MAKING SENSE OF BUSINESS LITIGATION IN RUSSIA

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Abstract

The inability or unwillingness of economic actors to pay their debts in a timely fashion has contributed to the bumpy road of economic transition in Russia. The popular media, as well as much of the scholarly literature, have dismissed the relevance of courts to resolving non-payments. But field research on industrial enterprises has revealed that the courts are not as irrelevant as the literature would have us believe. A 1997 survey of over 300 enterprises found that over 70% of the respondent enterprises had initiated lawsuits in the past year, and official caseload statistics show a steady increase in filings over the past decade. What is less clear from the available data is how and why economic actors are using the courts and what sort of experience they have in court. This report aims to fill this gap by exploring what sorts of cases are brought, what sorts of enterprises are involved, and how the cases proceed through the system.

Introduction

The inability or unwillingness of economic actors to pay their debts in a timely fashion has contributed to the bumpy road of economic transition in Russia. The popular media, as well as much of the scholarly literature, have dismissed the relevance of courts to resolving non-payments, placing more emphasis on organized crime organizations as a mechanism for recovering debts (*e.g.*, Hay and Shleifer 1998; Greif and Kandel 1995). While not discounting the role of the mafia in economic life, field research on industrial enterprises has revealed that the courts are not as irrelevant as the literature would have us believe.

A 1997 survey of over 300 enterprises found that over 70% of the respondent enterprises had initiated lawsuits in the past year (Hendley, Murrell, and Ryterman 2000; see also Johnson, McMillan, and Woodruff 1999). Further buttressing the argument that courts are regarded as a viable option are the official caseload statistics, which document the steady increase in filings over the past decade (e.g., Hendley and Murrell 2002). What is less clear from the available data is how and why economic actors are using the courts and what sort of experience they have in court. This report aims to fill this gap by exploring what sorts of cases are brought, what sorts of enterprises are involved, and how the cases proceed through the system.

Departing from the standard practice of studying economic behavior from the vantage point of the enterprise, I take the individual case as the unit of analysis. I focus on non-payments cases, both because they were the most common type of case, and one of the simplest, to be brought to the Russian economic courts during the past decade. By examining mundane cases, I am able to eliminate statutory uncertainties and the specter of political influence that hang over some more complicated cases involving questions of corporate governance or bankruptcy.

My study is grounded in a set of 100 non-payments cases brought by one enterprise against another, supplemented by observations of court proceedings and interviews with courthouse personnel. I begin by reviewing the cases, detailing the amounts, the size and organizational structure of the litigants, and the pleadings. I then analyze what motivated the plaintiffs to initiate litigation. Finally I turn to what

happened once the case was filed, examining the role of the judge and the parties' representatives as well as how long it takes for the case to be resolved.

The Russian judicial system segregates economic disputes into separate courts, known as *arbitrazh* courts.[1] Notwithstanding the constitutional guarantee of public access to courts, entry is generally limited to the participants.[2] The *arbitrazh* courts, like much of post-Soviet Russia, are rigidly hierarchical. No trial judge nor any chairmen of an individual court would risk authorizing a foreign researcher to work in their midst without the prior approval of the Higher *Arbitrazh* Court, which stands at the apex of the hierarchy. With a letter from this court condoning my research, I was able to gain access to the individual *arbitrazh* courts where the case records are maintained. I drew the 100 cases that make up my database from the archives of the courts in Saratov, Ekaterinburg, and Moscow. Differences in the political economy among these regions as well as in the size and competence of the courts promised a rich mix of cases.

During the month I spent at each of the courts in the spring of 2001, I worked with a court official who funneled case files to me. My control over case selection was limited. I had specified that the cases should involve inter-enterprise debt collection that had been decided at least six months earlier, which meant that all of my cases were filed and decided in 2000. Another aspect of the research (not

[1]These courts evolved from the institution charged with resolving disagreements between state-owned enterprises during the Soviet era (Pomorski 1977). As part of the transformation from state *arbitrazh* (or *gosarbitrazh*) to full-fledged courts, the jurisdiction court was expanded to include privately owned enterprises as well as bankruptcy, and the roles of the judges and litigants were rethought (*e.g.*, Hendley 1998b; Hendrix 1997). One constant thread from the past to present is that only legal entities have standing; legal claims by individuals are shunted to the courts of general jurisdiction.

[2]Armed guards monitor who gains entry. As a rule, only those who can prove their presence is necessary by showing a court order that lists an imminent hearing are allowed in. The rigor of the guards varies. I was able to talk my way past the guards in Saratov and Ekaterinburg, but not Moscow. Moscow is the largest *arbitrazh* court in Russia with 147 judges (compared with 34 in Saratov and 54 in Ekaterinburg) and greater attention to procedure is not surprising. The tight security is justified on the grounds of preserving the safety of judges. From a practical point of view, having spectators at an *arbitrazh* court hearing is unwieldy. Most hearings are held in judges' offices and there is barely enough room for the participants, much less interested members of the public.

included in this article) focused on the enforcement process, which gave me a strong preference for cases that afforded the parties sufficient time to make some effort at collection.[3]

In addition to reviewing case files, I observed judicial proceedings in non-payments cases. Even though these cases presented different fact patterns and parties, they gave me a more hands-on perspective on the roles of those involved than could be gleaned from the paper record. After gathering the information from case files, I worked with groups of law students from local non-governmental organizations to contact the participants and ask them a set of standardized questions about why they had brought the case and their level of satisfaction with the experience.

Profile of non-payments cases

The most striking feature of non-payments cases brought to the *arbitrazh* courts is their banality. They rarely present cutting-edge issues of law. Nor is their much suspense about the outcome. Indeed, the petitioner prevailed in 99 of the 100 cases I reviewed, though, as we will see, the court did not always award as much as requested in the complaint.[4] The results from my sample reflects the dominance of plaintiffs in the official caseload records for these courts, though not all defendants are as hapless as those in my sample (see Table 1, at the end of this paper).

In most cases (80%), the dispute arose when the defendant failed to pay for goods supplied by the plaintiff. A small but significant group of cases (16%) presented the opposite situation, where delivery of

[3]The *Arbitrazh* Procedural Code in force at the time of my study (hereinafter 1995 APK) gives the victor six months to enforce the judgment by taking a court order (*ispolnitel'nyi list*) to the losing side's bank (art. 202, 1995 APK). If this proves futile, the victor can seek the assistance of bailiffs (*sudebnye pristavy*) to collect on the judgment (Yukov and Sherstyuk 2000).

[4]The case where the titular plaintiff lost occurred in Saratov and is an example of a debtor rushing to the courthouse in a preemptive effort to deflect attention from its own behavior. The two parties, a children's theater and a props company, had previously been involved in litigation. The theater had been found liable for unpaid debts but refused to capitulate, filing a lawsuit against the props company alleging that it had shirked on separate earlier debts, leaving the two even. The props company counter-sued for interest on the preceding judgment. The court found the theater's claims without merit and piled on by validating the counterclaim, though the amount of the interest was reduced to a nominal 100 rubles (approximately $3), signaling the court's displeasure with both sides. Precisely who should be seen as the plaintiff in this finger-pointing exercise is unclear.

goods had not followed prepayment.[5] Almost all of the underlying transactions (85%) were grounded in a written contract. Although Russian law does not require a contract per se to establish an enforceable obligation between the parties, contracts can be helpful in clarifying the parameters of these obligations. Absent a contract, the default rules laid out in the Civil Code govern the transaction.

Manufacturers typically develop form contracts that are then adapted to the needs of each deal. Over 80% of the cases originated with a form contract (rather than with a contract that was drafted specifically for the deal). Along with price and quantity, which obviously vary from transaction to transaction, Russian business contracts also anticipate the need to tailor payment terms, often having alternative language for prepayment (full or partial), setting the number of days after shipment when payment is due, and/or penalties in the case of delinquent payment.

