TITLE: **APPEALING DECISIONS OF RUSSIAN *ARBITRAZH* COURTS**

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Abstract

Appellate courts are an important element of a judicial system. The ability to appeal trial court decisions serves as a check on the power and discretion of trial court judges. For litigants, the ability to appeal sends an important signal that the trial judge is acknowledged as being fallible, and that mistakes can be corrected.

Prior to the latest overhaul of the procedural code for the *arbitrazh* courts which went into effect in July 1995, the appellate structure of the *arbitrazh* courts was unclear and ineffective. The new procedural code clarifies the procedural hierarchy. Two new courts have been added: an appellate court and a cassation court. As before, the court of last resort is the Higher *Arbitrazh* Court. The sort of mistakes that can be remedied at each level, and the circumstances under which decisions can be appealed are clearly spelled out.

In principle, the structure created by the new procedural code is a step in the right direction, *i.e.*, toward creating a useable and understandable structure for appealing cases. The new structure has not been in place long enough to judge whether it will be embraced by litigants.

I. Overview

The possibility of appeal serves as an important check on trial courts. (Shapiro, 1981). Appellate review constitutes a reexamination of the work of the trial courts, and presents an opportunity to correct mistakes. From the point of view of trial judges, this would seem to constrain their discretion. Absent appellate review, trial judges might be more willing to bend the law or exercise discretion in other ways that might serve justice in a particular case, but be undesirable on policy grounds. From the point of view of litigants, appellate review is critical to the legitimacy of the judicial system as a whole. It constitutes an acknowledgment that no single judge is infallible; that mistakes can be made and should be corrected promptly.

In virtually all judicial systems, appeals are made at the discretion of the litigants. In the context of economic disputes, either side generally has the option of appealing if unhappy with the outcome at trial. Legal systems diverge over the question of what sort of review the trial court decision is subjected to at various levels of the appellate process. There are two basic possibilities to be considered when designing a judicial system. An appellate court may reexamine the case anew which, in essence, amounts to trying the case over again. This sort of *de novo* trial at the appellate level would be unthinkable in an Anglo-American legal system, but is relatively common among civil law legal systems. (Merryman, 1985; Jacob, et al., 1996) The contrast stems from the presence of an adversarial process for trials in common law systems, and inability of appellate courts within

such systems to accommodate trial processes. The difference in form and rules between trial and appellate courts is considerably less within civil law systems.

The second issue to be considered with regard to the nature of appellate review is what sort of errors may be corrected. A distinction is made between factual and legal errors. Factual errors involve a failure to consider relevant evidence, either because the litigants failed to present it in a timely fashion or because the judge refused to admit it. Legal errors relate to mistakes in interpreting or applying the law (either procedural or substantive norms). Some appellate courts are empowered to address and remedy all mistakes, regardless of their category, while others are empowered only to correct legal errors.

At issue is the need to balance between concerns of efficiency and justice. If appellate courts address all mistakes and/or hear cases over again (*de novo*), then the appellate process will move slowly. On the other hand, if mistakes that threaten to undermine the very fairness of the decision are allowed to stand unchallenged even after being exposed, then the beliefs in the capacity of the courts to mete out justice may be compromised.

II. Appealing Decisions of *Arbitrazh* Courts: How the Process Works

Decisions of the *arbitrazh* courts in Russia can be appealed. The jurisdiction of these courts is basically limited to resolving economic disputes between legal entities.[2] As in other countries, either party to the dispute has the right to appeal. The *APK* (which took effect in July 1995) introduced a new appellate structure. Within the *arbitrazh* court hierarchy, two new courts have been inserted between the trial court and the supreme court: the appellate court and the cassation court.

