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AUTHOR: KATHRYN HENDLEY, University of Wisconsin, Madison

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CONTRACTOR: University of Wisconsin, Madison
PRINCIPAL INVESTIGATOR: Kathryn Hendley
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Executive Summary
Russian Economic Courts: Institutionalizing New Rules and Remedies

Kathryn Hendley

Russian economic courts (or arbitrazh courts) are charged with resolving disputes between companies. Their role has changed markedly with the introduction of market reforms in Russia. The critical question is whether they are becoming an institution that is relevant to economic actors. The goal is not to have trading partners submit all disputes to these arbitrazh courts. Rather, the goal is more modest, namely that parties who are unable to settle their differences through negotiation consider the arbitrazh courts to be a possible arena for resolving such disputes.

A number of factors contribute to any decision as to whether to submit a dispute to the arbitrazh courts. Among these are perceptions of fairness in how cases are handled, the amount of money that can be recovered via the courts, and whether judgments can actually be enforced. This paper analyzes these questions by focusing on non-payment cases. Inter-enterprise debt has plagued the Russian economy and petitions to recover overdue debt constitute the largest single category of dispute resolved by the arbitrazh courts.

The conclusions that emerge from this analysis are mixed. In terms of the long-term goal of building authority for the arbitrazh courts as an institution, there are both positive and negative indicators. On the positive side, the trial courts work hard at resolving cases quickly and fairly. Judges often reach out to non-legal experts to help them through the process in the interest of justice. Also encouraging is the ability of creditors to recover amounts owed plus interest and/or penalties through the arbitrazh system. This progress threatens to be undermined by the shortcomings in the mechanism for implementing decisions of the arbitrazh courts. Whether the political will is going to emerge to remedy these problems remains unclear.
Russian Economic Courts: 
Institutionalizing New Rules and Remedies

Kathryn Hendley
Law School and Political Science Department
University of Wisconsin
Madison, WI 53706

hendley@polisci.wisc.edu

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Russian Economic Courts:  
Institutionalizing New Rules and Remedies  

Kathryn Hendley

In market economies, businessmen typically use courts as a last resort. When a disagreement arises, the first impulse is not to run to a court, but to find some means of resolving it privately. Threats to pursue the matter to court may be part of the discourse of negotiation, but most disputes are settled without resort to courts. Despite being rarely invoked, litigation remains a viable option because the courts are capable of enforcing their decisions and are perceived as more-or-less even-handed in resolving disputes among merchants. This combination of efficacy and fairness has helped build and sustain the legitimacy of courts.

As part of its transition to a market economy, Russia is struggling to build an economic court system that is perceived as effective and just. Building legitimacy for a judicial institution is a slow and arduous process under the best of circumstances. Progress requires the participation of both state and society. The state must be willing and able to enforce judgments when litigants fail to comply voluntarily, even when this requires taking action against the politically and economically powerful. Businessmen participate by using the judicial system when negotiations prove fruitless, and by forcing the courts to live by the law. Contemporary Russia is hardly an auspicious site for institutional regeneration.

In this paper, I analyze the ongoing efforts to create an economic court system that answers to the needs of post-Soviet Russia. Recent years have witnessed a series of reforms to these courts. I examine how these changes have played out in the context of non-payment cases. The inquiry is not limited to the success with which new rules have been institutionalized, but encompasses more basic questions about the extent to which these new rules are helpful in achieving the goal of legitimizing the economic courts.

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2For an analysis of how disputes evolve and escalate, see Felstiner et al. (1980-81).

3See Dunworth and Rogers (1996) and Kenworthy et al. (1996) for a discussion of the circumstances under which litigation among American corporations becomes more likely.

4The extensive pre-trial discovery and the high cost of legal counsel in the U.S. makes litigation a threat that is sometimes employed by more well-endowed companies to "convince" their trading partners to settle.
Historical Legacy

Post-Soviet Russia was not a tabula rasa with regard to legal institutions. The Soviet Union had courts of general jurisdiction, which heard virtually all cases except for disputes between state enterprises. (Huskey, 1997) The latter were resolved by an administrative agency known as state arbitrazh (gosudarstvennyi arbitrazh or gosarbitrazh). (Pomorski, 1977; Kroll, 1987) In 1991, gosarbitrazh was transformed into the system of economic or arbitrazh courts that exist today. These courts have jurisdiction over three types of cases: civil disputes between legal entities, bankruptcy, and administrative cases involving legal entities and state agencies.

This legacy has not been entirely helpful in building respect and authority for the new arbitrazh courts. Gosarbitrazh made no pretense at independence. Although resembling a court on the surface in that it resolved disputes among state enterprises, the primary goal of the decision-makers (or arbiters) was to facilitate fulfillment of the national economic plan. Often the law (whether statutes or administrative regulations) had to be bent to accommodate this goal. The volume of disputes was high, sometimes requiring arbiters to hear as many as 30 cases per day. But the issues presented were rarely complicated or unusual.

The arbitrazh courts break with the past in terms of their structure, function, and procedures. Their independence is guaranteed by the Russian Constitution. (Topornin et al., 1994, pp. 499-542; FKZoAS) A new procedural code was adopted to mark the changeover from administrative agency to court. (1992 APK) It has since been thoroughly reworked as part of the continuing effort to make the arbitrazh process more "court-like." (1995 APK) Decision-makers are no longer arbiters but full-fledged judges, with the same rights as judges in the courts of general jurisdiction. The courts' functions have been greatly expanded. (Hendley, 1997b) Thanks to the introduction of market reforms, the participants and disputes are more varied, and the issues raised are increasingly complex. Rather than being limited to disputes between state enterprises over delivery or quality problems, as was the norm in the days of gosarbitrazh, cases submitted to the arbitrazh courts run the gamut from garden-variety contractual disputes to complex issues of commercial law and corporate governance. In contrast to the past, decisions are to be based solely on the law. The political and/or economic effects of the case are not to be considered. These new courts seem to be sticking to their mandate. (Hendley, 1996b)

To an outsider, the differences between the arbitrazh courts and gosarbitrazh seem

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5 The Soviet constitutions proclaimed the independence of the courts of general jurisdiction, but remained silent as to gosarbitrazh. Although this constitutional guarantee was meaningless in practice, it was important to the USSR in its propaganda battles with the West. Interestingly, the Soviets apparently saw no use to proclaiming gosarbitrazh to be independent.

6 Judges of the Moscow City court even wear robes. At the other arbitrazh courts I studied, all of the judges had robes, but they hung in their chambers unused. When asked why they didn't wear them, the answer was typically that they were too uncomfortable (too long, too hot) and that the judges did not want to be perceived as putting on airs. During the Soviet period, judges did not wear robes.
striking. But many Russians -- particularly non-lawyers -- have difficulty perceiving any difference between the two. There have been few changes in location and, while a significant number of new judges have been appointed, the old arbiters are still firmly ensconsed but are now called judges. Thus, participants still go to the same place and, for the most part, still have their disputes resolved by the same people. The rules by which the disputes are resolved have changed, but this is a level of detail that escapes most Russian citizens. In addition, as we will see, even businessmen have been slow to absorb these new procedures. On a deeper level, the skepticism of the Soviet period toward courts and law persists.

