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Business Litigation and Arbitration in Russia

“[F]orget it. Don’t even think about getting justice in a Russian court.”¹

This assessment of Russian justice, offered by a Western mutual fund manager, is widely shared.² It is, in part, a legacy of the Soviet era, when the phrase “telephone justice” was coined to describe the practice by which Communist Party officials would contact judges and instruct them how to rule in particular cases. Courts and lawyers were held in low esteem.³ A Russian proverb cautions: “Don’t be afraid of the law, be afraid of the judge.”⁴

These perceptions are compounded by the Wild East image of post-Soviet Russia. In a recent California case, the plaintiff, an American company, urged the court to accept jurisdiction over a Russian defendant on the ground that its

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1. Mark Mobius, *quoted in* Elif Kaban, *Shares, Guns, and Bodyguards in Russia's Courts*, Reuters Newswire, May 14, 1995, *available in* LEXIS, News Library, Reuna File. Mr. Mobius manages several emerging market funds, including the Templeton Russia Fund.

2. *See, e.g.*, Michael Binyon, *Murmansk Corruption and Red Tape Put Nordic Business Links at Risk*, LONDON TIMES, Oct. 12, 1995, *available in* 1995 WL 7704524 (asserting, in connection with a Norwegian party’s ouster from a joint venture, that “[r]esort to the courts was impossible: there is virtually no enforceable contract law in Russia”).

3. *See, e.g.*, George Ginsbergs, *The Soviet Judicial Elite: Is It?*, 11 REV. SOCIALIST L. 293 (1985).

4. Yevgeny Yevtushenko, *Russia's Amateur Justice*, 25 STETSON L. REV. 1121, 1125 (1996).

representatives "would be killed if they attempted to litigate this case in Russia."⁵ Western observers also express concerns that Russian judges lack expertise in commercial matters and are susceptible to influence by bribery, physical intimidation, and xenophobia.⁶ A U.S. congressional committee heard testimony in 1996 that:

Soviet-era judges lack the training and legal knowledge to protect property rights and to adjudicate disputes between private citizens. Moreover, many of these judges are corrupt. (For example, in one town I heard of a sitting judge who was paid a monthly salary by a local law firm to settle cases in favor of that firm's clients).⁷

It is not surprising, therefore, that many Western companies doing business in Russia "will do everything possible" to avoid the Russian courts.⁸

Yet, whether they like it or not, foreign companies are increasingly finding themselves in Russian courts and arbitral tribunals,⁹ as in the following situations:

- A Scandinavian company obtains an arbitration award in London against a Russian company and seeks to have it recognized by a Russian court.¹⁰
- An American partner in a joint venture does not receive its share of the venture's profits. The joint venture agreement provides for arbitration by a Moscow-based arbitration tribunal.¹¹
- A Finnish construction firm performing work in Russia is assessed Russian social insurance/payroll taxes. The firm files suit in Russian court to challenge the assessment based upon the provisions of a tax treaty between the USSR and Finland.¹²
- Western investors holding 40 percent of the stock of one of Russia's largest steel manufacturing enterprises are denied the opportunity to nominate candi-

5. *Happy Merchant Ltd. v. Far Eastern Shipping Co.*, No. C-94-3927, 1995 WL 705131, at *4 (N.D. Cal. Nov. 8, 1995). The court expressed sympathy for the plaintiff, observing that it "may be correct in its assertion that Russia . . . [is] unwilling or unable to protect plaintiff's legal rights," but nevertheless declined jurisdiction. *Id.*

6. See, e.g., Simon Zinger, Comment, *Navigating the Russian Shipping Industry: Making the Most of International and Russian Law for Successful Arbitration Against Russian Parties*, 8 U.S.F. MAR. L.J. 141, 172 (1995).

7. *Rise of Int'l Organized Crime, Testimony before the House Int'l. Affairs Comm. by Ariel Cohen Ph.D.*, Jan. 31, 1996. available in 1996 WLF135369 (Jan. 1996) available in 1996 WL.

8. Jim Vail, *Arbitration Courts Grow Slowly*, MOSCOW TIMES, Sept. 24, 1996, available in LEXIS, News Library, Mostms File (quoting an unidentified Western lawyer).

9. *Western Law Firms Are Litigating More in Russian Courts*, 8 RUSS. & COMMONWEALTH BUS. L. REP., July 30, 1997, at 3, available in LEXIS, News Library, Rcbfr File.

10. Decision of Jan. 23, 1992 (*Frontline v. ExportKhleb*), Moscow City Court, translated in Y.B. COMM. ARB. at 710 (vol. XIX 1994).

11. *Myrick Int'l. v. Ammyinter*, Contritade AG, Ammophos, ICAC Case No. 286/1995 (Apr. 12, 1995). See discussion *infra* Part III.

12. See *Informatsionnoe Pis'mo Presidiuma VAC RF, Obzor praktiki rassmotreniia sporov po delam s uchastiem inostrannykh lits* [Informational Letter of Presidium of the Supreme Arbitrazh Court of the RF, Review: Practice in Examination of Disputes Regarding Matters with the Participation of Foreign Persons], issued Dec. 25, 1996, reprinted in KHOZIATSTVO I PRAVO [hereinafter KHOZ. I PRAVO], April 1997, 95, 107.

dates for the board of directors. They bring an action in the regional court for Lipetsk, located over 200 miles south of Moscow.¹³

Western parties are experiencing surprising success in such actions. Notwithstanding the acute problems afflicting the Russian legal system, to simply write off Russian courts and arbitral tribunals as avenues for enforcement of legal and contract rights is a mistake.

This article focuses on the types of litigation most likely to involve foreign companies doing business in Russia, including:

- (i) recognition of foreign arbitral awards in Russian courts;
- (ii) arbitration in the Moscow-based International Commercial Arbitration Court; and
- (iii) litigation in the Russian commercial courts (known as *arbitrazh* courts).

I. Recognition of Foreign Arbitral Awards

The USSR ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the "New York Convention," in 1960. After the breakup of the Soviet Union, the Russian Federation (RF) agreed to fulfill the USSR's international treaty obligations, including those under the New York Convention.

During the Soviet era, all foreign trade was controlled by the state, and arbitration awards against Soviet parties were invariably honored. Thus, the issue of whether a Soviet court would recognize a foreign arbitral award was never tested.¹⁴

With the breakup of the USSR, foreign trade became decentralized and voluntary compliance with arbitral awards by Russian entities was no longer assumed.¹⁵ Indeed, many Russian entities refused to comply with arbitral awards.¹⁶

There was speculation among international lawyers regarding whether Russian courts would actually recognize a foreign arbitral award.¹⁷ The first concrete affirmation came in January 1992, when a Moscow city court ordered enforcement of an award issued by an arbitration tribunal in London against a former Soviet foreign trade organization.¹⁸ In doing so, the court brushed aside the defendant's

13. John Thornhill, *Russian Court Backs Investors*, FIN. TIMES (London), May 22, 1997, available in 1997 WL 11029544.

14. Kaj Hober, *Arbitration in Moscow*, 3 ARB. INT'L 120, 152 (1987).

15. *Russia's Failure to Pay Western Firms Leads to Increased Use of Arbitration*, 3 BNA E. EUR. REP., Mar. 29, 1993, at 243.

16. *Company Case Study: Norwegians Get Their Money Back*, BUS. E. EUR., Aug. 23, 1993, available in LEXIS, Busfin Library, Abi File; Marina Shpagina, Vladimir Rudenko & Mikhail Solovyov, *Foreign Creditors: Only Live Debtor Is Good Debtor*, BIZEKON NEWS, July 12, 1993, available in LEXIS, World Library, Sbe File.

17. See, e.g., Volker Viechtbauer, *Arbitration in Russia*, 29 STAN. J. INT'L L. 355, 429-430 (1993). Skepticism on this point still abounds. See, e.g., Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1965 (1996) (asserting that "arbitral awards face little likelihood of successful enforcement if rendered against a Russian party").

18. *Frontline*, supra note 10.

argument that the New York Convention was not applicable because it was ratified by the USSR and not the RF.¹⁹

A succession of other Moscow city court decisions recognizing foreign arbitral awards quickly followed, including court orders in October 1992²⁰ and February 1993 upholding awards by the Arbitration Institute of the Stockholm Chamber of Commerce²¹ in favor of Scandinavian and Swiss companies, respectively. The latter decision was appealed to the Supreme Court of the RF, which affirmed the lower court's enforcement order.²²

Foreign legal observers drew additional comfort from the RF's enactment on July 7, 1993, of an international commercial arbitration statute based on the model arbitration act of the United Nations Commission on International Trade Law (UNCITRAL).²³ The law provides that "an . . . award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced,"²⁴ subject to the following limited exceptions, which track those set forth in the New York Convention:

- (i) one of the parties to the arbitration agreement was incompetent, or the agreement is invalid according to the governing law of the agreement or the law of the RF;
- (ii) one of the parties was not properly notified of the arbitration hearing or, for other reasons, could not present its case in the arbitration;
- (iii) the award resolves issues over which the arbitrator(s) had no jurisdiction under the arbitration agreement; or
- (iv) the panel of arbitrators or procedures were not in accordance with the arbitration agreement.²⁵

In addition, enforcement may be refused if it would be contrary to RF public policy or if the subject matter of the dispute cannot be settled by arbitration under RF law.²⁶

In theory, the foregoing exceptions, particularly the public policy exception, might appear to offer a Russian court considerable leeway in refusing to recognize

19. *Id.*

20. Decision of Oct. 12, 1992, Moscow City Court, *translated in* Y.B. COM. ARB. 666 (vol. XXI 1996).

21. For Western parties, Stockholm has been the venue of choice for East-West arbitrations since at least 1977, when the American Arbitration Association (AAA) and the USSR Chamber of Commerce and Industry agreed upon a model arbitration clause providing for arbitration of US-Soviet trade disputes in Sweden. In March 1993 the AAA and the RF Chamber of Commerce and Industry signed a new Optional Clause Agreement, which also provides for arbitration in Sweden. The recommended arbitration clause is reproduced in 3 *WORLD ARB. REP.* 3313 (1993). For an insightful discussion of the Stockholm Chamber's Arbitration Institute, see Yves Dezalay & Bryant G. Garth, *DEALING IN VIRTUE* 182-196 (1996).

22. Decision of April 28, 1993 (No. 8-3g 93-17), Supreme Court of the RF, *translated in* Y.B. COM. ARB. 668 (Vol. XXI 1996).

23. *Zakon o mezhdunarodnom kommercheskom arbitrazhe* [Law on International Commercial Arbitration], *Vedomosti Fed. Sobr. RF*, 1993, No. 32, Item No. 1240 [hereinafter *Int'l Arb. Law*].

24. *Id.* art. 35.

25. *Id.* art. 36(1).

