



香港國際仲裁中心
Hong Kong International
Arbitration Centre

VIAC || Vienna International
Arbitral Centre

JOINT REQUEST FOR CERTAIN CLARIFICATIONS

TO

THE RUSSIAN MINISTRY OF JUSTICE AND THE COUNCIL FOR DEVELOPMENT OF
ARBITRATION AT THE RUSSIAN MINISTRY OF JUSTICE

FROM

THE HONG KONG INTERNATIONAL ARBITRATION CENTRE

AND

THE VIENNA INTERNATIONAL ARBITRAL CENTRE

10 February 2020

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1. INTRODUCTION

- 1.1 On 1 September 2016, Russian arbitration legislation was amended to introduce the concept of the “permanent arbitral institution” (“**PAI**”).¹ On 29 March 2019, further amendments to Russian arbitration legislation came into effect with respect to PAIs.²
- 1.2 Under the law, arbitral institutions (Russian and foreign) may apply to the Russian Ministry of Justice for recognition as a PAI. The decision on the application is made on the basis of a recommendation of the Council for the Development of Arbitration (“**Council**”), which is also empowered to assist the Russian Ministry of Justice in responding to the requests of PAIs and to summarise the practice of application of Russian arbitration legislation.³ Whether an institution has PAI status has significant consequences under Russian law for arbitrations administered by that institution. In summary, the key consequences are that:
- (a) corporate disputes within the meaning of Article 225.1 of the Arbitrazh Procedural Code (“**APC**”) may only be administered by PAIs, subject to certain conditions in respect of certain types of corporate disputes;⁴
 - (b) disputes arising from contracts entered into in accordance with the Federal Law dated 18 July 2011 No. 223-FZ “On the Purchase of Goods, Works and Services by Certain Types of Legal Entities” or in relation to such contracts where the seat of arbitration is in Russia may only be administered by PAIs;⁵
 - (c) Russian domestic disputes may only be administered by foreign PAIs subject to certain conditions; and,
 - (d) where the seat of the arbitration is in Russia, there are important differences between arbitrations administered by a PAI and *ad hoc* proceedings.
- 1.3 On 25 April 2019, the Hong Kong International Arbitration Centre (“**HKIAC**”) was granted PAI status.
- 1.4 On 4 July 2019, the Vienna International Arbitration Centre (“**VIAC**”) was granted PAI status.
- 1.5 Recognising that there are areas under Russian law that would benefit from clarification, HKIAC and VIAC submit this joint request for certain clarifications of the law in respect of: (a) corporate disputes (**Section 2**); (b) procurement disputes (**Section 3**); (c) Russian domestic disputes (**Section 4**); (d) the differences between arbitrations administered by a PAI and *ad hoc* proceedings (**Section 5**); and (e) the consequences of a PAI administering an arbitration that it is not authorised to administer (**Section 6**).

¹ Federal Law No. 382-FZ dated 29 December 2015 “On Arbitration (Arbitral Proceedings) in the Russian Federation” (“**Law on Arbitration**”) and Federal Law No. 409-FZ dated 29 December 2015 “On Incorporation of Amendments to Certain Legislative Acts of the Russian Federation and recognition of Article 6(1)(3) of the Federal Law ‘On Self-Regulating Organisations’ to Have Lost Force in Connection with Enactment of the Federal Law ‘On Arbitration in the Russian Federation’”.

² Federal Law No. 531-FZ dated 27 December 2018.

³ Article 44 of the Law on Arbitration, Section 6 of the Regulation on the Procedure of Creation and Performing its Activities by the Council for Development of Arbitration (approved by the Order of the Russian Ministry of Justice No. 45 dated 20 March 2019).

⁴ Part 5, Article 225.1 of the APC.

⁵ Part 10, Article 45 the Law on Arbitration.

