TITLE: REMAKING AN INSTITUTION: THE TRANSITION IN RUSSIA FROM STATE ARBITRAZH TO ARBITRAZH COURTS

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SUMMARY

This Report is itself a consolidation of four previous Council reports by the author on particular aspects the Arbitrazh court system in Russia, which holds jurisdiction over contractual and other economic disputes between legal entities. Those reports are:
2. Professionalizing the Judiciary in Russia: Issues Associated with the Arbitrazh Courts, 2/21/97.

There is a large overlap of text, as reflected by the CONTENTS on the preceding page. The general tenor of the author’s conclusions, however, has not changed:

In Russia, progress has perhaps been stymied by deep economic problems. The illiquidity of enterprises means that there is no money to pay suppliers and no money to pay a subsequent court judgment. This creates strong incentives to avoid official channels (including the courts) and to resort to private mechanisms for contract enforcement. The widespread nature of these problems means that there is no shame associated. The inability to pay debts does not connote poor management but is seen as unavoidable under current macro-economic conditions. Thus, there is no stigma attached to defaulting on loans, or reneging on contracts, or even failing to pay court judgments.

Under these conditions, presuming that changing the procedural rules and/or perfecting the institutional structure of the arbitrazh court will act as a magic tonic to fix all the problems and stimulate increased use of the courts is unrealistic. These changes are certainly necessary, but are only one piece of a very complicated puzzle. The remaining pieces will have to be put into place before the arbitrazh courts will emerge as a player in post-Soviet Russia.
REMAKING AN INSTITUTION:
THE TRANSITION IN RUSSIA FROM STATE ARBITRAZH TO ARBITRAZH COURTS

KATHRYN HENDLEY

I. Overview

The existence of a state-sponsored forum for resolving contractual and other economic disputes between legal entities is critical to the smooth functioning of a market economy that is embedded in a democratic political context. These disputes are, after all, inevitable. Even accepting that trading partners have a powerful incentive to resolve disputes through negotiation (without resorting to outside mediation) in order to maintain the relationship, there will always be disputes that persist. Absent a state-sponsored forum, economic actors may be forced into self-help and perhaps even reliance on private enforcers. Its presence may also tend to reduce the length and complexity of the negotiations associated with economic transactions by offering the parties ready-made procedures for resolving disputes. In a democratic setting, economic actors cannot be compelled to use state-sponsored forums to resolve private disagreements. Their usefulness depends on their appeal, i.e., on the willingness of economic actors to resort to them when disputes arise and their underlying legitimacy. If the courts are perceived as being too time-consuming, or incompetent, or incapable of enforcing their decisions, then they may be bypassed in favor of more efficient mechanisms.

In Russia, arbitrazh courts are the state-sponsored tribunal charged with resolving economic disputes. Arbitrazh courts are not entirely new to post-Soviet Russia. They are the institutional successor to state arbitrazh (gosudarstvenyi arbitrazh or gosarbitrazh), which existed during the Soviet period. Gosarbitrazh never had the status of a court. Instead, it was a quasi-administrative agency that resolved disputes between state enterprises. Like all Soviet-era judicial organs, gosarbitrazh was politicized. It operated within the confines of the administrative-command system.

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5I use the transliterated Russian term deliberately. Others have translated arbitrazh courts as arbitration courts, Paul H. Rubin, Growing a Legal System in the Post-Communist Economies., 27 CORNELL INT'L L.J. 1 (1994), or as arbitrage courts, Bernard Black & Reiner Kraakman, A Self-Enforcing Model of Corporate Law, 109 HARV. L. REV. 1911 (1996), but these translations only confuse matters because the English words chosen fail to capture the essence of how the Russian arbitrazh courts operate.

which means that the underlying goal was always plan fulfillment.\textsuperscript{7} As a result, the arbiters who decided cases looked more often to the implications of the case for the economy than to the law when making their decisions. Kroli argues that enterprises used appeals to \textit{gosarbitrazh} as a means of signalling their ministries that they had taken all reasonable steps to force a recalcitrant supplier to comply.\textsuperscript{8}

The inadequacies of \textit{gosarbitrazh} were apparent from the earliest days of the transition. The introduction of new property forms in the late 1980s and early 1990s\textsuperscript{9} required a similar expansion in jurisdiction. Consequently, new procedural rules were adopted and put into effect in 1992.\textsuperscript{10} One of their most important institutional innovations was to discard the administrative agency persona of \textit{gosarbitrazh} and, in its place, to create \textit{arbitrazh} courts (\textit{arbitrazhnye sudy}). In addition, these newly constituted \textit{arbitrazh} courts were no longer limited to resolving disputes between state enterprises, but were empowered to resolve disputes between all types of legal entities, and even between legal entities and the state.\textsuperscript{11} Although this new \textit{arbitrazh} procedure code represented a step away from \textit{gosarbitrazh}, it also proved inadequate. The \textit{arbitrazh} procedure code (APK) was again rewritten and, in July 1995, a new set of rules took effect.\textsuperscript{12}

Some Western observers see the \textit{arbitrazh} courts as being hopelessly flawed and advocate designing commercial legislation to minimize the need to resort to these courts.\textsuperscript{13} To be sure, flaws

\textsuperscript{7}There were two types of \textit{gosarbitrazh}. The first was organized geographically, and heard disputes in which at least one of the state enterprises was local. The second was organized through the system of economic ministries that was integral to the Soviet administrative-command system. This was known as departmental (\textit{vedomstvenny}) \textit{arbitrazh}. It considered cases involving enterprises that were within its ministry. Katharina Pistor, \textit{Supply and Demand for Contract Enforcement in Russia: Courts, Arbitration, and Private Enforcement}, 22 REV. CENT. & E. EUR. L. 55 (1996). The present-day \textit{arbitrazh} courts are the successor to the former. The latter has ceased to exist. Pistor argues that many of the judges from this departmental \textit{arbitrazh} system have moved into the Russian system for private arbitration of disputes, known as the \textit{treiteiskie} courts. \textit{Id.} See generally E.A. Vinogradova, \textit{Treteiskii sud v Rossii}, MOScow: IZDATEL’STVO BEK (1993).

\textsuperscript{8}Heidi Kroli, \textit{The Role of Contracts in the Soviet Economy}, 40 SOVIET STUD. 349 (1988).


\textsuperscript{11}Traditionally, state enterprises did not have the right to sue the state. The Gorbachev-era law on state enterprises ostensibly changed the rule by allowing state enterprises to sue a ministry when it issued an order that violated the rights of the enterprise, and that the enterprise could recover losses that are a consequence of the improper exercise of the higher-level agency’s duties with respect to the enterprise. \textit{O gosudarstvennom pereiptriiti (ob”edinenii)}, 30 VEDOMOSTI SSSR item 1013, art. 9 (1987). In practice, however, few lawsuits were filed. During the Soviet era, the ministries controlled access to key supplies, and enterprises were unwilling to risk their ire.

\textsuperscript{12}\textit{Arbitrazhnyi prosessual’nyi kodeks Rossiiskoi Federatsii}, 19 SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII (1995) [hereinafter APK]; \textit{Federal’nyi Konstitutionnyi Zakon “Ob Arbitrazhnykh sudakh v Rossiiskoi Federatsii,”} 18 SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII item 1589, 19 SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII item 1709 (1995) [hereinafter \textit{FKZoAS}].

\textsuperscript{13}E.g., Black & Kraakman, \textit{supra} note 3.
persist. Yet the fact remains that Russia was not an institutional *tabula rasa* with regard to commercial disputes at the time the transition began. In drafting legislation, it seems prudent to take this institutional legacy and current reality into account.