26. *Id.* art. 36(2).

an award. As observed by one commentator: "A Russian court, especially at the local level, may be unwilling to subject a Russian party to fines which result in insolvency and may define public policy to shield the Russian party from paying a foreign award."²⁷

Yet, most countries that have ratified the New York Convention read the public policy exception narrowly.²⁸ It is unclear whether Russian courts will follow a similar approach. One encouraging sign, however, is that since the enactment of the July 1993 law, Russian courts continue to recognize international arbitral awards in favor of foreign parties.²⁹ By one assessment in early 1996, "[a]t least forty foreign arbitration awards ha[d] been successfully submitted to Russian courts for enforcement."³⁰ Indeed, with one exception (the *Myrick International* case, discussed below), it does not appear that a Russian court has ever refused to recognize an arbitral award in favor of a foreign party.³¹

II. The International Commercial Arbitration Court

In negotiating arbitration provisions with Russian parties, Western firms generally seek to designate a third country as the arbitral forum.³² Russian parties, on the other hand, are becoming increasingly insistent upon designating the Moscow-based International Commercial Arbitration Court (ICAC), which is attached to the Chamber of Commerce and Industry of the RF.³³ This insistence is driven,

27. Zinger, *supra* note 6, at 171. Such concerns are not unique to Russia. See, e.g., Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 FORDHAM INT'L L.J. 920, 954 (1993).

28. See generally Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 880 (1996). Courts in the United States have taken the position that the "public policy limitation on the Convention is to be construed narrowly [and] to be applied only where enforcement would violate the forum state's most basic notions of morality and justice." *Fotochrome, Inc. v. Copal Co., Ltd.*, 517 F.2d 512 (2d Cir. 1975).

29. See C.M. Kudriashov, *Institutsionnyi arbitrazh v Stokgolme [Institutional Arbitration in Stockholm]*, 3 MOSKOVSKII ZHURNAL MEZHDUNARODNOVO PRAVO 101, 109 (1995) (discussing a December 10, 1993, Moscow City Court ruling enforcing an award issued by the Stockholm Chamber of Commerce); Olin Wethington & Peter Lichtenbaum, *Does the Bear Dance to the Arbitrator's Tune? Russian Courts' Enforcement of Foreign Arbitral Awards*, 4 E./W. EXEC. GUIDE, at 3-4 (1994) (discussing a March 28, 1994, Moscow City Court decision enforcing a Stockholm Chamber award).

30. W.E. Butler, *Techniques of Law Reform in the CIS*, 1 SUDEBNIK 9, 29 n. 11 (1996).

31. See Kaj Hober, *Enforcing Foreign Arbitral Awards in Russia*, 6 RUSS. & COMMONWEALTH BUS. L. REP., 1, 9 (1995); Wethington & Lichtenbaum, *supra* note 29, at 4.

32. For a discussion of arbitral fora catering to Russia-related disputes, see Glenn P. Hendrix, *Finland as an Alternative Arbitration Forum*, 6 RUSS. & COMMONWEALTH BUS. L. REP., 1 (June 22, 1995).

33. In addition to the ICAC, there are numerous arbitral bodies in Russia attached to commodity and stock exchanges, city chambers of commerce, and trade associations (such as the Association of Russian Banks). These bodies are oriented toward arbitrating disputes between wholly Russian entities, however, and are beyond the scope of this article. There is also a Maritime Arbitration Commission attached to the RF Chamber, with a history dating back to 1930. An international commercial arbitration court was recently formed in St. Petersburg. See Eric Schwartz, *Local Arbitra-*

in part, by the expense of arbitrating in the major Western European arbitral institutions.³⁴

The number of cases filed annually with the ICAC mushroomed from less than 100 in 1990 to approximately 500 in 1992, and has stayed at roughly that level since then.³⁵ The ICAC handles more disputes involving Russian parties than any competing arbitral institution, including the Stockholm Chamber, which reportedly conducts 50 to 100 Russia-related arbitrations per year.³⁶

American companies are arbitrating before the ICAC with increasing frequency, with five U.S. companies involved in cases in 1993 (three as claimants and two as respondents, with a total of \$8 million in dispute); eighteen in 1994 (fifteen as claimants and three as respondents, with a total of \$100 million in dispute);³⁷ and thirty-four in 1995 (two as claimants and thirty-two as respondents, with approximately \$115 million in dispute). Through the first ten months of 1996, there were thirty-four cases filed in which U.S. companies were involved (nine as claimants and twenty-five as respondents, with approximately \$31 million in dispute).³⁸

The ICAC is the successor to the Moscow-based Foreign Trade Arbitration Commission (FTAC), which was founded in 1932 in connection with the Soviet Union's effort to boost its image as a reliable trading partner. Consistent with that goal, the FTAC sought to avoid decisions that might be perceived in the international arena as politically motivated,³⁹ and secured grudging respect from Western jurists as a generally unbiased tribunal.⁴⁰

The ICAC itself is also widely recognized for impartial decision making. In

tion Court Coming To Life, ST. PETERSBURG TIMES (Russia) (May 24, 1997) <<http://www.spb.su/times/current/local-arb.html>>. It is too early to determine whether the St. Petersburg court will be a serious rival to the ICAC.

34. *Russia's Failure to Pay Western Firms*, *supra* note 15, at 244; Olga Zimenkova & Alla Kazakina, *New Rules Prompt Rethinking: Is It Time to Arbitrate in Russia?*, 6 SEEL 1, 5 (1995).

35. I. Zikin, *Spory s uchastiem predpriatii s inostrannymi investitsiami v praktike Mezhdunarodno-kommercheskovo arbitrazhnovo suda pri TPP RF* [Disputes Involving Foreign Investors in the Practice of the CCI International Commercial Arbitration Court], KHOZ. I PRAVO, May 1995, at 99.

36. Rachel Katz, *Petersburg to Get Home Court*, MOSCOW TIMES, Sept. 10, 1996, at 3.

37. U.S. Embassy (Moscow), *Commercial Dispute Settlement in Russia and the Role of the International Commercial Arbitration Court*, Feb. 21, 1995, available in LEXIS, World Library.

38. Letter from Alexander Komarov, President, ICAC, to Glenn P. Hendrix (Oct. 31, 1996).

39. See Susan E. Samuels, Note, *The Soviet Position on International Arbitration: A Wealth of Choices or Choices for the Wealthy*, 26 VA. J. INT'L. L. 417, 432 (1986). The FTAC's most notorious misstep was the decision in *Jordan Investments, Ltd. v. Soiuznefteksport* (Israel v. USSR), award of June 19, 1958, reprinted in Martin Domke, *The Israeli-Soviet Oil Arbitration*, 53 AM. J. INT'L L. 787, 800 (1959). See Harold J. Berman, *Force Majeure and the Denial of an Export License Under Soviet Law: A Comment on Jordan Investments Ltd. v. Soiuznefteksport*, 73 HARV. L. REV. 1128, 1144 (1960).

40. See, e.g., Thomas M. Bell, Note, *Resolution of International Trade Disputes: An Analysis of the Soviet Foreign Trade Arbitration Commission's Decisions Concerning the Doctrine of Force Majeure as an Excuse to the Performance of Private International Trade Agreements*, 10 MD. J. INT'L L. & TRADE 135 (1986); Harold J. Berman & George L. Bustin, *The Soviet System of Foreign Trade*, 7 LAW & POL'Y INT'L BUS. 987, 1019-26 (1975). But see Pat K. Chew, *A Procedural and Substantive Analysis of the Fairness of Chinese and Soviet Foreign Trade Arbitrations*, 21 TEX. INT'L L. J. 291 (1986).

compelling an American party to comply with an agreement to arbitrate before the ICAC, a U.S. district court recently observed that "there is no reason to believe that the Chamber of Commerce in Moscow cannot provide fair and impartial justice to these litigants."⁴¹

The ICAC's jurisdiction extends beyond matters which would ordinarily be considered "international," and is specifically defined to include "disputes arising between enterprises with foreign investments and international associations, and organizations, set up in the territory of the Russian Federation, as well as disputes between their participants, and also disputes between them and other subjects of the law of the Russian Federation."⁴² Thus, a dispute between two Russian legal entities, one of which has foreign investors, can be arbitrated before the ICAC even if the dispute pertains solely to matters occurring within Russia.⁴³ In that regard, the ICAC offers an alternative Russian forum to foreign parties wishing to avoid the Russian court system.

The ICAC's fees compare favorably to those of the major European arbitral institutions. The effective rate of the fee declines with the size of the claim. For a claim valued at \$1 million, for instance, the fee would be \$16,240. For claims above \$10 million, the fee equals \$39,440 plus 0.1 percent of the portion of the claim over \$10 million.⁴⁴ The arbitration fee not only remunerates the ICAC, but also covers the arbitrators' and reporter's fees.⁴⁵ The fee is reduced by 30 percent if the case is considered by a single arbitrator.⁴⁶

Effective May 1, 1995, the ICAC amended its rules of procedure to address certain long-standing concerns of foreign legal observers.⁴⁷ The rules are based

41. *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1242 (S.D.N.Y. 1992), *appeal dismissed*, 984 F.2d 58 (2d Cir. 1993).

42. Rules of the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry [hereinafter ICAC Rules], art. 1, § 1, ¶ 2. An English translation of the ICAC rules and arbitrator list may be obtained at the following address: 6 Ilyinka Street, Moscow 103012, RF, Facsimile number: 7 095 929 03 34.

43. The breadth of the ICAC's jurisdiction tracks the broad scope of the RF International Arbitration Law. See Int'l Arb. Law, *supra* note 23, art. 1, § 2. The President of the ICAC, Alexander S. Komarov, notes that both the RF International Arbitration Law and the ICAC Rules cover certain "disputes which can be regarded as 'internal' rather than of an international nature." Alexander S. Komarov, *Russian Federation Legislation on International Commercial Arbitration*, ICC INT'L CT. COMM. ARB. BULL. 117 (1994).

44. ICAC Rules (Fee Schedule Appendix), § 3.

45. *Id.* To put the ICAC's fees in perspective, the Stockholm Arbitration Institute's fee for the administration of a \$1 million claim would be approximately \$7700 (at December 1996 exchange rates); however, that amount is exclusive of the compensation paid to the arbitrators themselves. See Rules of the Arbitration Institute of the Stockholm Chamber of Commerce app. § 1. The Stockholm Arbitration Institute's fee, together with the arbitrators' fees, will probably exceed the ICAC fee in most cases.

46. ICAC Rules (Fee Schedule Appendix), § 4.

47. For an article by the President of the ICAC discussing the new rules, see Alexander S. Komarov, *International Commercial Arbitration in Russia as a Means of Resolving International Economic Disputes*, 22 REV. CENTRAL & E. EUR. L. 19 (1996). An ICAC arbitrator, Professor Olga Zimenkova, has also co-authored an article in English on the new rules. See Zimenkova & Kazakina, *supra* note 34.

largely upon the UNCITRAL model rules and allow flexibility with respect to choice-of-law,⁴⁸ the language⁴⁹ and the location⁵⁰ of the hearing, and other issues.