2. CORPORATE DISPUTES

I. Non-arbitral corporate disputes

- 2.1 Please confirm that pursuant to Article 225.1 of the APC, the following corporate disputes in respect of Russian legal entities are **non-arbitrable**:
- (a) disputes on convening of a general meeting of a legal entity's participants;⁶
 - (b) disputes arising out of the notaries' activities on certifying of transactions with participation interests in the charter capital of the limited liability companies;⁷
 - (c) disputes relating to the challenge of non-normative legal acts, resolutions and actions (omissions to act) of the state bodies, local authorities and other bodies, organisations, vested by the federal law with certain state or public powers, officials;⁸
 - (d) disputes regarding a legal entity which, at the time of initiation of arbitrazh court proceedings or commencement of the arbitral proceedings, is a business entity of strategic importance for national defence and state security in accordance with the Federal Law No. 57-FZ dated 29 April 2008 "On Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defence and State Security" ("**Strategic Entities**"), save for disputes relating to ownership over the shares, interests in the charter (contributed) capital of the Strategic Entities and arising out of transactions which did not require preliminary approval under the aforementioned Federal Law;⁹
 - (e) disputes arising out of chapters IX and XI.1 of the Federal Law No. 208-FZ dated 26 December 1995 "On Joint-Stock Companies", i.e., those arising out of acquisition and buy-back by a joint-stock company of the outstanding shares (shares acquired by shareholders), and mandatory or voluntary tender offer made by a shareholder in case of acquisition of more than 30 percent of the shares of the public company;¹⁰ and,
 - (f) disputes relating to the expulsion of the participants from a legal entity which is a profit-making organisation as well as a non-profit organisation that brings together profit-making organisations and (or) individual entrepreneurs.¹¹
- 2.2 In respect of disputes referred to above at paragraphs 2.1(c) and (e), please explain the scope of application of these provisions.
- 2.3 In respect of disputes referred to above at paragraph 2.1(d), please confirm that if, after the initiation of arbitrazh court proceedings or the commencement of arbitral proceedings, an entity acquires the status of Strategic Entity, the dispute will remain arbitrable under the law.

⁶ Para. 7, part 1, Article 225.1 of the APC, para.1, part 2, Article 225.1 of the APC.

⁷ Para. 9, part 1, Article 225.1 of the APC, para.1 part 2, Article 225.1 of the APC.

⁸ Para. 2, part 2, Article 225.1 of the APC.

⁹ Para. 3, part 2, Article 225.1 of the APC.

¹⁰ Para. 4, part 2, Article 225.1 of the APC.

¹¹ Para. 5, part 2, Article 225.1 of the APC.

II. Corporate disputes that may be referred to arbitration administered by an institution with PAI status

- 2.4 At present, neither HKIAC nor VIAC have adopted special corporate dispute resolution rules (“**Special Corporate Dispute Rules**”) that would comply with the provisions of Article 45 of the Law on Arbitration.
- 2.5 Please confirm that pursuant to Article 225.1 of the APC, the following corporate disputes in respect of Russian legal entities may be referred to **arbitration administered by an institution with PAI status** and do not require the application of Special Corporate Dispute Rules:
- (a) disputes relating to the ownership of shares, participation interests in the charter (contributed) capital of business entities and partnerships, equity of cooperatives’ members, including disputes arising out of sale and purchase agreements of shares or participation interests with the exception of disputes specifically referred to in Article 225.1(1)(2) of the APC;¹²
 - (b) disputes relating to the establishment of encumbrances over shares, participation interests in the charter (contributed) capital of business entities and partnerships, equity of cooperatives’ members and the exercise of the rights conferred by them, including disputes relating to the enforced recovery against shares or participation interests, with the exception of disputes specifically referred to in Article 225.1(1)(2) of the APC;
 - (c) disputes arising out of the activities of the registrar of securities’ owners, relating to the recording of title to shares and other securities, exercise by the registrar of securities’ owners of other rights and obligations, as provided by the federal law on the offering of issuance and circulation of the securities,¹³ and,
 - (d) disputes arising out of agreements between the participants of a legal entity regarding the management of that legal entity, including disputes arising out of corporate agreements.¹⁴

