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PROFESSIONALIZING THE JUDICIARY IN RUSSIA:
ISSUES ASSOCIATED WITH THE ARBITRAZH COURTS
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Abstract

A professional judiciary is a critical element in building legitimacy for any court. If citizens are to trust the courts sufficiently to ask these institutions to resolve their private disputes, then they must believe that the judges are competent and accountable for their actions.

Creating a professional judiciary in Russia presents special problems. The legacy of the Soviet past, during which all aspects of the judicial process were highly politicized, weigh heavy on the present day. Although the arbitrash courts (which hear economic disputes between legal entities) are less distrusted than the courts of general jurisdiction, it is difficult to prove definitively that a new era has dawned in Russian jurisprudence, in which politics no longer trumps law.

Two small but critical steps have been taken in the direction of professionalizing the judicial corps of the Russian arbitrash courts. First, judges now hear cases on their own rather than in panels of three judges. This means that individual judges have greater control over what goes on in hearings, and are more accountable to litigants. Second, judges are now required to explain the reasoning underlying the outcome in the text of the decision. This raises the standard for opinion writing, and opens the black box of judicial reasoning.

I. Overview

In Russia, economic disputes between legal entities (as opposed to physical persons) are heard by arbitrash courts. These courts are institutionally distinct from the courts of general jurisdiction, that hear all other claims. The arbitrash courts are not an entirely new institution in the post-Soviet era. Rather, they are the successor in interest to state arbitrash (or gosarbitrazh), which was an administrative agency charged with resolving disputes between state enterprises. (Pomorski, 1977)

It is important to recognize that gosarbitrazh was not a court. As a result, the decision-makers were arbiters and not judges. This is not simply a question of semantics, but of institutional status. Gosarbitrazh, as an administrative agency, was an arm of the state, and it existed in the institutional context of the administrative-command system. There was not even a pretense of independence.² Complying with the written law was less important than advancing policy goals, particularly plan fulfillment. Enterprises had limited autonomy. They could not choose their contractual partners nor did they have much control over the content of the contracts (which were determined by the ministries). Enterprises were also constrained by the rules which forbade them from suing the

²I recognize that the claims of independence for the courts of general jurisdiction advanced in successive Soviet constitutions were empty for all practical purposes. (Hendley, 1996) But the claims remained important on a symbolic level.
ministries, even when the inability to perform under the terms of a contract could be traced directly back to an order issued by the ministry. Given that gosarbitrazh resolved disputes between state enterprises (which were likewise arms of the state) this lack of independence was not terribly problematic. Some have argued that enterprises appealed to gosarbitrazh only as a last resort, i.e., that they used gosarbitrazh to signal their ministries. (Kroll, 1988) In essence, gosarbitrazh simply transferred funds from one pocket of the state to another and/or forced state enterprises to live up to the terms of their agreements.

The need to reform gosarbitrazh was apparent even in the late 1980s, before market reform began in earnest. New laws were passed in 1991-92 that recast gosarbitrazh as arbitrazh courts and expanded the jurisdiction of these courts to include disputes between all legal entities, not merely between state enterprises. (Ob arbitrazhnom, 1992; 1992 APK) At the same time, the decision-makers were elevated from arbiters to judges. These changes were important both symbolically and substantively. Institutionally, it meant that the arbitrazh courts were now on an equal footing with the courts of general jurisdiction. Promises were made regarding financial support, and increasing the number of judges to meet demand. The judges (former arbiters) welcomed the change in status, and the accompanying promises of better compensation. In my interviews, judges in both Saratov and Ekaterinburg mentioned this as a factor that kept them on the bench. It was also helpful in recruiting new judges.

