Summary of the Position of the Working Group No. 2[1] on Foreign Arbitral Institutions on the Matters Referred to in the Joint Request for Certain Clarifications from HKIAC and VIAC issued on 26 May 2020 (Vienna, 14 June 2020)

I. Corporate Disputes

1. Definition of Corporate Disputes:

Under Article 45(7) of the Law on Arbitration and Article 225.1(1) of the APC, a corporate dispute shall be understood as a dispute related to establishment of, management of or participation in a legal entity (a commercial or non-commercial organisation), whose personal law (lex societatis) is Russian law (Article 1202 of the Civil Code of the Russian Federation).

2. Corporate Disputes that cannot be referred to Arbitration (non-arbitrable disputes) (Article 33(2) and Article 225.1 of the APC)

(a) disputes on convening of a general meeting of a legal entity's participants (Article 225.1(1)(7) and 225.1(2)(1) of the APC);

(b) disputes arising out of the notaries' activities on certifying of transactions with participation interests in the charter capital of the limited liability companies (Article 225.1(1)(9) and 225.1(2)(1) of the APC);

(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 other public powers, officials (Article 225.1(2)(2) of the APC)[2];

(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" (the **Strategic Entities**). However, disputes relating to ownership over the shares, interests in the charter (contributed) capital of the Strategic Entities may be referred to arbitration, save where such disputes arise from transactions involving shares, interests in the charter (contributed) capital of the Strategic Entities which require preliminary approval under the said Federal Law No. 57-FZ dated 29 April 2008 (Article 225.1(2)(3) of the APC)[3];

(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" (the **Law on Joint-Stock Companies**) (Article 225.1(2)(4) of the APC); and

(f) disputes relating to the expulsion of the participants from legal entities (Article 225.1(2)(5) of the APC)[4].

[1] This position reflects the opinion of the Working Group No. 2 on Foreign Arbitral Institutions and shall not prevent any different construction of the rules of law by courts and other government bodies considering particular disputes.

[2] Disputes referred to in Clause 2(c) hereof shall be understood as disputes out of administrative and other public legal relations arising in connection with the performance of state and other public authorities by state bodies, local authorities, public officials, and other bodies and organisations, vested by the federal law with certain state or other public powers. Those disputes shall be resolved as per the procedure set by Section III of the APC and the Russian Code of Administrative Judicial Proceedings

[3] Disputes referred to in Clause 2(d) hereof are non-arbitrable, where they have arisen in relation to a legal entity having the legal status of a Strategic Entity as at the time of initiation of arbitrazh court proceedings or commencement of the arbitral proceedings. It follows from Article 225.1(2)(3) of the APC that if a legal entity, in whose relation there have arisen a dispute, had no legal status of a Strategic Entity as at the time of commencement of arbitral proceedings but acquired such status thereafter, the arbitral tribunal may continue arbitration (its arbitrability shall be preserved).

[4] Disputes referred to in Clause 2(f) hereof shall be understood as (i) disputes relating to acquisition by a joint-stock company of own outstanding shares (Articles 72 –73 of the Law on Joint-Stock Companies), (ii) disputes relating to consolidation or splitting of outstanding shares (Article 74 of the Law on Joint-Stock Companies), (iii) disputes relating to buyback by a joint-stock company of own outstanding shares (Articles 75 – 76 of the Law on Joint-Stock Companies), (iv) disputes relating to voluntary or mandatory tender offers that shall be made in connection with the acquisition or an intent to acquire more than thirty

Restrictions on referral of corporate disputes to arbitration provided by subparagraphs (a), (d), and (f) of this Clause shall not apply to disputes relating to the international companies established under Federal Law No. 290-FZ dated 3 August 2018 "On International Companies and International Foundations", where the charter of such company provides that the rules of foreign law and of the regulations of foreign exchanges shall apply to such international company and contains an arbitration agreement incorporated thereto as per the procedure specified by Russian laws (Article 225.1(2.1) of the APC).