III. Corporate disputes that may be referred to arbitration administered by an institution with PAI status and Special Corporate Dispute Rules

- 2.6 Please confirm that pursuant to Article 225.1 of the APC, where (i) the seat of arbitration is in Russia; and (ii) the legal entity, all participants of a legal entity, and other persons being claimants or respondents in such disputes, have entered into an arbitration agreement to submit such disputes to arbitration, the following corporate disputes in respect of Russian legal entities may be referred to **arbitration only when administered by an institution with PAI status that has adopted Special Corporate Dispute Rules**:¹⁵
- (a) disputes relating to the incorporation, reorganisation and liquidation of a legal entity;¹⁶

¹² Para. 2, part 1, Article 225.1 of the APC, para. 5 part 1, Article 225.1 of the APC, part 7.1, Article 45 of the Law on Arbitration.

¹³ Para 6, part 1, Article 225.1 of the APC, para. 5 part 1, Article 225.1 of the APC, part 7.1, Article 45 of the Law on Arbitration.

¹⁴ Part 7.1, Article 45 of the Law on Arbitration No. 531-FZ.

¹⁵ Part 3, Article 225.1 of the APC.

¹⁶ Para. 1, part 1, Article 225.1 of the APC.

- (b) claims brought by founders, participants or members of a legal entity, seeking compensation for damages caused to a legal entity, invalidation of the transactions of a legal entity and/or to the application of the consequences of invalidity of such transactions;¹⁷
- (c) disputes relating to the appointment or election, termination, suspension of the powers and the liability of the persons who are members or were members of management bodies and control bodies of a legal entity; disputes arising out of civil law relations between the members of the management bodies and control bodies of that legal entity in connection with the exercise, termination, suspension of their powers;¹⁸
- (d) disputes relating to the issuance of securities, with the exception of disputes referred to at paragraph 2.1(c) above;¹⁹ and,
- (e) disputes on challenging the resolutions of the management bodies of a legal entity.²⁰

IV. *Other requests for clarification concerning corporate disputes*

- 2.7 Please clarify whether an arbitration agreement to refer a corporate dispute to arbitration is effective only if it has been entered into not earlier than 1 February 2017.²¹
- 2.8 Please clarify the requirements under Russian law for the referral to arbitration of a matter that involves both corporate disputes referred to under paragraph 2.5 and non-corporate disputes. In particular, will disputes arising out of share purchase agreements, which influence neither the ownership of shares and participation interests nor encumbrances over them (e.g., disputes related to payment of share purchase price, indemnities or compensation for damages related to the alleged breach of warranties and representations) be characterised as corporate disputes as per paragraph 2.3(a) above?
- 2.9 Please clarify the requirements under Russian law for the referral to arbitration of a matter that involves corporate disputes referred to under paragraph 2.6 and other corporate or non-corporate disputes.
- 2.10 On 29 March 2019, amendments to part 7.1, Article 45 of the Law on Arbitration came into effect such that private disputes arising under shareholders agreements and other agreements regarding the management of a legal entity may be arbitrated by a PAI without the need for Special Corporate Dispute Rules. However, these amendments only changed the Law on Arbitration and did not remove mirror requirements in Article 225.1 of the APC. Please clarify:
 - (a) the consequences of this inconsistency; and,

¹⁷ Para. 3, part 1, Article 225.1 of the APC.

¹⁸ Para. 4, part 1, Article 225.1 of the APC.

¹⁹ Para. 5, part 1, Article 225.1 of the APC. This is based on the understanding that disputes on the challenging of non-normative legal acts, and decisions and actions of state bodies and local authorities are caught by the prohibition described at paragraph 2.1(c) above and that these disputes would be considered public-law rather than private-law disputes.

²⁰ Para 8, part 1, Article 225.1 of the APC.

²¹ Part 7, Article 13 of the Federal Law No. 409-FZ dated 29 December 2015 “On Amendments to Certain Legislative Acts of the Russian Federation and the Repeal of Article 6 (1)(3) of the Federal Law on Self-Regulating Organisations in connection with the Adoption of the Federal Law on Arbitration in the Russian Federation”).