II. Efforts to Professionalize Arbitrazh Court Judges

A. Cases Heard by Single Judge

The APK changed how cases are heard in arbitrazh court. Previously all cases were heard by three-judge panels. During the days of gosarbitrazh, these were panels of three arbiters. In an important departure from prior practice, the APK provides for cases to be heard at the trial level by a single judge (edinolichnoe rassmotrenie dela). (art. 14, APK) Exceptions are made for bankruptcy

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3The Gorbachev-era law on state enterprises, which was considered the cornerstone of perestroika, allowed state enterprises to sue their ministries for damages caused to the enterprise as a result of ministerial orders. (Art. 9-3, "O gosudarstvennom," 1987) Few enterprises sued. The ministries continued to control access to supplies and enterprise management was reluctant to risk their ire.

4Expanding the jurisdiction was necessary if the arbitrazh courts were to remain relevant, since new organizational forms had been legalized during the Gorbachev era. (Maggs, 1992) The need became even more pressing as state enterprises began to privatize, both through the state-sponsored program and so-called "spontaneous" privatization. (Aslund, 1995; Johnson and Kroll, 1991; Hendley 1992)

5Several judges also mentioned the critical importance of having V.F. Yakovlev as the chairman of the Higher Arbitrazh Court. As a former Minister of Justice during the Gorbachev era and a well-known legal scholar, Yakovlev's decision to head the arbitrazh courts was taken as a sign that it would become a credible institution.

6The 1992 APK retained the requirement that all cases be heard by panels of three judges. (1992 APK)

7The APK went into effect on July 1, 1995. The change in how cases were heard was introduced in an abrupt and somewhat jarring fashion. Cases that had been begun under the old rules (requiring a 3-judge panel) were continued under the new regime. The presiding judge of the panel would simply hear the case on his/her own.
cases. At the discretion of the chairman (predsedatel') of the court, other cases may also be heard by multi-judge panels. Cases at any stage of the appellate process are heard collegially. (Ibid.)

Other than bankruptcy, the APK does not specify the conditions under which private disputes are to be heard collegially at the trial level. The commentary to the APK (Yakovlev and Iukov, 1995, p. 34) states that the decision to have a multi-judge panel can be based on “various circumstances: complexity of the dispute, a well-founded petition by one of the participants in the case, etc.” In talking with arbitrazh court judges, I found similar reasons being advanced. All agreed that the complexity of the case was the key factor to be considered. Sometimes complexity stems from the factual basis for the claim. For example, cases involving bank debt that has passed through several holders are often referred to multi-judge panels. In other cases, a tortuous relationship between the parties can serve as the basis. In one instance, an Ekaterinburg judge told me that she asked for a three-judge panel because she feared that the petitioner would be too difficult for her to handle alone, and would appeal a ruling against him on the basis of her supposed biases. Her fears were based on past experience with this particular petitioner.

How the decision is made to use a multi-judge panel is left unclear by the APK. The statute provides only that the decision is within the discretion of the chairman of the court. The commentary clarifies that the impetus can come either from the judge to whom the case was originally assigned or from one of the participants in the case. (Ibid.) Any request by a participant must come in the form of a written petition (khodataistvo). Based on my conversations with arbitrazh court judges, it seems that such petitions are relatively rare, but that they are usually successful.

The APK does not specify the number of judges to be included on these panels. Once again, this decision is left to the chairman. The commentary notes that, “as a rule, the collegial consideration of a case contemplates the participation of three judges.” (Ibid., p. 36) When the case is heard collegially, all judges have an equal vote, and decisions are made by majority vote. (art. 15, APK) Prior practice indicates, however, that some votes are more equal than others. Judges consistently report that the presiding judge in a three-judge panels (or three-arbiter panels in the days of gosarbitrazh) took the lead, and that the other judges rarely quarreled with his/her handling or decision of the case. All indications are that contemporary practice is the same.

Although the APK allows for multi-judge panels, the presumption is now in favor of single judges. In other words, under ordinary circumstances cases are heard and decided by one judge. This represents an important change in the procedural rules for arbitrazh courts. The trial judges with

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8In such cases, one judge may be required to take notes for the record, a second will be responsible for the arithmetic calculations, while the third runs the proceeding.