A. Pre-1995 Rules for Appealing Decisions

Previously, under the 1992 *APK* (and the *gosarbitrazh* system that went before it), only two courts existed: the trial court and the higher *arbitrazh* court.[3] If a litigant was dissatisfied with the outcome at trial, he/she had the right to appeal. The appeal was first considered by a panel of judges drawn from the same *arbitrazh* court where the case was heard.[4] This panel had no official status as a court, but was known as a "collegia for the verification through the cassation process of the legality and well-founded nature of decisions." (art. 121, 1992 *APK*) Although this panel had the right to retry the case, its function was usually limited to a review of the pleadings and the case file for evidence of legal errors. The panel had the usual rights of appellate courts, namely to affirm or reverse the decision (in whole or in part), to change the decision, or to order a new hearing. (art.

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[2]The *arbitrazh* courts also hear bankruptcy petitions and disputes between legal entities and governmental agencies. This report, however, focuses on disputes (mostly contractual in origin) between legal entities.

[3]On *gosarbitrazh*, see Pomorski (1977).

[4]If such a panel did not exist, then the case could be appealed directly to the Higher *Arbitrazh* Court. (art. 121, 1992 *APK*)

127, 1992 *APK*) A reversal of, or change to, the trial court opinion had to be based on the inadequacy of evidence or the improper application of relevant law. (art. 128, 1992 *APK*) If a litigant remained dissatisfied, an appeal to the Higher *Arbitrazh* Court could be pursued. But the right to appeal to the Higher *Arbitrazh* Court was limited to the Chairman of the Higher *Arbitrazh* Court and his deputies, and the General Procurator and his deputies. More specifically, a dissatisfied litigant would appeal to one of these officials, asking him/her to write a "protest" of the decision that would then be heard by the Higher *Arbitrazh* Court. (arts. 133-34, 1992 *APK*) This court would then review the case for legal mistakes, and would either affirm, change, or reverse the decision. Depending on the outcome, the case might be remanded for a new hearing.[5] (art. 139, 1992 *APK*)

B. Appellate Structure Under New *APK*

With the new *APK*, however, the appellate procedure has been clarified and regularized. Litigants must go through an appellate court and a cassation court before reaching the Higher *Arbitrazh* Court. The goals were several: to create a structure capable of dealing with the increased demand expected to result from the market reforms; to reduce the workload of the Higher *Arbitrazh* Court, thereby freeing up the justices for other tasks; to increase the predictability of outcome. The chairman of the Saratov *arbitrazh* court considers this new three-level appellate process to be the most significant reform of the *APK*.

1. First Step: Appellate Instance. The first step for a litigant who is dissatisfied with the outcome of a case is to submit an "appellate complaint," which will be heard by the "appellate instance of the *arbitrazh* court that decided the case at first instance." (art. 146, *APK*) Such an "appellate instance" must exist at every *arbitrazh* court. The law does not require that a particular group of judges be designated as the appellate court, and separate themselves from their colleagues. Instead, it merely mandates that the judge who decided the case at trial cannot participate in the reconsideration on appeal. When the *APK* came into force, *arbitrazh* courts experimented with how best to handle this new function. In Saratov, for example, the initial response was to organize appellate panels on an ad hoc basis, much as the review function had been exercised in the past. But litigants viewed this structure as unfair, fearing that the same judge would hear the case. More legitimate is their concern that the appeal will not be rigorous when all the judges know one another and interact informally. From the court's point of view, the structure was also difficult to manage. After about six months of experimentation, the chairman of the court decided to designate a group of five judges as more-or-less permanent appellate judges. He selected his most competent and experienced judges for these positions.

During the appellate instance, cases are heard by panels of three judges. Although these appellate judges review the trial court decision and other documentation in the case file, the merits of

[5]See Hendley (1997) for descriptions of actual cases.

the case are redebated. The review is not limited to legal mistakes. In essence, the case is retried. (art. 153, *APK*) The most important legal limitation on this appellate procedure is that new evidence is not to be admitted, unless it can be established that the evidence was unavailable during the time of the trial. (art. 155, *APK*; Yakovlev and Iukov, 1995, pp. 341-42) This provides a powerful incentive for both parties to present all relevant evidence at trial. But my observation of the conduct of appellate cases in Saratov and Ekaterinburg indicate that new evidence is being routine accepted. Judges justify their leniency as a transitional measure, designed to avoid unjust results because uninformed litigants failed to submit evidence in a timely manner. Such an argument is persuasive at first glance, but only if it is combined with an effort to educate potential litigants. Absent this effort, it only serves to reinforce old behavioral patterns.