The present-day *arbitrazh* courts remain institutionally distinct both from the courts of general jurisdiction and from the constitutional court. Their jurisdiction encompasses two categories of cases: (1) economic disputes between legal entities, including bankruptcy; and (2) economic disputes between legal entities and the government. This article focuses on the first category of cases. The purpose is to examine the most important innovations introduced by the new *APK*, to assess the implementation of these new rules and the operation of the *arbitrazh* courts; and to analyze the prospects for the future. The article weaves together analysis of the relevant statutes with insights gained during field research in the *arbitrazh* courts over the past few years. I rely most heavily on what I learned during the summers of 1996 which I spent in the *arbitrazh* courts of Saratov and Ekaterinburg, observing daily court activities, interviewing *arbitrazh* court judges and other personnel, and reviewing the files of already-decided cases. By this point, the new *APK* had been in effect for almost a year, and I was able to observe what sort of behavioural changes it had effected.

II. Key Differences Between *Gosarbitrazh* and *Arbitrazh* Courts

In addition to the expansion of jurisdiction that came with the transition from *gosarbitrazh* to *arbitrazh* courts came a number of other important changes in how the institution worked. Among the most important innovations are:

- Lowering the fees for filing cases.
- Requiring parties to bear the burden for assembling and presenting evidence.

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15. The in-house statistical forms of the *arbitrazh* courts list 21 different categories of so-called *economic* disputes. Almost all of them are some type of contractual dispute.

16. These so-called *disputes in the sphere of governance* (*spory v sfere upravleniia*) are quite varied, including tax cases, appeals from a refusal to register legal entities, and problems relating to privatization. The in-house statistical forms list seven different categories of disputes. See generally *APK*, supra note 10, art. 22.

17. This 1996 field work supplements previous research in the *arbitrazh* courts of Moscow, Saratov, and Ekaterinburg, carried out periodically during 1994 and 1995.
- Hearing cases by single judge.
- Requiring that judicial opinions include the rationale for the decision.
- Enforcing decisions.
- Reforming the appellate structure.

**A. Filing Fees.**

When filing a case in arbitrazh court, a petitioner (istets) is required to pay a fee (gosudarstvennaia poshlina or gosposhlina) equal to a statutorily set percent of the value claimed for the case by the petitioner in the complaint (iskovoe zaiavlenie). If the petitioner prevails, then the court will order the defendant (otvetchik) to reimburse the petitioner for these expenses. If the petitioner loses, then this money is forfeited to the state. Given that the amount of money involved in such cases can be quite substantial, gosposhlina is not an insignificant concern for petitioners.

Requiring payment in advance is not a market-driven innovation, but was a standard feature of gosarbitrazh. Indeed, it predates even gosarbitrazh. Payment of court fees by the petitioner in advance is not unique to Russia, but is commonplace throughout continental Europe and in other countries that share the civil law or Romanist tradition.

The reasons for prepayment are obvious. In principle, it compensates the state for the administrative costs of the court. The arbitrazh courts do not retain these fees in-house (either on a regional or national level). Instead, they are turned over to the federal budget. They may (or may not) be reallocated to the arbitrazh courts to meet expenses. The advance payment of filing fees also discourages both frivolous litigation and inflation of the damages sought. Knowing that a percentage of the claim must be paid in advance and will be lost if the suit is unsuccessful, petitioners are unlikely to sue unless they have a convincing case. There are two ways in which the rules governing gosposhlina discourage the overstatement of claims, i.e., padding the claim by asking for amounts that might possibly be recovered but for which the legal basis is shaky. The first is the basic requirement to pay a percentage of the total amount demanded. This should prompt the petitioner to think carefully about all components of the claim. Second, the defendant is required to reimburse the petitioner only for that portion of the damages for which he is found liable. In other words, if the petitioner prevails, but recovers less than the amount originally claimed, then the plaintiff loses the gosposhlina on that excess amount. Thus, at least in theory, gosposhlina is designed to make the arbitrazh courts operate more efficiently.

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18 During 1996, 647 billion rubles were received as gosposhlina, and were turned over to the federal budget. According to V.F. Yakovlev, the chairman of the Higher Arbitrazh Court, these moneys then financed the arbitrazh courts in a very miserly fashion. Konstantin Katanian, Problemy sudov svyazany v osnovnom s nekhvatkoi sredstv, NEZAVISIMAYA GAZETA, Jan. 16, 1997, at 2.
Beginning in 1996, gosposhlina was lowered, and a sliding scale was established based on the amount being sought in the case. The change in the law was prompted by a concern that cases were not being brought due to the inability to pay the filing fee. There were two countervailing forces at work. On one hand, the amounts of the cases being brought had increased along with inflation. Although the amount of gosposhlina was no greater in real terms, the addition of several zeros to the amount owed somehow made it feel more substantial to enterprises, and made them think twice about filing claims. On the other hand, the disintegration of the administrative command system brought a fundamental change to inter-enterprise relations. No longer were firms all state-owned; most were (or were becoming) privately held. This changed and, for the most part, raised the stakes in arbitrazh court. Damages recovered no longer represented transfers from one pocket of the state to another, but were now critical to the health of the enterprise. Taken as a whole, the incentives were mixed. The desire to survive and to force trading partners to live up to their agreements created an incentive to sue, but the cost of suing might have undermined that incentive and caused enterprises to look for other (perhaps extra-legal) methods of solving their problems.

Lowering the amount of gosposhlina did not solve the problem. Enterprises fighting for their very survival, owing huge amounts of back taxes and unable to pay their workers or their suppliers, found it difficult to justify using their scarce resources to pay gosposhlina. This was true even when the enterprise believed they would win the case and when the recovery could solve some of the cash-flow problems.

Enterprises did not simply walk away from arbitrazh courts. Instead, they began to ask judges to waive the requirement that gosposhlina be paid when the case was filed in favor of collecting these fees from the losing party at the conclusion of the case (otsrochka). If the petitioner won, then the bill for gosposhlina would never come due. The defendant would have to pay. If the petitioner lost, then at least it had put off payment, and had gotten the value desired, i.e., the resolution of the case. From the court’s perspective, the fear was that if the gosposhlina was not collected at the outset, then it might never be paid. After all, the court has leverage only at the beginning of a case, when the parties are eager for its ruling. Once the decision has been rendered, the losing side may have little reason to comply. Further complicating matters is the more general propensity for not

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19 O vnesenii izmenenii i dopolnenii v Zakon RF “O gosudarstvennoi poshline,” 1 SOBRANIE ZAKONODATEL’SТVA ROSSIISKoi FEDERATSIi (1996). For claims up to 1 million rubles, fees were equal to 5 percent of the amount sought. For claims between 1 and 10 million rubles, the fees were 50,000 rubles plus 4 percent of the amount sought in excess of 1 million. For claims between 10 and 50 million rubles, the fees were 410,000 rubles plus 3 percent of the amount sought in excess of 10 million. For claims between 50 and 100 million rubles, the fees were 1,610,000 rubles plus 2 percent of the amount sought in excess of 50 million. For claims between 100 and 500 million rubles, the fees were 2,610,000 rubles plus 1 percent of the amount sought in excess of 100 million. For claims in excess of 500 million rubles, the fees were equal to 1.5 percent of the amount sought. Id., art. 4.

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paying judgments as a result of the illiquidity of many enterprises. (See the discussion below under Implementing Decisions.)

How have judges responded to these requests to delay the payment of gosposhlina? Based on the interviews I conducted with arbitrazh judges in Saratov and Ekaterinburg during the summer of 1996, their responses seem to range across the board. What is interesting is that no judge claimed to reject such requests out-of-hand. As opposed to interpreting the requirement to pay gosposhlina prior to hearing the case as an absolute statutory requirement, they regarded the decision as to whether to grant the waiver as being completely within their discretion. This goes against the usual practice of Russian judges to interpret the rules narrowly. In fact, my reading of the law and the supporting procedural rules suggest that the original intent was to have them be strictly enforced regardless of the petitioner's circumstances. According to the rules, the judge must receive official notification of payment prior to accepting the case and setting a date for hearing it. No provision is made for a pretrial hearing or the submission of pleadings on the postponement of gosposhlina.