**Non-Payment Cases in the Arbitrazh Courts**

In order to assess the development of the *arbitrazh* courts and the prospects for the future, some narrowing of the focus is necessary. As the graph set forth below demonstrates, the largest single category of cases heard by these courts relate to the failure (or inability) of industrial enterprises to pay their bills. This problem of inter-enterprise arrears arose in the early days of the transition and persists to this day. (Ickes and Ryterman, 1993; Gosudarstvennyi komitet, 1997, pp. 147-55) Some portion of these overdue debts end up in the *arbitrazh* courts. A careful examination of what happens in these cases will illustrate the extent to which the procedures and remedies available to litigants in the *arbitrazh* courts are fair and efficacious.

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7The national-level data are published. (Sudebno-arbitrazhnaya statistika, 1995, 1997) The information for individual *arbitrazh* courts is not published. The courts complete statistical forms for each year and send them to the Higher *Arbitrazh* Court in Moscow, which allowed me access to these forms. Information for the Moscow City court was unavailable for 1992.
Handling the Case: New Procedures in Theory and in Practice

In July 1995, a new Arbitrazh Procedure Code (APK) went into effect. It introduced a number of important changes in how cases are heard. (Hendley, 1997b) Some of these changes have taken hold quickly. For example, the new rule that disputes are to be heard by one judge rather than by a panel of three judges as was the custom has been eagerly embraced by judges and litigants alike. It serves all their interests by allowing cases to proceed more expeditiously. Other changes have been slower to take hold. Typically these are changes that impose new burdens on litigants or limit rights they previously took for granted.

Filing the Case: The basic requirements for a complaint are straightforward, and have changed little in various iterations of the procedural code. (E.g., art. 103, 1995 APK; art. 79 1992 APK) Legal education is not necessary to understand the rules or to prepare a complaint. The prerequisites are minimal. They give rise to short complaints that are almost exclusively devoted to relating the facts underlying the dispute. In reviewing hundreds of non-payment cases brought between 1992 and 1997, I encountered only a handful of complaints that exceeded 2 pages. Often one of the two pages would be taken up by a list of attached documents. This non-discursive style is, of course, common in legal systems based on a continental tradition.

The APK imposes no obligation on the defendant to answer the complaint in writing. The defendant does, however, have the right to respond. (Art. 109, 1995 APK; Yakovlev and Iukov, 1996, p. 253) By contrast, the 1992 APK required a written response to be filed at least three days prior to the hearing. (Art. 83. 1992 APK) The relaxation of this rule most likely responds to the reality of arbitrazh practice. Defendants often failed to respond or to appear, leading to interminable delays. The current APK places responsibility on the defendant -- though it does require the plaintiff to document the defendant’s receipt of the complaint. The limited evidence indicates that defendants are increasingly taking advantage of this new rule. Of the 21 non-payment cases I reviewed in Saratov in 1996, answers were filed in almost half (9 cases or 43%). By 1997, my review of 52 such cases uncovered only 12 (23%) cases in which answers were filed. In 77% of the cases (40) the defendants failed to respond in writing. Indeed, in 42% of cases (22), the defendants failed to participate in any way.

One of the most important innovations of the new APK is to place the burden for assembling the evidence necessary to prove its allegations on the plaintiff. (Art. 53, 1995 APK) Similarly, the APK makes the defendant responsible for rebutting the plaintiff’s case. In the past, the parties relied on the judge to specify the documents to be presented. But now this burden has been shifted onto the litigants. This can be seen as an effort to even out the responsibilities among the participants in the judicial process. In retrospect, it may be seen as a first step toward a more adversarial system, but such conclusions are premature. In a nod to prior practice, the court retains the right to order the parties to produce relevant evidence if this is necessary to resolve the case. (Art. 53-2, 1995 APK) The Kommentarii to the APK, however, clearly indicates the preference of the drafters for having the parties assume the burden of proving their own cases. (Yakovlev and Iukov, 1996, pp. 112-17)
Notwithstanding this preference, day-to-day practice has been little changed by this new rule. Initially most judges attempted to follow the new scenario. When they issued the order (opredelenie) setting forth the date of the hearing, they did not provide an exhaustive list of documents to be presented, as was the custom. Instead, they simply paraphrased the new language of the APK, and told the parties to bring whatever evidence needed to prove their case. More often than not, the parties then showed up empty-handed. When asked why, they told the judge that no evidence had been demanded from them. For a time, judges responded by explaining the new rules of the game, and postponing the hearing to allow the parties to assemble the relevant evidence.

This was the situation as I found it during the summer of 1996, almost one year into the era of the new APK. Interviews with judges in Saratov and Ekaterinburg revealed a growing frustration with the inability of litigants to adjust to the new rules. But this was laced with a recognition that many who came to the arbitrazh courts were not lawyers and had little experience. These laymen expected judges to lead them by the hand through the process. But even lawyers had exhibited little willingness to play by these new rules. The APK permits judges to dismiss complaints when the plaintiff is unable to sustain its allegations. However, I encountered no judges who were willing to take such a step. Their reasoning reflected a dual concern with efficiency and fairness that I have found to be the hallmark of the arbitrazh courts. They argued that dismissing would be impractical, since the plaintiff would likely appeal and win a reversal of that dismissal on the grounds that it had been unfairly denied the opportunity to present its case. They also argued that the very newness of the rules required them to exhibit greater flexibility than mandated by the APK. These judges, therefore, favored a non-literal application of the rules in order to further the broader goals of justice.

By the spring of 1997 (when I returned for additional field research), frustration had given way to resignation. Judges seem to have lost hope that parties would, in the short run, assume the burden of proof assigned to them by the APK. Of the 52 non-payment case files I studied in Saratov, 31 (60%) included detailed lists of documents to be delivered to the court, while 17 (33%) contained more general lists. Only 4 (8%) of the cases left the matter to the discretion of the parties. This seems to be clear evidence of backsliding. When questioned about why they had reverted to old-style practices, judges in both Moscow and Saratov typically shrugged and said something to the effect that they had little choice if they wanted to manage their heavy case loads. They confirmed that their efforts to shift the burden of deciding what evidence to present had largely failed.

Yet many judges expressed optimism about the future, pointing to the emerging popularity among young Russian lawyers of arbitrazh as a specialization. This is a new development -- few Soviet era lawyers ventured into gosarbitrazh, preferring to devote themselves to criminal work in the courts of general jurisdiction. (Kaminskaya, 1982) But market reforms have created the possibility for highly lucrative careers in corporate law. At present, these opportunities are concentrated in Moscow. My observations of courtroom practice in Moscow and Saratov revealed a significant discrepancy in terms of competence and initiative.
in favor of the Moscow bar. My impressions were confirmed through interviews with judges and other court personnel.