Control over the form indicates greater power in the relationship, in that the drafter can use subtle language changes to craft a document that best serves its interests. Prior research showed that form contracts generally originate with the seller, and my cases confirm this finding. The uncertainty over payment places greater risk on sellers, leading them to be more vigilant about contractual protections. Buyers are able to dictate terms only when they enjoy some unusual market sway.

The degree to which the transactions in the cases were monetized is worth noting, given the trend toward barter that emerged in the mid-1990s in Russia.[6] Earlier field research in the *arbitrazh* courts suggested that barter-based transactions were unlikely to find their way to court due to the strictly-enforced procedural rules requiring documentary evidence of all aspects of the transaction. In-kind exchanges were thought to be more likely to be based on a handshake than on a written contract.

This set of cases indicates this assumption needs to be reexamined. One-fourth of the cases involved barter. Virtually all (22 of 24) of these were memorialized, often in baroque detail, in written form. Indeed, a higher percentage of barter cases had written contracts than did the monetized cases.

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[5]This latter type of case was most prevalent among the subset of cases from Ekaterinburg, with ten cases, compared with only two and four cases in Moscow and Saratov, respectively.

[6]Among its other functions, barter allowed cash-poor enterprises to stay in business (Aukutsionek 1998).

Only two of the barter cases asked the court to enforce the underlying agreement to exchange goods.[7] The remainder eschewed equitable remedies in favor of monetary damages.

At the same time, we should not lose sight of the fact that the bulk of the cases (75%) were straightforward sales of goods or services for money. The amounts petitioned for varied widely, ranging from a less than $100 to over $4 million. With only two exceptions, plaintiffs asked for rubles. Assuming an exchange rate of 30 rubles to the dollar (which was the average for the period when these claims were being brought), one-third of the claims fell between $167 and $1,667, with another third falling between $1,667 and 16,667 (see Table 2).

These seemingly small amounts are actually in line with, if not greater than, non-payments cases more generally. Table 1 sets forth the average amount of petitions in these courts for all non-payments cases over the past three years. Only in Moscow does it exceed $100. Indeed, the average Saratov non-payments case has yet to exceed $30. This raises the question as to why Russian enterprises bother suing over such paltry sums. But as the caseload data imply, amounts that might seem trivial to an American reader can be monumental to a Russian enterprise teetering on the brink of insolvency.[8]

Most non-payments cases were brought by and against privately held corporations.[9] Likewise most (82%) were between entities from the same region (*oblast'*), rendering moot any concern over preferential treatment for local parties.[10] Slightly less than half involved first-time transactions. The

[7]Both cases arose in Saratov. One was settled by the parties before the court could address the merits. The other case was brought by a dairy plant against a milk producer. The contract called for the plaintiff to supply parts for agricultural machinery in return for milk. While the plaintiff lived up to its obligations, the defendant breached. The plaintiff sued to get a court order compelling the defendant to supply milk. The Saratov *arbitrazh* court found in favor of the plaintiff but refused to issue the desired order for specific performance. Instead it awarded the dairy plant the value of the undelivered milk (133,827 rubles).

[8]To put these sums in context, the average monthly income for a Russian during 2000 was 2,193 rubles (approximately $73), up from 1630 (approximately $54) the year before (Goskomstat 2001, p. 173).

[9]Whether they were former state-owned enterprises that had been privatized or had been created more recently, and so had been private from the outset, was impossible to determine. Given the realities of post-Soviet Russia, it is fair to assume that most had a prior life as a state-owned enterprise.

[10]Cases are heard in the *arbitrazh* court closest to the defendant, unless otherwise specified in the contract (art. 25, 1995 APK). The Moscow city court is widely regarded as the most experienced and competent.

average length of the trading relationship for those who have interacted previously was about two years, indicating that few litigants had long histories together. Prior problems between them over payments had arisen for almost half, though only a few (three) had previously resorted to litigation. As Table 3 shows, large enterprises (open joint-stock companies) are the most common plaintiffs, whereas smaller enterprises (closed joint-stock companies) are most likely to emerge as defendants.[11] These smaller enterprises also sue one another with some regularity.

Three realities of Russian economic life bring some logic to these findings. First, most large enterprises have legal departments inherited from the Soviet era when they were state-owned enterprises. Although legal representation is not essential to bring a claim in *arbitrazh* court, it helps (as we will see). These open joint-stock companies act strategically, settling cases with long-standing partners while pursuing less desirable trading partners to court. Second, small enterprises have a shorter track record, becoming legally recognized only in the early 1990s. As a result, they stand a slimmer chance of having the sort of long-term relationship with their creditors that could withstand an inability to pay on-time.

Finally, smaller enterprises tend to be on shakier financial ground and some compensated by dodging creditors and even reincorporating under different names in an effort to stay one step ahead of their debts. Table 4 buttresses these conclusions by showing that the larger enterprises tend to bring larger claims while the smaller enterprises go after relatively small sums. For example, a plurality (41%) of open joint-stock companies brought substantial claims ranging from 50,000 to 500,000 rubles. By contrast, the same percentage of closed joint-stock companies brought smaller claims, ranging from 5,000 to 50,000 rubles.

In over a third of the cases sampled from Moscow, the underlying contracts stipulated that disputes were to be heard in this court. Most did not have to rely on the forum clause because the debtors were from Moscow. Forum clauses were also found in about a quarter of the contracts in the Saratov cases and, as in Moscow, only a few ended up having to rely on the contractual language to establish jurisdiction. Yet the presence of such forum clauses is worth noting because it suggests that enterprises in these regions are skeptical of their ability to get fair treatment when off their home turf.

[11]Closed joint-stock companies emerge as the most frequently sued in all regions, though the thresholds vary. While 60% of the cases examined in Moscow and 53% of those in Saratov were brought against

In a climate where enterprises are barely clinging to solvency, the requirement that petitioners pay a filing fee (*gosposhlina*) that is based on a percentage of the amount sought risks shutting out potential claimants.[12] If successful, the filing fees are made part of the judgment imposed on the defendant, but this is of little solace to cash-poor petitioners trying to initiate lawsuits. Responding to an obvious need, the Higher *Arbitrazh* Court issued a decree in 1997 sanctioning the ad hoc solution that trial courts had devised of delaying the payment of filing fees until the conclusion of the case if the petitioner could demonstrate its lack of cash resources.[13]

The cases I studied were fairly evenly split between those who paid up front and those who sought relief[14] though, quite logically, the likelihood of asking for a deferment grew with the size of the case. While about two-thirds of all plaintiffs who were seeking less than 50,000 rubles (approximately $1,167) paid their filing fees with no complaint, the situation was reversed for those with claims in excess of this amount. Two-thirds sought deferments, which were typically granted by the courts. Because the explanation of how to go about delaying filing fees was contained in a decree of the Higher *Arbitrazh* Court, I had hypothesized that enterprises with access to legal professionals would be more likely to use it. Oddly enough, when I isolated this as a factor, it turned out that enterprises with in-house legal departments were slightly less likely to petition to have the fees postponed.[15] This indicates that knowledge of this strategy has now spread beyond legal insiders.

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these smaller enterprises, it was only 39% of cases in Ekaterinburg (with larger enterprises not far behind with 30%.

[12] *Gosposhlina* amounts to about 5% of the amount sought, though there is a sliding scale for amounts in excess of a million rubles ("O vnesenii izmenenii i dopolnenii," 1996).

[13] "O nekotorykh voprosakh" 1997. Plaintiffs are required to submit affidavits (*spravki*) from their bank(s) verifying that they lack sufficient funds to pay the filing fees as well as from the tax inspectorate confirming the location of their bank accounts.

[14] There was considerable regional variation. Only a few (20%) Moscow plaintiffs asked for help. In Saratov, the situation was reversed in that about 80% sought assistance through deferments. Ekaterinburg was somewhere in the middle, with about half seeking to have their filing fees delayed. This reflects the variation in economic conditions throughout Russia.