Notwithstanding the absence of any official procedure for postponing the payment of gosposhlina, it is being requested with great regularity. By talking with trial court judges and reading case files I learned that a de facto procedure exists. A petitioner who feels unable to pay the gosposhlina will usually so indicate in the complaint, and will submit an affidavit from its bank(s) confirming the lack of funds. Sometimes the court will require the petitioner to submit a certificate from the tax inspectorate listing all bank accounts in order to guard against the possibility of funds being transferred to a different bank account. The judge also considered his/her prior experience with the petitioner and its credibility. Without exception, judges expressed frustration at their inability to ensure that they were getting an accurate picture of the petitioner's financial situation. The arbitrazh judge must decide whether or not to grant the request to delay payment of filing fees before setting a date for a hearing on the merits.

One Saratov trial court judge related an incident when she refused to allow a petitioner to delay payment. She said that she had a feeling that the enterprise had money squirreled away. She felt vindicated when the petitioner did find the money and paid the fees. I asked whether she punished the petitioner for having lied to her. She had not. In fact, though she conceded that complete honesty was rarely encountered, the idea of fining liars struck her as bizarre. The link

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20 The Vice-Chairman of the Krasnoyarsk arbitrazh court reports that delays are requested in at least 50 percent of submitted cases. NINA VLASOVA, Spor za svoi schet, KRASNOYARSKII RABOCHII, Jan. 23, 1997, at 2.

21 According to a recent commentary supports the requirement to submit a bank affidavit, thereby indicating that procedural rules (and expectations) are beginning to grow up around this issue. V.K. Puchinskii, Arbitrazhnyi protsessual'nyi kodeks Rossiiskoi Federatsii: Postateinyi kommentarii, 4 VESTNIK VYSSHEGO AREBITRAZHNOGO SUDA 81, 82 (1996).
between fining litigants for material misrepresentations made to the court and building respect for the
court as an institution that is often taken for granted in Western contexts is not apparent to Russian
arbitrazh court judges.

The chairman of the Saratov arbitrazh court, A.I. Baranov, strongly opposes granting requests
to delay the payment of gosposhlina. At the heart of his opposition lies a profound skepticism about
enterprise claims of poverty. He cited examples of enterprises requesting relief, but then
mysteriously finding the necessary resources when their request was denied. The affidavits from
banks attesting to the empty coffers of enterprises, which are routinely offered as evidence, do not
persuade him. He contends that enterprises have deliberately drained their bank accounts in order to
evade taxes, and use this apparent illiquidity to escape other obligations. But Baranov is subordinate
to the Higher Arbitrazh Courts, which has left the decision as to whether to grant a delay in payment
of gosposhlina to the discretion of trial court judges. The rationale for Moscow's position is clear. It
fears that legitimate claims will not be brought due to an inability to pay the filing fees. Baranov
argues that the fact that filings actually increased during the summer of 1995 when trial courts were
forbidden to delay payment of gosposhlina demonstrates that Moscow's concern is misplaced.

Both Baranov and his Moscow superiors are struggling to strike the proper balance between
conscerns of justice and efficiency. Neither has any desire to shut out legitimate claims. By the same
token, neither wants to allow solvent enterprises to escape paying gosposhlina or to create incentives
for such enterprises to hide their assets.

B. Burden of Proof.

Perhaps the most fundamental innovation of the new APK is the requirement that petitioners
bear responsibility for proving their case to the court. To clarify, this imposes an affirmative burden
on petitioners to present evidence sufficient to demonstrate the liability of the defendant, as claimed
in the original complaint. This stands in contrast to the prior rules (for both gosarbitrazh and the
post-1992 arbitrazh courts) which merely obligated the petitioner to respond to requests by the
judges (or arbiters) for evidence. In other words, neither of the parties had any affirmative duty to
present evidence; both the petitioner and the defendant had only to present evidence in response to
formal judicial requests.

The preexisting system is typical for countries with a civil law tradition. In such countries, the
judicial process is not adversarial, but inquisitorial. As a practical matter, this means that roles of the

22 According to the vice-chairman of the Krasnoyarsk arbitrazh court, up to 16 percent of submitted cases are
never heard because of the failure of petitioners to comply with the APK. VLASOVA, supra note 18 at 2.
participants are very different. Judges are seen not as neutral arbiters who should stay above the fray, but as an active participant in the process of ferreting out the truth. Judges (not lawyers) do most of the questioning of witnesses. Lawyers are more peripheral. They certainly have the right to question witnesses, but tend to stay more in the background than do lawyers in Anglo-American systems.

Russian arbitrach courts and the predecessor gosarbitrazh fit into this familiar pattern. To a greater extent than even the Russian courts of general jurisdiction, the arbitrach process has always been judge-driven, not lawyer-driven. In fact, the Saratov and Ekaterinburg arbitrach judges uniformly told me that lawyers participated in less than half of the cases they heard. Upon closer questioning, these judges reported that the incidence of participation by lawyers had increased in the post-1992 period, but that cases with lawyers still remained the exception and not the rule. The judge-driven nature of the process made lawyers less essential. Upon receiving a complaint, the judge would issue an order (opredelenie), setting the date for the hearing, and detailing the sort of evidence that each side should bring with them. At the subsequent hearing(s), the judge would review the evidence and render his/her decision based on that documentary evidence. Lengthy questioning of witnesses or other types of oral evidence were rarely accepted as the basis for an opinion. Each side was given an opportunity to present an opening and closing statement, but typically this added little to the pleadings. In essence, judges led the parties through the process, rendering lawyers almost superfluous.

The new APK seems to break with this tradition, and to move in the direction of an adversarial system. The law now requires the judge to decide the case based on evidence presented by the parties. This would seem to represent an effort to shift the burden of proof onto the parties. On its face, the law empowers arbitrach judges to dismiss cases if the petitioner fails to present sufficient evidence to support the claim. Similarly, judges have the right to decide in favor of the petitioner if the defendant fails to present evidence that convincingly rebuts the claim. Judges are no longer required to coax the evidence out of the parties or even to prompt them as to what sort of evidence is necessary. Thus, the order setting the date for the first hearing no longer has to list the evidence to be brought. Instead, the order may be phrased in more general language, instructing the parties to bring whatever evidence they believe necessary to prove their claims.

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24Some scholars contend that U.S. judges are increasingly becoming an active participant (or at least manager) of the judicial process. See Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 376 (1976).

25APK, supra note 10, art. 52.
The potential implications of this admittedly incremental shift toward an adversarial system are profound. First, if parties are required to present their case without any guidance from the court, then we might expect to see the participation of lawyers become more common. Lay people may be able to respond to targeted requests from judges, but are unlikely to be able to understand what the law requires without some professional advice. This, in turn, might contribute to the growth of a business law bar in Russia. Second, if judges begin to dismiss cases summarily when petitioners show up without corroboration and to issue summary judgments in favor of petitioners when defendants show up empty-handed, then this may create an incentive to prepare for arbitrazh court proceedings. Over the long run, this may increase the efficiency with which the courts operate.

But in typical Russian fashion, the APK tries to have it both ways. In the article of the APK that follows that which seems to assign decisively new roles to the parties, the APK seems to backtrack by giving arbitrazh courts the right to suggest (predlozhit’) to the parties other sorts of evidence that should be presented.26 Arbitrazh judges are frustrated by this mixed message. They would prefer a more definitive rule. They fear that the inconsistency reflects a lack of political will in Moscow. One judge in Ekaterinburg told me that she had complained about it in an internal written memo to the V.F. Yakovlev, the chairman of the Higher Arbitrazh Court, but to no avail.

Reading between the lines is always dangerous, but it seems that the provision giving arbitrazh courts the right to suggest additional evidence was tacked on as an afterthought. Rather than helping matters, the inconsistency between these two articles of the APK has created a lack of clarity for both judges and litigants. No one is sure of the ultimate rule. Is article 52, in which petitioners seem to bear the burden of proving their case intended only as an incentive to get them to prepare for court appearances? More specifically, can judges legitimately dismiss a case if the petitioner fails to present sufficient evidence to support the claim? No one knows.