The most important change effected by the new rules concerns the pool of available arbitrators. Prior to May 1, 1995, parties were restricted to selecting arbitrators from a list maintained by the court. All of the arbitrators on the FTAC's list were Soviet. Likewise, until recently, all of those on the ICAC's list were Russian.⁵¹ This led many observers to question the court's ability to render impartial decisions.⁵²

The new rules allow parties to select arbitrators (including non-Russians) who are not on the ICAC's list, although that right is subject to certain limitations. For instance, if the parties' agreement provides for the arbitration to be conducted by a panel of three or more arbitrators, the president of the panel must be selected from the list.⁵³ The ICAC also makes an appointment from the list if the agreement provides for a single arbitrator and the parties fail to select a mutually acceptable candidate.⁵⁴ Moreover, the list itself was recently expanded to include non-Russians. As of October 1996, seventeen nationalities (including at least two Americans) were represented on the list.

These changes confirm the ICAC's emergence as a credible arbitral institution. The ICAC deserves a look from Western companies seeking a forum for the resolution of Russia-related disputes.

III. The *Myrick International Case*

It is generally assumed that one advantage of ICAC arbitration is the greater ease of enforcing an award in the Russian courts.⁵⁵ Nevertheless, to the author's knowledge, the only instance in which a Russian court refused to enforce an arbitral award in favor of a foreign party involved a ruling by the ICAC (although the court's refusal to enforce the award was overturned on appeal). That case serves as an interesting case study of the use of Russian legal institutions to enforce contract rights.

The case involved a dispute between a U.S. company (Myrick International Ltd., or MIL), its Russian joint venture partner (Ammophos), and the venture

48. ICAC Rules, § 13. See also Int'l Arb. Law, art. 28.

49. ICAC Rules, § 10. Over half of the 109 arbitrators on the ICAC's arbitrator list report they speak English.

50. *Id.* at § 7.

51. Viechtbauer, *supra* note 17, at 370.

52. See, e.g., WILLIAM E. BUTLER, ARBITRATION IN THE SOVIET UNION 13 (1989); Alan Koman, *Arbitrating Among the Russians? Sixteen Issues a Western Party Must Consider*, 42 FEDERAL LAWYER 26, 28 (1995).

53. ICAC Rules, § 2.3.

54. *Id.* at § 21.

55. Such awards were, in fact, enforced by Russian courts in several instances. See, e.g., *Company Case Study*, *supra* note 16.

entity itself (Ammyinter).⁵⁶ The venture operated a fertilizer production plant in Cherepovets, a city of 320,000 located 250 miles north of Moscow. MIL was denied its share of the venture's 1991 profits and initiated arbitration proceedings with the ICAC in August 1993.

The arbitration panel was comprised of three Russians (two law professors and one practicing lawyer). Ammyinter presented a colorable argument in defense of withholding the dividend, contending that MIL had failed to make its capital contribution (primarily consisting of equipment) to the venture prior to December 31, 1991, as required by the joint venture agreement. As a result, the venture lost Russian tax benefits for 1991 that were available to entities with greater than 30 percent foreign investment. Nevertheless, the ICAC panel rejected Ammyinter's contentions (and implicitly disagreed with the findings of the Russian tax authorities), holding that the contribution of equipment was effective when the equipment was shipped from the United States (in 1991), not when it was released from customs in Russia (in 1992).

ICAC rules provide that an award shall be rendered "if possible" within 180 days of the appointment of the arbitrator(s).⁵⁷ Even so, the proceedings in the *MIL* case were somewhat prolonged, partly because the panel postponed a ruling pending the Tax Inspectorate's final determination regarding Ammyinter's tax liability, and also because Ammyinter delayed producing financial records requested by the panel.⁵⁸ The ICAC award was issued in April 1995, eighteen months after the proceeding commenced.

The Russian party refused to comply with the ICAC award, and MIL sought to have it enforced in the court of general jurisdiction in Cherepovets.⁵⁹ The court, without referring to the New York Convention or the RF International Arbitration Law, refused to enforce the award. Both MIL and its Russian lawyer attribute the court's refusal to enforce the award to Ammophos' influence in Cherepovets. Ammophos is one of Cherepovets' largest employers and its general director was, at the time, a deputy in the Russian parliament.

MIL appealed to the regional appellate court in the nearby city of Vologda. In August 1996 that court ordered the Cherepovets court to issue a writ of execu-

56. This discussion of the *MIL* case is based upon the ICAC decision; see Myrick International Ltd. v. Ammyinter, Contitrade AG, Ammophos, ICAC Case No. 286/1995 (Apr. 12, 1995), and a series of telephone interviews in October and December 1996 with John Myrick (MIL's sole shareholder) and MIL's counsel, Alexander Pipia.

57. ICAC Rules, § 11.

58. Pursuant to the RF International Arbitration Law, art. 25, in the event a party fails to produce requested documentary evidence, the panel has discretion to either continue the hearing or to make an award based on evidence before it.

59. An action to enforce an international arbitral award must be filed at the debtor's residence. See Ukaz prezidiuma Verkhovnoy Sovieta SSSR, O priznanii i ispolnenii v SSSR reshenii inostrannykh sudov i arbitrazhei [Decree on Recognition and Execution of Decisions of Foreign Courts and Arbitration Tribunals in the USSR], Vedomosti SSSR, 1988, No. 26, Item No. 427, ¶ 2 [hereinafter 1988 Arbitration Decree], translated in BUTLER, *supra* note 52.

tion. As of this article's completion, however, MIL had yet to collect any money. During the three years in which the case was pending, the venture's assets were siphoned to other entities.

The *MIL* case illustrates many of the difficulties of arbitrating or litigating disputes in Russia, particularly those involved in collecting a monetary award.⁶⁰ The case also demonstrates that not all Russian courts will necessarily be as accommodating as the Moscow city courts in enforcing arbitral awards in favor of non-Russian parties. Nevertheless, MIL's victory before the ICAC, and the Vologda court's recognition of the award, also shows the possibility for a foreign party to vindicate its rights in Russian legal institutions.

IV. The *Arbitrazh* Courts

Given a choice between arbitration and litigation in a Russian court, arbitration is the preferred alternative in most cases. In certain situations, however, arbitration may not be possible. Unless the parties to a dispute agree to arbitrate, or previously provided for arbitration in a contract between them, an arbitration tribunal does not have jurisdiction. In addition, certain disputes are simply not arbitrable, including, for instance, disputes with government authorities, such as tax officials. In other instances, a party may require relief that an arbitral body cannot provide, such as a preliminary injunction or attachment of property.

A. JURISDICTION OVER COMMERCIAL DISPUTES

Russia has a system of specialized commercial courts, known as *arbitrazh* courts. *Arbitrazh* is often translated into English as arbitration, which is somewhat misleading. Although *arbitrazh*⁶¹ courts in a few regions are conducting an experiment with certain characteristics of arbitration,⁶² generally speaking, the *arbitrazh* courts differ from arbitral tribunals in several important respects: *arbitrazh* court judges are government employees; the parties do not select the judge (or judges, in cases requiring collegial decision making); the court's jurisdiction over a particular dispute is generally governed by law, rather than by agreement of the parties; the court may not act *ex aequo et bono*, but rather must resolve disputes according to substantive law; and the court's decision is subject to review for substantive errors by higher courts.

The jurisdiction of the *arbitrazh* courts is defined in part by the juridical status of the parties. With few exceptions, recourse to the courts is available only to legal entities and to physical persons having formally registered with the appropriate

60. For further discussion on difficulties with enforcement, see *infra* Part IV.H.

61. In order to avoid confusion, the author uses the term *arbitrazh* rather than its literal English counterpart, arbitration, when referring to the courts. A true arbitral tribunal is referred to in Russian as a *treteiskii sud*.

62. See discussion at *infra* Part IV.E.

authorities as entrepreneurs.⁶³ With respect to such parties, the jurisdiction of the courts extends to all contract and property disputes, bankruptcy cases, cases concerning injury to business reputation, and review of state administrative acts in the economic sphere, such as licensing or registration decisions, tax matters, government liability in tort, confiscation of land or other valuables, and imposition of fines and other penalties.⁶⁴ In short, the *arbitrazh* courts are responsible for the "protection of violated or contested rights and legitimate interests" of legal entities and registered entrepreneurs "in the field of entrepreneurial and other business activity."⁶⁵

The delimitation of the courts' jurisdiction according to the status of the parties (*i.e.*, legal entities and registered entrepreneurs) is founded more on historical circumstance than any policy rationale. As discussed in the following section of this article, the *arbitrazh* courts are the successors to Soviet-era institutions charged with adjudicating economic disputes between state enterprises. In that capacity, they had no responsibility for disputes involving individuals.

Prior to July 1, 1995, the *arbitrazh* courts did not have jurisdiction over foreign entities, or even Russian entities with foreign investment, unless all parties to the dispute acquiesced.⁶⁶ Cognizance over disputes with foreign parties was vested in the courts of general jurisdiction (referred to in this article as general courts).⁶⁷ *Arbitrazh* court jurisdiction was extended to foreign entities and entrepreneurs with the enactment of a new Code of *Arbitrazh* Procedure in 1995.⁶⁸ This development was welcomed by Western lawyers because the general courts had little expertise in handling commercial disputes.⁶⁹

63. Arbitrazhnyi protsessualnyi kodeks RF [Code of *Arbitrazh* Procedure of the RF], Sobr. Zakonod. RF, 1995, No. 19, Item No. 1709 [hereinafter 1995 CAP], art. 22. Although the *arbitrazh* courts have jurisdiction over physical persons not registered as entrepreneurs in certain situations (*see id.* art. 22.4), the precise extent of that jurisdiction is a subject of some debate in Russian legal circles. *See, e.g.*, Boris Polonski, *Nekotorie tonkosti arbitrazhnovo protsessa* [Some Fine Points of *Arbitrazh* Process], 6 ZAKON, June 1996, at 119; C. Kaiurov, *Individualnyi predprinimatel v arbitrazhnom protsesse* [The Individual Entrepreneur in the *Arbitrazh* Process], KHOZ. I PRAVO, Sept. 1996, at 143.

64. The authority of *arbitrazh* courts with respect to administrative decisions extends only to executive acts, not normative (*i.e.*, legislative) acts, which may be challenged only in the RF Constitutional Court. *See* Ob arbitrazhnom sudakh v RF [RF Federal Constitutional Law, On *Arbitrazh* Courts], Sobr. Zakonod. RF, 1995, No. 18, Item No. 1589 [hereinafter 1995 *Arbitrazh* Law], art. 10(4).

65. *Id.* art. 5.

66. Arbitrazhnyi protsessualnyi kodeks RF [RF Code of *Arbitrazh* Procedure], Vedomosti RF, 1992, No. 16, Item No. 836 [hereinafter "1992 CAP"], art. 20. *See also* Postanovlenie No. 12/12 Plenuma Verkhovnoyo Suda RF i Plenuma Vysshevo Arbitrazhnovo Suda RF, O nekotorykh voprosakh podvedomstvennosti del po sudam i arbitrazhnym sudam [On Certain Matters Regarding the Jurisdiction of the General Courts and *Arbitrazh* Courts], VESTNIK VYSSHEVO ARBITRAZHNOVO SUDA [hereinafter VESTN. VYSSH. ARB. SUDA RF], 1992, No. 1, p. 84.