Another ray of hope comes from appellate practice. I observed 29 cases in the Moscow appellate and cassation courts in May 1997. When seeking to explain why certain evidence was not part of the trial court record (and why it should be allowed in on appeal), litigants first impulse was to blame the trial judge. They would tell the appellate panel that the judge had erred in failing to request this evidence. This strategy never worked. Rather than provoking a favorable ruling, it usually gave rise to a Socratic dialogue in which the appellate judge exposed the shaky legal foundation of the claim. In many cases this was followed by a lecture about the duty of litigants to marshal their own evidence. In private conversations, appellate judges told me that they viewed such exchanges as part of an ongoing process to change how the arbitrazh courts functioned, i.e., to institutionalize the new procedural rules.

Trying the Case. During the hearing, each side is given an opportunity to present its case. But this is not accomplished by a parade of witnesses who tell various portions of the story with the lawyer pulling all the pieces together in the closing argument. Instead, the representatives of the parties (who may or may not be lawyers) provide summaries of their positions for the court. Few points seem to be awarded for style. Between 1993 and 1997 I have observed several hundred cases in different arbitrazh courts, and in almost all of these cases the petitioner did nothing more than read the complaint -- usually in a rapid monotone that makes the words almost incomprehensible. The judge, having already reviewed the filings in preparation for the hearing, often pays no attention and uses this time to fill in the blanks on the "protokol" that is required by law. Some judges, having less patience, stop the recitation and begin immediately to question the representative about the nature of the demands set forth in the complaint and the legal and factual basis for satisfying them. After the judge finished, the defendant's representative is offered an opportunity to question his or her opponent. Then it is the defendant's turn. Once again, the summary of its position is followed by questions from the bench and then the plaintiff.

Without a doubt, the heart of the arbitrazh process is the judge's questioning of the parties. When done well, the questioning can be exhilarating, but is more often merely tedious. Judges have carte blanche to pursue any aspect of the case, and their stated goal is to learn the truth. A claim made by a litigant can be accepted by the court only if it can be substantiated through original documentary evidence. Oral testimony, while permissible under the APK, is

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9In interviews, arbitrazh judges estimated that lawyers are involved in about half of the cases. They confirm that the incidence of involvement is on the upswing.

9The parties have the right to question one another. This right was exercised in about one-third of cases I observed. But rarely was more than one question asked. When the litigant attempted to follow up on the question or expose his or her opponent in a lie, the judge usually told them to sit down -- that their question had been answered. In only one Moscow case did the plaintiff come close to usurping the judge's role by asking a series of detailed questions. If the level of professionalism among lawyers continues to rise, judges may be sidelined more often.
extremely unusual in practice. This is a carry-over from the days of gosarbitrazh and
distinguishes the arbitrazh courts from the Russian courts of general jurisdiction where witnesses
are heard routinely. In all of the cases I have observed and in the additional case files I have
reviewed. I have yet to find a case in which the court accepted and relied upon oral testimony in
reaching its decision. In interviews, judges openly expressed their skepticism of relying on
witnesses, noting that absent written proof, they had no way to be sure these witnesses were not
lying. Arbitrazh judges do not view credibility assessment as being within their competence.

In a case of non-payment, the contract and other documents relating to the basic
transaction are obviously central to any legal analysis of liability. But to refuse to consider
testimony from key participants in the transaction about why certain agreements were signed
runs the risk of distorting the court's understanding of what actually happened. For example, in a
Moscow case that I observed in May 1997, the deputy director of a defense plant in the Urals
explained to the judge that he had signed various agreements to obtain credit from a private bank
with conditions that were disadvantageous to his plant because this was the only source of money
available to him. The workers at this plant had not been paid for several months, and the deputy
director said that he would have signed any piece of paper in order to ameliorate the situation.
He was not asking to be excused from repaying the debt, but merely that the context of the
agreement be taken into consideration. The judge's response to this outpouring of emotion was
to ask whether he could produce written evidence supporting any of his claims. When he could
not, the argument was rendered legally irrelevant.

A more serious danger is that the requirement of documentary evidence is keeping
disputes over non-payment out of the arbitrazh court system, and possibly relegating them to
private contract enforcers (a euphemism for the mafia). The illiquidity of many Russian
enterprises has forced them to resort to barter transactions. (Illarionov, 1996) These deals are
not as "clean" as cash sales because of the difficulty of agreeing on terms of exchange. In many
instances, they mushroom. What begin as a bilateral trading arrangement end up involving many
more enterprises, as each seeks to recover something of value to them. Moreover, they are often
not fully documented since they rely on personal relationships and may even contemplate future
promises. Interviews with arbitrazh court judges in Moscow, Saratov, and Ekaterinburg confirm
that they rarely encounter multilateral barter transactions. Yet the prevalence of such
transactions is well established. (Ibid.; Hendley et al., 1997) Their conspicuous absence from the
court system strongly suggests that the inevitable disputes are being resolved elsewhere.

There is, of course, always some degree of non-compatibility between the necessarily
formal rules of a judicial system and real-life economic transactions, which are frequently
grounded in long-term relationships that can be difficult to document fully. (Macaulay, 1963)
Ideally, the procedural rules should facilitate a search for the truth. Taken out of context, the
choice to rely exclusively on written evidence in resolving cases in the arbitrazh courts seems
reasonable. But the very specific circumstances found in post-Soviet Russia create a strong
possibility that an important category of business transaction has been excluded. This is highly
troubling in light of the goal of building legitimacy for the arbitrazh courts.
Deciding the Case. The APK requires that cases be resolved within two months of being filed.\footnote{The deadline is one month in the appellate (art. 147, 1995 APK) and cassation (art. 173) courts.} (Art. 114, 1995 APK; Art. 97, 1992 APK) Statistics are kept and published about the extent of compliance with these deadlines. Although judges on all levels consistently denied that this plays any role in promotions or raises, they conceded that they would be "chastised" by their superiors for violations. There is no doubt that the information has a profound affect on how judges regard one another.

