

# HKIAC to Become First Foreign Arbitration Institution Permitted to Administer Disputes in Russia

16 April 2019

On 4 April 2019, the Council for the Development of the Arbitration Process of the Ministry of Justice of the Russian Federation issued a positive recommendation for granting the Hong Kong International Arbitration Centre (“HKIAC”) the right to operate as a permanent arbitration institution (“PAI”). It is expected that based on this recommendation, the Ministry of Justice of the Russian Federation will include HKIAC in the list of foreign arbitration institutions recognized as PAIs in Russia by 25 April 2019.<sup>1</sup>

**Debevoise  
& Plimpton**

As a result of the 2016 arbitration reform, most arbitrations in Russia can be administered only by PAIs.<sup>2</sup> Currently, only four Russian arbitration institutions are qualified as such: (1) the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation; (2) the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation; (3) the Russian Arbitration Center at the Russian Institute of Modern Arbitration; and (4) the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs.

Therefore, HKIAC will become the first foreign arbitration institution with the right to administer arbitrations in Russia, including corporate disputes. This will be important, in particular, for capital markets and foreign investments in Russia where parties to sale and purchase agreements or shareholders’ agreements involving Russian companies will be able to refer their disputes, including those arising out of relations governed by foreign law, for resolution to HKIAC, one of the leading arbitration institutions in the world.

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<sup>1</sup> The date is cited in accordance with the HKIAC press release, dated 9 April 2019, available [here](#). The respective period of 15 business days is set forth in Article 44(4.1) of Federal Law No. 382-FZ on Arbitration in the Russian Federation, dated December 29, 2015 (the “Arbitration Law”) and paragraph 50 of the Regulations on the Creation and Activities of the Council for the Development of the Arbitration Process approved by Order No. 45 of the Ministry of Justice of the Russian Federation, dated 20 March 2019.

<sup>2</sup> See Article 52(13) of the Arbitration Law and Article 225.1(5) of the Commercial (*Arbitrash*) Procedure Code of the Russian Federation. We discussed the results of the arbitration reform in detail in our earlier client update of 16 February 2016, available [here](#).

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**Disputes Which HKIAC Will Be Able to Administer.** HKIAC will have the right to administer:

- international commercial arbitrations<sup>3</sup> seated in Russia;
- disputes in Russia and abroad (including domestic disputes) between residents of a special administrative district (“SAD”), arising out of agreements between SAD residents and the SAD management company for conducting business in the SAD and relating to special requirements for becoming a SAD resident;<sup>4</sup> and
- certain types of corporate disputes (including domestic disputes) considered in Russia and abroad, in particular those related to ownership of shares/interests in the capital of Russian companies (including those arising out of share/interest purchase agreements), disputes arising out of management agreements in respect of Russian companies (shareholders’ agreements)<sup>5</sup> and disputes related to registration and maintaining a register of rights to shares in Russian companies.

**HKIAC Will Not Yet Be Able to Administer a Number of Other Disputes.** The status of PAI as such does not, however, permit HKIAC to administer domestic disputes (except for those indicated above) as HKIAC does not have a separate subdivision in Russia at present.

In addition, HKIAC will not yet be able to administer certain arbitrable corporate disputes for which the PAI is required to have special rules. HKIAC does not have such rules for the time being.

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<sup>3</sup> Disputes may be referred to international commercial arbitration (i) if at least one of the parties has its business located abroad or if the agreement between the parties is mainly performed abroad, or the dispute is most closely linked to a place outside of Russia and (ii) if such disputes arise out of foreign investments in Russia or Russian investments abroad (Article 1(3) of Law of the Russian Federation No. 5338-1 on International Commercial Arbitration, dated 7 July 1993).

<sup>4</sup> See Articles 44(6.2) and 44(12) of the Arbitration Law; Articles 9(3), 12(2) and 16(3) of Federal Law No. 291-FZ on Special Administrative Districts in the Kaliningrad Region and Primorsky Krai, dated 3 August 2018.

<sup>5</sup> As indicated below, as a result of the recent changes to the Arbitration Law the conflict between the Commercial (*Arbitrash*) Procedure Code of the Russian Federation and the Arbitration Law occurred with respect to the seat of arbitration for disputes arising out of management agreements. The Commercial (*Arbitrash*) Procedure Code of the Russian Federation requires that Russia must be a mandatory seat of arbitration for such disputes while the Arbitration Law directly provides for this requirement only with respect to disputes administered in accordance with the special rules for the resolution of corporate disputes (thus, PAIs which do not have such rules are permitted to administer disputes arising out of management agreements).