67. GPK RF [Code of Civil Procedure], art. 25.

68. 1995 CAP arts. 22.6, 210, 212.

69. Lev Simkim & Ted Smith, *Foreign Investors Win Greater Access to Arbitration Courts*, 5 E./W. EXEC. GUIDE, Aug. 1995, at 19; Eric Anderson, *Arbitration Courts Given Jurisdiction Over Many Commercial Issues*, 5 E./W. EXEC. GUIDE, Dec. 1995, at 26.

There is some question whether the general courts retained concurrent jurisdiction over disputes involving foreign parties, including foreign legal entities and persons registered as entrepreneurs. This possibility arises because the statutory provisions conferring general court jurisdiction over foreign parties have not been repealed.⁷⁰ Nevertheless, most commentators (including Supreme *Arbitrazh* Court justices who have addressed the topic) believe that concurrent jurisdiction with respect to legal entities and registered entrepreneurs is not contemplated.⁷¹

The general courts continue to have responsibility for enforcing foreign arbitral awards. The International Arbitration Law states that an application to enforce an award shall be made to the "competent court,"⁷² without defining which court, general or *arbitrazh*. However, Soviet-era laws (which continue in effect unless they conflict with Russian Federation laws) provide that jurisdiction over the recognition and enforcement of international arbitral awards rests with the general courts.⁷³

Notwithstanding such jurisdictional anomalies, most commercial litigation is conducted in the *arbitrazh* courts. Accordingly, these courts are the focus of the remainder of this article.

B. ARBITRAZH IN THE SOVIET PERIOD

The origins of the *arbitrazh* courts lie in the Soviet centrally planned economy. Soviet *arbitrazh* bodies served to resolve economic contract disputes between state enterprises, which even in the USSR exercised some degree of autonomy. Although the state owned all means of production, the Communist leadership recognized the need to allow enterprises to exercise operational management over certain state property. State enterprises were also juridical persons capable of concluding contracts. Their economic independence was sharply circumscribed, however, by the administrative-command system, which centralized economic decision making through the national economic plan.⁷⁴

Thus, the contract disputes resolved through Soviet *arbitrazh* were, in certain

70. See C. Zagrebnev, *Podvedomstvennost sporov s uchastiem inostrannykh investorov-iuridicheskikh lits* [Jurisdiction of Disputes with the Participation of Foreign Persons], KHOZ. I PRAVO, Aug. 1996, at 85.

71. See, e.g., *Arbitrazhnyi sud Rossii: Opyt i problemy realizatsii novovo zakonodatelstva* ("kruglyi stol" zhurnal) [The Russian Arbitrazh Court: Experience and Problems in the Realization of the New Legislation (Journal Roundtable)], 7 GOS. I PRAVO 3, 7, 6, 27 (1995) (roundtable discussion of *arbitrazh* court judges); Anderson, *supra* note 69, at 26.

72. Int'l Arb. Law, art. 35.

73. See 1988 Arbitration Decree, *supra* note 58, ¶ 2; GPK RF, arts. 338 and 437. The Supreme *Arbitrazh* Court has confirmed that international arbitration awards, including those of the ICAC, "shall be recognized and executed" by the general courts. See Informational Letter of the Supreme *Arbitrazh* Court of the RF No. S-13/OSZ-268 regarding Law on International Commercial Arbitration, issued Aug. 25, 1993, VESTN. VYSSH. ARB. SUDA RF, 1993, No. 10.

74. See generally Olympiad S. Ioffe, *Law and Economy in the USSR*, 95 HARV. L. REV. 1591, 1613-1617 (1982).

respects, different from those arising in a market economy.⁷⁵ For instance, a significant percentage of *arbitrazh* cases consisted of pre-contract disputes, in which an enterprise filed a claim to compel another to enter into a contract (most often a supply agreement) in order to enable the enterprise to satisfy its obligations under the plan.⁷⁶

Despite their judicial function, *arbitrazh* institutions were not considered courts. *Arbitrazh* personnel were "civil servants dependent on and subordinate to the executive branch of government."⁷⁷ They did not enjoy the theoretical independence of general court judges.

In addition to resolving economic contract disputes, *arbitrazh* also served to improve the functioning of the economy by investigating shortcomings in the economic activity of enterprises and the planning system. *Arbitrazh* personnel (known in the Soviet period as arbiters) were responsible for notifying an enterprise's management or the appropriate government ministry of defects in economic performance, suggesting methods of correction, and, if necessary, recommending to the appropriate authorities the imposition of disciplinary, financial, or penal sanctions.⁷⁸

Even in their adjudicative role, arbiters focused less upon the interests of the parties to a dispute than upon the functioning of the economy as a whole. The primary concern of arbiters, particularly in the early Soviet period, was economic expediency, rather than the rights or relative fault of the parties.

Consequently, *arbitrazh* proceedings were informal and speedy. Arbiters were required to render a decision in pre-contract disputes within fifteen days of a suit being filed and, in all other disputes, within thirty days of filing.⁷⁹ Arbiters were not bound by formal rules of evidence.⁸⁰

Telephone justice was not commonly practiced in *arbitrazh* proceedings. Based upon extensive interviews in the early 1980s of Soviet lawyers and arbiters who

75. Stanislav Pomorski, *State Arbitrazh in the USSR: Development, Functions, Organization*, 9 RUT.-CAM. L.J. 61, 67-68 (1977).

76. LOUISE SHELLEY, *LAWYERS IN SOVIET WORK LIFE* 58-61 (1984).

77. Pomorski, *supra* note 75, at 110.

78. The nonjudicial nature of this function is illustrated by the following description by one arbiter of her work in the mid-1980s:

"When the collective farms raised potatoes, vegetables, and fruit, . . . there was a colossal quantity lost on the way from the field to the store . . . For a year we tried to follow this small chain, where is the potato? Where has it disappeared to? . . . A slogan was even developed: 'For the potato without nitrates and for socialism without embezzlers of public funds.'"

Phoebe W. Brown, *Russian Women Lawyers in Post-Soviet Russia*, 12 GA. ST. U. L. REV. 381, 410 (1996).

79. Pomorski, *supra* note 75, at 100, n. 228.

80. *Id.* at 100. There were, however, rules setting forth general requirements that evidence be relevant, as well as provisions concerning the burden of proof, taking notice of commonly known facts (similar to judicial notice), and other broad principles. K. IULDELSON, *ARBITRAZH V SSSR [ARBITRAZH IN THE USSR]*, 99-113 (1984).

had emigrated to the United States and to Israel, Louise Shelley concluded that arbiters were more autonomous than general court judges:

Judges seek to pronounce politically correct decisions, whereas [arbiters] strive to reach correct legal decisions. Judges cannot be impartial figures in the court process but must favor the government's side in both civil and criminal cases. . . . [Arbiters] can be more autonomous because they are not forced to choose between the government and a private individual. Only rarely does the [Communist] Party interfere in the arbitra[zh] process.⁸¹

As compared to the general courts, moreover, *arbitrazh* was relatively free of corruption, in part because the stakes in an economic dispute between state-owned enterprises were generally lower than in, say, a criminal case, in which defendants would be willing to pay large sums of money to shorten their prison terms.⁸² In addition, arbiters were less likely than general court judges to be members of the Communist Party and, therefore, lacked the Party protection that helped shield members of the judiciary from prosecution.⁸³ Yet, the relative absence of corruption among arbiters was not entirely a function of lack of opportunity. Shelley's interviewees also indicated that bribery was particularly restrained in the major cities, where decisions appearing to be influenced by corruption were readily detected. As stated by one former arbiter: "The most that I could do for an organization that offered me a bribe was to find a loophole to aid their case."⁸⁴

The consensus of most Western scholars, including those with a jaundiced view of Soviet justice, was that the *arbitrazh* system manifested "continuously growing concern about the protection of the rights of enterprises and associations, the increased role of economic contracts, and observance of legality in the national economy."⁸⁵ As noted by Professor Hazard, this evolution was driven by the pragmatic recognition that "the administration of the economy improves as directors sense that . . . there will be an honest attempt made by the [arbiters] to determine fault" in the event of a contract dispute.⁸⁶ Indeed, the present Chairman of the Supreme *Arbitrazh* Court, Veniamin Yakovlev, views contemporary *arbitrazh* court reforms as the continuation of a process that began in 1965 in connection with Brezhnev's early efforts to liberalize the Soviet economy.⁸⁷

C. THE POST-SOVIET TRANSFORMATION OF *ARBITRAZH*

With the demise of the Soviet Union, there was some question whether *arbitrazh*, as a creature of central planning, had any meaningful role to play in a

81. SHELLEY, *supra* note 76, at 71.

82. *Id.* at 93-94.

83. *Id.* at 94.

84. *Id.*

85. Pomorski, *supra* note 75, at 111. See also John N. Hazard, *Production Discipline: The Role of State Arbitration in the USSR*, 4 REV. SOCIALIST L. 297 (1982).

86. Hazard, *supra* note 85, at 325.

87. *Arbitrazhnyi sud Rossii*, *supra* note 71, at 5.

market economy.⁸⁸ Nevertheless, in 1991 the Russian legislature, deciding that the general courts were wholly unprepared to adjudicate business disputes, elected to transform the *arbitrazh* bodies into a new system of commercial courts.⁸⁹ Two pieces of legislation, the *Arbitrazh* Court Act, enacted on July 4, 1991,⁹⁰ and the Code of *Arbitrazh* Procedure, enacted on March 5, 1992 (the 1992 CAP),⁹¹ implemented sweeping changes with respect to *arbitrazh*. Arbiters were recognized as judges, thereby affording them various protections set forth in judicial reform legislation.⁹² The *arbitrazh* court legislation also included separate guarantees of permanent tenure,⁹³ independence,⁹⁴ and judicial immunity.⁹⁵ In addition, *arbitrazh* procedure was modified, a Supreme *Arbitrazh* Court created, and a defined appellate process established.⁹⁶

Further structural changes were implemented in 1995 with the enactment of the Federal Constitutional Law on *Arbitrazh* Courts⁹⁷ and a new Code of *Arbitrazh* Procedure (the 1995 CAP).⁹⁸ The 1995 legislation substantially reduced the investigative role of the judge, moved court proceedings further toward an adversarial model,⁹⁹ extended the jurisdiction of the courts equally to Russian and foreign entities alike,¹⁰⁰ accorded the courts federal status (thereby reducing their dependence on local government patronage),¹⁰¹ and established a level of intermediate appellate courts known as circuit courts.¹⁰²

88. Viechtbauer, *supra* note 17, at 443.

89. *Id.* at 447. Several other Soviet bloc countries have also transformed their *arbitrazh* bodies into economic or commercial courts. See, e.g., William Craig, *Dispute Resolution in Vietnam*, 14 INT'L FIN. L. REV. 36 (1995). For a comparative analysis of *arbitrazh* institutions in several communist countries, see ARBITRAZH V MEKHAZISME SOTSIALISTICHESKOVO KHOZIAISTVOVANIA STRAN-CHLENOV S.E.V. [ARBITRAZH IN THE MECHANISM OF THE SOCIALIST ECONOMY OF THE MEMBER-STATES OF THE CMEA] (T.E. Abova ed., 1988).