The appellate instance can in whole or in part affirm, reverse, or change the trial court opinion. A reversal or change may be based on substantive or procedural grounds. If the evidence is found to be insufficient to support the conclusions or the law is misapplied, then the appellate instance can make the necessary corrections. This is similar to the first stage of review under the prior law. But the new *APK* departs from the past on the impact of violations of procedural norms by the trial court. Under the 1992 *APK*, such violations could serve as the basis for reversing or changing a decision only when "the violation led or might have led to the adoption of an incorrect decision." (art. 128, 1992 *APK*) In contrast, the *APK* now makes it easier to reverse or change a decision as a result of procedural mistakes. For example, the failure of the trial judges to sign the decision or the record of the hearing in a timely fashion, or the absence of a party to the action if they have not been properly notified can serve as a basis for reversal. (art. 158, *APK*) Allowing cases to be overturned on these sorts of technicalities can be a double-edged sword. On one hand, it creates clear standards of behavior designed to protect the due process rights of all parties. On the other hand, it can undermine the confidence of potential litigants, if they watch cases being overturned for reasons that have nothing to do with their merits.[6] To date, there is no indication that the process is being abused.

2. Second Step: Cassation Court. If a litigant remains dissatisfied, even after the case has been reviewed by the appellate instance, he/she may appeal to the Federal Cassation Court of the Okrug. (art. 161, *APK*) As the commentary points out, this "has absolutely nothing in common with the procedural institution that bore the same name under the 1992 *APK*." (Yakovlev and Iukov, 1995, p. 352) The law provides for ten such courts in Russia. Much like the federal circuit courts of the United States, each court hears appeals from a specified geographic area.

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[6]A July 1996 Saratov case was overturned because one of the judges that heard the case left on vacation without signing the opinion.

The Cassation Courts are a completely new institution. They are subordinate to the Higher *Arbitrazh* Court, but are institutionally independent from the trial level *arbitrazh* courts. In cities that have both trial and cassation courts, such as Ekaterinburg, the two courts may occupy the same building, but the judicial cadre are separate. Unlike the appellate instance, for which the judges were culled from the existing *arbitrazh* court judges, the members of these newly created cassation courts typically come from the outside. Some came from academia, and others from practice. According to the trial court judges with whom I spoke, this lack of judicial experience has left the cassation court judges a bit detached from reality and a bit too quick to overturn the trial court decisions. Since the cassation courts took some time to set up, the record is limited.[7] Perhaps these growing pains will be temporary.

The task of the cassation court is to "verify the proper application of the substantive law and of the procedural norms by the *arbitrazh* courts of the first and appellate instance." (art. 174, *APK*) What this means is that the cassation court does not reconsider the case on its merits. Instead, its function is limited to reviewing cases for legal errors. (Yakovlev and Iukov, 1995, p. 368) It is concerned only with mistakes in applying the substantive or procedural law that may have caused an incorrect decision to have been rendered by the trial or appellate court.[8] (art. 176, *APK*) It may uphold the opinion of the appellate court or reach down and reinstate the decision of the trial court. It also has the right to overturn both decisions (in whole or part) and either remand the case for a new hearing or adopt a new decision. (art. 175, *APK*) As with the appellate instance, the decision to change or overturn the decision can be based on violations of substantive or procedural law. (art. 176, *APK*)

3. Third Step: Initiating a Protest. After having tried unsuccessfully to get the decision changed by the appellate and cassation courts, a dissatisfied litigant may take action to initiate a protest to the Higher *Arbitrazh* Court. Thus, the *APK* requires an exhaustion of existing remedies before the Higher *Arbitrazh* Court can potentially be drawn into the dispute. (art. 185, *APK*)

The protest is a carryover from the 1992 *APK*. The rules surrounding it have changed little. As in the past, only two sets of officials have the right to issue protests: the chairman of the Higher *Arbitrazh* Court and his deputies, and the General Procurator and his deputies. The litigant can only petition for a protest to be issued. There is no process for appealing a decision not to grant a protest.