The upshot is that judges pay lip service to the requirement imposed by article 52, but continue to operate according to the old rules. In other words, most judges still issue an order listing the sort of evidence that the parties ought to bring to the hearing. What this means is that the effort to shift the burden for running the case from the judge to the parties has been largely ineffective. The determination as to what evidence is relevant is still being made by the judge.

A few judges that I spoke with in Saratov and Ekaterinburg had taken a harder line. They take article 52 at face value as a requirement that the parties assume the burden for proving and/or disproving the case. They interpret the law as giving the parties responsibility for deciding what sort of evidence should be submitted. If the petitioner fails to provide sufficient evidence to prove its

26 Id., art. 53.
case, then it loses. Likewise, if the defendant fails to provide evidence that convincingly rebuts the petitioner’s case, then the defendant loses. These judges no longer view it as their responsibility to lead the parties through the process by the hand by specifying the evidence that has to be presented.

What happens when judges take this hard line? Typically they are rewarded by having the parties show up empty-handed. I observed a number of these cases, and found other examples in the case files. The hearing was usually quite short. The judge would ask the petitioner to state its case, whereupon the petitioner would orally restate the claim set forth in written form in the complaint. When the judge asked for supporting documentary evidence, the petitioner would look surprised, and would say that he/she hadn’t brought it because it had not been requested by the judge. This then led to a lecture on the requirements imposed by article 52 of the APK. The tone of the lecture would vary depending on whether the target was a lay person or a lawyer. Judges were less forgiving of lawyers. But in no case that I observed or reviewed did the judge dismiss the case -- even though the law technically requires dismissal. Instead, the judges would reschedule the case, and admonish the parties to arrive better prepared. Usually, the judge listed the evidence that should be brought.

Why do these judges bother? Why not simply issue the order listing evidence when the case is filed (as was routinely done in the past)? In response to these questions, the judges told me that they felt an obligation to educate the litigants about the new standards. They recognized that few litigants were now complying, but said that nothing would change if judges did not draw these new rules to the litigants’ attention. The implication was that the judges might be less tolerant of non-compliance the second or third time it happened with a particular litigant. But changing standards and practices on a person-by-person basis is slow going and frustrating for all concerned. It is already a minority of judges that try to get litigants to comply. Over time, it may become easier for them just to go along with the crowd than to push for compliance with the letter of the law.

Three reasons were uniformly cited by all judges for not dismissing cases and for giving the parties a list of relevant documents. First, they said that it makes court procedure go more quickly. Second, they said that such dismissals would not be upheld on appeal. Third, they said that until litigants learn (and fully absorb) the new procedural rules, it seems unfair to punish them for adhering to the old rules. Unstated but just as important is inertia. For judges as well as litigants, it is easier to go along as always than to make fundamental changes.

When appealing a case that was decided on the basis of the failure of one of the parties to present convincing evidence, the loser would argue that the trial court had refused to listen to the relevant evidence, which was now available. The assumption implicit in such an argument is that the trial court acted rashly in dismissing the case, and should have postponed the case rather than deciding it. To date, appellate courts have consistently found such arguments convincing, and so have remanded the case for a new hearing by the trial court. From the judge’s perspective, dismissing a case because one side does not produce evidence in a timely manner is pointless if the
losing party can successfully appeal the case and win a new hearing. Better to delay the trial court
decision until the parties either submit or clearly refuse to submit all of the relevant evidence. It is
important to recognize that, in remanding these cases, the appellate courts are acting with more
leniency than the law technically allows. (See the discussion below under Revised Appellate
Structure.) Once again, trial court judges are caught in a catch-22; a choice between law and
justice. If they enforce the law as written and dismiss the case, there is a good chance they will see
it again on remand. If they are lenient and accommodate old behavioral patterns, then they violate the
law. At this point, it seems that trial court judges are erring in the direction of leniency rather than
strict adherence to the law. In this minds of most judges, leniency equates with fairness and justice.
Enforcing the rules as written would amount to a preference in favor of litigants who had competent
legal representation. Such a preference does not strike Western lawyers as unfair (or even abnormal),
but Russian judges have traditionally not penalized unrepresented litigants. Instead, they have bent
over backwards to help them through the process. This is true of both arbitrazh courts and courts of
general jurisdiction. What we see in article 52 of the APK may represent a move away from this
philosophy and toward a more professionalized court. But arbitrazh judges are not yet willing to
make that leap, which will inevitably leave many potential litigants behind. But my observations
reveal some indications of incremental movement. For example, judges routinely lecture litigants in a
very critical fashion about their mistakes and about the importance of knowing what the APK
requires before coming to court. At this point, however, the lectures serve only a pedagogical
function; judges do not follow up with punishment for the lack of knowledge.

C. Cases Heard by Single Judge.

The APK changed how cases are heard. Previously all cases were heard by three-judge panels.
During the days of gosarbitrazh, these were panels of three arbiters. As a general rule, the APK
provides for cases to be heard at the trial level by a single judge (edinolichnoe rassmotrenie dela).27
Exceptions are made for bankruptcy 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.28

27Id., art 14. The 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 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.

28Id.
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 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 Ekterinburg 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. 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. When the case is heard collegially, all

29. KOMMENTARI K ARBITRAZHNOMU PROTSESSUAL'NOMU KODEKSU ROSSIISKOI FEDERATSII 34 (V.F. Yakovlev & M.K. Iukov eds., 1995) [hereinafter Kommentarii].

30. In 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.

31. Article 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. APK, supra note 10, art. 21.

32. Kommentarii, supra note 27.

33. Id. at 36.
judges have an equal vote, and decisions are made by majority vote. \(^{34}\) 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 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. \(^{35}\) 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.

D. Reasoned Decisions.

When deciding a case on the merits, the *arbitrazh* court issues a decision (*reshenie*). \(^{36}\) In the past, these decisions were extremely short, rarely exceeding two pages. Typically, the included only factual information about the identity of the parties, a brief description of the facts, and a statement

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\(^{34}\) *APK*, *supra* note 10, art. 15.

\(^{35}\) His concerns do not reflect his experience. Like virtually all chairman of *arbitrazh* courts, Baranov is occupied full-time with administrative tasks and does not hear cases.

\(^{36}\) 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.
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), but is standard in courts of countries with a civil law legal tradition.

Article 127 of the APK contains a requirement that opinions consist of: introductory, descriptive, explanatory, and determinative parts. Thus, judges are now required to explain the basis for their decision. According to the commentary, this explanatory part (motivirovnochnaia chast') must contain the factual and legal basis for the conclusions of the arbitrazh court. The court has to specify the laws that are relevant to the case. 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.

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.

37 Decisions rendered by courts of general jurisdiction are also very short. Kathryn Hendley, Trying to Make Law Matter: Legal Reform and Labor Law in the Soviet Union (1996) [hereinafter Hendley 1].

38 Merriman, supra note 21.

39 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.

40 Kommentarii, supra note 27, at 292.

41 Id., at 290-4.

42 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 John Hazard, Is Russian Case Law Becoming Significant as a Source of Law?, 1 Parker Sch. J. Eur. L. 23 (1994); Hendley 1, supra note 35.

43 The introduction of this requirement for the trial to explain its reasoning simultaneously with an expansion of appellate courts is probably not coincidental.
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 less trouble with this requirement to explain their rationale. When I asked him what he is doing to remedy the problem, he shrugged. 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 seemed unconvinced that these seminars were having the desired effect. For the most part, he seemed 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 the new rules is openly acknowledged. The only oversight comes through the appellate process.

The new rules, designed to improve the quality of decision-writing is part of a larger effort to professionalize the arbitrazh courts by having more complete written records of the proceedings. In addition to requiring fuller opinions, the APK now requires arbitrazh judges to prepare a record (protokol) of each hearing. These protokoly, which have long been routine in cases heard by courts of general jurisdiction, had never been part of the arbitrazh procedure. Perhaps this reflects the non-judicial nature of gosarbitrazh. Having a record, even a non-stenographic impressionistic record

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44 When talking with 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. She commented that her hectic trial schedule left her little time to write lengthy opinions.