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In particular, these disputes include:

- disputes related to the incorporation, reorganisation and liquidation of legal entities;
- disputes under the claims brought by the participants of a legal entity seeking compensation for losses caused to the legal entity;
- disputes under the claims brought by the participants of a legal entity seeking invalidation of transactions concluded by a legal entity and/or the application of the consequences of the invalidity of such transactions (“disputes for the invalidation of transactions”);
- disputes related to the appointment or election, termination or suspension of the powers and liability of persons who are members of the governing bodies or internal audit bodies of a legal entity, and disputes arising from the civil law relations between such persons and the legal entity in connection with the performance, termination or suspension of their powers;
- disputes related to the issuance of securities/financial instruments;
- disputes related to a challenge of corporate resolutions adopted by the management bodies of a legal entity;
- disputes that are not expressly listed in the Commercial (*Arbitrash*) Procedure Code of the Russian Federation arising between the legal entity and its members, including disputes under the claims of the members in connection with the relations of such legal entity with a third party where the law so provides.

**Practical Considerations When Referring Disputes to HKIAC.** When drafting an arbitration clause, it is important that parties ensure that the potential dispute is one that HKIAC can administer in Russia.

In addition, parties should ensure that the arbitration clause contains not only a specific reference to the rules of the arbitration institution that should apply in the arbitration, but also to a specific reference to the arbitration institution which will administer the dispute, as the Russian courts have previously adopted an ambiguous approach to the interpretation of arbitration clauses.<sup>6</sup>

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<sup>6</sup> We discussed this issue in detail in our client update of January 7, 2019, available [here](#).

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It should be noted that HKIAC's right to administer disputes arising out of management agreements (shareholders' agreements) follows from the recent amendments to the Arbitration Law (which became effective on 29 March 2019).<sup>7</sup> However, the necessary amendments have not been made yet to Article 225.1(3) of the Commercial (*Arbitrazh*) Procedure Code of the Russian Federation, which still provides that a PAI is required to have special rules in place for the resolution of such corporate disputes.<sup>8</sup> In addition, Article 225.1(3) of the Commercial (*Arbitrazh*) Procedure Code of the Russian Federation requires that Russia must be the designated seat of arbitration for such management disputes, but the new provisions of the Arbitration Law require this only for disputes administered under the special rules for the resolution of corporate disputes.

Therefore, when drafting an arbitration clause or assessing risks, it is important to bear in mind the inconsistencies between the two federal laws. We expect that these inconsistencies will be addressed by the Russian lawmakers soon, and there is an expectation that the Russian courts, when resolving the existing contradictions, would favour the more recently-enacted and specific norms of the Arbitration Law over the conflicting provisions of the Commercial (*Arbitrazh*) Procedure Code of the Russian Federation.

**Increased Interest in HKIAC-Administered Russian Arbitrations.** In recent years, HKIAC has hosted and participated in a number of events in Russia. It now boasts a Panel and List of Arbitrators which includes 30 Russian-speaking arbitrators, and the HKIAC Administered Arbitration Rules are also available in Russian. As economic activity continues to grow between Russian and Asian businesses, it is not surprising that HKIAC has emerged as one of the preferred institutions for disputes involving Russian parties. HKIAC has stated that several Russian companies have already started to include HKIAC clauses in their contracts.

HKIAC's attractiveness as an arbitral institution also stems from Hong Kong itself, as a Model Law jurisdiction with pro-arbitration courts, and which has not imposed sanctions against Russian entities which might otherwise impact the conduct of arbitrations. Hong Kong also does not require visas for Russian visitors.<sup>9</sup>

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<sup>7</sup> See Article 45(7.1) of the Arbitration Law introduced together with other amendments by Federal Law No. 531-FZ on Amendments to the Federal Law on Arbitration in the Russian Federation and the Federal Law on Advertising dated 27 December 2018.

<sup>8</sup> See Article 225.1(3) of the Commercial (*Arbitrazh*) Procedure Code of the Russian Federation.

<sup>9</sup> Please see Debevoise International Arbitration Clause Handbook (available [here](#)) for additional information on specifics of arbitration law in certain jurisdictions, including Hong Kong and Russia.

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The anticipated grant of PAI status to HKIAC reinforces this trend and will most likely result in an increased interest in Hong Kong and HKIAC from the legal and business community in Russia, with more Russian disputes being submitted to HKIAC.

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Please do not hesitate to contact us with any questions.

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