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by
Alexis Martinez

Squire Patton Boggs
Perth, Australia

and

Aleksandra Dziki

Squire Patton Boggs
London, England

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Commentary

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Alexis Martinez
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Aleksandra Dziki

[Editor's Note: Partner Alexis Martinez and associate Aleksandra Dziki are lawyers specializing in international arbitration at Squire Patton Boggs, a global law firm with 45 offices in 20 countries. Any commentary or opinions do not reflect the opinions of Squire Patton Boggs or LexisNexis® Mealey Publications™. *Responses are welcome.]*

On 18 May 2021, the Russian Ministry of Justice granted the status of Permanent Arbitration Institution (PAI) to the ICC International Court of Arbitration (ICC) and the Singapore International Arbitration Centre (SIAC), thereby facilitating arbitrations administered by these institutions and the enforcement of the ensuing awards in Russia.

Just as the successful registration of these familiar institutions is recent news, the requirement to register as a PAI in Russia is also a fairly recent development. The ICC and SIAC are only two out of four major international arbitral institutions with the accreditation to administer international commercial arbitrations seated in Russia after wide-ranging reforms changed the landscape of arbitration in the country. These reforms introduced the concept of a Permanent Arbitral Institution, or PAI, a non-profit organisation to which the Russian government has granted the right (to the exclusion of non-PAIs) to administer arbitrations seated in Russia and/or concerning certain types of disputes which can, under Russian law, be validly administered only by PAIs.

The earlier Russian arbitration rules had adopted a liberal approach to the administration of arbitrations, and an arbitral institution could validly administer proceedings in Russia as soon as it notified a local state court of its establishment, with no need for centralised registration and no official lists being kept. However, in the early 2010s, questions arose as to the credibility and transparency of a number of arbitral institutions that had been set up to cater to the quick growth and popularity of arbitration after the fall of the Soviet Union. These concerns resulted in the introduction of a wide-ranging set of reforms to Russia's arbitration laws and the more recent amendments, which came into force in 2019.

Becoming a PAI in Russia - where do I sign up?

In order to be accredited as a PAI, all arbitral institutions are required to undergo a registration procedure conducted by the Ministry of Justice and the Council for the Development of Arbitration, an entity created by the new reforms. The applicant institution must first submit an application to the Ministry of Justice along with accompanying documents. The complete application is reviewed by the Council for the Development of Arbitration together with official from the Ministry of Justice and market specialists. If the Council finds that the applicant institution meets the requirements set out in the new Russian Arbitration Laws, it makes the appropriate recommendation to the Ministry of Justice. The PAI is then granted its accreditation in the form of an Act of the Ministry.

The law provides for a carve-out for the registration of foreign arbitral institutions by requiring that in its application for registration as a PAI, a foreign arbitral institution only need to prove that it "*has a widely acclaimed international reputation*" in accordance with the criteria defined by the authorized federal executive body and based on a recommendation of the Council for the Arbitral Proceedings. Foreign arbitral institutions are expressly exempt from complying with a number of requirements that apply to domestic arbitral institutions during the application process, such as providing evidence of compliance with its rules, providing a list of recommended arbitrators who meet the requirements of Russian law, and the authenticity of its creation and founders.

In 2016, the list of PAIs was short – only Russia's International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation did not need to apply for PAI status to continue to operate in Russia. The first international arbitration institutions accredited as PAIs were the Hong Kong International Arbitration Centre (HKIAC) and the Vienna International Arbitration Centre (VIAC), which both obtained their registrations in 2019. The ICC International Court of Arbitration (ICC) and the Singapore International Arbitration Centre (SIAC) followed in their footsteps in 2021. This is a welcome development given that both of these institutions are world leaders in the administration of large-scale international commercial arbitrations, and access to these two further institutions' expertise will undoubtedly make things easier for market participants who had previously taken the availability of these institutions for granted.

The benefits of a PAI-administered arbitration – *ad hoc* just won't do

Obtaining PAI status appears to be the only route for arbitral institutions to ensure the arbitrability, finality and enforceability of international commercial arbitrations seated in Russia and/or concerning certain corporate matters involving Russian entities. Following the reforms, a Russia-seated arbitration administered by a non-PAI or conducted entirely without the support of an arbitral institution is considered an *ad hoc* arbitration. Crucially, parties to an *ad hoc* arbitration in Russia do not have the right to agree on the finality of an arbitration agreement, which means that the PAI status of institutions such as the ICC and SIAC provides an umbrella which protects awards rendered in those proceedings from being challenged in state courts. There are also significant procedural benefits, as tribunals presiding over *ad hoc* arbitrations also lack the right to request the assistance of Russian courts in obtaining evidence and cannot exclude the application of Russian law with regard to the appointment and removal of arbitrators.

PAI status also grants arbitrations conducted by those institutions in Russia the right to administer a range of corporate disputes which are not arbitrable under an *ad hoc* tribunal. This includes the majority of disputes arising from mergers and acquisitions, as well as disputes concerning shares and shareholder agreements. In order to administer certain corporate disputes, including disputes in relation to the liability, termination, appointment, election and suspension of corporate management, PAIs need to adopt Special Rules of Arbitration of Corporate Disputes. At the time of writing, no foreign PAI has done this. Further, a foreign institution without a separate division in Russian territory generally cannot administer Russian domestic disputes.