3. Corporate Disputes that may be referred to a PAI and do not require the application of Special Corporate Dispute Rules (Article 45(7.1) of the Law on Arbitration)

(a) disputes relating to the ownership of shares or participation interests in the charter (contributed) capital of business entities and partnerships, equity of cooperatives' members, to the establishment of encumbrances and the exercise of the rights conferred by them, including disputes arising out of sale and purchase agreements of shares or participation interests in the charter (contributed) capital of business entities and partnerships, disputes relating to the enforced recovery against shares or participation interests in the charter (contributed) capital of business entities and partnerships, with the exception of disputes arising out of the activities of the depositories relating to the recording of title to shares and other securities, disputes arising in connection with division of the estate or division of the joint marital property, including shares or participation interests in the charter (contributed) capital of business entities and partnerships, equity of cooperatives' members (Article 225.1(1)(2) of the APC);

(b) disputes arising out of the activities of the registrars 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 in connection with the offering of issuance and/or circulation of the securities (Article 225.1(1)(6) of the APC);

(c) 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 (Article 45(7.1) of the Law on Arbitration).

Those corporate disputes may be referred to arbitration only where administered by a PAI (Article 45(7) and (7.1) of the Law on Arbitration, Article 225.1(5) of the APC).

4. Corporate Disputes that may be referred to a PAI subject to the application of Special Corporate Dispute Rules (Article 45(7) of the Law on Arbitration and Article 225.1(3-4) of the APC)

(a) disputes relating to the establishment, reorganisation and liquidation of a legal entity (Article 225.1(1)(1) of the APC);

(b) disputes in 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 (Article 225.1(1)(3) of the APC);

(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; disputes arising out of civil law relations between those persons and the legal entity in connection with the exercise, termination, suspension of powers of such persons (Article 225.1(1)(4) of the APC);

percent of the total number of shares in a public joint-stock company (Articles 84.1 – 84.6 of the Law on Joint-Stock Companies), (v) disputes relating to buyout of shares in a public joint-stock company by a person having purchased over 95 per cent of shares in such company (Articles 84.7 – 84.8 of the Law on Joint-Stock Companies).

(d) disputes relating to the issuance of securities, with the exception of 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 other public powers, officials (Article 225.1(1)(5) of the APC, Article 225.1(2)(2) of the APC);

(e) disputes on challenging the resolutions of the management bodies of a legal entity (Article 225.1(1)(8) of the APC); and

(f) other corporate disputes arising between the participants of a legal entity and that legal entity, e.g., corporate disputes on provision by a legal entity of information to its participants (Article 225.1(4) of the APC).

g) Disputes arising out of sale and purchase agreements of shares or participation interests but not affecting the ownership of such shares or participatory interests, as well as encumbrance thereof (e.g., disputes on recovery of the purchase price of shares or participatory interests, on reduction of the purchase price of shares or participatory interests, on recovery of penalties or damages due to false representations and warranties, etc.) shall not be characterised as corporate disputes[5]. Therefore, the special requirements for arbitrating the corporate disputes set by the Law on Arbitration and Article 225.1 of the APC shall not apply to them.

Following Additional Conditions have to be met for the Dispute to be Arbitrable:

1) the arbitration shall be administered by a PAI (Article 45(7) of the Law on Arbitration, Article 225.1(3-5) of the APC);

2) the seat of arbitration is in the Russian Federation (Article 7(7) of the Law on Arbitration, Article 225.1(3) of the APC);

3) a PAI administering the arbitration has approved, posted on its website and deposited with the Russian Ministry of Justice, Special Corporate Dispute Rules as per the requirements of the Law on Arbitration (Article 45(7) of the Law on Arbitration, Article 225.1(3) of the APC);

4) the legal entity, in whose connection the corporate dispute has arisen, all its participants, as well as other parties acting as claimants or respondents, have entered into an arbitration agreement to refer the corporate dispute to arbitration (Article 225.1(3) of the APC). However, for arbitral tribunals to resolve disputes in claims brought by the participants of a legal entity seeking to invalidate transactions entered into by the legal entity and/or to apply the consequences of those transactions being invalidated, an arbitration agreement entered into by the parties to such transactions shall suffice (Article 1(2) and Article 7(7.1) of the Law on Arbitration).

