

HONG KONG INTERNATIONAL ARBITRATION CENTRE TO BE CONFERRED STATUS OF PERMANENT ARBITRAL INSTITUTION IN RUSSIA

By 25 April 2019 the Hong Kong International Arbitration Centre (the "**HKIAC**") is to be included on the list of foreign arbitral institutions recognised in Russia as permanent arbitral institutions ("**PAI**"). The HKIAC will be the first foreign arbitral institution to be conferred the status of a PAI. This means, among other things, that from a Russian law standpoint it should be possible to refer certain types of corporate disputes related to ownership of shares and participation interests in Russian companies to the HKIAC for resolution.

STATUS OF A PAI

The Russian arbitration law reform of 2015 introduced the new concept of a "*permanent arbitral institution*" (PAI), i.e. an institution that fulfils the function of administering arbitration. Under Russian law, foreign arbitral institutions must obtain the status of a PAI in order to be able to administer certain types of disputes.¹ Since 29 March 2019 PAI status has been conferred by the Russian Ministry of Justice (the "**MoJ**") (previously it was conferred by the Russian Government) on the basis of a recommendation of the Council for the Advancement of Arbitration at the MoJ (the "**Council**").

On 4 April 2019, the Council issued a recommendation that the HKIAC be granted permission to function as a PAI.² The MoJ is required to grant the HKIAC the status of a PAI within 15 business days after the date of the Council's meeting, i.e. by 25 April 2019.

The HKIAC is thus set to become the first foreign arbitral institution to be conferred the status of a PAI. To date, only four Russian institutions have obtained this status.³

Key provisions

- The HKIAC will be the first foreign arbitral institution to be conferred the status of a PAI
- It will be able to consider disputes relating to ownership of shares and participatory interests in Russian companies
- The HKIAC will probably not be able to hear domestic Russian disputes
- Restrictions on the administration of disputes by the HKIAC follow from the Procurement Law
- When entering into agreements referring disputes to HKIAC arbitration seated in Russia, the parties may expressly agree to limit the jurisdiction of Russian courts with respect to arbitration

Other Clifford Chance publications on Russian arbitration

- Client briefing from August 2016 ([Rus.](#), [Eng.](#))
- Client briefing from January 2019 ([Rus.](#), [Eng.](#))
- Client briefing from February 2019 ([Rus.](#), [Eng.](#))

¹ For further detail see our client briefings from [August 2016](#) and [January 2019](#).

² <https://minjust.ru/ru/novosti/o-zasedanii-soveta-po-sovershenstvovaniyu-tretevskogo-razbiratelstva> (in Russian). The Sports Arbitration Chamber also received a recommendation to be permitted to function as a PAI.

³ The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, the Russian Arbitration Centre at the autonomous non-commercial organisation "Russian Institute of Modern Arbitration", the Arbitration Centre at the Russian National Non-governmental Organisation "Russian Union of Industrialists and Entrepreneurs" and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation.

ADMINISTRATION OF DOMESTIC RUSSIAN DISPUTES

A domestic dispute is a dispute that is not an international commercial dispute. International commercial disputes are "*disputes between the parties arising out of civil law relationships in the course of carrying out foreign trade and other types of international economic relations, if the place of business of at least one of the parties is abroad, or any place where a substantial part of the obligations out of the relationship of the parties is to be performed or the place with which the subject matter of the dispute is most closely connected is located abroad, as well as disputes arising in connection with foreign investments in the territory of the Russian Federation or Russian investments abroad*".⁴ For example, a dispute between two Russian entities which does not have any of the foreign elements described above would most likely qualify as a domestic dispute.

There is conflicting Russian case law as to the question of whether domestic disputes can be referred to a foreign arbitral institution or not.⁵ Federal Law No. 531-FZ of 27 December 2018 On the Incorporation of Amendments to the Federal Law On Arbitration in the Russian Federation and to the Federal Law On Advertising (the "**Amending Law**"), which entered into force on 29 March 2019, has failed to add clarity to this issue and provides as follows: if a foreign arbitral institution intends to administer arbitration of domestic Russian disputes, it must submit documents to the MoJ confirming that it has a separate division in Russia.

According to the information currently available, the HKIAC did not submit such documents to the MoJ. This suggests that the HKIAC does not intend to administer domestic Russian disputes, at least for the time being.