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[7]In Saratov and Ekaterinburg, the two regions where I did research, it took approximately six months to organize the cassation court (find judges, office space, etc.). Saratov is in the Povolzhskii okrug. Its cassation court is in Kazan. Ekaterinburg is in the Ural okrug. The cassation court is also in Ekaterinburg. (Art. 24, *FZKoAS*)

[8]The commentary states that mistakes in the application of procedural norms are grounds for overturning when they give rise to "doubts about the correctness of the resolution," thereby evidencing a concern with how the work of the *arbitrazh* courts is perceived. (Yakovlev and Iukov, 1995, p. 371) The statute contains a list of the types of procedural mistakes that can serve as a basis for reversal. Such a list was absent from the 1992 *APK*. It was drawn from article 308 of the *GPK*.

The protest is then heard by the Presidium of the Higher *Arbitrazh* Court in its supervisory capacity (*v poriadke nadzora*).[9] (art. 183, *APK*) When considering the protest, the Presidium listens to arguments by the judges of the Higher *Arbitrazh* Court regarding the circumstances that occasioned the protest and the arguments in favor of it. Naturally, the judge that writes the protest takes the lead in the ensuing discussion. Outsiders, such as parties to the dispute or third-parties with relevant information, may be invited to come to the session of the Presidium, but their failure to appear does not require the proceedings to be postponed (as would be the case in the lower courts). (art. 186, *APK*) The Presidium has rights similar to any appellate court. By its written ruling (*postanovlenie*), it may uphold, reverse or change the lower courts' decision or may call for a new hearing. (art. 187, *APK*)

The standard for reversal or changing the opinion by the Higher *Arbitrazh* Court is less clearly spelled out by the *APK*. The looseness in language seems intentional. The purpose of the supervisory function of the Higher *Arbitrazh* Court and of hearing cases on protest is to ensure the legality of the decision and, more generally, to preserve the integrity of the *arbitrazh* process. It is understandable that the standard for accepting cases under this rubric and for deciding them would be rather expansive. As a result, the members of the Higher *Arbitrazh* Court have considerable discretion at every step. The one cautionary note inserted by the *APK* is that cases should not be overturned at this stage on the basis of minor technicalities, but only when the mistakes by the lower court(s) compromise the basic legality of the decision. (art. 188, *APK*)

As a general matter, this final stage of the appellate process for the *arbitrazh* courts is interesting for several reasons. First, the *APK* does not allow ordinary litigants to have any direct access to the Higher *Arbitrazh* Court. Instead, such access is only possible if a judge on that court or a high level procurator can be convinced that a mistake has been made. This marks a departure from the user-friendly procedure found at the trial and appellate level. It seems unlikely that a non-represented litigant will be capable of navigating through the system to obtain a protest and, consequently, a hearing with the Higher *Arbitrazh* Court. In this instance, efficiency concerns seem to have outweighed concerns for justice. Second, the rules do not specify to whom litigants should apply for protests. Perhaps the internal rules of the Higher *Arbitrazh* Court assign particular judges to this task. But there is a danger that a dissatisfied litigant will not quit after being turned down by one judge (or procurator) but will gradually work his/her way through the entire composition of the court. The fact that the decision as to whether or not to issue a protest cannot be appealed provides an incentive to prolong the ultimate denial.

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[9]The Presidium is composed of the Chairman of the Higher *Arbitrazh* Court and his deputies, and the chairman of the departments (*sudebnye sostavy*) of the Higher *Arbitrazh* Court. (Yakovlev and Iukov, 1995, p. 381) Decisions are taken by a majority vote. (art. 189, *APK*)

III. Conclusion

A careful reading of the new *APK* reveals an effort to create a new appellate structure for the *arbitrazh* courts. Evaluations of how this appellate structure will work remain premature, but the effort is to be applauded.

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