Therefore, where a PAI has not taken steps to approve, post on its website or deposit with the Russian Ministry of Justice, Special Corporate Dispute Rules as per the requirements of the Law on Arbitration, it can not administer corporate disputes referred to in Clause 7 hereof.

Where a corporate dispute shall be resolved with the application of Special Corporate Dispute Rules, the PAI shall post on its website the information about the filing of a statement of claim within three days from the receipt thereof (Article 45(8)(2) of the Law on Arbitration). The information to be posted shall include the following details:

- the legal entity, in whose relation the corporate dispute has arisen;

- the claimant, the respondent and the representative of the claimant filing a [derivative] claim on behalf of the legal entity based on the provisions of applicable law (if any);

- the corporate dispute type;

[5] This conclusion is specifically supported by the following judicial acts: Russian Supreme Court Ruling dated 6 February 2018 No. 5-КГ17-218, Russian Supreme Court Ruling dated 22 May 2018 No. 5-КГ18-94, Moscow Circuit Arbitrazh Court Resolution dated 28 January 2019 in Case No. A40-113760/2018, Moscow Circuit Arbitrazh Court Resolution dated 25 December 2019 in Case No. A40-102762/19, Moscow Circuit Arbitrazh Court Resolution dated 23 May 2018 in Case No. A40-39191/2017, West-Siberian Circuit Arbitrazh Court Resolution dated 23 April 2018 in Case No. A45-24558/2017.

- the right of each participant of the legal entity, in whose relation the corporate dispute has arisen, to join the arbitration at its any stage.

Unless otherwise provided by the arbitration agreement or the arbitration rules, the PAI is not obligated to post on its website any other information about the corporate dispute, including about the further progress or termination of the arbitral proceedings.

Validity of Arbitration Agreements

Arbitration agreements referring to arbitration the corporate disputes indicated in Clauses 6 and 7 hereof, can not be entered into prior to 1 February 2017. Those arbitration agreements entered into prior to 1 February 2017, shall be deemed inoperative.

Mixed Claims

Where a claimant has filed a claim covering both a corporate dispute and a non-corporate dispute, the requirements set for the respective type of corporate disputes shall apply.

For an arbitral tribunal to resolve disputes in claims brought by the participants of a legal entity seeking to invalidate transactions entered into by the legal entity and/or to apply the consequences of those transactions being invalidated, an arbitration agreement entered into by the parties to such transactions, i.e. the legal entity and its counterparty, shall suffice (Article 1(2) and Article 7(7.1) of the Law on Arbitration). However, those corporate disputes must be referred to arbitration with the application of Special Corporate Dispute Rules, and the seat of arbitration for such corporate disputes must be in the Russian Federation, whether it shall be resolved by way of domestic arbitration or international commercial arbitration (Article 225.1(3) of the APC).

Correlation between Federal Law No. 531-F and Article 225.1 of the APC

The the provisions of Law No. 531-FZ have priority as they were adopted more recently. Yet, where the provisions of Law No. 531-FZ do not expressly govern a certain matter, the rules provided by Article 225.1 of the APC shall continue to apply.[6]

Since the provisions of Law No. 531-FZ govern procedural matters of arbitration in corporate disputes and taking into account Article 52(9) of the Law on Arbitration, whereunder arbitration commenced after the Law on Arbitration came into force shall be governed by the provisions of the Law on Arbitration, the provisions of Law No. 531-FZ shall apply to those corporate disputes, whose arbitration was commenced after 29 March 2019 (the effective date of Law No. 531-FZ) irrespective of the date the arbitration agreement was entered into.

