (para. 709).

25. The Panel also accepted WADA’s submission that it was necessary to take particularly robust action in order to deter the Russian authorities (and others) from deliberately and fraudulently attacking and undermining the anti-doping system in the future:
- (i) *“These manipulations show that the Russian authorities remain as willing as ever to interfere with, and corrupt, the anti-doping system. Having done so in the past (in a manner previously considered unthinkable), it is necessary to take robust action to attempt to deter any repetition” (para. 710)*
 - (ii) *“The Panel accepts that it is necessary to impose serious consequences not only in the interest of the fight against doping in general, but also specifically in the long-term interest of RUSADA, the protection of Russian athletes, and clean Russian sport. To attempt to ensure that RUSADA can fulfil its role of fighting against doping in Russia, it is necessary to effect a fundamental change in attitude at the level of public authorities in Russia, who have demonstrated frequently that they are able and willing to interference with the anti-doping infrastructure and processes [...]” (para. 711).*
26. The Panel also explicitly referred to the overriding objective of the consequences under the ISCCS, which is to *“maintain the confidence of all Athletes and other stakeholders, and of the public at large, in the commitment of WADA and its partners from the public authorities and from the sport movement to do what is necessary to defend the integrity of sport against the scourge of doping” (para. 714).*
27. The Panel dismissed the Russian parties’ arguments related to competition law, human rights and other legal principles such as equal treatment and legitimate expectation (see para. 803 *et seq.*). It also dismissed the argument that, in order to respect due process and the right to be heard, it would have been necessary to hear from every person that might potentially be affected by the consequences, holding that the *“impracticability of this suggestion is self-evident” (para. 809).*
28. Notwithstanding the Panel’s acceptance of the ISCCS regime, and with respect to the seriousness of the non-compliance in this case, the Panel was (for reasons that are not comprehensively explained in the Award) not willing to endorse the full suite of consequences recommended by the CRC, which WADA believes were proportionate and reasonable. In other words, based on its own assessment of proportionality, the Panel considered that the legitimate objectives of WADA could be adequately achieved with lesser consequences.
29. In particular, the Panel decided to apply the consequences for a period of two years rather than the four years recommended by the CRC and sought by WADA (see paras. 739-745 in particular).
30. Whereas the Panel maintained the consequences with respect to the most important events i.e. the Olympic/Paralympic Games and the World Championships, it decided not to apply the Consequences to the Youth Olympic Games and the events of Major Event Organizations.

31. Despite reducing the period of consequences and excluding certain events (although not the most important ones), the Panel did endorse a significant number of the consequences sought by WADA. In particular:

- (i) Government representatives are excluded from sitting on the boards and commissions of Signatories (with the exception of persons elected or appointed in a personal capacity to bodies of the IOC/IPC).
- (ii) Government representatives are excluded from attending or participating in the Olympic/Paralympic Games and World Championships.
- (iii) The restriction on hosting or bidding for the relevant events was accepted by the Panel. It also accepted that events that had already been allocated to Russia had to be reallocated unless it was legally or practicably impossible to do so. WADA notes that the Panel did not follow the recommendation to prevent Russia from bidding for the 2032 Olympic/Paralympic Games (even outside of the period of consequences).
- (iv) The Panel accepted the consequence that the Russian flag cannot be flown at the relevant events. The Panel provided further guidance that this would not cover the use of flags by spectators or the limited use of the Russian flag to designate technical officials.
- (v) The Panel did not accept the consequences that high-ranking ROC/RPC officials could not attend or participate in the relevant events.
- (vi) The Panel did not accept WADA's request that Russian athletes and support personnel would need to demonstrate that they were not implicated by the non-compliance⁴ in order to be eligible to participate in the relevant events.
 - a. The Panel found that it would be *"excessively burdensome and inappropriate in the circumstances to require Russian Athletes and Athlete Support Personnel to bear the onus of proving they were not affected in any way by the manipulation of the Moscow Data"* (para. 770).
 - b. The Panel also appears to have been keen to provide *"finality to this dispute"*, which is presumably a reference to avoiding the cases around the eligibility of individual athletes (see para. 773). Indeed, the view of the Panel was that granting this consequence would *"probably lead to lengthy investigations and subsequent litigation as to whether an athlete has been able to discharge the burden. It would potentially involve athletes being required to access the massive amount of data involved in this case (which was at least 23 terabytes), perhaps in a fruitless and time-consuming search to discover whether they are implicated or even mentioned in the database or the circumstances of the non-compliance"* (para. 783).