90. Zakon ob arbitrazhnom sude [*Arbitrazh* Court Act], Vedomostiizmenenii i dopolnenii v zakon RSFSR, Ob arbitrazhnom sude [Amendment to the RF *Arbitrazh* Court Act], Vedomosti Fed. Sobr. RF, 1992, No. 34, Item No. 1965 [hereinafter 1991 *Arbitrazh* Act].

91. 1992 CAP.

92. See, e.g., Zakon RF o statuse sudei v RF [Law on Status of Judges of the RF], Vedomosti Fed. Sobr. RF, 1992, No. 9, Item No. 223.

93. 1991 *Arbitrazh* Act, art. 20.

94. *Id.* art. 23.

95. *Id.* art. 24.

96. *Id.* art. 10. Although there were no formal avenues of appeal under the Soviet system, chief arbiters and their deputies reviewed the correctness of decisions through a procedure known as supervision (*nadzor*). ABOVA, *supra* note 90, at 171-72.

97. 1995 *Arbitrazh* Law, *supra* note 64.

98. 1995 CAP.

99. See generally 1995 CAP art. 7, chs. 6, 16. See also V. Anokhin, *Problemy arbitrazhno suda i protsessy* [Problems of the *Arbitrazh* Court Process], KHOZ. I PRAVO, April 1997, at 173.

100. 1995 CAP arts. 22.6, 210, 212.

101. 1995 *Arbitrazh* Law, art. 2. See also Press Briefing by Foreign Ministry Spokesman Grigory Karasin and Supreme *Arbitrazh* Court Chairman Veniamin Yakovlev, FED. NEWS SVC.—KREMLIN PKG. (June 8, 1995), available in 1995 WL 7570435 [hereinafter Yakovlev Press Briefing]; *Arbitrazhnyi sud Rossii*, *supra* note 71, at 6.

102. 1995 *Arbitrazh* Law, Ch. III.

D. ARBITRAZH COURT JUDGES AND JUDICIAL PANELS

There are presently about 2,000 *arbitrazh* court judges, many of whom are former arbiters inherited from the Soviet *arbitrazh* system.¹⁰³ According to the Russian Constitution, judges must be twenty-five or older, hold a law degree, and have worked for five years in the legal profession.¹⁰⁴ In Russia, as in many European countries, the judiciary is primarily comprised of persons who became judges near the beginning of their legal careers. Many gain the requisite legal experience for a judgeship by working as staff lawyers (specialists) for the courts.

Judges are among the highest paid officials in the Russian Government.¹⁰⁵ A 1997 Yeltsin decree increased the average judge's monthly pay by 65 percent, from 2 million rubles (\$345) to 3.2 million rubles (\$550).¹⁰⁶ That amount, while meager by the standards of the Russian *nouveaux riche*, compares favorably to the average Russian monthly wage of 828,500 rubles (\$143).¹⁰⁷

Nevertheless, as a class, judges do not enjoy nearly the same social standing and prestige as their American or Western European counterparts. There is also a wide compensation gap between judges and private attorneys, particularly in major cities. The Chairman of the Supreme *Arbitrazh* Court complains that the courts "hardly manage to get a specialist trained before he is grabbed" by the private sector.¹⁰⁸

The 1992 CAP required that most cases be decided by a panel of three judges.¹⁰⁹ The 1995 CAP scaled back the use of collegial decision making. In the lower courts, three-judge panels are now reserved for bankruptcy cases, challenges to government actions, and reviews in the appellate instance.¹¹⁰

E. ARBITRAZH COURT ASSESSORS

Arbitrazh courts in several regions, including Moscow and St. Petersburg, are conducting a three-year experiment of trying cases before panels composed of

103. V. F. Yakovlev, *Arbitrazhnyy sudam—vsestoronnee obespechenie* [Thorough Guarantees to the Arbitrazh Courts], *ROSS. IUST.*, April 1997, at 7, 8.

104. KONST. RF (1993) art. 119.

105. Mikhail S. Paleev, *The Establishment of an Independent Judiciary in Russia*, 1 PARKER SCH. J. E. EUR. L. 647, 655 (1994).

106. Ukaz Prezidenta RF, Ob uvelichenii dolzhnostnykh okladov sudei sudov RF [Decree of President of RF, On Increasing Salaries of Judges of Courts of the RF], *Sobr. Zakonod. RF*, 1997, No. 4, Item No. 526; Bronwyn McLaren, *Beleaguered Judges Get 65% Pay Raise*, ST. PETERSBURG TIMES, Aug. 4, 1997 <<http://www.spb.ru/times/284-285/beleaguered.html>>.

107. Vladimir Bobkov, *Incomes and Living Standards in the First Quarter of the Year*, RIA-NOVOSTI DAILY REVIEW (May 8, 1997) <<http://www.ria.novost.com/products/ds/1997/05/08-1-5-htm>>.

108. Valentin Maslennikov, *Judge Discusses New Laws on Arbitration Court Procedures*, ROS-SISKAYA GAZETA [hereinafter ROSS. GAZETA], 22 Feb. 1995, translated in FBIS-SOV-95-0485, Mar. 13, 1995, at 38 (interview with V. F. Yakovlev). See also Yakovlev, *supra* note 104, at 8.

109. 1992 CAP art. 4.

110. 1995 CAP art. 14. With regard to the appellate instance, see discussion *infra*, Part IV.G.

one professional judge and two laypersons (known as assessors) with knowledge of business and entrepreneurship.¹¹¹ Most assessors are drawn from the private arbitral tribunals sponsored by various Russian trade associations, chambers of commerce, and stock and commodity exchanges.¹¹² The list of eligible assessors is approved by the plenum of the Supreme *Arbitrazh* Court. Each assessor has an equal vote with the judge.¹¹³ The assessors are used only with the assent of the parties, who may nominate particular assessors to participate in the case.

The experiment superficially resembles the use of people's assessors in the general courts, who are typically representatives of local unions and enterprises. People's assessors are ostensibly the judges' equals, but are nicknamed noddors because they tend to defer to the judges' decisions.¹¹⁴

The Chairman of the Supreme *Arbitrazh* Court rejects comparison to the people's assessors and states that the experiment is inspired by the French commercial courts (the *tribunaux de commerce*), which also sit in tribunals composed of a professional judge and two laypersons.¹¹⁵ The Chairman is an ardent champion of the experiment, believing that the assessors will enhance confidence in the fairness of the courts and in the courts' ability to handle commercial disputes.¹¹⁶

It is too early to assess the effectiveness of the assessors in that regard. A few Russian lawyers have advised the author that they typically forgo the use of *arbitrazh* assessors, in part because of their experience with assessors in the general courts. Nevertheless, the *arbitrazh* assessors, by virtue of their backgrounds, are likely to be more assertive than those in the general courts and should serve to some degree as a check on arbitrary judicial decision making.

F. ARBITRAZH COURT PRACTICE

1. *Initiating the Case*

A case is initiated in *arbitrazh* court with the filing of a statement of claim.¹¹⁷ The statement sets forth the plaintiff's case in a comprehensive manner, including citations to the laws upon which the claim is based. The plaintiff's evidence must also be attached to the statement.¹¹⁸

111. See *Zakon o vvedenii v deistvie Arbitrazhnovo protsessualnovo kodeksa RF* [Law on Implementation of the RF Code of *Arbitrazh* Procedure], *Sobr. Zakonod. RF*, 1995, No. 19, Item No. 1710, art. No. 8.

112. T. Andreeva, *Zasedateli v arbitrazhnom protsesse* [Assessors in the *Arbitrazh* Process], *ROSS. IUST.*, May 1997, at 49. For a description of these arbitral bodies, see Katharina Pistor, *Supply and Demand for Contract Enforcement in Russia: Courts, Arbitration, and Private Enforcement*, 22 *REV. CENT. & E. EUR. L.* 55, 69-71 (1996).

113. Law on Implementation of the RF Code of *Arbitrazh* Procedure, *supra* note 112, art. 8.2.

114. ROBERT RAND, *COMRADE LAWYER* 3-4, 41, 42 (1991); Stephen Thaman, *Reform of the Procuracy and Bar in Russia*, 3 *PARKER SCH. J. E. EUR. L.* 1, 7 (1996).

115. *Yakovlev Press Briefing*, *supra* note 102; Yuri Feofanov, *There Will Be No Jurors in the Court of Arbitration*, *IZVESTIYA*, Dec. 24, 1994, at 4.

116. *Arbitrazhnyi sud Rossii*, *supra* note 71, at 8-9.

117. 1995 CAP art. 102.

118. *Id.* art. 102.5.

The claim must generally be filed with the court in the jurisdiction in which the defendant, or one of the defendants in a multi-defendant case, is located.¹¹⁹ The new Civil Code contemplates that once a law on state registration of legal entities is enacted, the location of a legal entity will be determined by its place of registration.¹²⁰ In the meantime, a joint decree of the Supreme (General) Court and the Supreme *Arbitrazh* Court directs that "it shall be considered in dispute resolution that the location of a legal entity is defined as the location of its organs,"¹²¹ which apparently means the entity's headquarters or primary place of business.

In a contract action, the plaintiff has the option of filing in the venue where the contract was to be performed.¹²² The venue of an action may also be established by agreement of the parties.¹²³ This works to the benefit of a foreign party wishing to designate a court outside its Russian contract partner's locality to hear any disputes.¹²⁴

Filing fees in *arbitrazh* court can be substantial. Prior to August 1994 the state duty for filing most cases equalled 10 percent of the value of the claim.¹²⁵ This exorbitant rate discouraged recourse to the *arbitrazh* courts.¹²⁶

Since 1994 the state duty for most claims is determined according to a sliding scale, currently ranging from 5 percent to .05 percent, depending upon the amount of the claim.¹²⁷ A claim valued at one billion rubles (currently around \$170,000), for instance, will result in a levy of 16.6 million rubles (roughly \$2,800), which constitutes an effective duty rate of 1.66 percent.¹²⁸ The maximum state duty is 1,000 times the monthly minimum wage (currently about \$14,000).¹²⁹ Upon a

119. *Id.* arts. 25, 26.

120. GK RF art. 51.

121. Postanovlenie No. 6/8 Plenuma Verkhovonovo Suda RF i Plenuma Vyshevo Arbitrazhnovo Suda RF, O nekotorykh voprosakh, svyazannykh s primeneniem chasti pervoi Grazhdanskovo Kodeksa RF [Decree No. 6/8 of Plenums of Supreme Court and Supreme Arbitrazh Court, On Certain Questions Associated with Application of Part I of the Civil Code], issued Aug. 10, 1996, reprinted in *Ross. Iust.*, Oct. 1996, at 57, 59, ¶ 21.

122. 1995 CAP art. 26.4.

123. *Id.* art. 30.

124. See Tatiana Neshatayeva, *O nekotorykh problemakh, vznikaiushchikh pri rassmotrenii sporov s uchastiem inostrannykh lits* [On Several Problems Arising in Connection with Disputes Involving Foreign Persons], 10 *VESTN. VYSSH. ARB. SUDA RF*, 1996, No. 10, pp. 139-40.