[6] To that end, disputes arising out of agreements between the participants of a legal entity regarding the management of such legal entity, including disputes arising out of corporate agreements, may be referred to arbitration administered by a PAI under the general arbitration rules and shall not require the application of Special Corporate Dispute Rules (Article 1(2) and Article 45(7.1) of the Law on Arbitration). For those disputes to be referred to arbitration there is no need for all the legal entity participants or the legal entity itself to be parties to such agreement (Article 1(2) and Article 7(7.1) of the Law on Arbitration). However, the seat of arbitration for such corporate disputes must be in the Russian Federation, whether it shall be resolved by way of domestic arbitration or international commercial arbitration (Article 225.1(3) of the APC).

II. Disputes Arising out of Contracts relating to Procurement Disputes

Under Article 33(2)(6) of the APC, Article 22.1(2)(6) of the CPC, Article 13(8) of Federal Law No. 409-FZ dated 29 December 2015, all disputes arising out of the relations governed by Federal Law No. 44-FZ dated 5 April 2013 "On the Contract System in State and Municipal Procurement of Goods, Works and Services" cannot be referred to arbitration (are non-arbitrable) until a special federal law is adopted setting out the procedure for identifying of a PAI that shall be entitled to administer disputes arising out of relations governed by the Russian laws on the contract system in state and municipal procurement of goods, works and services (Clause 17(5) of Supreme Court Plenum Resolution No. 53). No such special federal law was adopted as of the approval of this Position.

The provisions of Article 33(2)(6) of the APC and Article 22.1(2)(6) of the CPC shall not extend to the disputes arising out of contracts entered into in accordance with Federal Law No. 223-FZ dated 18 July 2011 "On Procurement of Goods, Works and Services by Certain Types of Legal Entities" or in relation thereto (Clause 16 of the Overview of Case Law Related to Performance of the Functions of Assistance and Control as Related to [Domestic] Arbitration and International Commercial Arbitration approved by the Russian Supreme Court Presidium on 26 December 2018). Where the seat of arbitration of such dispute is in the Russian Federation, they may only be referred to arbitration administered by a PAI (Article 45(10) of the Law on Arbitration).

III. Arbitration of Domestic Disputes

1. Definition of Domestic Disputes:

Domestic disputes are all disputes which are not characterised as international commercial arbitration (Article 2(4) of the Law on Arbitration and Article 1(3-5) of the Law on International Commercial Arbitration). The following types of disputes between the parties arising out of civil-law relations shall be resolved by way of international commercial arbitration, rather than domestic arbitration:

(a) where the place of business of at least one party is abroad. If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement. If a party does not have a place of business, reference is to be made to his habitual residence;

(b) the place where a substantial part of the obligations arising out of the relations between the parties shall be performed is abroad;

(c) the place with which the subject-matter of the dispute is most closely connected is abroad;

(d) the dispute has arisen in connection with injection of foreign investments in the Russian Federation or Russian investments abroad. Where a party to the dispute is a Russian commercial organisation with a share (contribution) in its charter (contributed) capital held by a foreign investor, but the dispute is not related to foreign investments in the Russian Federation, and no other conditions for resolving of a dispute by way of international commercial arbitration are applicable, such dispute shall be resolved by way of domestic arbitration (Clause 8(2) of Supreme Court Plenum Resolution No. 53);

(e) where an investment dispute shall be referred to international commercial arbitration in other cases provided by an international treaty of the Russian Federation or a federal law.

2. Administration of domestic disputes by foreign PAI without separate division in the RF

Under Article 44(6.2) and 44(12)(2) of the Law on Arbitration, where a foreign PAI or the organisation hosting such foreign PAI, has no separate division in the Russian Federation, such foreign PAI cannot administer arbitration of domestic disputes, save for the following types:

(a) disputes between parties from any special administrative region as defined by Federal Law No. 291-FZ dated 3 August 2018 "On Special Administrative Regions in the Territories of Kaliningrad Region and Primorsky Krai";

(b) disputes arising from agreements to carry out activities in any special administrative region as defined by Federal Law No. 291-FZ dated 3 August 2018 "On Special Administrative Regions in the Territories of Kaliningrad Region and Primorsky Krai".