45 Hendley I, supra note 35.
written after the fact by the judge, is helpful on appeal. At the very least, it establishes who was present, and the broad outline of what happened. During the first half of 1995, after the new APK had been adopted but before it had gone into effect, arbitrazh judges complained bitterly about this new burden being placed on them. The complaints continued after the APK went into effect. Judges feel overworked and under-supported administratively. Although this is a frequent complaint among judges the world over, these arbitrazh judges have a point. But this does not minimize the importance of introducing a requirement to have a formal record of all judicial proceedings.

E. Implementing Decisions.

Without exception, arbitrazh court judges identify implementation of their decisions as the single biggest problem facing the court. The chairman of the Higher Arbitrazh Court has gone on the record with strong criticisms of the courts' capacity to implement their decisions. An enforcement capacity is a fundamental feature of any judicial institution, and the arbitrazh courts fall short. This is a relatively new problem. During the Soviet period, all enterprises were state owned, which meant that damages awarded by gosarbitrazh amounted to transfers from one pocket of the state to another. Under these circumstances, enforcement was virtually automatic. Implementing arbitrazh court decisions became increasingly more difficult as enterprises had to answer for their financial well-being and could no longer count on the state to bail them out. Not surprisingly, as money came to matter, enterprises were less willing to part with it. Also contributing to the difficulty in enforcing judgments were the rapidly changing regulations governing bank accounts. In the Soviet era, an enterprise could only have one bank account (with subaccounts for nalichnye and beznalichnye funds). In the early 1990s, the rules changed and, for a time, enterprises were able to hide money by opening new accounts. In time, this loophole closed, but new ones grew up in its wake. Now many enterprises operate on a cash basis, which makes it extremely difficult to assess their financial condition. The political difficulties associated with bankruptcy result in enterprises hanging onto life long after their resources have been depleted.

46In the Russian courts of general jurisdiction, these protokoly are usually prepared by the court secretary. In the arbitrazh courts, judges often share secretaries, which means that they are not able to sit in on all hearings, leaving this work to the judges.

47Katanian, supra note 16; Marina Vasil'eva, Nel'zia zhit' po zakonam dzhunglei, 7 CHELOVEK I ZAKON 54 (1996). The chairman of oblast' level courts have expressed similar frustrations. E.g., V. Tarasovaya, Kogda ne ispolnyaiutsya zakony, v nastuplenie perekhodit prestupnost', STAVROPOL'SKAYA PRAVDA, Jan. 23, 1997 at 2.
The APK outlines the procedure by which judgments of the arbitrazh court should be implemented.\textsuperscript{48} The process is best illustrated through a hypothetical situation. Assume the petitioner wins and is awarded damages. The decision takes legal effect one month after its issuance.\textsuperscript{49} During this month, the parties have the right to file an appeal, which would stay the trial court decision. Assuming no appeal, the defendant is legally obligated to comply with the decision once it takes legal force. Ideally, the defendant should pay the damages on the basis of the decision, without the court taking any further action. If the defendant fails to pay, then the petitioner can go back to the arbitrazh judge and request an enforcement order (ispolnit'nyi list).\textsuperscript{50} The APK obligates the judge to take all steps necessary to ensure the implementation of his/her decisions.\textsuperscript{51} In effect, an ispolnit'nyi list is an order from the court to the bank to pay the judgment from the defendant's account.\textsuperscript{52} If the defendant has money in the bank, then the judgment will be paid. If the account is empty, the bank will so notify the petitioner. The next step is for the petitioner to seek the assistance of the judicial enforcer (sudebnyi ispolnitel'). The petitioner ask for the assistance of the sudebnyi ispolnitel' in writing and must provide him/her with the ispolnit'nyi list and the certification from the bank that there is no money in the defendant's account. At this point, the sudebnyi ispolnitel' is obliged to find the defendant and to locate assets equal to the amount of the judgment. The regulations provide that this is to be accomplished within 20 days from the time the petitioner makes the appeal but, according to the sudebnye ispolniteli with whom I spoke in Saratov, that this requirement is totally unrealistic is well understood. How the sudebnyi ispolnitel' goes about his/her job depends on the circumstances. Sometimes the defendants cannot even be located.\textsuperscript{53} Assuming the defendant can be located, the sudebnyi ispolnitel' then has the task of identifying marketable assets and finding buyers. Only then does the victorious petitioner receive the damages.

\textsuperscript{48} The arbitrazh courts are also charged with enforcing decisions of the private arbitration courts, the treiteiske courts, when parties to those disputes refuse to comply voluntarily. APK, supra note 10, art. 91-1; Vinogradova, supra note 5, at 35-50; Vremennoe polozhenie o treiteiskom sude dlya razreshenie ekonomicheskih sporov, 1 VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA 57, arts. 24-6 (1992).

\textsuperscript{49} APK, supra note 10, art. 135.

\textsuperscript{50} In the past, this document was known as an order (prikaz). 1992 APK, supra note 8, art. 148.

\textsuperscript{51} APK, supra note 10, art. 136.

\textsuperscript{52} Id., art. 198; Kommentarii, supra note 27, at 406-14.

\textsuperscript{53} This has been a particular problem with the bank loans made during 1992 and 1993 that are now coming due. The documentation of the identity of the debtors was slipshod, and money was sometimes loaned to fictive legal entities, or to legal entities located at nonexistent addresses.
Why is the implementation of arbitrazh court decisions so difficult? The causes are both institutional and operational: (1) the petitioner must take the initiative to get the decision implemented; (2) the arbitrazh courts have no in-house enforcement capacity; (3) legal limits on the ability to reach hidden assets of defendants; and (4) the illiquidity of many Russian enterprises.

1. Heavy Burden on Petitioner. The burden of ensuring that the decision is enforced rests entirely on the petitioner. The court does not require the defendant to report back after payment has been made. If the defendant does not pay on its own, then the petitioner will never recover the damages unless it takes further action. This is not unique to Russia. As a general matter, courts have limited internal enforcement power. It is assumed that the litigants will comply voluntarily with court decisions. This willingness to comply stems from their consent to the jurisdiction of the court, from their fear of being exposed as having evaded a court decision and, more generally, from the legitimacy of the court as an institution. Legitimacy is built up gradually. The arbitrazh court is a relatively new institution and so has had little time to amass political capital (or legitimacy). Its efforts to build credibility are hampered by the negative legacy of its predecessor, gosarbitrazh. Moreover, non-compliance with arbitrazh court decisions has no adverse reputational effect. It has become so commonplace that few pay any heed. Whether the arbitrazh court will evolve into a meaningful element in the Russian legal system remains to be seen.

2. Absence of Enforcement Division Within Arbitrazh Court Structure. The sudebnye ispolniteli are not part of the hierarchical structure of the arbitrazh courts, but are part of the courts of general jurisdiction. Most of their time is spent enforcing judgments for these other courts. As a result, their primary loyalty is not to the arbitrazh courts. The process of enforcing judgments for


56 When preparing the new Russian company law, efforts were made to limit the need to interact with arbitrazh courts. Their stated goal was to make the law self-enforcing. The impetus for doing so was the drafters' lack of confidence in arbitrazh courts. See Black & Kraakman, supra note 2. More generally on path dependence, see David Stark, Path Dependence and Privatization Strategies in East Central Europe, 6 E. Eur. Pol. & Societies 17 (1992).


58 In Saratov, the sudebnye ispolniteli annually handle approximately 1200 enforcement claims for the courts of general jurisdiction, and less than 100 arbitrazh court cases.
the two court systems is different. *Arbitrazh* decisions often involve huge sums of money which can only be recovered through auctioning off the defendant's assets. The *sudebnyi ispolnitel'*, has to be financially savvy enough to recognize which assets are marketable, and to obtain the fair market value. This is a far cry from garnishing wages to pay child support, which is the sort of activity the *sudebnyi ispolnitel'*, typically undertakes for the courts of general jurisdiction.