Arbitrability - some wrinkles still to be ironed out

The 2016 arbitration reform also provided important clarifications as to the rules on arbitrability, including particular provisions regarding the arbitrability of certain categories of cases. Given that arbitrability has been a controversial and, at times, unclear point of debate, clarifications on this point were an important development. Arbitration participants in Russia can now look to the law for guidance as to what types of disputes must be submitted to the courts and avoid the risks of ending up with an unenforceable award.

Nonetheless, despite these clarifications, there appear to still be uncomfortable zones of arbitrablity that will keep tribunals and parties on their toes until they are ironed out in the future or play out in practice. Importantly, it is still unclear whether PAIs such as the ICC and SIAC may administer disputes which arise from shareholders' agreements with respect to Russian joint ventures. The question mark arises as a result of a discrepancy between the amendments made to Federal Law No. 382-FZ in 2018, which sought to abolish previously existing restrictions on the administration of these disputes, and the Russian Arbitrazh Procedure Code, which has not yet been amended to reflect these changes.

The Russian Ministry of Justice has published a statement clarifying that the 2018 amendment has priority over the previous Arbitrazh Procedure Code. However, it also expressly stated that its clarification is not legally binding. It is therefore unclear what approach will be adopted by Russian courts, and such arbitrations remain vulnerable to challenge until this discrepancy in Russian law is corrected. The vulnerability is even more acute given that in the same statement, the Ministry of Justice emphasised that corporate disputes relating to the liability, termination, appointment, election and suspension of corporate management remain subject to the special requirements under the Arbitrazh Procedure Code, as such questions are often part and parcel of disputes arising out of shareholders' agreements.

A positive outlook?

The arbitration reforms that have unfolded in Russia since 2016 paint a conservative picture of the country's approach and attitude to international commercial arbitration. While other jurisdictions move towards less regulation and adopt increasingly pro-arbitration laws, Russia took the approach of closely regulating arbitral institutions and participants. This approach seems to be here to stay, and it remains to be seen whether Russia will apply its approach liberally or drift towards an even more conservative environment by limiting the types of disputes which are arbitrable, toughening its requirements for PAI accreditation or doing away with *ad hoc* arbitrations altogether. However, the registration of four leading international arbitration institutions is a move in the right direction and a good sign that perhaps worries about Russia closing itself off from international commercial arbitration altogether are unfounded. It is likely only a matter of time before other institutions follow in the footsteps of the HKIAC, ICC, VIAC, and SIAC, and it remains to be seen what the real impact of the 2016 reforms will be on the arbitration environment in Russia.

Endnotes

1. Notably, state authorities, state companies, lawyers' and notaries' associations, and Bars cannot found arbitration institutions. Articles 44(1)–(3) of the Federal Law, On Arbitration (Third-Party Tribunals) in the Russian Federation, 29 December 2015, No. 382-FZ, as amended.

2. Law of the Russian Federation No. 5338-1 of 7 July 1993 on International Commercial Arbitration. This was preceded by an interim law, namely the Resolution of the Supreme Court of the Russian Federation No. 3115-1 of 24 June 1992 on the Adoption of the Interim Regulation on Arbitration Court for Resolution of Economic Disputes.

3. These reforms include primarily Federal Law, On Arbitration (Third-Party Tribunals) in the Russian Federation, 29 December 2015, No. 409-FZ and Federal Law, On Arbitration (Third-Party Tribunals) in the Russian Federation, 29 December 2015, No. 382-FZ.

4. Federal Law No. 531-FZ of 27 December 2018.

5. Art. 44(5) of the Federal Law, On Arbitration (Third-Party Tribunals) in the Russian Federation, 29 December 2015, No. 382-FZ, as amended.

6. Art 44(6) of the Federal Law, On Arbitration (Third-Party Tribunals) in the Russian Federation, 29 December 2015, No. 382-FZ, as amended.

7. Article 44(12) of the Federal Law, On Arbitration (Third-Party Tribunals) in the Russian Federation, 29 December 2015, No. 382-FZ, as amended.

8. Article 44(8) and (12) of the Federal Law, On Arbitration (Third-Party Tribunals) in the Russian Federation, 29 December 2015, No. 382-FZ, as amended.

9. Article 34(1) of the Federal Law on International Commercial Arbitration of 7 July 1993, as amended.

10. Article 27 of the Federal Law on International Commercial Arbitration of 7 July 1993, as amended.

11. Articles 11(5), 13(3), 14(1) of the Federal Law on International Commercial Arbitration of 7 July 1993, as amended.

12. Article 225.1(5), Arbitrazh Code of Procedure of the Russian Federation.

13. None of the currently registered PAIs have established separate divisions in Russia.

14. These restrictions require an arbitral institution administering disputes arising out of shareholders' agreements in Russian joint ventures to adopt special rules for the arbitration of corporate disputes and contain a requirement that the arbitration clause in the shareholders' agreement must be signed by all shareholders and the Russian joint venture company. ■

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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
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