125. 1992 CAP art. 69.

126. *Press Conference with RF Vice Premier, Economy Minister Alexander Shokhin*, *FED. NEWS SVC.—KREMLIN PPG.* (Sept. 20, 1994) <<http://www.fnsg.com>>.

127. 1995 CAP art. 92; Instructions of the RF State Tax Service No. 42 of May 15, 1996, on the Application of the RF Law on State Duty, Chap. V (art. 28) [hereinafter *State Duty Instructions*], published in *Ross. GAZETA*, July 27, 1996.

128. *State Duty Instructions*, *supra* note 128, art. 28.

129. *Id.* The monthly minimum wage is currently 83,490 rubles, which equals approximately \$14. Jeff Kadet & Scott Antel, *The Good News, and Bad News, About the New Russian Tax Amendments*, 7 *E./W. EXEC. GUIDE*, Mar. 1, 1997, at 8.

showing of financial hardship, the duty may be paid in installments or deferred altogether pending judgment.¹³⁰

The 1995 CAP specifically provides for the dismissal of a claim if the dispute is within the scope of an arbitration agreement.¹³¹ The right to arbitrate is forfeited, however, if the party fails to file an application to transfer the proceeding to an arbitration tribunal prior to making its "first statement on the essence of the dispute."¹³²

2. *Interim Relief*

A claimant may obtain pre-judgment relief "at any stage of the *arbitrazh* process," including an arrest of property or a preliminary injunction, if the absence of such relief might cause "interference with or render impossible the execution of the judicial act."¹³³ The court must act upon a request for interim relief within one day.¹³⁴ Failure to comply with an interim order may result in the imposition of a fine of up to 50 percent of the face value of the claim in an action seeking a liquidated amount, or up to 200 times the minimum monthly wage in other cases.¹³⁵ The claimant may recover damages for losses incurred because of the failure of any person (party or nonparty) to comply with an interim order.¹³⁶

3. *The Court Proceedings*

In preparation for trial, the judge reviews the documentary evidence previously submitted by the parties and suggests what other evidence should be presented.¹³⁷ There is no provision for direct, party-to-party discovery; however, a party may submit a request to the court to secure any needed documentary evidence.¹³⁸ Refusal by the court to grant such a request is subject to appeal.¹³⁹ The court may order the production of evidence from both parties and nonparties and may impose a fine of up to 200 times the monthly minimum wage upon a person refusing to comply.¹⁴⁰

130. Postanovlenie No. 6 Plenuma Vyshevo Arbitrazhnovo Suda RF, O nekotorykh voprosakh primeneniia arbitrazhnymi sudami zakonodatel'stva RF o gosudarstvennoi poshline [Decree No. 6 of Plenum of Supreme Arbitrazh Court on Application of RF Legislation Regarding State Duties], issued Mar. 20, 1997, reprinted in *Ross. Iust.*, June 1997, at 53. Several classes of claimants, including, for instance, governmental entities, are exempt from the duty altogether. State Duty Instructions, *supra* note 128, art. 33.

131. 1995 CAP arts. 23, 87.

132. *Id.* art. 87.2. See Informational Letter of Dec. 26, 1996, *supra* note 12, at 96-99 (discussing two cases involving foreign parties, British and German, which waived arbitration pursuant to this provision).

133. 1995 CAP art. 75.1.

134. *Id.* art. 75.2.

135. *Id.* art. 76.3.

136. *Id.* art. 76.4.

137. *Id.* arts. 112, 53.2.

138. *Id.* arts. 54.2, 71.

139. *Id.* art. 71.4.

140. *Id.* art. 54.3.

Parties are not required to use a lawyer. According to one informal survey, more than half appear *pro se*.¹⁴¹ A significant proportion of the lawyers who practice in *arbitrazh* court are *iurisconsulty* (in-house enterprise lawyers), as opposed to *advokaty* (independent attorneys belonging to the *collegia* of advocates).¹⁴²

Although the *arbitrazh* courts are moving toward an adversarial model, the judge, not the lawyers, continues to take center stage at trial. The 1995 CAP charges the court with "ensuring that the circumstances, essential for the case, are clarified."¹⁴³ The judge controls the sequence of proof¹⁴⁴ and is typically the principal examiner of witnesses. The lawyer's role in most cases is to ask supplementary questions and to present arguments on behalf of the client. Testimony tends to be in narrative form, as opposed to the tight question-and-answer format to which American lawyers are accustomed. As in many civil law countries, oral testimony is given little weight in relation to documentary evidence.

A party may request that the court retain an expert and make suggestions as to the particular expert to be retained.¹⁴⁵ Nevertheless, the court ultimately determines whether an expert is necessary,¹⁴⁶ selects the expert, and formulates the questions to be presented (albeit with input from the parties).¹⁴⁷

Parties may seek recusal of judges and experts on several grounds, primarily relating to partiality.¹⁴⁸ Parties (or their counsel) are also guaranteed the right to present evidence, conduct cross-examination, object to the other party's proof, make statements, and present arguments on all issues.¹⁴⁹

The court is responsible for determining the existence and the content of foreign law, if applicable to the dispute.¹⁵⁰ This may be accomplished through assistance from Russian agencies and institutions (such as the Ministry of Justice or Russian embassies abroad) or through expert testimony. If the court cannot determine the foreign law, Russian law may be applied.¹⁵¹

141. Kathryn Hendley et al., *Observations on the Use of Law by Russian Enterprises*, IRIS WORKING PAPER SERIES (No. 201), Apr. 1997, at 6.

142. For a discussion of the Russian legal profession, see William Meyer, *Facing the Post-Communist Reality: Lawyers in Private Practice in Central and Eastern Europe and the Republics of the Former Soviet Union*, 26 LAW & POL'Y INT'L BUS. 1019 (1995).

143. 1995 CAP art. 115.2.

144. *Id.*

145. *Id.* art. 66.

146. *Id.* art. 66.1. The court apparently may not retain an expert, however, unless expert testimony is requested by the parties. See C. Morgunov, *APK RF: otdelnye stati nuzhdaiutsa v konkretizatsii* [*The Arbitrazh Procedure Code: Certain Articles Require Revision*], ROSS. IUST., Aug. 1996, at 43, 44.

147. 1995 CAP arts. 66.2, 3.

148. *Id.* arts. 16-17, 19-20.

149. *Id.* art. 33.

150. *Id.* art. 12.1. Conflict of laws principles are not set forth in the CAP itself, but rather are addressed in other Russian laws.

151. *Id.* art. 12.3.

4. *The Case Term*

Proceedings before the *arbitrazh* courts are expeditious. The court must issue a decision within two months of the filing of a claim.¹⁵² This mandate represents an increase of one month from the time limit for decisions in Soviet *arbitrazh*. To an American lawyer accustomed to litigating a case for years at the trial level, this increase might appear insignificant. Nevertheless, at the time of the change in 1992 Russia was experiencing skyrocketing inflation and some Russian judges were concerned that justice delayed, even by a month, was justice denied.¹⁵³

More recently, Russian commentators have expressed concern that two months does not allow the court sufficient time in complex cases. Thus, some suggest the time limit be extended for certain categories of disputes.¹⁵⁴

The speed with which *arbitrazh* courts process cases might be viewed as an indication that they have yet to move beyond the assembly line justice administered by their Soviet precursors. Case statistics indicate this is not entirely the case. The annual case load of Soviet arbiters ranged from 1,200 to 1,800 cases.¹⁵⁵ The current goal for individual judges, as laid down by the Supreme *Arbitrazh* Court, is 120 to 144 cases per year.¹⁵⁶ Moreover, approximately 40 percent of *arbitrazh* court cases are simple claims for nonpayment for goods or services, which are often susceptible to routine disposition.¹⁵⁷

5. *The Final Decision*

The final decision is announced at the conclusion of the trial,¹⁵⁸ typically after a brief recess in which the judge (or panel) considers the matter. A written decision must be issued within three days, describing the evidence upon which the decision is based, stating the grounds for rejecting any items of proof, referring to the legal norms which guided the court, and setting forth the disposition of the matter.¹⁵⁹ A judgment enters into force thirty days after issuance, unless the

152. *Id.* art. 114. *Arbitrazh* court data indicate that the courts exceeded this time limit in only 1.6% of all cases in 1995, and 3.6% in 1996. *Sudebno-arbitrazhnaya statistika* [*Arbitrazh Court Statistics*], VESTN. VYSSH. ARB. SUDA RF, 1997, No. 4, pp. 102-03 [hereinafter 1996 *Arbitrazh Court Statistics*].

153. Inflation has since abated—from an annual rate of 2,642% in 1992 to 22% in 1996. David Mapley, *Investing in Russia: The Upside Is Enormous*, 6 E./W. EXEC. GUIDE, Dec. 1996, at 2, 23.

154. See, e.g., B. Zavidov, *Arbitrazhnyi protsessualnyi kodeks: osnovnye idei i printsipy* [*The Arbitrazh Procedure Code: Basic Concepts and Principles*], ROSS. IUST., Mar. 1996, at 35, 38 (referring to views expressed by unidentified learned jurists).

155. SHELLEY, *supra* note 76, at 50; see also Hazard, *supra* note 85, at 309.

156. YAKOVLEV, *supra* note 104, at 8.

157. 1996 *Arbitrazh Court Statistics*, *supra* note 153, at 104. Moreover, according to the Chairman of the Supreme *Arbitrazh* Court, a “huge” number of cases are dismissed for “formal” reasons (*i.e.*, lack of jurisdiction or failure to pay the state duty). *Report on Arbitration Court Prospects*, EKSPERT, Feb. 19, 1996, at 18, translated in FBIS-SOV-96-064, Apr. 2, 1996, at 36; see also PISTAR, *supra* note 113, at 75.

158. 1995 CAP art. 134.

159. *Id.* art. 127.

judgment is appealed.¹⁶⁰ It is "binding on all state bodies, local self government bodies, other organs, organizations, officials, and private persons" and may be executed "on the entire territory of the Russian Federation."¹⁶¹

Court costs, including the state duty, are allocated between the parties in proportion to the extent to which the plaintiff prevailed on its claim.¹⁶² Regarding attorney fees, the *arbitrazh* courts essentially follow the American rule. Each side pays its own fees unless otherwise stipulated by agreement. The Code of Civil Procedure, which governs civil actions in general court, was amended in November 1995 to adopt the English rule, whereby the loser pays the prevailing party's attorney fees.¹⁶³ This amendment may be a harbinger of future changes in the *arbitrazh* court rule.

G. APPELLATE REVIEW IN THE ARBITRAZH COURTS

In the first level of appeal, known as the appellate instance, a panel of three judges from the same court that originally decided the matter hears the case.¹⁶⁴ The judge who decided the case in the initial instance may not serve on the panel.¹⁶⁵ The panel reviews both the facts and the law *de novo*, generally retrying the case; however, new evidence may be submitted only upon a showing that it could not have been presented in the proceeding below.¹⁶⁶ The judgment is stayed pending the court's review.¹⁶⁷ Approximately 13 percent of cases were appealed to the appellate instance in 1996.¹⁶⁸

Some Russian jurists express concern that conducting the appellate instance in the same court that initially decided the matter undermines the efficacy of the process.¹⁶⁹ Nevertheless, review at the appellate instance does not appear to be a rubber stamp. Between 1994 and 1996, almost one-quarter of all cases appealed to that level were reversed or modified.¹⁷⁰

160. *Id.* art. 147.