At the conclusion of the hearing, the judge will ask the parties to leave the room so that he or she can contemplate the decision. The APK mandates immediate decisions. (Art. 124, 1995 APK) Since the cramped quarters of the arbitrazh courts require hearings to be held mostly in judges' offices, this means that everyone goes and stands in the corridor to await the decision. The amount of time varies from a few minutes to an hour or more. On average, most judges are ready to announce their decision in about a half an hour, which is about how long it takes them to write out in longhand the legalese that must accompany the announcement.\footnote{All of the written work of arbitrazh judges is initially prepared in handwritten form. The opinions and orders are then typed by the so-called "specialists" before being sent out to the parties by registered mail. For the most part, the "protokols" outlining what happened during the hearing are never typed up. Judges generally consider the requirement, imposed for the first time by the 1995 APK (art. 123), to prepare such protokols to be a waste of their time.} The APK gives them an option to announce the outcome, i.e., who wins or loses, and then to provide the explanation within three days. (Art. 134, 1995 APK) Although the new APK purported to make it more difficult to render such partial decisions by sanctioning them only under "exceptional circumstances," they had become the norm by the spring of 1997.\footnote{The 1992 APK (art. 109) contemplated announcements of just the "resolution part" of the decision, providing no additional details on when the full text had to be made available. The elaboration on the conditions under which this is possible, set forth in the 1995 APK, has been largely ignored. Ostensibly the Kommentarii further restricts the use to "especially complex cases." Yet the practice has become routine. (Yakovlev and Iukov, 1996, p. 304).} The judges explained that the work of the court would become hopelessly delayed if they immediately wrote up each decision in full. Of the 30 trials I observed in Moscow, the judge rendered a complete decision in just one case.\footnote{The case involved non-payment for transportation services. It was analogous to many of the cases I observed. In fact, the involvement of the procurator made it more complicated than some other cases. Writing the full opinion took approximately 30 minutes.} As a rule, arbitrazh courts devote at least one day a week to catching up on opinion-writing, and schedule no hearings for that day.

As this suggests, time is one of the main preoccupations of arbitrazh judges. Their conversations -- both with me and with each other -- are dominated by a concern over not falling behind. At lunch, they would often relate anecdotes about how judges in other legal systems are allowed to wait a day or a week or perhaps even a month before rendering their decision. These
stories were received as if they were tall tales, rather than real life. The sensitivity to this question stems from the criticism of arbitrazh courts for being slow. Yet the data show that the incidence of violations of this two-month deadline are relatively rare.\(^{24}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of cases in which two-month deadline was violated</th>
<th>Percentage of total cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>5,553</td>
<td>1.6</td>
</tr>
<tr>
<td>1993</td>
<td>9,386</td>
<td>3.4</td>
</tr>
<tr>
<td>1994</td>
<td>3,207</td>
<td>1.5</td>
</tr>
<tr>
<td>1995</td>
<td>3,887</td>
<td>1.6</td>
</tr>
<tr>
<td>1996</td>
<td>10,340</td>
<td>3.6</td>
</tr>
</tbody>
</table>

The obsession with maintaining a rapid pace has its pluses and minuses. Economic disputes tend to fester if delayed, so prompt attention is essential.\(^{15}\) A satisfied clientele is also important to building legitimacy, and timeliness plays a role in that. But equally critical to creating and sustaining a reputation for fairness on the part of arbitrazh courts are decisions that are accurate and well-grounded in the law. A number of judges have related instances in which they decided cases improperly. Their mistakes were not conscious, but were the product of time constraints and the lack of access to up-to-date legislative information. More examples come from a review of appellate case files and observing appellate hearings.\(^{16}\) Such miscarriages of justice are the exceptions, but are sufficiently frequent to warrant concern.

**Summary.** Taken as a whole, the 1995 APK marks a decisive break with the old traditions of gosarbitrazh. The changes introduced were intended to create a more court-like institution. It envisions the parties taking more responsibility for presenting their own cases, freeing up the judge to focus on resolving cases. For the most part, however, litigants have resisted these new procedural rules and judges have not forced the issue. This perhaps suggests that the new rules somehow do not fit into post-Soviet legal culture -- that litigants are not yet

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\(^{24}\)The table is drawn from Sudebno-arbitrazhnaya statistika, 1995, 1997. Unpublished 1996 data for individual courts indicate that the level of violations vary widely from 0.35% of resolved cases in Saratov to 1.9% in Sverdlovsk, 3.3% in St. Petersburg, 5.4% in Novosibirsk, and 5.5% in the Moscow City court.

\(^{15}\)It would be even more helpful if arbitrazh courts had more of the tools of rapid response at their disposal, such as preliminary injunctions and contempt citations.

\(^{16}\)E.g., *AOZT “Saratovryba” v. Nezavisimaya mnogoprofil’naya firma “Veritas”*, case no. III-27/24, Saratov, cassation court decree of March 5, 1996 [the appellate and cassation court agreed that the trial court erred by deciding in favor of the plaintiff in the absence of proof of a contractual relationship with the defendant].
ready to abandon all of the old practices. Whether the resistance is principled or results from inertia is not yet clear. In the short term, the arbitrazh courts exist in a kind of limbo. In certain respects they have broken with their past, but some Soviet legacies cling to life tenaciously.

**Remedies: Debt, Damages, Penalties, and Interest**

When deciding whether or not to pursue a dispute in court, one of the most important questions that possible litigants ask is what they can potentially recover. In cases of non-payment, parties ideally want to obtain the full amount of the debt plus any incidental damages, such as lost profits and inflation. The goal is to make the wronged party whole -- to put them where they would have been had the transaction been carried out as the agreement contemplated. If the court can help accomplish that goal, then economic actors may well regard it as useful. If not, then they will avoid the courts and find other ways of recovering their losses.

In payment cases, arbitrazh courts routinely award the amount of the underlying debt, assuming the wronged party is able to establish its existence through written evidence. More interesting is the extent to which related losses can be recovered. In theory, the Russian Civil Code also allows for the recovery of damages (arts. 15, 393, GK), interest (art. 395 GK), and penalties (arts.330, 332 GK; Ukaz. 1993; Postanovlenie, 1992). The law governing remedies is complex. (See Kuznetsov and Braginskaya, 1996, pp. 284-88, 312-28) It follows the general pattern of civil law countries. Although its details are beyond the scope of this paper, some understanding of the basic principles is necessary in order to evaluate the strategic choices being made by litigants.

**Damages.** In practice, damages (ubytki) are rarely awarded. The reasons are not immediately apparent from the text of the law, which provides that “the debtor is obligated to compensate the creditor for damages that are caused by the non-fulfillment or improper fulfillment of its duties.” (Art. 393-1. GK) The difficulty in recovering damages lies in the requirement to establish a causal relationship between the amount being requested and the contractual breach. Typically such a claim would involve lost profits. Such claims are inevitably somewhat speculative, in that they are grounded in assumptions about what might have happened and what other opportunities the plaintiff might have had but for the breach. The arbitrazh courts requires written evidence substantiating these claims. I have yet to encounter a

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17Equally important is whether a judgment from the court can be enforced. This issue is discussed below.

18When drafting the Civil Code and the Arbitrazh Procedure Code, Russian policymakers visited many countries in order to acquaint themselves with different possibilities. German and Dutch law appear to have had the greatest influence on Russian civil law. On the more general question of remedies for contractual breach under civil law systems, see Marsh (1994) and Treitel (1988).
case in which the plaintiff has been able to meet the burden of proof imposed by the court.\textsuperscript{19} Drafts of contracts with other potential trading partners are rejected as inconclusive, and requests to have them testify are likewise refused by judges. Interviews confirm that judges are uncomfortable with awarding damages: they consistently stress the insufficiency of proof.