REFERABILITY OF CERTAIN CATEGORIES OF CORPORATE DISPUTES TO THE HKIAC

As a result of Russia's arbitration reform of 2015, three categories of corporate disputes (i.e. disputes related to the establishment or management of, or participation in, a Russian legal entity) are distinguished on the basis of their arbitrability:

- Category 1: non-arbitrable corporate disputes.
- Category 2: corporate disputes that must be administered by a PAI and heard according to special rules, with the seat of arbitration in Russia.

This category includes disputes arising out of corporate agreements and shareholder agreements. The Amending Law, which entered into force on 29 March 2019, eliminated the requirement that disputes arising out of corporate agreements must be heard under special corporate rules. However, this requirement still remains in Art. 225.1 of the Arbitrazh Procedure Code of the RF, hence there are currently two conflicting rules in force.⁶

- Category 3: corporate disputes, the only requirement applicable to which is that they must be administered by a PAI.

This category includes disputes relating to ownership of shares or participation interests in Russian companies, the establishment of encumbrances over them, and the exercise of the rights conferred by them (including disputes associated with agreements on sale and purchase of shares or participation interests and enforced recovery against them).⁷

⁴ Article 1 of RF Law No. 5338-1 of 7 July 1993 On International Commercial Arbitration (the "**ICA Law**").

⁵ See the Ruling of the Supreme Arbitrazh Court of the RF No. VAS-17046/13 dated 10 February 2014, Ruling of the Supreme Arbitrazh Court of the RF No. VAS-3174/10 dated 22 March 2010, and the judicial acts in case No. A40-219464/2016.

⁶ For further detail see our client briefing from [January 2019](#).

⁷ It remains open to question whether any dispute arising out of an agreement on sale and purchase of shares or participation interests qualifies as a corporate agreement, or only disputes relating to property rights in respect of such shares or participation interests. For example, under Ruling of the Supreme Court of the RF No. 5-KG17-218 dated 6 February 2018 a dispute concerning reduction of the purchase price for shares in a Russian company was found to be not a corporate dispute. See also the following judicial acts in which a similar position is expressed: Ruling of the Supreme Court of the RF No. 5-KG18-94 dated 22 May 2018, Decree of the Arbitrazh Court of the Western Siberia District No. F04-1394/2018 dated 23 April 2018, Decree of the Arbitrazh Court of the Moscow District No. F05-23844/2018 dated 28 January 2019.

Once the HKIAC obtains the status of a PAI, from the standpoint of Russian law it will be able to hear category 3 corporate disputes.

At the same time, according to the latest available information, the HKIAC has not submitted any special rules on corporate dispute resolution to the MoJ. Therefore, from the standpoint of Russian law it remains unclear whether the HKIAC will be able to hear category 2 corporate disputes or not.

To date, the HKIAC has heard very few disputes involving Russian parties. In our view, it can be expected that the HKIAC's new status as a PAI should increase the popularity of this arbitration institution in Russia.

POSSIBILITIES AVAILABLE TO PARTIES WHEN ENTERING INTO ARBITRATION AGREEMENTS REFERRING DISPUTES TO THE HKIAC WITH THE SEAT OF ARBITRATION IN RUSSIA

If parties refer an international commercial dispute to the HKIAC with the seat of arbitration in Russia, Russian courts will retain residual jurisdiction in respect of certain aspects of the arbitration, including appointment of the arbitrators,⁸ consideration of requests to challenge arbitrators,⁹ termination of arbitrators' powers¹⁰ and reviewing the tribunal's decisions as to jurisdiction (as a preliminary matter).¹¹

Under the ICA Law, such residual jurisdiction of the courts can be excluded, but only if the arbitration institution administering the dispute has the status of a PAI.

Therefore, where an international commercial dispute is to be referred to the HKIAC and the arbitration is seated in Russia, the parties can exclude the jurisdiction of Russian courts regarding the aspects mentioned above. The parties can also expressly agree that the award rendered by the HKIAC is final and not subject to appeal.¹² The inclusion of such a provision means that the respondent cannot file an appeal seeking to overturn the HKIAC award (if such an appeal were to be filed, it would be dismissed and the proceedings terminated), but it can still oppose the issuance of a writ of execution intended to enforce the HKIAC award.¹³

⁸ Article 11 of the ICA Law.

⁹ Article 13 of the ICA Law.

¹⁰ Article 14 of the ICA Law.

¹¹ Article 16 of the ICA Law.

¹² Article 34 of the ICA Law.

¹³ See our client briefing from [February 2019](#).

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