[15] The presence of a legal department can sometimes operate as a crude proxy for size and age of enterprises. During the Soviet era, legal departments were *de rigeur* for large state-owned enterprises and

Motivations for seeking repayment through the *arbitrazh* courts

Why do creditors go after debtors through the courts? In Russia, as elsewhere, litigation is rarely the first course of action. Even though success in court seemed to be a foregone conclusion, the plaintiffs I studied did not rush to file their lawsuits. On average, about eleven months passed from the time the debt arose until litigation ensued.[16] During this time, most plaintiffs made some effort at resolving the case, usually starting with phone calls and ratcheting up to telegrams, letters, and personal visits as time went on. About half of them sent written notices to their delinquent contractual partners clarifying their intent to initiate proceedings in the *arbitrazh* court if payment was not forthcoming.[17]

Often these *pretenziya*, as they are known, warned debtors that penalties and/or interest would be added to the balance of the debt if the cases proceeded to court. They reminded the debtors that, if they lost, they would also be liable for court costs (including the filing fees discussed above). Of course, my decision to focus on cases means that I have isolated the proverbial "barking dogs." My earlier field research in enterprises indicates that many creditors never resort to court, preferring to use relational strategies (including *pretenziya*) to sort out their problems (Hendley 2001).

In a series of follow-up questions to the victorious plaintiffs posed to the person who had handled the lawsuit, I explored the question of motivation. Not surprisingly, getting their money back served as inspiration for virtually everyone (see Table 5). More interesting are the less obvious catalysts. Some issues that would probably emerge as significant in an adversarial setting in the United States, fade in importance in Russia. Very few plaintiffs use litigation as a signal to other customers of the parameters of acceptable behavior. This makes sense given that case decisions are unpublished and apply only to the parties involved. Third parties (including customers) are unlikely to learn of the outcomes and, if they do,

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they were mostly retained when the enterprises privatized. But among the cases I reviewed, organizational type had no noticeable impact on the propensity to seek delays in payment of filing fees.

[16]Article 196 of the Civil Code gives creditors three years to collect their debts.

[17]*Pretenziya* were mandatory under state socialism but, since 1995, have been discretionary for enterprises. Only two of the contracts I reviewed made sending a *pretenziya* a prerequisite for initiating a claim in *arbitrazh* court.

would not take them as a warning because the variation in the facts of a case involving them might give rise to a different result. Even fewer plaintiffs regard litigation as a mechanism for punishing a undisciplined trading partner. As we will see, the assumptions underlying this view of the judicial process as onerous and unpleasant, namely that the experience will be lengthy and expensive and that it will wreak havoc on existing relationships, are not borne out in the context of the Russian *arbitrazh* courts.

More relevant are factors that are specific to Russia. The uncertainty of the economic transition left the rules about when debts could be written off in flux. In conversations predating the study, some enterprise managers had reported that they preferred to have a court judgment in hand before writing off debt. Along similar lines, I was also told that they occasionally resorted to the courts even when the chances of collecting on a judgment were slim, in order to prove to the state authorities the genuineness of a debt. A practice of manufacturing debt in order to hide income had developed during the mid-1990s among desperate enterprises desperate to avoid taxes. Manipulating the debt level is not uncommon among firms heading toward bankruptcy. According to managers, an *arbitrazh* court judgment was viewed as definitive proof that a debt was not illusory.

Table 5 shows that concerns over tax and accounting implications motivated a significant group of plaintiffs. But Table 6 suggests that these worries may be concentrated in Saratov.[18] While accounting issues influenced only about a quarter of the Moscow and Ekaterinburg enterprises, they were a catalyst for two-thirds of the Saratov enterprises. The situation is even more lopsided vis-à-vis tax issues. Given the small sample size, reading too much into these results would be premature, though they certainly warrant further investigation.[19]

[18]The post-judgment interviewing was carried out by students associated with NGOs in each city. There is a danger that the student interviewers in Saratov somehow encouraged respondents to respond affirmatively to these questions.

[19]Particularly surprising is the relative lack of concern about tax implications on the part of Ekaterinburg enterprises. The official caseload data show that Ekaterinburg is one of the most aggressive regions in terms of pursuing alleged tax dodgers (Hendley 2002).

An analysis of what structural conditions provoke concern over accounting and/or tax consequences provides some intriguing leads as well as some dead ends. Having access to legal expertise turns out to have little effect, probably because neither tax issues nor accounting matters are within the purview of in-house lawyers (even when they would seem to have legal implications). More telling is the length of the relationship between the parties. Petitioners are unlikely to have tax or accounting concerns in cases involving a first-time transaction but, as the length of the relationship grows, such concerns become more pressing.

This makes sense. As the lifespan of business relationships increases so too does the likelihood of having side arrangements that might not stand up to scrutiny. Organizational structure turns out to matter, though not equally everywhere. Its effect is strongest in Saratov, where large enterprises (open joint-stock companies) emerged as the uneasiest over tax and accounting consequences. I had thought that the amount of the case would matter, hypothesizing that management's desire to have debts recognized as legitimate would intensify with the size of the debt. But the data reveal a murkier picture. Once again, there is regional variation. My hypothesis is born out only in Moscow, where the odds of being motivated by tax or accounting issues spikes for cases in excess of 500,000 rubles (approximately $16,667).[20] But in Saratov and Ekaterinburg, such concerns are most likely to be manifested for smaller cases, *e.g.*, cases ranging from 50,000 to 500,000 rubles. Precisely why they are absent from the larger cases is a puzzle.

Processing non-payments cases through the *arbitrazh* courts

Non-payments cases proceed through the *arbitrazh* courts with great dispatch. The 1995 *Arbitrazhnyi protsesual'nyi kodeks Rossiiskoi Federatsii* (APK) sets a deadline of two months from filing to deciding (Art. 114, 1995 APK). Both trial judges and court administrators take the deadline seriously.

[20]The two dollar-denominated cases, both of which involve amounts in excess of $2 million, arose in Moscow. In neither of these cases was the petitioner motivated by tax or accounting concerns. Perhaps this is because the parties were well-established and successful subsidiaries of foreign corporations and, therefore, unlikely to be accused of booking illusory debts.

Although delays have been inching upwards, they have yet to exceed 5% of cases decided in the *arbitrazh* courts nationally (Hendley and Murrell 2002). Records are maintained for each judge; the ability to process cases quickly colors perceptions of competence. Whether this quick turnaround compromises the integrity of the process is a difficult question. One Moscow judge grumbled about being part of a "conveyor belt of justice," but felt the two-month deadline was essential to keep things moving[21].

During these two months, the judge must send out a notice (*opredelenie*) of the hearing to the parties, hold the hearing, and make his or her decision. Substantively the cases present few complications but the uncertainty of the Russian mail can result in slowdowns. If the return-receipt postcard from the defendant is not in hand by the time of the hearing, the judge has no choice but to postpone in order to guarantee due process to the defendant (arts. 115, 119 1995 APK; Yakovlev 1999, pp. 286-87). The mostly local nature of the disputes I sampled mitigated this factor. Indeed, 84% were decided within the two month deadline.[22] Even more startling, most (71%) needed only one hearing to be resolved, further evidencing their simplicity.[23] When additional hearings were required, it was typically because one of the parties' representatives was sick or unprepared. In only 2 of 26 cases were the additional hearings needed to resolve some substantive issue.

As is usual in countries with civil law traditions, judges exert tight control over the proceedings. This is evident from the outset. Since 1995 when the second APK was passed, the burden of assembling evidence relevant to their claim (or defense) has ostensibly been placed on the litigants (art. 53, 1995 APK; Yakovlev 1999, pp. 116-23). My earlier research showed that the inclination of *arbitrazh* court

[21]The APK passed by the Duma in June 2002 modifies the rule by giving judges two months from the date of filing to hold the first hearing and requiring them to render their decision within a month of that hearing (arts. 134, 152, 2002 APK). This change is part of an effort to create a pretrial period that will make complex cases proceed with fewer disruptions. It will have little impact on the simple non-payments cases I studied. Indeed, it is likely to encourage desperate defendants to use delaying tactics to take full advantage of the two months.