3. Choice of Seat outside Russian Federation

Choice of a seat of arbitration outside the Russian Federation for a domestic dispute shall not prevent the application to such dispute of mandatory rules of the Law on Arbitration set for domestic arbitration, i.e. foreign PAIs having no separate division in the Russian Federation, as well as foreign arbitral institutions having no PAI status, cannot administer a domestic dispute in the situation at hand nor exercise separate functions for the administration of arbitration, including appointment of arbitrators, resolving challenges or terminating the mandate of arbitrators, as well as other actions related to the conduct of arbitration established by the parties to resolve a particular dispute (receipt of arbitration costs and fees, regular provision of premises for oral hearings and meetings, and others, as per Article 44(20) of the Law on Arbitration).

4. Procedure for Establishing a Separate Division in the Russian Federation

The procedure for establishing in the Russian Federation of a separate division of a foreign PAI or of an organisation hosting a foreign PAI, are governed by Articles 13.1 and 13.2 of Federal Law No. 7-FZ dated 12 January 1996 "On Non-Commercial Organisations" (for foreign non-commercial organisations), or Articles 21 and 22 of Federal Law No. 160-FZ dated 9 July 1999 "On Foreign Investments in the Russian Federation" (for foreign commercial organisations).

Where a foreign arbitral institution had been earlier granted a PAI status and thereafter finalised the process of establishing a separate division in the Russian Federation, such foreign PAI (or organisation hosting a foreign PAI) shall obtain a right to administer domestic arbitrations from the date of posting on the Russian Ministry of Justice website of the information about the establishment of such separate division in the Russian Federation.

IV. Differences between Arbitrations Administered by a PAI and *Ad Hoc* Arbitrations

Awards rendered by Arbitration Institutions without PAI Status

Where a foreign arbitral institution with no PAI status administers arbitration having its seat in the Russian Federation, the arbitral award in such case shall be considered in the Russian Federation as an arbitral award rendered by an arbitral tribunal established by the parties to resolve a particular dispute (*ad hoc* arbitration) (Article 44(3) of the Law on Arbitration). In this case, the following features and restrictions set by the Russian law for *ad hoc* arbitration shall apply to that arbitration:

(a) Corporate disputes may only be referred to arbitration administered by a PAI (see Clauses 6 - 8 hereof);

(b) Where the seat of arbitration for the disputes arising out contracts entered into in accordance with Federal Law No. 223-FZ dated 18 July 2011 "On Procurement of Goods, Works and Services by Certain Types of Legal Entities", or in relation to such contracts, is the Russian Federation, such disputes may only be referred to arbitration administered by a PAI (see Clause 16 hereof);

(c) State courts shall only assist an arbitral tribunal in the taking of evidence, where the arbitration is administered by a PAI and the seat of arbitration is in the Russian Federation (Article 30 of the Law on Arbitration, Article 27 of the Law on International Commercial Arbitration, Article 74.1 of the APC, Article 63.1 of the CPC, Clause 39 of Supreme Court Plenum Resolution No. 53);

(d) In an arbitration agreement providing for arbitration to be administered by a PAI, the parties may expressly agree that an arbitral award shall be final (Article 40 of the Law on Arbitration, Article 34(1) of the Law on International Commercial Arbitration). No final arbitral award shall be set aside by a competent state court upon application by a party to the arbitration. The final arbitral award provision may only be expressly agreed by the parties and may not be deemed agreed, where contained in the arbitration rules of a PAI, even where the parties entering into the arbitration agreement agreed that those rules shall be integral part of the arbitration agreement (Clause 43 of Supreme Court Plenum Resolution No. 53);