Given that everyone from the officials of the Higher *Arbitrazh* Court down to trial court judges and *sudebnye ispolniteli* agrees that the lack of an enforcement capacity is problematic, why has such a capacity not been created? The initial answers to this question always focused on money.59 One close associate of Yakovlev claimed that he had raised the issue with Chernomyrdin, but that the Prime Minister could not grasp the urgency. I find the budgetary argument unconvincing. To be sure, the funds of the Russian government are severely constrained, but other law-related administrative agencies have been created when a need is perceived.60 More convincing is an explanation that takes account of the power of the advocate for the new agency and the priority placed on having effective *arbitrazh* courts. When I got to know trial court judges better and reintroduced this question, they often acknowledged their skepticism of the facile explanation of no money. Of course, Yakovlev has had many issues to press, including the passage of the new *APK* and funding for the increased number of judges. Despite paying lip service to the problems of enforcement,61 it may have a lower place on Yakovlev's agenda than other issues.62 Equally important is the marginal nature of *arbitrazh* courts within the Russian political landscape. My guess is that many Russians are unaware of their existence, and that what news they hear is less than flattering. The low status of *sudebnye ispolniteli* also plays a role. Upon reflection, the circularity and interrelated nature of the problems of creating the political will to make the *arbitrazh* courts more effective in the short run and of building legitimacy for the institution over the long run become apparent.

59 Several draft of laws that would create a separate judicial police to enforce decisions have been circulating among legal scholars in Moscow for several years.

60 Recent examples include the anti-monopoly committees, the bankruptcy commissions, and the special tax commissions.


62 Buttressing this argument is that fact that two draft laws that might address the problem, and that have had a first reading in the Duma, have languished for two years without further action by the Duma. Katanian, *supra* note 16.
a. Convoluted Enforcement Procedure. Those involved in the process openly concede that if the defendant does not have the money in the bank to cover the damages, then the chances for recovery are slim. For example, in July 1996 a sudebnyi ispolnitel' in Saratov told me that, of the 25 enforcement actions then pending, only five stood some reasonable chance of collection.

The entire process is fraught with problems. As I already noted, some defendants are never located. Even if they can be located, all too often they are effectively bankrupt. Once located, the sudebnyi ispolnitel' negotiates with the defendant with the goal of gaining voluntary compliance. To this end, he/she issues a written proposal (predlozhenie) as to how the judgment could be satisfied containing a deadline for payment. If the defendant does not meet the deadline, then the sudebnyi ispolnitel' has no choice but to seize assets. He/she prepares an act of inventory and seizure (akt opisi i aresta). The critical part of this act is a list of property to be seized, along with a market value. The petitioner and the defendant have to agree on the values stated. If they cannot agree, then an expert is called in to make an assessment. In order to prevent the defendant from selling the assets and absconding with the money, the sudebnyi ispolnitel' either removes the assets or takes the title documents (pasport). Removing assets is complicated by the fact that sudebnye ispolniteli have access neither to cars or trucks for transporting the goods nor to warehouses in which the goods might be stored prior to auction. The window sills of the rooms in which these sudebnye ispolniteli work are piled high with various pieces of equipment waiting to be sold. The responsibility for selling the assets listed in the act rests with the sudebnyi ispolnitel'. The problem is that, for the most part, no one wants the assets. Often they are worn-out office equipment or industrial machinery that is useful only for particular industries. Sales take place through placing advertisements in the paper, placing the goods in second-hand commission shops, and auctions.

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64 Sudebnye ispolniteli try to avoid using experts because the delays and expenses involved. Technically, the court should pay the cost of obtaining the expert. Recognizing that the budget is insufficient, the sudebnye ispolniteli tell the party disputing the price that it will have to find the expert and pay him/her. This provides a powerful incentive for the parties to compromise, thereby avoiding the need for experts.

65 Transportation is not provided for any aspect of the work of sudebnyi ispolniteli. At every stage, they have to rely on public transportation, and they have to cover these costs (which have become significant in recent years) from their own pockets. Conversations with sudebnye ispolniteli uncovered incidents when they had to haul typewriters, adding machines, and larger pieces of machinery back to the office for safe keeping on public transportation.

66 Each of these options poses difficulties for the sudebnyi ispolnitel’. The budget does not provide funds to pay for advertisements or announcements of seized assets in the paper. Efforts are made, sometimes successfully, to convince the local papers to run the ads at no charge. Selling through stores that specialize in second-hand goods (kommissionnye magaziny) has become increasingly difficult. These stores recognize that the goods will be hard to
The upshot is that it can take months to sell the assets, consuming considerable time and energy on the part of the sudebnye ispolniteli.67

b. Inadequate Support of Sudebnye Ispolniteli. As the foregoing indicates, sudebnye ispolniteli are not adequately supported. This same complaint could be made by virtually any part of the Russian legal system, but the situation of the sudebnye ispolniteli is particularly troubling. Their work requires constant travel throughout the city, locating defendants, negotiating with them over their assets, and then seizing assets. Yet they are given no access to cars or trucks. They are left to the vicissitudes of public transportation, and are expected to subsidize this transportation out of their salaries.68 In Saratov and Ekaterinburg, the majority of the sudebnye ispolniteli are women, and often they call on their husbands to help them haul heavy machinery. It struck me that the fact that most sudebnye ispolniteli are women and that they have low status is probably related.

3. Finding Hidden Assets. Trying to avoid paying judgments through claims of poverty is not unique to Russian defendants. It is an understandable (though not legal) reaction familiar the world over. What is somewhat unusual about Russia are the limits placed on petitioners and sudebnye ispolniteli, when acting as their agents, in seeking to recover judgments. One common response on the part of an losing defendant is to transfer assets to family members or other trusted colleagues. In the context of arbitrazh court decisions, the defendant is always a legal entity (not a physical person), so the defendant may disperse company assets to key managers and even to their family members. Such actions are illegal, but can be difficult to detect and unravel after the fact.

In other countries, procedures have been developed for finding diverted assets. In the United States, for example, it is possible to go after the assets of company officials if it is found that these officials have used the shield of limited liability to enrich themselves. This so-called piercing of the corporate veil is not commonplace, but it is possible. In Russia, it is not. Court officials are limited

66(...continued)
sell, and often refuse to accept them. According to the law, auctions can be used to sell real property, but not moveable assets.

67I inquired as to whether petitioners seeking recovery ever threaten or take action to declare the defendant bankrupt. The sudebnye ispolniteli had not yet encountered such a case. They attributed the reticence on the part of petitioners to an inaccurate understanding of the law. Petitioners assume that, if the defendant becomes bankrupt, they will never recover. In reality, they would have a high priority among creditors to be repaid upon liquidation.

68It goes without saying that sudebnye ispolniteli are underpaid, but this hardly makes them unique in Russia. In Saratov in July 1996, the monthly salary for a sudebnyi ispolnitel' with nine years experience was 200,000 rubles. At this time, judges earned, on average, one million rubles per month.
to seizing assets that are owned by the defendant, i.e., listed on its balans. Judges and sudebnye ispolniteli agreed that going after the personal assets of an enterprise director, even assuming it could be definitively proven that the assets had been diverted from the enterprise, would be impossible. Once the assets pass through the enterprise management to their family or others, the task becomes even more futile. A Saratov sudebnyi ispolnitel' recounted her unsuccessful efforts to help the victims of stock pyramid schemes over the past few years. At one point in 1995, as many as twenty victims would come to her every day with court judgments. According to their bank statements and other records, the defendants had no money. Yet to this sudebnyi ispolnitel', it was absolutely clear that the bank funds had been dispersed in illegal ways, such as over overpaying for worthless assets. She is sure that she could have unraveled these illegal transactions if she had had the time, authority, and resources.