[22]For the past two years, the percentage of cases not resolved within the two-month deadline has held steady at 4.6% (Sudebno-arbitrazhnaya 2002, p. 22), making the 16% of cases that lagged past this deadline look less impressive.

[23]Usually one more hearing was sufficient, *e.g.*, 80% of cases requiring more than one hearing were decided in two hearings.

judges to continue their prior practice of listing the documents that should be produced at the hearing in the decree (*opredelenie*) notifying the parties of the time and place of the hearing, effectively means assuming the burden of proof themselves (Hendley 1998a).

In interviews, judges rationalized their behavior on grounds of efficiency and justice. They argued that if left to their own devices, the parties would show up empty handed and, even though the 1995 APK allows for dismissal in such cases, doing so would only add to the burden of the appellate courts. They further contended that the need for their helping hand would dissipate as the new rules worked their way into practice. My data suggest that the learning process has stagnated, due in no small part to the judges' enabling behavior. In over 80% of the cases I reviewed, the *opredelenie* contained a detailed list of evidence to be presented. Thus, in practice, the parties are not taking responsibility for their own cases. Perhaps this will happen only if trial judges are tougher, and appellate judges are inured to the pleas of those whose claims have been dismissed peremptorily. But my conversations leave me dubious of the likelihood of such a behavioral change in the near future. At this point, helping litigants through the process is clearly central to the self-image of *arbitrazh* judges.

Likewise the style of opinion found in non-payments cases is largely unchanged. As with other legal systems with a civil law tradition, opinions tend to be terse. The arbiters in the Soviet-era *gosarbitrazh* took it further, often writing opinions that bordered on superficial. In an effort to enhance the professionalism of the *arbitrazh* court judges, the 1995 APK mandated that opinions include an explanation of how the judge came to his or her conclusion, rather than merely revealing the outcome (art. 127, 1995 APK: Yakovlev 1998, p. 292). Yet a majority (60%) of the opinions I read were cursory. As a rule, they included a summary of the facts (often taken verbatim from the complaint) and a list of relevant statutes, followed by a one-sentence statement of who won and how much.

Judges who write pro forma opinions are highly likely to also send out *opredelenie* that specify the relevant evidence. About 60% of the judges I followed behaved in this old-style manner. The meaning of this finding is unclear. Perhaps we should be encouraged that a significant percentage (40%) broke with tradition, albeit within the limits to be expected in a non-precedential system. Rarely do they

make any attempt to distill general principles from the case, preferring instead to concentrate on the situation at hand.[24]

On the other hand, maybe we should be discouraged that most still adhere to the old customs rather than respecting the new rules. It is also possible that judges' behavior is not uniform, but that it is influenced by the specifics of the case. When the parties are represented, the odds of getting a nuanced opinion increase. Judges are also more likely to write careful and well-reasoned opinions when they award the plaintiff more than originally requested than they are when they accede to, or diminish, the plaintiff's demands. This may reflect trial judges' fear of reversal. Presumably the chances of reversal are lower if the logic of the opinion is laid out clearly.

Outcomes of non-payments cases

At the outset I noted that petitioners in the non-payments cases I reviewed uniformly won in the Russian *arbitrazh* courts. But what does it mean to win? Table 7 provides more insight by differentiating cases in which the plaintiff's demands were fully satisfied from those in which it got less (or even more) than was requested in the original complaint. Also delineated are cases in which the parties reached a settlement after the lawsuit was initiated,[25] as well as those that were dismissed due to the failure of the plaintiff to appear for trial.[26] The table shows that plaintiffs received exactly what they asked for in a

[24]In only nine cases did the judges weave the facts and law together to make a coherent argument. In the remainder, judges merely had a long string citation of relevant statutory provisions.

[25]Settlements (*mirovye soglasheniya*) typically followed on the heels of the complaint being filed, indicating that initiating legal action served as a stimulus to action for some defendants. In all the cases that were settled, the defendant paid the full amount of the debt. In the few cases in which the plaintiff had also asked for penalties, these were forgiven as part of the settlement agreement, suggesting that such claims had been used to pressure debtors into living up to their obligations. In order for a case to be classified as being settled by the court, the parties must submit their agreement to the court for approval (art. 121, 1995 APK). It is likely that many of the cases dismissed were actually settled, but that the parties did not bother to get the court's blessing.

[26]The *arbitrazh* courts cannot hear the case in the plaintiff's absence unless the plaintiff has specifically authorized the case to go forward without it (art 87, 1995 APK). Plaintiffs resist doing this, but when litigating in regions far from home, are sometimes forced to allow hearings to proceed without them because they cannot afford to send a representative. The new APK eliminates this requirement, allowing

majority of the cases that proceeded to judgment. Taken together with the *pro forma* nature of most opinions and the haste to resolve disputes, it is tempting to conclude that non-payments cases are being processed in a rote manner with little regard for the substance of the individual disputes.

My review of the decisions made in the cases convinces me that the outcomes generally followed the dictates of the law. The parties evidently agreed, as did the appellate courts. Only seven of the cases were appealed, and the lower court was upheld in five of them. During my months in the *arbitrazh* courts in 2001 (as well as during earlier field research), I have been consistently impressed by the judges' commitment to getting at the essence of what happened in the transaction under scrutiny. To be sure, their style tends to be brusque, but they do not steamroller the litigants unless it is warranted.

Table 7 demonstrates that a majority of plaintiffs got precisely what they wanted. This outcome was most likely when the petition was limited to debt (excluding penalties or interest): 63% of cases in which the outcome mirrored the complaint involved only debt.[27] At the same time, Table 7 also confirms that the courts do not act as a rubber stamp for creditors. More than a third of the petitioners received less than the amount originally requested. The reductions were not overwhelming, averaging about 15%. These results for the cases in my database are more plaintiff-friendly than are outcomes more generally, where reductions of up to 50% are commonplace (see Table 8).

Within my sample, reductions usually turned on arithmetic rather than on cutting-edge legal issues. Most petitioners were able to document the existence of the debt to the courts' satisfaction, but their efforts to obtain penalties or interest were more unpredictable. In the early years of the transition, creditors commonly asked for both penalties and interest, but a July 1996 decree from a joint plenary session of the Russian Supreme Court and the Higher *Arbitrazh* Court denounced this practice as "double

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the judge to go forward with a case in the plaintiff's absence so long as notice has been given (art. 156, 2002 APK).

[27]This strategy was most successful for creditors in Saratov, where 79% of those receiving the amount of their petition had only asked for debt, compared with 69% in Ekaterinburg and 44% in Moscow.

dipping" and limited creditors to one or the other.[28] About two-thirds of the petitions included claims for either interest or penalties in addition to debt, divided fairly evenly between the two remedies.[29] In almost half of the cases (45%) involving penalties, the petitioners' claims for these punitive damages were reduced. Interestingly, the impetus to cut back penalties most often came from the court than from the defendant. A 1997 informational letter from the Higher *Arbitrazh* Court explicitly authorized trial courts to take up the question of the fairness of penalties on their own initiative (Obzor 1997). No doubt the low participation rate for defendants contributes to this tendency, but so too does the increasing activism of the *arbitrazh* courts.

In recent years, the courts have been emboldened by a provision of the Civil Code that gives them discretion to reduce penalties that are inappropriately high in the interest of justice.[30] Judges have used this provision to discourage malingering on the part of plaintiffs. In other words, they have lost sympathy for plaintiffs that wait until the three-year statute of limitations expires and then go after penalties for the entire period.[31] Given that penalties are calculated as a percentage of the debt owed and accrued daily,

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[28]Postanovlenie 1996, p. 17. For a fuller discussion of the policy shifts regarding the obligation of debtors to pay penalties and/or interest, see Hendley, Murrell, and Ryterman 2001b.

[29]In research undertaken in 1997, I had found that two-thirds of the 52 non-payments cases I reviewed included claims for penalties, suggesting that the appeal of penalties is fading (Hendley 1998a). There is also more variation in the amount sought. In the mid-1990s, most petitions assessed penalties at 0.5% per day of the amount owed. In my database, one-third of the cases seeking penalties used this traditional formula while another third made more modest demands and the final third asked for more.