(e) Parties, whose arbitration agreement provides for arbitration to be administered by a PAI, may expressly agree that no application seeking to obtain an order as to the lack of the tribunal's jurisdiction (challenging the tribunal's interim order on its jurisdiction) may be filed to a competent state court (Article 16(3) of the Law on Arbitration, Article 16(3) of the Law on International Commercial Arbitration);

(f) Parties, whose arbitration agreement provides for arbitration to be administered by a PAI, may expressly agree that no competent state court can resolve issues related to appointment or challenge of the arbitrator(s) and termination of their mandate (Article 11(4), Article 13(3), Article 14(1) of the Law on Arbitration, Article 11(5), Article 13(3), Article 14(1) of the Law on International Commercial Arbitration);

No support for Ad-hoc Arbitration

Persons having no PAI status are prohibited from exercising separate functions for the administration of *ad hoc* arbitrations having its seat in the Russian Federation, including appointment of arbitrators, resolving challenges or terminating the mandate of arbitrators, as well as other actions related to *ad hoc* arbitrations (receipt of arbitration costs and fees, regular provision of premises for oral hearings and meetings, and others). Persons having no PAI status are prohibited in the Russian Federation from advertising and (or) public offering of exercising the functions related to arbitration, including that of *ad hoc* arbitration. Where the above prohibitions are not complied with, an arbitral award shall de deemed rendered in violation of the arbitral procedure, and a competent state court shall set aside such arbitral award or refuse from its recognition and enforcement (Article 44(20) of the Law on Arbitration, Clause 50 of Supreme Court Plenum Resolution No. 53).

Where the seat of arbitration is in the Russian Federation, the sole arbitrator or the tribunal's president shall send an arbitral award or an order terminating the arbitration together with all case file available to the arbitral tribunal, to a PAI (the parties agreed to keep those documents and materials with), and where there is no agreement on the matter between the parties, those shall be sent to a state court, whose jurisdiction covers applications for issuance of a writ of execution to enforce the arbitral award (Article 1(2) and Article 39(1) of the Law on Arbitration).

V. Administering Disputes That a PAI is Not Authorized to Administer

Under Article 16(1) of the Law on (International) Arbitration as well as similar provisions of foreign law at the seat of arbitration, an arbitral tribunal by virtue of the doctrine of kompetenz-kompetenz shall resolve the matter of its jurisdiction on its own and, where necessary, assess the compliance with mandatory rules of Russian arbitration laws.

Arbitration rules may provide that, prior to formation of an arbitral tribunal, the matter of jurisdiction shall be referred to the competent body of a PAI, however, the powers of such PAI body would be normally limited to identifying of situations, where the dispute *prima facie* cannot be referred to arbitration. In case of any doubts on the matter, it has to be referred to an arbitral tribunal.

Taking into account that a decision on the jurisdiction to resolve a dispute shall be taken by an arbitral tribunal, rather than PAI bodies, no PAI can be sanctioned as set in Article 48 of the Law on Arbitration (a warning, a notice of termination of PAI, etc.), where the PAI has informed the arbitral tribunal and the parties to arbitration on potential risks of violation of mandatory rules of Russian laws as related to the scope of disputes that may be administered by the respective PAI.

Information may be provided by way of approval by the PAI of the general guidelines on specifics of arbitrating the Russia-related disputes, or by way of individual advising under particular cases, or by any other manner chosen by the PAI acting in compliance with the standards of good faith and reasonableness. Where an arbitral tribunal that has been made aware of those risks recognises the jurisdiction to resolve a dispute or postpones resolution of the matter pending an arbitral award on the merits, the respective PAI shall be entitled to keep administering the arbitration.

These rules shall specifically apply, where a competent state court has concluded that the arbitral tribunal resolving a dispute had violated the mandatory rules of Russian laws as related to the scope of disputes that may be administered by the respective PAI.