One method of dealing with this problem is for the court to freeze enough of the defendant's assets (arestovat' imushchestvo) to cover the potential judgment. This is akin to putting the assets in escrow, i.e., they cannot be sold or otherwise encumbered until the case is resolved. It can be done anytime after the case is filed. Implicit in such action is a distrust of the defendant. Indeed, whether freezing the defendant's assets preemptively is open to question. The APK lists freezing assets as one of five permitted methods of ensuring that the case proceed. Any petition for freezing assets must be ruled upon within one day of submission. The impetus may come from the court or from a petition filed by a participant in the case. The statutory language establishing the standard for granting such a petition is quite general. It states that the order may be granted

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69 Since the petitioners were all physical (not legal) persons, these were decisions from the courts of general jurisdiction. The underlying point, however, is the same.

70 M.S. Fal'kovich, Arbitrazhnyi protsessual'nyi kodeks Rossiiskoi Federatsii: Postateinyi kommentarii, 8 VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA 100 (1996).

71 APK, supra note 10, art. 76-1. Article 92 of the 1992 APK also contemplated freezing assets. Most of the detail about how to seize assets comes in the rules for collecting on judgments, 1992 APK, supra note 8, art. 156, suggesting that freezing assets at the beginning of a case was not the norm.

72 Grazhdankii protsessual'nyi kodeks RSFSR, 24 VEDOMOSI VERKHovNOGO SOVETA RSFSR item 407, art. 136 (1964) [hereinafter GPK]. Note that the specifics regarding how to handle these petitions comes from the GPK, not the APK.

73 I have observed only one instance where the court initiated the freezing of assets. In a 1994 Ekaterinburg case, the judges perceived the defendant to be unscrupulous and the petitioner to be hopelessly naïve. Once the judgment was rendered, the presiding judge was immediately on the phone trying to get whatever was left in the defendant's bank account frozen. She worried out loud that if she gave them enough time to get to the bank, then the account would be emptied.
whenever the circumstances of the case suggest that implementing the decision of the court will be difficult or impossible.\textsuperscript{74} When deciding on such a petition, the commentary advises the judge to consider the potential detrimental impact on the defendant.\textsuperscript{75} My conversations with trial court judges indicate that they are well aware of the need to proceed with caution. As one Ekaterinburg judge put it, she cannot base the decision on a feeling of the plaintiff. She needs more. Typically, she places great weight on the behavior of the defendant.\textsuperscript{76} She also looks at prior behavior by the defendant. Interestingly, the likelihood of the petitioner prevailing on the merits is not considered. In theory, the court can punish non-compliance by the defendant with fines of up to fifty percent of the value of the case. As I noted earlier, arbitrazh judges do not routinely impose fines; I encountered no cases in which fines were assessed.

Although the petitioner has the right to request that the defendant’s assets be frozen, the request is not made in most cases. This seems illogical given that inability to enforce judgments is such a widespread problem. When I asked judges why more petitioners failed to take these steps, some placed the blame on poor knowledge of the law. They contended that petitioners were unaware of their rights and of the potential consequences of not acting preemptively. Other judges thought the reason might be a perception that it is difficult to get such an order. To some extent, this is accurate. Judges do not issue orders to freeze assets lightly. But it is possible and, depending on the circumstances, may be the only hope for recovery. The judges seemed to see the need for increased use of this mechanism, but to date most petitioners do not. It is worth noting if such orders become routine, it may create new problems since defendants may be unable to pursue normal business activities if a significant portion of their assets are frozen. This problem has already arisen with respect to banks, and most judges said they would not freeze correspondent accounts. The goal, of course, is to increase the awareness of these orders so that they may be used when warranted.

4. Illiquidity of Enterprises. The problem with implementing arbitrazh decision goes far deeper than flaws in legal procedures or inadequate funding. It can be traced back to the lack of liquidity of Russian enterprises. As has been well-documented, many enterprises are unable to cover normal business expenses, such as wages and taxes. Debts owed to utilities have lead to highly

\textsuperscript{74}GPK, supra note 70, art. 133.

\textsuperscript{75}KOMMENTARII K GRAZHDANSKOMU PROTSESSUAL’NOMU KODEKSU RSFSR 200 (M.K. Treushnikov ed., 1996).

\textsuperscript{76}In one example where the request to freeze assets came after the case had been decided, the judge denied the request because she believed the fact that the defendant had paid the basic debt and part of the fine showed that it was trying to live up to the obligation.
publicized service shut-offs. The non-payment crisis has had a domino effect throughout the Russian economy. Not surprisingly, enterprises are also deeply in debt to their suppliers. Efforts have been made to remedy the crisis by requiring partial or even full pre-payment before goods will be shipped. But the problems persist. Some portion of these non-payment cases ultimately end up in arbitrazh court. For the most part, they are open-and-shut cases. But the judgment only puts the debt on the public record; the defendant still has no money.

The question this raises is why anyone bothers to go to arbitrazh court. I put this question to judges and sudebnye ispolniteli. The most common answer was that the petitioner needed to show that it had taken all steps possible to recover on the debt before writing it off. Whether this was a legally-imposed requirement was unclear. For banks, I was told that the Central Bank had issued a regulation requiring a court judgment before a bad debt could be taken off the books. The sudebnye ispolniteli believe that petitioners bring cases knowing full well that recovery would never be had. Some judges were slightly less cynical, and argued that petitioners were trying to preserve their place in line by getting a court judgment. A few petitioners confirmed that this was their motivation.

F. Revised Appellate Structure.

The APK introduces 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. 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. 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.\(^77\) 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.\(^78\) 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.\(^79\) A

\(^{77}\) If such a panel did not exist, then the case could be appealed directly to the Higher Arbitrazh Court. 1992 APK, supra note 8, art. 121.

\(^{78}\) Id.

\(^{79}\) Id., art. 127.
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. 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. 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.

b. 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.

i. 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. 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

\[\text{Id., art. 128.}\]

\[\text{Id., arts. 133-4.}\]

\[\text{Id., art. 139. For descriptions of actual cases, see Kathryn Hendley, The Role of Law in the Russian Economic Transition: Coping with the Unexpected in Contractual Relations, 14 WIS. INT'L L.J. 624 (1996) [hereinafter Hendley III].}\]

\[\text{APK, supra note 10, art. 146.}\]

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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 the case are redebated. The review is not limited to legal mistakes. In essence, the case is retried.\textsuperscript{85} 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.\textsuperscript{86} 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.\textsuperscript{87} 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

\textsuperscript{85} Id., art. 153.

\textsuperscript{86} Id., art. 155; Kommentarii, supra note 27 at 341-2.

\textsuperscript{87} APK, supra note 10, art. 128.
notified can serve as a basis for reversal.\textsuperscript{88} 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.\textsuperscript{89} To date, there is no indication that the process is being abused.

\textbf{ii. 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.\textsuperscript{90} As the commentary points out, this has absolutely nothing in common with the procedural institution that bore the same name under the 1992 \textit{APK}.\textsuperscript{91} 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.

The Cassation Courts are a completely new institution. They are subordinate to the Higher \textit{Arbitrazh} Court, but are institutionally independent from the trial level \textit{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 \textit{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.\textsuperscript{92} Perhaps these growing pains will be temporary.

\textsuperscript{88} \textit{Id.}, art. 158.

\textsuperscript{89} A July 1996 Saratov case was overturned because one of the judges that heard the case left on vacation without signing the opinion.

\textsuperscript{90} \textit{APK}, \textit{supra} note 10, art. 161.

\textsuperscript{91} \textit{Kommentarii}, \textit{supra} note 27 at 352.

\textsuperscript{92} 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. \textit{FZKoAS, supra} note 10, art. 24.
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. 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. 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. 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 overturn both decisions (in whole or part) and either remand the case for a new hearing or adopt a new decision. As with the appellate instance, the decision to change or overturn the decision can be based on violations of substantive or procedural law.

iii. 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.