[30]Art. 333, GK. My database indicates that some courts are more aggressive in their use of this mechanism than others. Among the three courts I studied, the Saratov court was by far the most likely to reduce penalties, doing so in over 70% of the cases involving penalties (compared with 25% of such cases in Moscow). Judges tend to be laconic in justifying the use of article 333, typically limiting themselves to the statutory language, *e.g.*, that the penalties demanded are "clearly out of line" (*yavno nesorazmerno*). When present, defendants routinely stress (perhaps exaggerate) their financial difficulties in an effort to convince the court that having to pay penalties will push them into bankruptcy. In contrast to the early years of the transition (Hendley 1996), courts now mostly turn a deaf ear to these sob stories. A Saratov *arbitrazh* court was moved to sympathy in a case brought by a gas company against a housing authority in which the defendant convinced the court that its supposedly guaranteed state funding had dried up over the past few years. The court reduced the penalties to 500,000 rubles, halving the original request.

[31]In the informational letter, the Higher *Arbitrazh* Court pointed with disfavor to a state agency that had asked for penalties of 102 million rubles on an outstanding debt of 14 million. This case was presented as paradigmatic example of when the trial court should use its discretion to reduce penalties (Obzor 1997, p. 76). For the most part, trial judges whole-heartedly endorsed this policy change, though one Ekaterinburg

cases in which the actual debt was dwarfed by the penalties were not uncommon in the early and mid-1990s (Hendley 1998a). This no longer happens. Interviews with judges reveal an informal rule capping penalties at the amount of the debt that was generally reflected in the case files I reviewed.[32] Plaintiffs have already begun to adapt their behavior by trimming their demands for penalties at the outset. For the most part, the courts ratified these reduced demands, but they occasionally cut penalties even more.[33]

The courts were even more fickle when it came to claims for interest. Almost 60% of such claims were readjusted downward by the court. Once again, judges took a leading role. In only a few cases did reductions in interest come at the behest of the defendant. More often, they resulted from mistakes made by the plaintiffs when calculating interest. Judges are not supposed to accept the figure proposed by the plaintiff, even if the defendant is in agreement. They are obliged to determine for themselves whether the final figure is correct. The rules governing interest on overdue debt are complicated and frequent errors by the uninitiated are not surprising.

In a few of the cases I reviewed, judges seemed to be moving away from a concept of interest as compensatory. Instead, they treat it as a punitive remedy only to be imposed when fault is present. An Ekaterinburg case involving a lawsuit by a wholesaler against a metallurgy plant for an unpaid bill for aluminum presents the most extreme example. The wholesaler had prevailed in an earlier lawsuit for the debt and was back in court seeking interest on the debt (which remained unpaid). The court conceded that the plaintiff had correctly calculated the interest due under the law, but cut that amount in half (from 210,200 rubles to 103,100 rubles) on grounds of fairness because it believed that the "unpaid obligation had ensued due to the fault of both parties, with some blame for the plaintiff which failed to demand

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judge told me that she thought it contradicted the principle of freedom of contract which is at the heart of the post-Soviet civil code. She agreed that high penalties were distasteful, but felt that they ought to be enforced if that was the agreement of the parties. She was uncomfortable rewriting contracts, but said that she routinely reduced penalties because she knew that otherwise her decisions would be reversed.

[32]In two Moscow cases, the penalties demanded and awarded slightly exceeded the debt.

[33]For example, although the utility company in one Saratov case reduced penalties from the 2.7 million rubles allowed under the contract with an agricultural firm to the amount of the accrued debt (310,000 rubles), the court was not satisfied and, citing article 333 of the Civil Code, awarded the utility company only 160,000 rubles in penalties along with the full amount of the debt.

payment for the goods shipped from the defendant." This court worked hard at excusing the defendant's delinquency and imposing duties on the plaintiff that are contemplated neither by the law nor by the contract. Other judges (in all three jurisdictions) invoked article 333 of the Civil Code, notwithstanding the fact that its language is limited to penalties. All of this indicates that the line between penalties and interest is becoming ever more blurred. I found complaints and opinions in all three courts in which the terms were used interchangeably.

What factors affect the outcome? Does the amount of the petition matter? Do certain types of entities have more luck than others? Do plaintiffs who draft detailed and well-reasoned complaints tend to do better than those who submit one-paragraph fill-in-the-blank forms? Is it helpful to have a lawyer or other representative? Does active participation by defendants give rise to better outcomes for them? My data begin to fill in these gaps.

Certain factors that intuitively would seem to matter turn out to be largely insignificant. For example, size and organizational structure have almost no impact. Large enterprises (open joint-stock companies) turn out to have the same odds of getting more, less, or the amount they petitioned for as do smaller enterprises (closed joint-stock companies). Likewise the amount of the petition has only limited explanatory power. Regardless of whether the case involves less than $100 or millions, the most common outcome is an award in the amount originally requested (see Table 9). Yet petitioners asking for sums ranging from 50,000 to 500,000 rubles (approximately $1,667 to 16,667) stand the greatest likelihood of ending up with what they wanted. Getting the court to increase the judgment is fairly unusual, but is most likely for petitioners with modest demands (less than 5,000 rubles or about $167). Often the increases come at the behest of the plaintiffs, who decide to tack on additional amounts after the case has been filed. By the same token, this group is the least likely to have the court reduce their requests. Such curtailments are most common among those with more ambitious designs, *e.g.*, petitions in excess of 500,000 rubles, which typically include demands for either penalties or interest.

Traditionally, complaints filed with *arbitrazh* courts have been succinct, rarely exceeding more than two pages (including the list of attached documents). My data indicate that this may be changing.

Although a majority persist with the familiar cryptic style, devoting more space to the calculations than to the textual argument, a significant (27%) minority filed petitions with detailed arguments supporting their claims. Their efforts paid off at the margins. Plaintiffs who went the extra mile show a slightly greater tendency to get more than their original complaint, whereas those who did the bare minimum seem to get the amount originally petitioned for or less.[34] This lends further credence to my argument that judges read case files carefully. Plaintiffs appear to benefit when they lay the groundwork for the court by weaving together their factual situation with the relevant legal standards. Whether a trend toward greater specificity in complaints will continue remains to be seen.

In many legal systems, advocates play a crucial role in determining outcomes. Whether this would be true in the case of the Russian *arbitrazh* courts was uncertain for several reasons. For one thing, the system is not adversarial. Litigants need not send a lawyer as their representative.[35] In the early 1990s, lawyers were more the exception than the rule. More often the general director would go himself or send a top lieutenant. This has changed over the years.[36] Petitioners typically send a lawyer to represent their interests at the hearing. Usually it is an in-house lawyer, though firms specializing in *arbitrazh* practice have emerged in Moscow (the development of this sort of specialized bar has lagged in the hinterland).

[34]Experience with the legal system played a role. Enterprises with legal departments (which were mostly made up of people with university-level degrees in law) were more inclined to file a well-reasoned complaint. *Pro forma* complaints tended to come from enterprises without legal specialists on staff.

[35]The early drafts of the 2002 APK threatened to tighten up the rules for lawyers. While retaining the option for litigants to send authorized (non-lawyer) officials to represent them, the draft of July 2000 limited representation by non-insiders to lawyers who had been certified by the *arbitrazh* courts (art. 62, 2000 Draft APK). Precisely how this would have worked is unclear, given that bar associations in Russia are rather amorphous. It was dropped from the final version passed by the Duma in June 2002.

[36]Non-lawyers again dominated hearings in the wake of the 1998 financial crisis. Defendants sent their accountants in an effort to explain why they were not at fault for overdue debts. The accountants presented documents showing that the defendant ostensibly had money in the bank and had ordered the bank to make payment to the plaintiff, but the bank had not done so. Judges had the unenviable task of explaining why the collapse of their bank did not excuse a failure to pay their debts, a task made more difficult by the lack of legal literacy on the part of the accountants.