161. 1995 *Arbitrazh* Law, art. 7.

162. 1995 CAP art. 95.

163. GPK RF, art. 91.

164. 1995 CAP arts. 145-160.

165. *Id.* art. 18.1; see also Postanovlenie No. 13 Plenuma Vyshevo Arbitrazhnovo Suda RF "O primenenii Arbitrazhnovo protsessualnogo kodeksa RF pri rassmotrenii del v sude pervoi instantsii" [Decree No. 13 of Plenum of Supreme Arbitrazh Court, On Application of CAP in Examination of Cases in Court of First Instance], issued Oct. 31, 1996, reprinted in *ROSS. GAZETA*, Nov. 27, 1996, at 6, ¶ 1.

166. 1995 CAP art. 18.1.

167. *Id.* art. 156.

168. 1996 *Arbitrazh Court Statistics*, *supra* note 153, at 103.

169. See, e.g., V. Sherstuk, *Predavlenie apelliatsionnoi zhaloby v arbitrazhnyi sud* [Presentation of the Appellate Complaint to Arbitrazh Court], *KHOZ. I PRAVO*, Oct. 1996, at 91, 93; O. Boikov, *Novoe zakonodatel'stvo ob arbitrazhnykh sudakh* [New Legislation on Arbitrazh Courts], *ROSS. IUST.*, Aug. 1995, at 10, 12.

170. *Arbitrazh Court Statistics*, *supra* note 153, at 103; *Sudebno-arbitrazhnaya statistika* [Arbitrazh Court Statistics], *VESTN. VYSSH. ARB. SUDA RF*, 1996, No. 3, pp. 102-03 [hereinafter 1995 *Arbitrazh Court Statistics*].

One disincentive to pursuing an appeal is the state duty, which equals 50 percent of the duty paid in the court of first instance. State duties on appeal are capped at 500 times the monthly minimum wage (approximately \$7,200 at current exchange rates).¹⁷¹

The second level of appeal, known as cassation, lies with the circuit courts created by the 1995 legislation. There are ten judicial circuits, each covering several constituent federal units of the RF.¹⁷² The upper chamber of the Russian legislature (the Federation Council) initially voted down the legislation creating the circuit courts.¹⁷³ In commenting upon the Federation Council vote, the Chairman of the RF Constitutional Court, Vladimir Tumanov, noted that "[i]n pre-revolutionary Russia the district of the Moscow judicial chamber . . . embraced several provinces. This is a major guarantee of judicial independence from the local authorities. . . . [M]any senators and regional leaders do not want to lose control over the courts."¹⁷⁴ Nevertheless, when the law ultimately passed in April 1995 the provisions regarding circuit courts were left intact, dealing a blow to the efforts of local leaders to exercise control over the *arbitrazh* courts sitting in their territories.¹⁷⁵

As in the appellate instance, circuit court appeals are heard by a panel of three judges.¹⁷⁶ Cassationary review is limited to issues of law.¹⁷⁷ Between 1995 and 1996, the circuit courts reversed or modified the lower court's decision in 40 percent of the cases decided (5,374 of 13,308 cases).¹⁷⁸ A cassationary appeal does not automatically stay the execution of the lower court's judgment; however, the circuit court may issue a stay upon the application of a party.¹⁷⁹

Cases may be brought to the Supreme *Arbitrazh* Court only through the process of supervision (*nadzor*). Supervision is initiated by a protest filed by the Chairman of the Supreme *Arbitrazh* Court, the Procurator General¹⁸⁰ of the RF, or their respective deputies.¹⁸¹ Although the parties themselves may not file a protest,

171. May 15, 1996, State Duty Instruction, *supra* note 128, art. 28.9.

172. 1995 *Arbitrazh* Law, art. 24.

173. *Senators Turn Down Bill on Courts of Arbitration*, 29 OMRI DAILY DIGEST (Feb. 9, 1995) <<http://www.omri.cz/Publications/DD/Digest>>. The Council is comprised of the leaders of RF's 89 constituent republics, regions, and other federal units. They hold their positions in the Russian legislature on an *ex officio* basis.

174. S. Orlyuk, *Is Russia Becoming a Law-Based Society?* MOSCOW TIMES, March 17, 1995.

175. See C. Amosov, *Federalnyi arbitrazhnyi sud okruga* [*The Federal Arbitrazh Circuit Court*], KHOZ. I PRAVO, Aug. 1996, at 114, 115; *Arbitrazhnyi sud Rossii*, *supra* note 71, at 9.

176. 1995 CAP art. 14.2.

177. *Id.* arts. 165, 174, 176.

178. 1996 *Arbitrazh Court Statistics*, *supra* note 153, at 104.

179. 1995 CAP art. 170.

180. The Procurator General is the rough equivalent of the U.S. Attorney General, but with significantly broader responsibilities and powers. For a discussion of the role of the procurator in *arbitrazh* proceedings, see A. Karlin, *Prokuror v arbitrazhnom protsesse* [*The Procurator in the Arbitrazh Process*], 5 ZAKONNOST' 2 (1996). For a general discussion of the procuracy, see THAMAN, *supra* note 115.

181. 1995 CAP art. 181.

they may apply to the appropriate officials to request the filing of such protest.¹⁸² The Court's Chairman stated that the Court will exercise supervision only in extraordinary matters.¹⁸³ The Court's primary role is ensuring uniform judicial practice; protecting the rights of parties in particular cases is an incidental function.¹⁸⁴

The scope of review in the Supreme *Arbitrazh* Court is narrower than in cassation; the only grounds for reversal or modification of a decision are illegality or lack of substantiation.¹⁸⁵ A substantively correct decision may not be reversed on formal grounds alone.¹⁸⁶ Parties may be summoned to attend a court session to present their arguments, but are not entitled to an oral hearing as a matter of right.¹⁸⁷

The final form of appeal is a rehearing (*peresmotr*) upon the presentation of newly discovered circumstances, which includes evidence that was not known and could not have been known by a party, criminal actions by the participants in the case (including the judge), and the knowing presentation of false evidence in the prior proceedings.¹⁸⁸ The petition for rehearing must be filed within one month of discovery of the new circumstances.¹⁸⁹

H. ENFORCEMENT OF *ARBITRAZH* COURT JUDGMENTS

During the Soviet era, *arbitrazh* decisions merely resulted in monies being shifted from one state enterprise to another. As a result, the *arbitrazh* system had little need for a strong enforcement regime. That ceased to be the case after the collapse of the centrally planned economy. Nevertheless, the Russian legislature was slow to develop new judicial enforcement mechanisms.¹⁹⁰ In a 1996 interview, the Chairman of the Supreme *Arbitrazh* Court described enforcement of court rulings as the judicial system's "Achilles heel."¹⁹¹ Speaking at a press conference the same year, the First Vice Chair of the Russian Duma, Alexander Shokhin, offered a blunter assessment: "It's much easier to send a group of armed people to collect debts than to appeal to an *arbitrazh* court and expect its

182. 1995 CAP art. 185.

183. V. F. Yakovlev, *quoted in* MASLENNIKOV, *supra* note 109, at 40.

184. Y. Shestopal, *Novye veksi, novye i starye problemy arbitrazhnovo suda* [New Milestones, New and Old Problems of the Arbitrazh Court], ZAKON, May 1996, 112, 113 (Interview with V. F. Yakovlev).

185. 1995 CAP art. 188; *see also id.* art. 190.2.

186. *Id.* art. 188.

187. *Id.* art. 186.

188. *Id.* art. 192.

189. *Id.* art. 193.1.

190. I. Andreev, *Ispolnenie sudebnykh reshenii* [Implementation of Court Decisions], Ross. IUST., Dec. 1996, at 37.

191. Veniamin Yakovlev, *quoted in* Shestopal, *supra* note 186, at 113. Enforcement is also a problem for the general courts. *See, Vstat! Sud idyot* [All Rise! The Court Is in Session], Ross. GAZETA, Dec. 3, 1996, at 1, 3 (interview with Supreme Court Chairman Vyacheslav Lebedev).

rulings to be carried out promptly."¹⁹² According to the Ministry of Justice, in 1995, only 50 percent of court rulings involving the recovery of money were implemented.¹⁹³

Several steps were taken during 1997 to resolve this problem. A law "On Court Officers,"¹⁹⁴ enacted on July 21, 1997, provides for the creation of a corps of marshals (*pristavy-ispolnitel'ny*) with responsibility for enforcing court decisions. The corps will be part of the Ministry of Justice and is to become operational by January 1, 1998, although it will not be fully staffed until at least 1999.¹⁹⁵ Responsibility for enforcing court decisions currently rests with poorly paid personnel attached to the general courts,¹⁹⁶ a group described by the former Chairman of the Constitutional Court as "young girls or old ladies who could not find any other job."¹⁹⁷

The law "On Enforcement Proceedings,"¹⁹⁸ also enacted in July 1997, vests marshals with broad powers to compel compliance with court rulings. The new law includes some interesting provisions relating to the enforcement of orders which either restrain or require the performance of certain conduct. If a party fails to act in accordance with such an order, the marshal imposes a fine in an amount up to 200 times the monthly minimum wage and sets a new deadline for compliance.¹⁹⁹ Each successive failure to comply results in a new deadline and a doubling of the fine.²⁰⁰ The fine must be approved by a senior Ministry of Justice official and may be appealed to court.²⁰¹ Repeated noncompliance may result in criminal prosecution.²⁰²

192. *Press Conference with Alexander Shokhin*, FED. NEWS SVC.—KREMLIN PKG. (July 26, 1996) <<http://www.fsng.com/>>.

193. *Press Conference with Minister of Justice Valentin Kovalyov*, FED. NEWS SVC.—KREMLIN PKG. (Dec. 6, 1995) <<http://www.fsng.com/>>. See also, Andreev, *supra* note 190, at 37.

194. *Zakon O sudebnykh pristavakh* [Law on Court Officers], *Sobr. Zakonod. RF*, 1997, No. 30, Item No. 3590.

195. *Id.* art. 25. As of this article's completion, it was unclear whether funding would be available to meet this schedule. Yuliya Latynina, *Kremlin Steels for Defense of '98 Budget*, *MOSCOW TIMES*, Sept. 2, 1997, at 8.

196. For a detailed discussion of the enforcement process in place prior to the enactment of the 1997 legislation, see Glenn P. Hendrix, *Enforcement of Russian Arbitrazh Court Judgments*, 7 E./W. EXEC. GUIDE, Feb. 1997, at 16. See also Mikhail Volodarsky, *Ispolnenie sudebnovo resheniia* [Implementation of a Judicial Decision], 49 EKON. I ZH., Dec. 1996, at 30; Ukaz Prezidenta RF No. 199, *Vremennoe polozhenie, O poriadke obrashchenia vzyiskania na imushchestvo organizatsii* [Decree of President of RF No. 199, Provisional Regulations on Executions Against the Property of Organizations], *Sobr. Zakonod. RF*, 1996, No. 8, Item No. 741.