9Article 16 of the APK outlines the circumstances under which judges must be recused from hearing a case. Articles 19-20 lay out the procedure for self-recusal, for a petition for recusal of the judge by a party to the case, and for deciding such petitions. If a judge is recused, the case will be reassigned to another judge. (art. 21, APK)
whom I spoke unanimously supported this new rule. All of them stressed efficiency considerations. They believed that hearing cases alone proceeded more expeditiously. The past practice of having three judges was cumbersome. Even though the judges rarely disagreed on the outcome, they all had to be present for the hearing and all had to sign the opinion. Arranging times that were convenient for three judges and for the litigants was very difficult. The new rule allows judges more independence and control over their court calendars.

Some judges expressed regret at the demise of collegiality, and said that they had learned from working with their fellow judges. The chairman of the Saratov court expressed fear that having only one judge might compromise the legality (zakonnost') of the decision-making process.\textsuperscript{10} He worries that the chances of making mistakes increases with only one judge. The existence of an appellate process ameliorates the problem to some extent, but only a small percentage of cases are appealed. One of the judges on the appellate bench in Saratov echoed his concerns. She noted that she found an alarming number of basic mistakes in the cases appealed, and wondered about the cases not appealed. Most trial court judges were less alarmist. They just seemed grateful that they no longer had to sit as the second or third judge on ordinary cases.

B. Reasoned Decisions

When deciding a case on the merits, the arbitrazh court issues a decision (reshenie).\textsuperscript{11} In the past, these decisions were extremely short, rarely exceeding two pages. Typically, they included only factual information about the identity of the parties, a brief description of the facts, and a statement of whether the claim was being satisfied by the court (or not). This last part, the statement of who had won, was rarely more than two or three sentences and included only the essential information about monetary damages and filing fees to be paid. The cursory nature of these decisions was not unique to Russia (or the Soviet Union),\textsuperscript{12} but is standard in courts of countries with a civil law legal tradition. (Merryman, 1985)

Article 127 of the APK contains a requirement that opinions consist of: “introductory, descriptive, explanatory, and determinative parts.”\textsuperscript{13} Thus, judges are now required to explain the basis for their decision. According to the commentary, this explanatory part (motivirovochnaia chast') must contain “the factual and legal basis for the conclusions of the arbitrazh court.” (Yakovlev and Iukov, 1995, p. 292) The court has to specify the laws that are relevant to the case.

\textsuperscript{10}His concerns do not reflect his experience. Like virtually all chairmen of arbitrazh courts, Baranov is occupied full-time with administrative tasks and does not hear cases.

\textsuperscript{11}When cases are dismissed on procedural grounds (e.g., for failure to state a claim) without reaching the merits, the court issues an order (opredelenie) but not a decision.

\textsuperscript{12}Decisions rendered by courts of general jurisdiction are also very short. (Hendley, 1996)

\textsuperscript{13}Article 108 of the 1992 APK ostensibly required judges to explain the basis for their decision. Yet this requirement was ignored. Indeed, arbitrazh court judges consistently gave it as an example of the important differences between the 1992 APK and the current APK.
The court is also supposed to assess the evidence presented, and to indicate its significance. The factual basis for the decision is considered complete only when the court has taken account of all evidentiary requirements set forth in the relevant substantive law. (Ibid., pp. 290-94)

Requiring judges to explain their rationale is familiar to Western lawyers. The purpose is twofold. First, it gives the litigants insight into why they won or lost. This is helpful to them in deciding whether to appeal and in ordering future behavior. In addition, if the case is appealed, then an explanation of the reasoning helps the appellate judges understand how the trial judge reached his/her decision. This, in turn, facilitates the review on appeal.

Different skills are necessary for writing these new reasoned opinions. Rather than merely stating the outcome, judges have to explain how they reached their decisions. The underlying analysis is presumably the same, but now it has to be clearly articulated in written form. Judges have to analyze the factual and legal arguments advanced by the parties, evaluate the evidence, and lay out the rationale for their conclusions. The task can be stated rather easily, but is not so easily accomplished. It is a far cry from the simple two sentences that were standard in pre-APK days.