Even when lawyers are present, most of the questioning is done by the judge, as in other countries with civil law traditions. Hearings begin with the judge summarizing the case.[37] Each party is then given an opportunity to lay out its case. This is done in narrative form. For plaintiffs, it usually amounts to reading the text of the complaint aloud (often very quickly and in a monotone). Questions from the judge come both during and following the presentation. They focus on the documents that make up the transaction. Oral testimony is rare, though if multiple representatives are present, the effect may be the same, as the judge pinpoints his or her questions to take advantage of the expertise of those present.[38]

But the court will not take notice of any aspects of a transaction that cannot be verified through documentary evidence (art. 60, 1995 APK). Judges do not view this restriction as constraining, but rather as a guarantee of objectivity. They are uncomfortable with assessing witnesses' credibility, preferring to ground their decisions in analyses of documents.[39] They note that this facilitates impartial appellate review, because the appeals court will have exactly the same record before them as did the trial court. In their view, this policy has had the effect of disciplining firms to memorialize all aspects of transactions in written form, which can be useful out of court, as well as being essential in court.

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[37]Judges' presentations are usually concise, but not always. One Moscow judge painstakingly listed the documents contained in the case file, often reading portions of them aloud. Her summaries dragged on for more than 30 minutes, providing a contrast to the norm of brevity (less than 5 minutes) I observed in other cases.

[38]Testimony is permitted when the judge is convinced that there is no alternative (arts. 66-69, 1995 APK).

[39]Occasionally this leaves them scrambling to avoid unjust results, as in one of the cases I observed in Ekaterinburg. The plaintiff was a construction company that had ostensibly built a school. The school director had signed an affidavit stating that the construction had been completed and the construction company was suing to collect the balance owed. In the hearing, the director divulged that he had signed the affidavit under duress, that the construction company had told him that its workers would not return to finish the job unless the affidavit were signed. The plaintiff's lawyer urged the court to limit itself to the documentary evidence which said that the construction company had fulfilled its obligations under the contract. Technically the judge should have found in favor of the plaintiff but was reluctant to do so because she believed the school director. The judge postponed the case and urged the parties to make a joint inspection of the school to ascertain the true state of affairs and to reach a settlement. She was visibly nervous when waiting for the parties to show up for this second hearing because she realized that if they had not reached an accord, she would have no choice but to rule for the plaintiff. She was relieved to learn that they had settled the case among themselves and agreed to endorse the settlement.

The 1995 APK opened the door for a move toward greater adversarialism by giving the parties (or their representatives) the right to question one another. When sitting in on hearings, I noted that relatively few litigants took advantage of this opportunity, preferring instead to rely on the judge to ferret out the relevant information. For example, in only four of the twelve cases I observed in the Moscow *arbitrazh* court in which both sides were represented was there any questioning of one party by another and, even then, it was mostly ineffectual. Judges tend to compensate for unrepresented parties by explaining the legal implications of various developments. They will also take a more pro-active role in the questioning if it becomes obvious that the party is unable to articulate his or her claim in legal terms.

My observations led me to question whether lawyers represented a value added for enterprises. I was struck by how poorly prepared they were. They were often unable to answer basic questions about the underlying transaction. Perhaps this lack of knowledge can be explained by the fact that in-house enterprise lawyers are not part of the inner circle of management and only become involved in a transaction when it goes sour (Hendley, Murrell, and Ryterman 2001a).

More unsettling was the lack of basic legal knowledge among some.[40] The absence of any sense of shame on the part of lawyers whose ignorance had been exposed indicates a low level of professionalization among these in-house lawyers who inhabit the *arbitrazh* courts. Judges regularly decried the quality of lawyering, but felt they had no mechanism for remedying the situation. In theory they could fine those who showed up unprepared, but they resisted doing so because it only created more work for them.[41]

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[40]For example, a Moscow case I observed was quickly dismissed when it emerged that the defendant was located in another jurisdiction. Questioning from the judge revealed that the lawyer for the plaintiff was unaware of the 1995 APK provision ceding jurisdiction to the court closest to the defendant. More striking was the complete absence of embarrassment on the part of this lawyer for not knowing this elemental rule. The Moscow judge did not chastise the lawyer, though some judges are less charitable. One Ekaterinburg judge dressed down the lawyers in a case involving a debt owed to the phone company when they showed up without the relevant documents, telling them that such behavior helped explain why the state was always broke. A dispute like theirs ought to have taken just one hearing, but now they would all have to reassemble at additional expense.

[41]The 1995 APK authorizes fines (art. 54), but no judge in Saratov or Ekaterinburg imposed fines in any case brought in 2000 or 2001. Fines were imposed in only one case (out of more than 40,000 decided

As problematic as the lawyering seemed to be during my time in the *arbitrazh* courts in 2001, it was noticeably better than it had been only a few years earlier. Conversations revealed judges to be heartened by the improvements, though far from satisfied. Indeed, one Moscow judge waxed nostalgic about the days when she only had to worry about incompetence. She decried the emergence of the cunning lawyers who play the sort of multi-level games familiar to observers of the U.S. legal profession. Other judges criticized lawyers for behaving as quislings vis-a-vis their clients, *e.g.*, making legal arguments that are patently absurd at the insistence of their clients.

The quality of legal expertise provided in the cases in my database remains somewhat elusive because my information was gleaned from the case file and not from observing the proceedings.[42] What emerges inescapably from these case files is the ubiquity of representatives for plaintiffs. As Table 10 shows, 84 of the 100 plaintiffs sent someone to the *arbitrazh* court on their behalf. Whether these were lawyers or some other enterprise official is less clear. Judges consistently noted the presence or absence of representatives, but were less vigilant about indicating who they were. As might be expected, local plaintiffs were more likely to send someone than were plaintiffs from other regions.[43]

Because plaintiff representatives were so commonplace, isolating the effect they had is difficult. Their impact comes into sharper focus when we compare what happened in cases in which only the plaintiff had a representative and those in which both parties were represented (see Table 11). The category of cases in which the plaintiff got more than originally requested is most striking. The plaintiff was represented in all these cases and, in five out of six, was the sole advocate present. At the other end of the scale, among the cases in which the plaintiff ended up with less than desired, the influence of

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annually) in Moscow in 2000 and 2001. Unlike civil contempt in the U.S., where the judge can levy fines in the course of a trial, *arbitrazh* judges would have to hold a separate hearing with all the attendant paperwork. To already overworked judges, this seems to be more trouble than it is worth.

[42]*Arbitrazh* courts have no court reporters. Judges are obligated to prepare a summary (*protokol*) of the proceedings (art. 123, 1995 APK). Every judge I encountered complained bitterly about this duty, telling me of the difficulties of simultaneously presiding and taking notes. As a result, *protokoly* tend to be rather elliptical.

[43]While 88% of local plaintiffs sent representatives, only 50% of plaintiffs from other regions did so.

representatives is apparent. When only the petitioner was represented, the odds favored getting the amount requested rather than less. But when both sides have representation, getting less emerges as the most likely outcome. This suggests that being able to present their side, even when some liability is a foregone conclusion, benefits debtor-defendants. As I noted above, the presence of representatives tends to raise the quality of the opinion. In almost all (96%) of the cases in which I found a well-reasoned opinion, either one or both sides were represented at the hearing(s). Among a slight majority (12 of 23) of these cases, both sides had advocates. In the remainder (10 of 23), only the petitioner was represented.

Yet a majority (55%) of defendants did not participate in the cases filed against them. They neither filed responses of any kind to the complaint nor did they appear at the hearing. Indeed, if we exclude the cases that were dismissed or settled, the percentage rises even higher (53 of 86 or 62%). Both providing a written answer as well as participating in the hearing are optional for defendants.[44] Participation correlates with locale, though not as strongly as expected. Local debtor-defendants were only slightly more likely to take part than were those who had the added hardship of distance. Larger enterprises (open joint-stock companies) showed a greater tendency to participate in hearings than did other types of defendants. Interestingly, the propensity to send a representative was not linked with the presence of a legal department. State enterprises, which uniformly had legal departments, sent a representative in only one of six cases (8%), compared with large enterprises, where 11 of 20 (55%) sent representatives, even though not all of them had in-house legal departments. The amount at stake in the cases did not serve as much of a motivation for defendants. The odds of having a do-nothing defendant were about the same for all of the ruble-denominated cases. The two cases in which the damages were dollar-denominated were fully contested.