Given this state of affairs, it is not surprising to learn that petitioners in non-payment cases rarely ask for damages. In only one of the 52 non-payment case files I reviewed in Saratov during spring of 1997 did the plaintiff request damages, as such. The court awarded the plaintiff the full amount of the overdue debt, but did not even mention the request for damages in its opinion.\textsuperscript{20} Similarly, the 21 cases reviewed in the summer of 1996 involved only one request for damages.\textsuperscript{21}

The difficulty of recovering damages has not left plaintiffs without recourse. Russian law allows for recovery of interest and/or penalties\textsuperscript{22} on overdue debts.\textsuperscript{23} In contrast to the rules governing damages, no affirmative proof of actual loss is required. As a result, these remedies have become quite popular and, as we will see, are sometimes abused.

\emph{Interest}. Before turning to the use of these remedies, a brief overview of the relevant law is in order. Interest awards are intended to compensate the wronged party for the cost of having to borrow money while waiting for its debts to be repaid. Yet the plaintiff need not prove that it actually incurred such expenses. All that need be proven is that the defendant/debtor is at fault.

\begin{itemize}
  \item \textsuperscript{19}E.g., Postanovlenie No. 2034/96, \textit{Vestnik Vysshego Arbitrazhnogo Suda} [hereafter cited as \textit{VVAS}], no. 6, pp. 64-65, 1997 [court rejected straightforward request from plaintiff to recover the difference in the cost of grain between the time at which the contract was concluded and the case was decided].
  \item \textsuperscript{20}Gosudarstvennyi Ryazanskii priyornyi zavod v. AOOT 'Zavod AIT,' case no. 5216/96-12, Saratov, decided December 27, 1996.
  \item \textsuperscript{21}The claim for “moral damages” based on the “lengthy evasion from payment of the amounts owed” was withdrawn before the court decided the case. Belotserkovskoe uchbovo-proizvodstvennoe predpriyatie v. Zavod samokhodnykh zamleroinykh mashin, case no. 1067/96-11, Saratov, decided April 11, 1996.
  \item \textsuperscript{22}There are three Russian words for “penalties” that, according to article 330 of the Civil Code, can be used interchangeably. They are: \textit{neustoiki, peni, and shtrafy}. See also Sadikov, 1995, p. 344.
  \item \textsuperscript{23}Whether both interest and penalties may be recovered in non-payment cases is a thorny question under Russian law. The difficulty arises from the language of article 395 of the Civil Code, which permits the recovery of interest only if the contract provides for no other type of interest. Sometimes courts have interpreted this language to prohibit dual recovery of interest and penalties because contractual penalty clauses are typically expressed in terms of percentages, which these courts view as a type of interest. Thus, asking for both is considered an attempt at double-dipping. (E.g., AOOZT Brokerskii Dom Al`fa v. AOOT Nitkan, case no. 4615/96-2, Saratov, decided December 23, 1996) Other times courts allow both remedies, on the theory that interest is compensatory and penalties are punitive. (E.g., ZAO Torgovo-proizvodstvennaya firma Rasoptprodorg v. KP Pokrovsk-LTD, case no. 4889/96-27, Saratov, decided December 10, 1996) This issue will remain cloudy until resolved by the Higher \textit{Arbitrazh} Court.
\end{itemize}
and fault is presumed if the debt is overdue. Claims for interest can be based on specific contractual provisions. Absent such provisions, the civil code allows for the recovery of interest calculated at the discount rate of the Central Bank of Russia. (Art. 395-1, GK: Postanovlenie, pts. 50-51, 1996)

The arbitrazh court cannot award interest on its own initiative: it must be requested. Although petitioners almost always have the right to claim interest in non-payment cases, they are under no obligation to do so. The decision to forego interest usually stems from a desire to maintain some sort of a relationship with the defendant. Of the 52 case files reviewed in Saratov in 1997, plaintiffs demanded interest in 22 (40%). The court awarded interest in 15 (68%) of these cases, often describing the claim as "legitimate" (pravomerno). Similarly, of the 30 non-payment cases decided by the Higher Arbitrazh court and reported in its Vestnik during the first half of 1997, 13 (43%) involved petitions for interest. In virtually all instances, the claims were statutorily grounded (rather than being based on specific contractual terms).

The statute of limitations for civil cases is three years. (Art. 196, GK) The Civil Code imposes no obligation to mitigate damages. Hence, there is no legal obstacle to holding back on initiating the case in order to allow interest (and penalties) to build up. In reading between the lines of case files, it seems that this has become rather common, particularly in cases where it is obvious to all that there is no realistic potential for recovery. This is more common in efforts to recover on bank loans than in inter-enterprise litigation, but can be found in the latter as well. The Civil Code provides no basis for lowering the amount of interest in such cases of quasi-bad faith. This suggests that interest is considered compensatory rather than punitive. My review of case files reveals this issue to be far from settled.

**Penalties.** The final option available to wronged parties in non-payment cases is to seek penalties against debtors. The default rule established by the Civil Code is that penalties can be recovered only if based on a written agreement by the parties. (Art. 331, GK) Yet exceptions exist that cover virtually all types of inter-enterprise debt. Decrees allow the automatic

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24Such a presumption of fault may, in theory, be rebutted by the defendant. But efforts by defendants to excuse their delinquency due to difficult financial conditions and other efforts at rebuttal have proven consistently unsuccessful at the trial level. (Hendley, 1996b) The Higher Arbitrazh Court has shown more willingness to take short-term cash flow problems into account, particularly in cases of defendants that are government-funded. E.g., Postanovlenie No. 2774/96, VVAS, no. 4, pp. 75-76 [defendant is Volgograd State Pedagogical University]; Postanovlenie No. 4296/96, VVAS, no. 6, pp. 70-71 [defendant is a professional institute].

25E.g., AO "Narat" v. OOO "Otilema," case no. 1054/96-3, Saratov, decided April 9, 1996 [defendant failed to pay for shipment of oil and, by the time plaintiff filed the case, the interest (63,299,794 rubles) exceeded the original debt (49,901,296)].

26E.g., AOZT LST v. TOO Khozstorg, case no. 4814/96-23, Saratov, decided December 5, 1996 [court treats interest pursuant to art. 395 of the Civil Code as a punitive sanction]; Kombinat Opptyti v. AOZT Terminal i OOO Balakovo-Market, case no. 4799/96-7, Saratov, decided January 17, 1997 [blurred line between penalties and interest in the complaint and the decision].
imposition of penalties in most sales contracts.\textsuperscript{27} (Postanovlenie, 1992; Ukaz, 1993) Indeed, no written agreement is necessary, so long as the parties have established a contractual relationship.\textsuperscript{28} As with interest, the decision as to whether or not to ask for penalties rests with the petitioner. Absent such a request in the complaint, the arbitrazh court cannot award penalties.