- (b) whether the amendments only apply to arbitration agreements concluded after 29 March 2019.

3. PROCUREMENT DISPUTES

- 3.1 Please confirm that pursuant to para. 6, part 2, Article 33 of the APC or para. 6, part 2, Article 22.1 of the Civil Procedural Code, disputes arising from contracting in the sphere of goods, works and services to meet state and municipal needs, i.e., those covered by the Federal Law dated 5 April 2013 No. 44-FZ “On the Contract System in State and Municipal Procurement of Goods, Works and Services”, are **non-arbitrable**.
- 3.2 Please confirm that with respect to disputes arising out of contracts entered into in accordance with the Federal Law dated 18 July 2011 No. 223-FZ “On Procurement of Goods, Works and Services by Certain Types of Legal Entities” (the “**Federal Law No. 223-FZ**”), or in relation to such contracts, only an institution with PAI status may administer the dispute when the seat of arbitration is in Russia.²²

4. DOMESTIC DISPUTES

- 4.1 At present, neither HKIAC nor VIAC have established a separate division in the territory of Russia.
- 4.2 Please confirm that pursuant to para. 5, part 6.2, Article 44 of the Law on Arbitration, a foreign institution without a separate division in Russian territory (including HKIAC and VIAC) cannot administer Russian domestic disputes, except for the following types of domestic disputes:
 - (a) between parties from any special administrative region as defined by the Federal Law dated 3 August 2018 No. 291-FZ “On Special Administrative Regions in the Territories of Kaliningrad Region and Primorsky Krai”; and,
 - (b) arising from the agreements to carry out activities in any such region.²³
- 4.3 The Law of Arbitration defines arbitration of domestic disputes as “*arbitration not related to international commercial arbitration*”.²⁴ The Law on International Commercial Arbitration defines “*international*” as (i) the place of business of at least one party is abroad; (ii) the place where a substantial part of the obligations is to be performed is abroad; (iii) the place with which the subject-matter of the dispute is most closely connected is abroad; or (iv) the dispute concerns foreign investments in Russia, or Russian investments abroad. Please clarify:
 - (a) whether parties can agree on a seat of arbitration outside Russia for domestic disputes, and, if so, whether that would change the status of the dispute from a domestic dispute to an international dispute under Russian law?
 - (b) if so, whether such a dispute may be administered by a foreign arbitral institution with PAI status but without a separate division in Russian territory?

²² Pursuant to part 10, Article 45 the Law on Arbitration. Amendments were introduced by the Federal Law dated 27 December 2018 No. 531-FZ “On amendments to the Federal Law “On Arbitration (Arbitral Proceedings) in the Russian Federation” and the Federal Law “On Advertising” and came into force as of 29 March 2019.

²³ Para. 2, part 12 of Article 44 of the Law on Arbitration.

²⁴ Part 4 of Article 2 of the Law on Arbitration.

4.4 Please clarify the requirements for a foreign institution with PAI status to establish a separate division in Russian territory for it to be eligible to administer all types of Russian domestic disputes.

5. DIFFERENCES BETWEEN ARBITRATIONS ADMINISTERED BY A PAI AND *AD HOC* PROCEEDINGS

5.1 Please confirm that the differences between arbitrations administered by a PAI and *ad hoc* proceedings, where the seat of arbitration is in Russia, include that:

(a) a party may request the assistance of the Russian courts in the taking of evidence for the purposes of an ongoing arbitration only if the dispute is administered by a PAI (and not in *ad hoc* proceedings);²⁵ and,

(b) parties may exclude by express wording in their arbitration agreement the Russian courts' competence to (i) set aside an arbitral award;²⁶ (ii) set aside an interim award on the tribunal's jurisdiction;²⁷ and (iii) reconsider a party's unsuccessful challenge to an arbitrator,²⁸ only if the dispute is administered by a PAI (and not in *ad hoc* proceedings).