[44]Prior to 1995, the procedural rules imposed a greater burden on defendants, requiring both an answer and their presence before the court could address the substance of the dispute. In an effort to streamline the processing of cases, the 1995 revision of the APK allowed cases to proceed in the absence of defendants provided the file contained proof of notice (art. 115, 1995 APK). The preparation of written answers was left to the defendants' discretion. Not surprisingly, those who go to the trouble of preparing an answer usually show up for the hearing. Only in a few cases did defendants send answers but not representatives.

But ultimately the most important question is whether participating affects outcomes. Does it matter? The evidence is mixed. As Table 11 shows, do-nothing defendants were most likely to end up owing the amount originally set forth in the complaint, which is the most common result for the sample as a whole. The fact that participation by the defendant appeared to improve the chances of having the court reduce the petition is undercut by the similar result for having the court increase the amount, leaving open the question of whether participation is worth the time and effort.

Conclusions

Examining business litigation through the lens of case files brings certain trends into focus. Whether the picture that emerges is of a judicial institution adapting to changing conditions or one that is stuck in out-dated patterns of behavior is less clear. Optimists might point to the judges' willingness to rein in rapacious creditors by using a throw-away provision of the Civil Code to limit penalties and interest as an indicator of the possibility that the *arbitrazh* courts are emerging as an institution to which enterprise managers must pay attention. The increasing tendency of creditors to send representatives to hearings further buttresses this impression. Even though outcomes are dictated by the documentary evidence, my data confirm that having a representative to put them in context helps.

On the other hand, pessimists could make a persuasive case for stagnation by pointing to the slow pace at which judges have changed their style of opinion writing. More troubling from an institutional point of view is the dogged unwillingness of *arbitrazh* judges to transfer the burden of putting together and presenting a case onto the litigants, as mandated by the law since 1995. The Soviet-era image of the judge as one-half fact finder and dispute resolver, and one-half educator and social worker lives on among both judges and litigants. The optimist might counter by arguing that these negative tendencies simply reflect the fact that *arbitrazh* judges are overworked and so find it quicker to maintain control over the process rather than shifting responsibility onto the parties. Which interpretation of the story is more accurate will be clear as time passes.

My approach also highlights the fact that relatively few non-payments cases brought to the *arbitrazh* courts present any real dispute. Most of the cases in my database involve debtor-defendants who would have paid the sums owed if they had had sufficient resources. The predetermined nature of the outcome helps explain why a majority of the defendants failed to mount any kind of defense, though the data suggest that they might have helped themselves at the margins had they made some sort of effort.

The uncontroverted merit of the petitioners' claims gives rise to a puzzle. Why are these creditors and debtors unable to work out some sort of accommodation? What is it about these cases that distinguishes them from the many other cases that never make it to court? A few factors seem relevant. The petitioners in my cases did not view litigating as a vendetta. Almost none of them filed their claims as a means of signaling the defendant or other customers. Instead, they went to court to get their money back. Given that few of my cases involved trading partners with a long history, they may not have had other levers available to them and so relational strategies may have been fruitless. Going to court seems not to be connected to the same level of apprehension as we find in the U.S. and other adversarial systems, due in no small part to the lower costs (measured in both time and money) associated with the *arbitrazh* courts.

Bibliography

Arbitrazhnyi protsesual'nyi kodeks Rossiiskoi Federatsii [2002 APK]. *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*, special supplement to no. 8, 2002.

Arbitrazhnyi protsesual'nyi kodeks Rossiiskoi Federatsii [2000 Draft APK]. Mimeo. Draft of 31 July 2000.

Arbitrazhnyi protsesual'nyi kodeks Rossiiskoi Federatsii [1995 APK]. *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*, no. 6, pp. 25-79, 1995.

Aukutsionek, Sergei. "Industrial Barter in Russia." *Communist Economies and Economic Transformation*. 10:2, pp. 179-88, 1998.

Goskomstat. *Rossiiskii Statisticheskii Ezhegodnik*. Moscow, 2001.

Greif, Avner, and Eugene Kandel. "Contract Enforcement Institutions: Historical Perspectives and Current Status in Russia." In *Economic Transition in Eastern Europe and Russia*, pp. 291-321. Edited by Edward P. Lazar. Stanford: Hoover Press, 1995.

Hay, Jonathon, and Andrei Shleifer. "Private Enforcement of Public Laws: A Theory of Legal Reform." *American Economic Review*, 88:2, pp. 398-403, 1998.

Hendley, Kathryn. "Suing the State in Russia." *Post-Soviet Affairs*, vol. 18, no. 2, pp. 148-81, 2002.

Hendley, Kathryn. "Beyond the Tip of the Iceberg: Business Disputes in Russia." In *Assessing the Value of Law in Transition Economies*, pp. 20-55, edited by Peter Murrell, Ann Arbor: University of Michigan Press, 2001.

Hendley, Kathryn. "Growing Pains: Balancing Justice & Efficiency in the Russian Economic Courts," *Temple International and Comparative Law Journal*, vol. 12, no. 2, pp. 302-32, 1998a.

Hendley, Kathryn. "Remaking an Institution: The Transition in Russia from State *Arbitrazh* to *Arbitrazh* Courts." *American Journal of Comparative Law*, 46:1, pp. 93-127, 1998b.

Hendley, Kathryn. "The Role of Law in the Russian Economic Transition: Coping with the Unexpected in Contractual Relations." *Wisconsin International Law Journal*, vol. 14, no. 3, pp. 624-50, 1996.

Hendley, Kathryn, and Peter Murrell. "Dispute Resolution in Russia: A Regional Perspective." In *Unleashing Russia's Business Potential: Lessons from the Regions for Building Market Institutions*, edited by Harry G. Broadman. World Bank Discussion Paper No. 434, March 2002.

Hendley, Kathryn, Peter Murrell, and Randi Ryterman. "Agents of Change or Unchanging Agents? The Role of Lawyers within Russian Industrial Enterprises." *Law & Social Inquiry*, vol. 26, no. 3, pp. 685-715, 2001a.

Hendley, Kathryn, Peter Murrell, and Randi Ryterman. "Punitive Damages for Contractual Breaches in Comparative Perspective: The Use of Penalties by Russian Enterprises." *Wisconsin Law Review*, no. 3, pp. 639-79, 2001b.

Hendley, Kathryn, Peter Murrell, and Randi Ryterman. "Law, Relationships, and Private Enforcement: Transactional Strategies of Russian Enterprises." *Europe-Asia Studies*, 52:4, pp. 627-56, 2000.

Hendrix, Glenn P. "Business Litigation and Arbitration in Russia." *International Lawyer*, 31:4, pp. 1075-1103, 1997.

Johnson, Simon, John McMillan, and Christopher Woodruff. *Contract Enforcement in Transition*. Mimeo, 1999.

"O Nekotorykh Voprosakh Primeneniya Arbitrazhnymi Sudami Zakonodatel'stva Rossiiskoi Federatsii o Gosudarstvennoi Poshline," Postanovlenie Plenuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii, No. 6, March 20, 1997, *Rossiiskaya gazeta*, April 22, 1997.

"O Vnesenii Izmenenii i Dopolnenii v Zakon RF O Gosudarstvennoi Poshline,'" *Sobranie Zakonodatel'stva RF*, no. 1, 1996.

"Obzor Praktiki Primeneniya Arbitrazhnymi Sudame Stat'i 333 Grazhdanskogo Kodeksa Rossiiskoi Federatsii." *Vestnik Vysshego Arbitrazhnogo Suda*, no. 9, pp. 75-80.