⁴ The specific criteria were, in particular, that (i) the athletes/support personnel were not subject to incriminating circumstances in the LIMS data or evidence underpinning the McLaren Reports, (ii) their data had not been manipulated and (iii) they would have to pass a minimum number of doping controls in advance of the relevant event.

- (vii) The Panel understood the need for, and imposed the consequence relating to, neutral participation of Russian athletes. However, for reasons that are not explained in any particular detail in the Award, the Panel decided to “*impose a modified and less restrictive version of the [Neutral Participation Implementation Criteria] to that proposed by WADA*” (para. 791). In summary, the Panel held that the uniforms of Russian athletes and their support personnel, which must be approved by the relevant Signatory, could not bear the Russian flag or other emblem of the country but could include the colors of the Russian flag and could bear the name ‘Russia’ provided that it was accompanied by the words ‘Neutral Athlete’ (or equivalent) in “*a position and size that is no less prominent.*” Subject to the above provision regarding uniforms, Russian athletes and support personnel are prevented from displaying the Russian flag, the name ‘Russia’ and other symbol or emblem of Russia on their clothes, equipment and personal items at official event areas. Moreover, WADA’s request that the Russian anthem could not be played was upheld. The Panel considered that this modified version of the neutrality conditions requested by WADA “*accommodates a balance between the WADA submission that the purpose of the consequences is that the athlete will not be associated with Russia, and the opposing concern that clean athletes should not be affected by neutrality conditions for any longer than is justified*” (para. 791).
- (viii) The fine, including the related finding that the non-compliance involved Aggravating Factors, was upheld by the Panel.
32. The Panel also upheld, for the most part, the reinstatement conditions recommended by the CRC and requested by WADA, including the reimbursement of 1.27m USD incurred by WADA in investigating the data manipulations.
33. The CAS Panel imposed 80% of the arbitration costs on RUSADA. Under R64.5 of the CAS Code, the Panel has the discretion to award the prevailing party a contribution to its legal fees and other expenses. In this case, the Panel awarded WADA a contribution of 400,000 CHF. This costs award is believed to be several times higher than any other costs award made by CAS in its history. It is a strong indication that, despite not granting all the consequences sought by WADA for reasons of perceived proportionality, the Panel considered that WADA had substantially prevailed in its case.
34. In conclusion, the CAS Panel upheld the ISCCS and, in particular, the principle that centralized and harmonized consequences can and must be implemented through WADA’s Signatories where non-compliance occurs, even where the underlying conduct is undertaken not by the Signatory but by third parties such as governments. The CAS Panel understood the seriousness of the non-compliance in this case and the harm caused to the fight against doping and the integrity of sport. Indeed, it held in its conclusion that the “*saga that has followed the exposure of systemic doping practices in Russian sport, including the matters which are the subject of this arbitration, has considerably damaged the history of Russian and international sport*” (para. 858). In accordance with the ISCCS, the Panel carried out its own proportionality assessment, taking into account the imperatives set out in the ISCCS. Whereas the Panel upheld a significant number of the consequences proposed by WADA, the Panel ultimately took the view that the period of consequences should be two years (rather than four) and that athletes should not be excluded unless actually prosecuted for anti-doping rule violations. WADA regrets that



latter finding in particular, not least as the Panel recognized in its conclusion that the data manipulation *“is likely to thwart or at least substantially hinder the ability to identify those athletes who participated in the doping scheme.”*