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. The protest is then heard by the Presidium of the Higher Arbitrazh Court in its supervisory capacity (v poriadke nadzora). 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). 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.

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 member 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.

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

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99(...continued)

Note 27, at 381. Decisions are taken by a majority vote. APK, supra note 10, art. 189.

100 APK, supra note 10, art. 186.

101 Id., art. 187.

102 Id., art. 188.
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.

III. Implications.

A. Professionalizing the Arbitrazh Courts.

The arbitrazh courts are only beginning their transition. The new procedural rules reflect a desire to move away from the prior existence as a quasi-administrative agency toward becoming a court that is independent (to the extent possible) from political pressures. The rules clarify the new roles of participants. Judges remain central, but are no longer required to stage-manage the judicial process. More responsibility is being placed on the litigants to organize and present the evidence necessary to prove their claims. With this may come a new prominence for lawyers in business litigation. To date, the participation of lawyers in Russian business life has been peripheral. But if arbitrazh judges are no longer willing to shepherd legally illiterate managers through the process, then lawyers may become more necessary.

The increased professionalization of the arbitrazh courts may exact a toll. To date, the arbitrazh courts (and gosarbitrazh before them) had an informal and low-key operating style. Because the representatives of enterprises that participated often had no experience or knowledge of the legal system, judges learned to be patient, and to tolerate delays and continuances while the parties assembled their evidence. Although judges made every effort to comply with time deadlines set by statute, efficiency concerns were clearly not paramount. But the scale may have to tip more toward efficiency if the arbitrazh courts are to become relevant for economic actors in the emerging market economy in Russia. The APK's effort to streamline the procedural rules represent a step in this direction. At this point, however, these rules are not being fully implemented. Whether the arbitrazh courts will break with the past and force litigants to stop depending on judges to tell them what to do and when to do it, remains to be seen.

Institutional change is always difficult. Breaking established behavioral patterns can take a very long time. The legacy of the past is a particular burden for legal institutions in Russia, which have to shake off the Soviet mantle of dependence and incompetence. The necessary safeguards have now been built into the system to ensure that political leaders cannot interfere in judicial processes.

103 SHAPIRO, supra note 53.

104 See Arbitrazhnyi spor i novye tekhnologii, EKONOMIKA i ZHIZN' - RUS' (RYAZAN'), no. 5 (Jan. 1997), p. 12.

105 Hendley II, supra note 55.

106 KENNETH JOWITT, NEW WORLD DISORDER: THE LENINIST EXTINCTION (1992); Stark, supra note 54.
But structural changes are often easier than attitudinal changes. Judges, particularly those who worked in the *gosarbitrazh* system, are accustomed to acting upon political signals. The culture of dependency that grew up during the Soviet period cannot be wiped out overnight.\footnote{Hendley I, supra note 35.} Even more intransigent are the attitudes of ordinary citizens. Even the chairman of the Saratov *arbitrazh* court admits that enterprise managers are not used to submitting their disputes to the *arbitrazh* court. According to tradition, complaints were addressed to the economic ministries, the Communist Party officials, or to the newspapers. Courts were simply irrelevant.\footnote{Kathryn Hendley, *Rewriting the Rules of the Game: Legal Reform in Post-Soviet Russia*, POST-SOV. AFF. (forthcoming 1997) [hereinafter Hendley IV].} Reorienting these managers is a daunting task. Perhaps new generations, not socialized during the Soviet era, will be more accepting of the potential usefulness of the *arbitrazh* courts.

Increased use of the *arbitrazh* courts may also depend on perfecting the institutional structure. The ability to enforce court judgments is seriously undermined by the lack of an in-house staff to deal with these problems. Instead, enforcement has been farmed out to the *sudebnye ispolnitely* of the courts of general jurisdiction. No expertise in the specific problems of enforcing *arbitrazh* decisions is being developed. Along similar lines, the *arbitrazh* courts (and their staff) have not been given the legal tools necessary to ferret out hidden assets. The ability of defendants to learn new techniques for siphoning off enterprise funds has far outpaced the capacity of court personnel to find these assets. To some extent, solving these institutional problems will require a stronger budgetary commitment to the *arbitrazh* courts. *Arbitrazh* courts are understaffed, and routinely fail to receive the support promised by the political leadership.\footnote{According to Yakovlev, approximately 24\% of all *arbitrazh* judgeships were vacant in January 1997. Ekaterina Poimenova, *V arbitrazhnykh sudakh chevert' mest vakanta*, 1 VEK 3 (1997). He attributes this to the low salaries available to *arbitrazh* judges. They can make more as private lawyers. He fears that the inability to attract the best legal talent to the bench will compromise the quality of decisions over time. Katanian, supra note 16.} While complaints of inadequate funding are not unique to these courts,\footnote{Hendley IV, supra note 106.} the lack of support runs the risk of compromising the ability to render fair and accurate decisions.\footnote{Eighteen *arbitrazh* courts still have no computers and even more lack access to computerized databases of Russian legislation. Semenova, supra note 81. This is an informational source that is becoming routinely available to private businesses. Hendley II, supra note 55. One Ekaterinburg *arbitrazh* judge confided that, some time after having decided a case, she discovered a relevant presidential decree that would have changed her decision. But budgetary constraints on the court meant that she had to wait for printed sources to make their way to Ekaterinburg, which sometimes took months.}

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B. Building Legitimacy

But perfecting the institutional structure, while necessary, may not be sufficient to make arbitrazh courts into an integral part of the post-Soviet market economy in Russia. To be sure, if economic actors cannot be assured of being able to collect on judgments without incurring substantial additional costs, then they are justified in bypassing the courts. Even assuming that this institutional shortcoming can be remedied, the underlying problem may persist.

No judicial system has the resources to cope with having to coercively enforce all (or even a significant portion) of its decisions. In designing such systems, it is assumed that most defendants will comply voluntarily. This compliance stems from a combination of respect and fear. The two factors complement one another. A basic respect for the institution of the court which presumably flows from the legitimacy of the state of which the court is a part. Defendants fear being exposed as having not complied with judicial decisions both because they will be identified as poor citizens and, more importantly, because potential trading partners will recognize that they do not live up to their obligations. In other words, they fear adverse impact on their business reputation. The fear also comes from the desire to avoid the entire judicial enforcement mechanism which can paralyze a business as assets or sold or auctioned to pay the judgment. In the worst case, the business can even be forced into bankruptcy. The presence of these incentives to comply with judicial decisions constitutes a key element in building legitimacy for the system as a whole.

For the most part, present-day Russian economic actors neither fear nor respect arbitrazh courts. As the chairman of the Saratov court indicated, these courts have never been terribly relevant. There are some signs that this ambivalent attitude is beginning to change. In December 1996, the chairman of the Tver arbitrazh court commented that over the four years of the existence of the arbitrazh court, enterprise managers have come to believe in the objectivity and independence of the court, its competency, and in the ability of judges to resolve cases fairly.112 At best, however, this is a slow process. Putting into place a clear and comprehensive set of procedural rules as a foundation for legitimacy is an important first step.

In Russia, progress has perhaps been stymied by deep economic problems. The illiquidity of enterprises means that there is no money to pay suppliers and no money to pay a subsequent court judgment. This creates strong incentives to avoid official channels (including the courts) and to resort to private mechanisms for contract enforcement. The widespread nature of these problems means that there is no shame associated. The inability to pay debts does not connote poor management but is seen as unavoidable under current macro-economic conditions. Thus, there is no stigma attached to defaulting on loans, or reneging on contracts, or even failing to pay court judgments.

Under these conditions, presuming that changing the procedural rules and/or perfecting the institutional structure of the *arbitrazh* court will act as a magic tonic to fix all the problems and stimulate increased use of the courts is unrealistic. These changes are certainly necessary, but are only one piece of a very complicated puzzle. The remaining pieces will have to be put into place before the *arbitrazh* courts will emerge as a player in post-Soviet Russia.