Penalties for contractual breaches are not a recent innovation in Russia. They were one of the levers used by gosarbitrazh during the Soviet period to punish deviations from the plan, such as late delivery and poor quality. (Kroll, 1987) Now their purpose is to encourage enterprises to pay for goods in a timely fashion. They are indisputably punitive in nature. In contrast to penalties found in other civil law systems (Treitel, 1988, p. 208), the typical Russian penalty is not a fixed sum owed in case of late payment or non-payment.\textsuperscript{29} Instead, it is a set percentage of the debt that continues to mount until the underlying debt is paid. Rates vary from 0.1% to 3%, depending on the circumstances. The decree covering sales of non-food products sets the rate at 0.5%.\textsuperscript{30} This percentage is frequently found in private contracts as well. There is no pretense that this amount approximates the damages suffered by the wronged party. The object is to punish the debtor. The long-term goal is a system in which trading partners pay for goods at the time and in the manner stipulated by the contract. More generally, it is a system not drowning in inter-enterprise debt.

In non-payment cases, most plaintiffs ask for penalties. Two-thirds of the 52 cases reviewed in Saratov in the spring of 1997 included petitions for penalties. Penalties were awarded in 86% of these cases. Of the five cases in which penalties were not awarded, only one represents a substantive rejection of the petition.\textsuperscript{31} In the other cases, the plaintiff ultimately awarded.

\textsuperscript{27}"Sales contracts" is intended to refer to contracts categorized as supply contracts (\textit{dogovory postavki}) or buy-sell contracts (\textit{dogovory kupli-prodazhi}) under the Russian Civil Code. (Braginskaya et al., 1996, pp. 21-38)

\textsuperscript{28}E.g., Postanovlenie No. 1578/96, \textit{VJAS}, no. 3, 1997.

\textsuperscript{29}This is a break with past tradition resulting from the rapid inflation of 1992-94, which rendered many penalties laughable. For example, a 1996 Saratov case involved a contract based on a Soviet-era form in which penalties for late payment were set at 28 kopeks per day. At the time the case was decided this daily fine would be worth considerably less than a penny. AOOT Saratov elektronsvyaz ' Gorodskoi radiotraslyatsionnyi uzel v. AOOT Elektroprobor, case no. 4651/96-2, Saratov, decided November 28, 1996. An analogous though somewhat less egregious case involved a penalty clause imposing daily fines of 250 rubles. In 1991, when the contract was concluded, this represented a significant amount of money. By mid-1992 when the case was decided, it had become insignificant. Mezhotraslevoe aktsionernoe stroitel'noe ob'edinenie "Programma 10" v. RPO ZhKKh r.p. Romanovka, case no. 375/6, Saratov, decided July 2, 1992.


\textsuperscript{31}In this case, the term dealing with penalties was contained not in the contract, per se, but in the "protokol on disagreements" and the court was not convinced that the parties had finalized this protokol. (OOO Ekstrostat' v. OAO Saratovskii podshipikovyi zavod, case no. 4616/96-18, Saratov, decided December 20, 1996) On these
withdrew the request for penalties, usually in connection with a settlement. 60% of the non-payment cases reported in the Vestnik in 1997 involved penalties. Quantifying the success rate is more difficult, since these reports encompass the results in the lower courts and often incorporate the recommendations of the Higher Arbitrazh Court directed at the trial court on remand. Nonetheless, the Higher Arbitrazh Court tends to scrutinize the contractual language relating to penalties. It has begun to disallow recovery on the grounds that penalty clauses are not identified as such with sufficient clarity. Where this will lead is unclear.

The routine use of penalties to punish late payment represents a response to the problem of widespread inter-enterprise arrears. In reviewing case files from 1992 through 1997, I have observed a change in form contracts to include a clause imposing penalties. Yet the freedom of contract principles embedded in the new Russian Civil Code create the possibility for abuse of the right to collect penalties for non-performance. Penalty clauses for late payment began to contemplate ever higher rates, and typically were left uncapped. This resulted in situations in which the amount of fines exceeded the value of the contract.

The courts were in a quandry. Either they had to enforce the agreement of the parties as reflected in the contract or they had to find some basis for reducing the penalties. There are strong policy arguments on both sides. Courts are always reluctant to dishonor the clear intent of the agreement. This is particularly true in Russia where there is an effort underway to break with the past tradition of interpreting and enforcing contracts so as to serve the interests of plan fulfillment. Convincing Russian businessmen that contracts are now meaningful in the new market regime has proven to be an arduous task. (Hendley, 1997a) On the other hand, the principle that contracts should be enforced as written is based on an assumption that the parties basically negotiate from positions of equal strength. In contemporary Russia, however, the playing field is far from level. Almost without exception, contracts in non-payment cases are forms created by the supplier (who is typically the plaintiff). Not surprisingly, the terms favor the supplier by imposing hefty fines of various kinds. Customers are placed in a take-it-or-leave-it situation. Often they feel they have no choice but to accept the terms offered. These feelings

protokols, see Hendley et al., 1997, p. 24.

12These decisions contain a sentence to the effect that “the contract did not provide that the penalties were to be considered sanctions” [dogovorom ne predusmotreno, chto neustoika yavlyaetsya shtrafnoi]. The language is difficult to translate because the two key words can both be translated as “penalties,” rendering the sentence nonsensical. Postanovlenie No. 3143/96, VVAS, no. 4, pp. 51-52, 1997; Postanovlenie No. 3187/96, VVAS, no. 4, pp. 78-79, 1997; Postanovlenie No. 2034/96, VVAS, no. 6, pp. 64-66, 1997.

13This imbalance is most often seen in cases filed by companies that supply energy. E.g., GMPO ZhKKh i RSKhT v Skh TOO im. Lenina, case no. 4521/96-23, Saratov, decided December 5, 1996 [penalties were more than three times the value of the contract and were awarded in full]; Postanovlenie 4296/96, VVAS, no. 6, pp. 70-71, 1997 [penalties were 18 times greater than the debt: the case was sent back for a new hearing at the trial court]. It is not limited to utilities. E.g., AO Saratovryba v. TOO Lemark, case no. 4874/96-18, Saratov, decided December 20, 1997 [plaintiff is fish supplier and demanded and received penalties that were more than three times greater than the debt].
come not just from the desire to maintain longstanding relationships that exists to some extent in all economies. They also stem from more practical concerns. Information about alternative suppliers is still not freely available, and the customer acts on the assumption that the existing supplier is a monopolist. (Hendley, 1995) Given that many enterprises have low or non-existent cash reserves, they resort to trade through barter, which tends to limit their options. (Hendley et al. 1997) Their desperation causes them to accept terms of trade that, under more "normal" circumstances, would be rejected as patently unfair.

In the first years of the transition, the courts generally enforced the agreements as written. Claims for penalties were evaluated from a technical legal point of view. If based on the contract or permissible under a decree, then the court awarded the penalties requested by the plaintiff without regard for the impact on the defendant. In interviews, judges justified their decisions by pointing to the contract, and reiterated that no one had forced the defendant to enter into the transaction. Judges' early sympathy for the defendants' pleas of financial hardship quickly evaporated. (Hendley, 1996b) In these early years, however, penalties rarely exceeded debt. Thus, judges might fairly regard these sanctions as a kind of slap on the wrist intended to discourage late payment in the future.