5.2 Please confirm that in respect of *ad hoc* proceedings where the seat of arbitration is in Russia, pursuant to part 20, Article 44 of the Law on Arbitration, institutions that do not have PAI status are prohibited from fulfilling separate functions for the administration of arbitration, including acting as appointing authority (appointing arbitrators, resolving challenges, terminating the mandate of arbitrators) and providing other assistance (receipt of arbitration fees and charges, frequent allocation of premises for oral hearings, etc), and that the violation of the aforementioned provisions is that the arbitral award shall be deemed rendered in violation of the arbitration procedure.

5.3 Please confirm that in *ad hoc* arbitrations where the seat is in Russia, pursuant to part 1, Article 39 of the Law on Arbitration, the case materials shall be deposited with a PAI or a Russian court for a period of five years after termination of the proceedings.

6. CONSEQUENCES OF A PAI ADMINISTERING AN ARBITRATION IT IS NOT AUTHORISED TO ADMINISTER

6.1 Please confirm the consequences under Articles 48 and 52 of the Law of Arbitration of an institution with PAI status administering an arbitration that, according to the Law, is not one that it is then authorised to administer; for example, if a foreign institution with PAI status but without a separate division in Russia administers a Russian domestic dispute, or a foreign institution with PAI status but which has not adopted Special Corporate Dispute Rules administers a Russian corporate dispute that requires the application of such rules.

I. HKIAC Practice

6.2 In this regard, pursuant to Articles 19.4 and 19.5 of the HKIAC Administered Arbitration Rules 2018 (“**HKIAC Rules**”), where a question arises as to, *inter alia*, the competence of HKIAC to administer an arbitration, the arbitration shall proceed if and to the extent that HKIAC is satisfied, *prima facie*, that an arbitration agreement under the HKIAC Rules may exist. Any

²⁵ Article 27 of the 1993 Law on International Commercial Arbitration, Article 74.1 of the APC.

²⁶ Article 34(1) and (3) of the 1993 Law on International Commercial Arbitration.

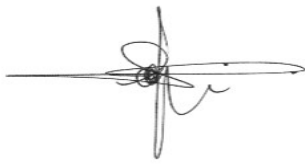
²⁷ Article 16(3) of the 1993 Law on International Commercial Arbitration.

²⁸ Article 13(3) of the 1993 Law on International Commercial Arbitration.

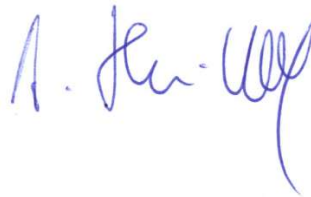
question as to the competence of the HKIAC or the jurisdiction of the arbitral tribunal, including any question of the arbitrability of a dispute, shall be decided by the arbitral tribunal, once constituted. Where HKIAC identifies that an issue arises as to its competence to administer an arbitration pursuant to the law at the seat of the arbitration, HKIAC will raise that issue with the parties at the earliest opportunity.

II. VIAC Practice

- 6.3 Art 1(3) of the VIAC Rules on Arbitration and Mediation 2018 (“**VIAC Rules**”) provides that the Board of VIAC may refuse to administer the proceedings if the arbitration agreement deviates fundamentally from and is incompatible with the VIAC Rules. The Statement of Claim has to contain particulars regarding the arbitration agreement and its content (Art 7 para 2.6 VIAC Rules). If such information is missing, the Secretariat will request the Claimant to provide this information before serving the Statement of Claim to the Respondent. There are no other rules on *prima-facie* scrutiny of its jurisdiction by the institution and no possibility to reject a claim *a limine*. Any issues as to jurisdiction of the tribunal, including the question whether the parties validly referred a dispute to the institution for administration, as well as the question of arbitrability of a dispute, are to be decided by the arbitral tribunal once constituted according to the principle of competence-competence (Article 24 VIAC Rules), subject to judicial control. It is VIAC’s practice to inform the parties and the tribunal as soon as it becomes aware of issues as to its competence to administer a particular arbitration.



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10 February 2020