Pomorski, Stanislaw. "State *Arbitrazh* in the U.S.S.R.: Development, Functions, Organization." *Rutgers-Camden Law Journal*, 9:1, pp. 61-116, 1977.

Postanovlenie No. 6/8 Plenuma Verkhovnogo Suda RF i Vysshego Arbitrazhnogo Suda RF "O Nekotorykh Voprosakh, Sviazannykh s Primeneniem Chasti Pervoi Grazhdanskogo Kodeksa RF." *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*, no. 9, pp. 5-20, 1996.

"Sudebno-arbitrazhnaya statistika." *Vestnik Vysshego Arbitrazhnogo Suda*, no. 4, pp. 20-29, 2002.

Yakovlev, V.F. *Kommentarii k Arbitrazhnomu Protsessual'nomu Kodeksu Rossiiskoi Federatsii*. 2d ed. Moscow: INFRA-M, 1999.

Yukov, M.K., and V.M. Sherstyuk, eds. *Komentarii k Federal'nomu Zakonu Rossiiskoi Federatsii: Ob Isponitel'nom Proizvodstve.'* Moscow: Gorodets, 2000.

Table 1: Percentage of Non-Payments Cases Decided by the *Arbitrazh* Courts in which the Plaintiff Prevailed Based on Caseload Data

(a) % of cases in which plaintiff wins

(b) average amount of petition in rubles (dollars)(1)

	2001		2000		1999	
	(a)	**(b)**	**(a)**	**(b)**	**(a)**	**(b)**
Moscow	71	4,427 ($148)	72	4,257 ($142)	73	2,651 ($88)
Ekaterinburg	68	1,141 ($38)	70	1,772 ($59)	77	542 ($18)
Saratov	82	406 ($14)	75	804 ($27)	85	408 ($14)

Source: Annual Reports on Activities, submitted by *arbitrazh* courts to the Higher *Arbitrazh* Court for 1999, 2000 and 2001.

(1) Assumes an exchange rate of 30 rubles to the dollar.

Table 2: Amounts of Petitions (percentage of cases in region in particular category)

	All	**Moscow**	**Ekaterinburg**	**Saratov**
Less than 5,000 rubles (~$167)	11	4 (12)	5 (15)	2 (6)
From 5,001 to 50,000 rubles (~$167 to $1,667)	34	13 (39)	11 (32)	10 (30)
From 50,000 to 500,000 rubles (~$1,667 to $16,667)	36	8 (24)	14 (41)	14 (42)
From 500,000 to 2.5 million rubles (~$16,667 to $83,333)	17	6 (18)	4 (12)	7 (21)
Dollar demands (ranging from $200,000 to over $4 million)	2	2 (6)	0	0

Table 3: Patterns of Litigation (percentage of cases brought by that category of plaintiff against various types of defendants)

D e f e n d a n t s

		Open joint-stock companies	Closed joint-stock companies	State-owned companies	State agencies	Agricultural firms	Individual entrepreneurs	Unknown
P l a i n t i f f s	**Open joint-stock companies**	8 (18)	24 (53)	0	6 (13)	3 (7)	2 (4)	2 (4)
	Closed joint-stock companies	7 (21)	20 (59)	2 (6)	1 (3)	0	2 (6)	2 (6)
	State-owned companies	0	4 (50)	3 (38)	1 (12)	0	0	0
	State agencies	1 (20)	0	1 (20)	3 (60)	0	0	0
	Agricultural firms	2 (100)	0	0	0	0	0	0
	Unknown	2	1	0	1	0	1	0

Table 4: Impact of the Organizational Structure of the Plaintiff on the Amounts of Petitions (percentage of cases brought by that type of organization with set amount of petition)

	Open joint-stock companies	Closed joint-stock companies	State-owned companies	State agencies	Agricul-tural firms	Unknown
Less than 5,000 rubles (~$167)	6 (13)	4 (12)	1 (12.5)	0	0	0
From 5,001 to 50,000 rubles (~$167 to $1,667)	14 (30)	14 (41)	2 (25)	2 (40)	0	2
From 50,000 to 500,000 rubles (~$1,667 to $16,667)	19 (41)	10 (29)	2 (25)	2 (40)	2 (100)	1
From 500,000 to 2.5 million rubles (~$16,667 to $83,333)	6 (13)	6 (18)	3 (37.5)	1 (20)	0	1
Dollar demand (ranging from $200,000 to over $4 million)	1 (2)	0	0	0	0	1

Table 5: Motivations for Initiating Litigation (percentage of enterprises with each response that had specified motivation)

Did the petitioner file the lawsuit in order to ... (1)	Yes	No
recover money owed to it?	87 (94)	4 (4)
get the judgment for accounting purposes?	35 (38)	56 (62)
get the judgment for tax purposes?	28 (31)	63 (69)
send a message to other customers that not paying is unacceptable?	13 (14)	78 (86)
punish the debtor because its behavior indicated an intolerable lack of respect?	7 (8)	84 (92)

(1) 11 enterprises refused to respond to the question.

Table 6: Extent to which Enterprises Were Motivated by Concerns Over Accounting or Tax Implications Broken Down by Region (percentage of enterprises in each region)

		Moscow	Ekaterinburg	Saratov
Was the lawsuit motivated by accounting concerns?				
	Yes	8 (26)	7 (23)	20 (67)
	No	23 (74)	23 (77)	10 (33)
Was the lawsuit motivated by tax concerns?				
	Yes	4 (13)	4 (13)	20 (67)
	No	27 (87)	26 (87)	10 (33)

Table 7: Case Outcomes (percentage of cases for region with given outcome)

	Less	Same	More	Settled	Dismissed
All	35 (36)	47 (48)	6 (6)	6 (6)	4 (4)
Moscow (1)	9 (29)	17 (55)	2 (3)	1 (3)	2 (6)
Ekaterinburg	12 (35)	16 (47)	3 (6)	2 (6)	1 (3)
Saratov	14 (42)	14 (42)	1 (3)	3 (9)	1 (3)

(1) The Moscow results exclude two cases for which information is unavailable.

Table 8: Average percent of the original petition awarded to the plaintiff by the court

	Within the sample	Results from official caseload statistics (1)		
		2001	2000	1999
All (2)	85.4	N/A	N/A	N/A
Moscow	90.1	35.5	54	46.5
Ekaterinburg	81.8	47	35.5	42
Saratov	84.2	77.5	61	52

(1) Source: Annual Reports on Activities, submitted by *arbitrazh* courts to the Higher *Arbitrazh* Court for 1999, 2000 and 2001.
(2) Published aggregate data do not detail the amounts of cases, either when filed or decided.

Table 9: Impact of Size of Petition on Outcome (percentage of cases of specified size with given outcome)(1)

	Less	Same	More
Less than 5,000 rubles (~$167)	2 (22)	5 (54)	2 (22)
From 5,001 to 50,000 rubles (~$167 to $1,667)	13 (42)	15 (48)	3 (10)
From 50,000 to 500,000 rubles (~$1,667 to $16,667)	11 (34)	20 (63)	1 (3)
More than 500,000 rubles (~$16,667)	8 (53)	7 (47)	0

(1) Excludes cases that were dismissed or settled.

Table 10: Presence of Representatives for Litigants at the Hearing(s)

	Defendant had representation at the hearing	Defendant had no representation at the hearing
Plaintiff had representation at the hearing	34	50
Plaintiff had no representation at the hearing	4	12

Table 11: Impact of representation (percentage of cases with given outcome that had specified level of representation)

	Less	Same	More	Settled	Dismissed
Both sides had representation at the hearing	18 (54)	10 (21)	1 (17)	2 (33)	0
Only the plaintiff had representation at the hearing	13 (38)	30 (64)	5 (83)	2 (33)	0
Only the defendant had representation at the hearing	1 (3)	1 (2)	0	2 (33)	0
Neither side had representation at the hearing	2 (6)	6 (13)	0	0	4 (100)