Emboldened by their success, suppliers began to increase the number and amount of penalties. In addition, the new civil code came into effect at the beginning of 1995, which changed the statute of limitations from one year to three. As with interest, some suppliers waited to file their cases until the penalties had become substantial. Judges told me that they knew this was going on and, while they were troubled by the implications of such behavior, they saw no legal basis to forbid or even to criticize it. Along these lines, I have found no decision that even mentions the issue of delay in filing and the resulting increase in penalties. This only confirms the absence of any duty to mitigate damages.

As penalties grew to exceed debt, the courts became less willing to turn a blind eye and simply enforce the contract. Under the Civil Code, they have the right to reduce penalties if the amount is considered to be "clearly disproportional." (Art. 333, GK) This statute was largely unused in the early years of the transition. but has gradually come into greater use during the past year. For example, in the 31 non-payment case files I reviewed in Saratov and Ekaterinburg in the summer of 1996, none raise the possibility of reducing penalties. Likewise, in my observation of trials in these arbitrazh courts over the course of several weeks, neither the court nor the defendants discussed reduction of penalties.

An incremental change in behavior was evident a year later. Ten of the 52 case files reviewed in Saratov in 1997 demanded penalties in excess of debt. A reduction in penalties was discussed in four of these cases, and they were actually decreased in two cases. In the first case,

34Neither Kommentar to the Civil Code pays serious attention to this statute, which suggests that the danger of suppliers abusing penalties had not been contemplated by the drafters. Kuznetsov and Braginskaya, 1996, p. 286; Sadikov, 1995, p. 345.
involving an overdue debt of 18 million rubles, the penalties were reduced from 158.8 million to 80 million rubles.\textsuperscript{35} In the other case, involving a debt of 53.7 million rubles, the penalties were reduced from 117.6 million to 90.2 million rubles.\textsuperscript{36} In neither case did the court explain its rationale for the final figure: it simply repeated the statutory language in describing the original request as "clearly disproportional." Progress is slow and uneven. In these cases, the court reduced penalties on its own initiative, as the civil code clearly permits. Yet in the two cases in which reduction was discussed but rejected, the reason was because the defendant had not made any such request.\textsuperscript{37} My conversations with Saratov judges reveal a more significant change in attitude that may soon be reflected in their decisions. In contrast to prior years, when they stubbornly insisted that contracts had to be enforced regardless of the consequences, they seemed to have a more nuanced view of reality. In particular, they spoke openly of the unequal bargaining power of suppliers and customers, and of how this tends to be reflected in the terms of contracts.

The Moscow City courts have shown a greater willingness to entertain the possibility of reducing penalties and, in fact, to reduce them. In virtually every case involving penalties that I observed at the trial, appellate, and cassation level during May 1997 the question of whether to reduce the amount was raised and discussed. Through listening to these cases and talking with the judges, it seemed to me that a rule of thumb has emerged. At least in Moscow, there now seems to be an unwritten but well-accepted presumption that penalties in excess of the debt are disproportional and should be reduced to the level of the debt. I saw no cases in which the courts were willing to go further. In making such reductions, the courts never referred to the financial condition of the defendant. Thus, the issue of ability to pay continues to be irrelevant. Instead, the crucial issue is disproportionality. Presumably plaintiffs will soon adapt themselves to this new norm, and will find more creative ways of extracting money from debtors.

Some judges see a trend toward the parties limiting penalties by reworking the language of the contract to cap the amount recoverable at a certain percentage of the value of the contract. For example, penalties would accumulate at 0.5% of the outstanding debt until such time as they equalled 10% of the value of the contract. Arguably, this serves both parties' interests. Suppliers are still able to recover a significant amount in penalties. Yet the possibility of penalties spiralling out of control is foreclosed, thereby benefiting the customer. Most importantly, it returns decision-making over penalties to the parties. In examples cited to me, the percentages were between 8-12. Judges described this development in positive terms. Perhaps if

\textsuperscript{35}GMPO Zhkh i RSKhT v. AOOT Pirovskii Myasokombinat, case no. 4806/96-7, Saratov, decided January 23, 1997.

\textsuperscript{36}Voiskaya chast' 2450 v. PKP STAR, case no. 4809/96-7, Saratov, decided December 25, 1996.

\textsuperscript{37}E.g., Saratovskoe oblastnoe upravlenie inkassatsii Rossiiskogo ob'edineniya inkassatsii Tsentral'nogo banka RF, case no. 4618/96-16, Saratov, decided November 19, 1996; AO Novilipetskii metallurgicheskii kombinat v. Saratovskii zavod stoimaterialov, case no. 4823/96-18, Saratov, decided December 5, 1996.
contracts are so adapted. Article 333 will once again recede into the shadows.

The language of contracts and/or legislation is only one piece of the puzzle. Just as important are the attitudes of businessmen toward repaying their debts. The following conversation, which was repeated many times over when I was observing arbitrazh courts in Moscow and Saratov during the spring of 1997, suggests that attitudes are not conducive to the elimination of inter-enterprise arrears. During a break in a hearing, the plaintiff (a Russian enterprise director with no legal training) asked me how the American system dealt with the problem of non-payments. I explained that it was not such a serious problem in the U.S. as in Russia, and that one reason was that persistent non-payment would negatively affect the reputation of the businessmen involved. He laughed and told me that in Russia today, paying on time would likely damage the reputation of a businessman. Allowing that this was a bit of an exaggeration, he assured me that non-payment has become so routine that it is now expected and certainly would have no negative reputational effect. Under such circumstances, changes need to go beyond merely reworking the contractual or statutory language. (See Hendley, 1997a)

Summary. Returning to the question of whether the Russian arbitrazh courts offer wronged parties the chance to make themselves whole again, the answer would seem to be a qualified yes. The courts consistently award the full amount of the debt owed and, while they have proven reluctant to award damages for lost profit or related expenses, they frequently award interest or penalties. What is even more interesting are the responses of the arbitrazh courts to the parties’ behavior. When it became clear that plaintiffs were riding roughshod over defendants, the courts stepped in to reduce penalties. Yet they did not leave plaintiffs empty-handed. This is obviously a fluid area in both law and practice. The willingness of both the judges and the litigants to try different solutions can be taken as a hopeful sign for the long term prospects for arbitrazh courts to become relevant to Russian economic life.