Indeed, in reading decisions during the summer of 1996 in Saratov and Ekaterinburg (after the new rules had already been in operation for approximately one year), I was easily able to separate the decisions written by judges who were carryovers from gosarbitrazh, and those written by judges who came on the bench only during the past few years. This confirms that the substance and style of the decisions have changed.

I spoke with the chairman of the Saratov oblast' court, A.I. Baranov, about the apparent inability of these carryover judges to live up to the standards of the APK. He acknowledged it as a problem, saying that the oldtimers are used to the simpler style of opinion. The newcomers, by contrast, have no trouble with this requirement to explain their rationale. When I ask what he is doing to remedy the problem, he shrugs. He has organized sessions at the court designed to teach opinion-writing skills, in which they analyze what makes an opinion good or bad. But he seems resigned to the situation. Perhaps more troubling (though hardly unusual) is the almost complete absence of oversight. Baranov confirms that no one in the arbitrazh court structure reviews decisions, even during this transition period when the fact that many judges are not complying with

\footnote{In a common law system, the decision would serve as precedent for future decisions in cases with analogous factual situations. This makes a thorough explanation of the reasoning underlying the decision even more critical than in civil law systems (such as Russia), which do not formally recognize precedent. On the role of precedent in Russian courts more generally, see Hendley (1996), and Hazard (1994).}

\footnote{The introduction of this requirement for the trial court to explain its reasoning simultaneously with an expansion of appellate courts is probably not coincidental.}

\footnote{I spoke to one of these carryover judges. I gingerly broached the standards for decision-writing imposed by the APK. She brushed off the question, saying that this was the fifth new APK that she had lived through. The message seemed to be that she had seen efforts at reform come and go, and that she had outlasted them all.}
the new rules is openly acknowledged. The only oversight comes through the appellate process, and far from all decisions are appealed.

III. Conclusion

Requiring judges to explain their reasoning represents an effort to professionalize the judicial corps within the arbitrazh courts. Implicit in this requirement is an effort to force judges to rely solely on law when making their decisions and thereby to lessen the role of politics in these courts. A clear explanation of the rationale behind a decision also serves a pedagogical function by clarifying what aspects of behavior contributed to a decision of liability (or non-liability). This allows economic actors to organize their behavior accordingly.¹⁷

Likewise changing the rules to require arbitrazh court judges to hear cases on their own (as opposed to in panels) can be seen as part of an effort to professionalize these judges. The new rule requires each judge to assume more responsibility for organizing the work of his/her court. The end result is that, as a whole, the judicial corps is more accountable to litigants.

The issue of professionalization is intimately linked to broader concerns with legitimacy. Earning trust is not easy, particularly in the post-Soviet context. (Shapiro, 1981) Having evolved from gosarbitrazh, the arbitrazh courts are burdened with the legacy of the past. (Stark, 1992) It may be argued that the cynicism and distrust of gosarbitrazh was not as profound as of the courts of general jurisdiction. But undoubtedly one reason is that relatively few people knew of gosarbitrazh. In a non-authoritarian society, economic actors cannot be forced to appeal to state-sponsored courts when disputes arise. Indeed, it is expected that submitting a dispute to court happens only after efforts at negotiation have failed. But courts are only one option. Some of the other options (including private contract enforcement) are less savory. At a minimum, the courts must be perceived as competent and capable of enforcing their judgments. Otherwise, going to court would seem to be a waste of time. The arbitrazh courts must struggle to find their place in the institutional landscape of post-Soviet Russia.

¹⁷Even recognizing that Russian courts (like all courts with a civil law tradition) do not recognize precedent as a source of law, it is nonetheless true that consistent patterns in terms of the substance of decisions can be observed. Thus, prior court decisions can be valuable for individual litigants, since the problems are likely to repeat themselves. (Hendley, 1996; Hazard, 1994; Merryman, 1985)
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