Enforcing Judgments

Winning at trial is largely meaningless if the judgment cannot be enforced. Petitioners that seek recovery of overdue debt are unlikely to be concerned or satisfied with moral victory; they want their money back. From the chairman of the Higher Arbitrazh Court (V.F. Yakovlev) to trial-level arbitrazh judges, enforcement is recognized as the achilles’ heel of the arbitrazh system. (Katanian, 1997; Tarasovaya, 1997; Vasil’eva, 1996) The problem is most acute with regard to non-payment cases. In contrast to eviction orders or decisions that invalidate actions taken by governmental agencies, enforcing judgments in cases of non-payment requires the defendant, usually a private entity, to hand over money. This, in turn, requires a level of coordination among economic institutions and good faith on the part of the defendant that has proven difficult to attain.
The apparent simplicity of the system is deceptive. In practice, plaintiffs find it difficult to get help from the sudebnye ispolniteli. These officials are not part of the institutional hierarchy of the arbitrazh courts, but are subordinate to the courts of general jurisdiction. This means that their primary loyalty is to judges from these courts and that they are likely to put requests from the arbitrazh courts on the back burner. Along similar lines, the expertise of most sudebnye ispolniteli is in enforcing judgments from the courts of general jurisdiction. There is a world of difference in the skills necessary to force the payment of child support, and to organize an auction of heavy machinery. Moreover, the legal mechanisms necessary to ferret out enterprise assets that have been transferred to other related corporate entities or even to individuals are not available under Russian law. Further complicating matters is the woeful underfunding of the sudebnye ispolniteli. While Russian judicial institutions are poorly funded as a general matter, the sudebnye ispolniteli are particularly neglected. They often lack funds necessary to carry out basic tasks, such as putting ads in the local paper to sell off enterprise assets or transporting assets from the enterprise to a more secure location.

The difficulties in enforcing civil judgments are well-known. The efforts to remedy the problem have been half-hearted at best. A presidential decree of February 1996 charged the government with fixing the system. More specifically, the decree ordered that “measures be taken to strengthen the sudebnyi ispolnitel’ service and to improve its material-technical support.” (Ukaz, 1996) Nothing much changed as a result. A draft law to create an implementation agency within the arbitrazh court system has not made it beyond a first reading in the national legislature. Most judges and administrative personnel of the arbitrazh courts cite a lack of funds as the reason why this rather obvious institutional glitch has not been addressed. But budgetary explanations are not fully satisfying. The Russian government has proven willing to fund a number of new law-related agencies in recent years whose raison d’etre is less compelling, e.g., bankruptcy commissions and anti-monopoly commissions. One Moscow cassation court judge suggested a more likely explanation. He said that the top officials of the arbitrazh court have long been concerned by efforts to absorb them into the courts of general jurisdiction.42 As a result, they are reluctant to push too hard on creating a new implementation agency within the arbitrazh hierarchy. In his words, “they do not want to stick their neck out too far for fear of having it chopped off.” Such pragmatic concerns over institutional survival ring true. A full discussion of the reasons why the political will is lacking to solve the problem is beyond the scope of this paper. (See Hendley, 1997b)

Plaintiffs seeking to recover on an arbitrazh court judgment are not interested in the

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42Objectively, the independence of the arbitrazh courts seems to be well-protected. The Russian constitution clearly contemplates their continued existence as a judicial organ separate from the courts of general jurisdiction and the constitutional court. This protection is confirmed in the constitutional law setting up the arbitrazh courts. (FKZoAS) Their independence was more recently confirmed in the December 1996 constitutional law on the Russian judicial system. (Federal’niy, 1997) Cassation court judges in Moscow, who are close observers of the policy battles, claim that an attempt was made to strip the arbitrazh courts of their independence during the drafting of that law. If so, the debate never spilled over into the public arena.
political or institutional reasons for why it is so difficult to enforce such judgments. They know
only that enforcement is often not easy and sometimes is not possible. As one appellate court
judge in Saratov commented, it is not surprising that enterprises seeking to recover debt go to the
"rackets" to get results.43 Appealing to private contract enforcers (or incorporating them into the
regular workforce) of an enterprise has the advantage of speeding up the recovery process. There
are no reliable data on the extent to which creditors use such extra-legal force to collect debts.
Interestingly, anecdotal evidence from interviews with enterprise officials and with arbitrazh
judges suggest that a melding of the two systems may be underway. Stories have begun to
emerge to the effect that some private enforcers are demanding arbitrazh court judgments in
favor of the plaintiff before taking action to recover a debt. (E.g., Hendley et al., 1997)

Conclusion

Drawing conclusions about an ongoing reform process is hazardous at best. Yet certain
patterns are coming into focus. On the trial court level, the arbitrazh courts live in limbo. While
doing their best to enforce new procedural rules, arbitrazh judges recognize that too much rigor
might compromise fairness. As a result, progress has been slow toward a new style of litigating
in which the parties assume responsibility for presenting their case rather than relying on the
judge to tell them what to do. But fundamental change is always slow.

The behavior of litigants suggests that arbitrazh judges may be underestimating their
capacity to absorb change. The speed with which they adapted to new rules governing
contractual remedies shows that they are quite capable of grasping and acting on new procedural
rules when these innovations inure to their benefit. Indeed, supplier/plaintiffs quickly learned
how to manipulate the rules so effectively that the arbitrazh courts have had to step in to restrain
them. Perhaps the less appealing procedural norms will become institutionalized only when
litigants begin to be punished for violating them. In other words, it may be time for arbitrazh
judges to stop coddling litigants and to dismiss cases when the parties fail to sustain their
respective burdens of proof. Of course, this assumes that appellate court judges will be able to
harden themselves to the inevitable petitions to reopen the cases.

The hard work of the trial courts is being undermined to some extent by the failure of
policy makers in Moscow (at the Higher Arbitrazh Court and elsewhere) to adjust the institutional
structure of the arbitrazh courts to the needs of Russian economic actors. Two problems stand
out. The first is the unwillingness to rely on oral testimony. In an economy interlaced with

4A third possibility is to submit the dispute to a private arbitration tribunal, known as a treteiski sud.
(Pistor, 1996; Vinogradova, 1997) Such alternative dispute resolution has been slow to take hold outside of the
major commercial centers of Moscow and St. Petersburg. Smaller cities typically do not have a treteiski sud;
indeed they are often hard pressed to find enough qualified judges to staff the arbitrazh court. Another problem
with these treteiskie sudy is that, if the defendant refuses to comply voluntarily, enforcement is carried out by the
arbitrazh courts, and is subject to the same problems discussed above.
multilateral barter transactions that contemplate ongoing trading until goods of equal value have been exchanged such a prohibition effectively places a significant number of business transactions outside the jurisdiction of the arbitrazh courts. It reflects an unwillingness to respond to the needs of society. Equally disturbing are the shortcomings of the system to enforce decisions of the arbitrazh court. The frequent difficulty and/or inability to implement decisions is discussed openly in the mainstream press. The corrosive effect of having a court that issues decisions but is unable to enforce them is obvious even to laymen.

Under these circumstances the quest for legitimacy seems rather like the fabled efforts to roll a large boulder up a steep hill. The trial courts' speed, flexibility, and concern with fairness would seem to move the process forward. But then the failure to make changes on the national level to the institutional structure seems to represent a step backwards. Consequently, in the final analysis, the rock stays in approximately the same position. Whether the impasse can be broken remains to be seen. Litigants are unlikely to wait around. If the arbitrazh court system cannot meet their basic needs of resolving standard business disputes and enforcing the resulting judgment, then they will seek relief elsewhere.


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