197. *Press Conference with Vladimir Tumanov, Chair, Constitutional Court*, FED. NEWS SVC.—KREMLIN PKG. (July 24, 1996) <<http://www.fsng.com/>>.

198. *Zakon Ob ispolnitel'nom proizvodstve* [Law on Enforcement Proceedings], *Sobr. Zakonod. RF*, 1997, No. 30, Item No. 3591.

199. *Id.* arts. 73, 85.1.

200. *Id.* art. 85.4.

201. *Id.*

202. *Id.* art. 85.3.

Russia's revamped Criminal Code, which became effective on January 1, 1997, makes prosecution for contempt of court a more potent threat than previously.²⁰³ The former Criminal Code imposed criminal responsibility upon certain government officials who defied a court decision, but did not extend criminal liability to private parties. The only sanction, moreover, was a nominal fine of three to ten times the monthly minimum wage (roughly sixteen to fifty-five dollars at 1996 exchange rates).²⁰⁴ The new Criminal Code imposes criminal liability on all persons responsible for nonexecution of court decisions. The new law also carries stiff penalties, including up to two years' imprisonment.²⁰⁵

Since *arbitrazh* courts do not have criminal jurisdiction, they may not directly impose criminal contempt sanctions. Rather, offenders must be prosecuted in the general courts. Nevertheless, an *arbitrazh* court may directly impose civil monetary penalties in an amount up to two hundred times the monthly minimum wage.²⁰⁶ *Arbitrazh* courts may also impose a fine of up to fifty percent of the value of a judgment upon a bank that fails to heed a writ of execution.²⁰⁷ A bank that repeatedly fails to honor writs of execution risks losing its license.²⁰⁸

Although the new legislative enactments will add teeth to court rulings, enforcement problems are likely to persist. Noncompliance with court decisions is, in part, symptomatic of broader societal distrust and disrespect for the state and its institutions, including the courts. It is also a reflection of economic conditions in contemporary Russia. Many Russian entities are in dire financial straits. The liquid assets of others are hidden, often abroad, not only from judgment creditors, but also from the Russian tax authorities. As the president of a German company with investments in Russia recently stated, "There are many legal mechanisms [for collecting debts], but the question is, if somebody is naked, how do you find the pockets?"²⁰⁹

I. CAN A FOREIGN PARTY GET A FAIR SHAKE?

Can a foreign party get a fair shake in the *arbitrazh* courts? As noted at the beginning of this article, reasons to fear otherwise include a judiciary with a short history of handling sophisticated commercial disputes, an alien court procedure,

203. See UK RF [Criminal Code], *Sobr. Zakonod. RF*, 1996, No. 25, Item No. 2954, art. 315.

204. UK RF [Criminal Code], art. 188.2 (superseded). In addition, until 1995, the Procurator General construed the criminal contempt law as applicable only to general court decisions, notwithstanding a 1993 presidential decree referring to criminal responsibility for noncompliance with *arbitrazh* court decisions. *Arbitrazhnyi sud Rossii*, *supra* note 71, at 21 (comments of M. Falkovich). See also *Rasporiazhenie Prezidenta RF, O sovershenstvovanii organizatsii i deiatel'nosti arbitrazhnykh sudov RF* [Edict of President of RF, On Improvement of the Organization and Operation of RF Arbitrazh Courts], *Sobr. Aktov*, 1993, No. 52, Item No. 5087.

205. UK RF, *supra* note 205, art. 315.

206. 1995 CAP art. 206.3.

207. *Id.* art. 206.1.

208. *Id.* art. 206.2.

209. *A Tactical Retreat by One Foreign Investor*, 7 E./W. EXEC. GUIDE, May 1997, at 3, 4.

corruption, the threat of physical intimidation of the judge by the opposing party, and the Russian party's home court advantage. Such concerns are legitimate, but do not justify writing the courts off altogether.

The sophistication of the *arbitrazh* courts in commercial matters is steadily increasing as they gain experience in handling business disputes. Moreover, the Russian legislature is giving the courts better and clearer laws to work with. The recent implementation of the second part of a new Civil Code, for instance, represents major progress.²¹⁰ Indeed, the entire Russian legal profession is becoming increasingly sophisticated. Most Western lawyers would be favorably impressed by the level of discourse in Russian law journals, many of which feature articles by *arbitrazh* court judges.

Practice in the *arbitrazh* courts, while quite different from American civil procedure, does not depart radically from procedure in most continental European courts.²¹¹ Many aspects of *arbitrazh* court practice most alien to American lawyers—the court's active questioning of witnesses, the expert's role as the court's witness, and the absence of party-to-party discovery—are accepted as a matter of course by lawyers of many European countries (although these features may be more pronounced in the *arbitrazh* courts due to the investigative tradition of Soviet *arbitrazh*). *Arbitrazh* court procedure might appear strange to American observers. Nevertheless, it is capable of affording parties a fair and efficient hearing of their dispute.

The extent to which graft and physical intimidation influence judicial decisions is difficult to determine; it certainly occurs. In a 1995 interview discussing the general courts, Russia's Procurator General conceded: "Are suspects released for bribes? I don't rule that out. Are judges forced to make decisions under threat? That is even more probable."²¹²

Yet, while thugs are sometimes used to resolve disputes, this is not standard business practice, as some media accounts would suggest. Moreover, because the *arbitrazh* courts do not have criminal jurisdiction, they are less exposed to criminal elements and concomitant physical threats than the general courts.²¹³

Although judges are not immune from the epidemic of corruption infecting the Russian government, graft appears to be less widespread among the judiciary

210. See generally Lane H. Blumenfeld, *Russia's New Civil Code: The Legal Foundation for Russia's Emerging Market Economy*, 30 INT'L LAW. 477-78 (1996).

211. For an article espousing the superiority of European civil procedure, see Ernst Stiefel & James Maxeiner, *Civil Justice in the United States—Opportunity for Learning from "Civilized" European Procedure Instead of Continued Isolation?* 42 AM. J. COMP. L. 147, 157 (1994).

212. *Does the Public Prosecutor Serve the Law of the Authorities?/An Interview with Prosecutor General Yuri Skuratov*, FED. NEWS SVC.—KREMLIN PKG. (Dec. 1, 1995) <<http://www.fnsg.com>>.

213. This view was stated most forcefully to this author in an interview with Evgueni L. Reizman, Counsel, DialogBank (Oct. 2, 1996). Mr. Reizman is a U.S.-trained Russian lawyer employed by DialogBank (a Russian-American joint venture).

than among other officials. Many judges genuinely seek to uphold the law.²¹⁴ In addition, judicial acts are scrutinized by the losing party, which limits how far a corrupt judge can go to manipulate the outcome.²¹⁵ Appellate review is likely to expose and to reverse any gross distortion of justice. Indeed, the right to a *de novo* retrial before a three-judge appellate panel is specifically intended, in part, as a check against corruption.²¹⁶ As observed by Veniamin Yakovlev, the Chairman of the Supreme *Arbitrazh* Court, it is "harder to [improperly] influence three judges" than one.²¹⁷

To put the courts' problems in perspective, it is useful to consider the following statistics: *Arbitrazh* courts handled 208,081 cases in 1994,²¹⁸ 237,291 cases in 1995, and 290,094 cases in 1996.²¹⁹ The commercial claims decided by the courts in 1995 were valued at eighty trillion rubles (roughly \$17 billion at 1995 exchange rates).²²⁰ During 1996, the courts considered claims valued at 185 trillion rubles (approximately \$37 billion).²²¹ This case volume suggests that the courts are doing something right.

The leadership of the courts, as represented by Chairman Yakovlev and his deputies, recognize that if Russia is to attract substantial foreign investment, its courts must protect the legitimate interests of foreign companies.²²² The *arbitrazh* courts do not yet have a substantial track record in cases involving foreign litigants. Nevertheless, anecdotal evidence suggests foreign parties have fared well in cases thus far decided.²²³ Western firms are experiencing particular success in litigating

214. Hendley, *supra* note 142, at 11 (noting that executives and in-house lawyers interviewed in a study of 15 Russian manufacturing enterprises "generally viewed" *arbitrazh* judges as "impartial in cases involving other firms"). The author participated in a home-stay exchange program in 1993 and 1994 with one of the deputy chairmen of the St. Petersburg *arbitrazh* court. The judge impressed the author as an upright, erudite individual.

215. As noted in a recent article on Russian corporate law, "[a] corrupt judge can twist a 'reasonableness' standard to reach the decision he was paid to reach, but cannot so easily twist a requirement that the company provide cumulative voting or appraisal rights. If the judge finds an exception on some spurious ground, it will be obvious to all." Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1942 (1996).

216. Maslennikov, *supra* note 109, at 39.

217. *Id.*

218. 1995 *Arbitrazh Court Statistics*, *supra* note 171, at 102.

219. *Id.* at 104.

220. *Report on Arbitration Court Prospects*, *supra* note 158, at 36, 38.

221. Veniamin Yakovlev, *Arbitration Court and a Market Economy*, RIA-NOVOSTI (May 7, 1997) <<http://www.ria-novosti.com/products/rein/1997/05/07-2-4.htm>>

222. Interview by Alexander Didusenko, with Arbitration Court Chief Yakovlev, NOVOE VREMYA (Feb. 6, 1995) translated in FBIS-SOV-95-042-5, Mar. 3, 1995, at 9; Yakovlev Press Briefing, *supra* note 102.

223. See, e.g., Remarks of John Peters, Minister-Counselor for Commercial Affairs, U.S. Embassy-Moscow, Conference on Opportunities in Russia at U.S. Embassy-Brussels (Jan. 23, 1997) (observing that "the arbitration courts are improving, and we are seeing more and more rulings in favor of foreign firms") (transcript on file with author); William Butler, *You Started It. Did Not. Did Too. Did Not*, RUSSIA REV., July 29, 1996, at 29; Newton Davis, *Commercial Litigation in Russia: Getting a Fair Deal*, 3 PARKER SCH. J. E. EUR. L., 625, 633 (1996); Economist Intelligence

against the tax authorities.²²⁴ Western companies have also successfully used the *arbitrazh* courts to enforce intellectual property rights.²²⁵

Foreign parties may be winning actions in Russian courts because they are forgoing litigation except in cases in which they are strongly favored.²²⁶ Yet, even if Russian courts are used to enforce legal and contractual rights only in relatively clear cases, the judicial system serves a more effective role than Western accounts of the Russian legal system typically give it credit for.

V. Conclusion

"[A]s a litigant," Judge Learned Hand once observed, "I should dread a lawsuit beyond almost anything else short of sickness and death."²²⁷ Anyone conducting business in Russia would do well to heed this advice.

Nevertheless, to borrow a phrase from the lead sentence of this article, a Western party should *not* "forget . . . about getting justice in a Russian court." The International Commercial Arbitration Court has earned international respect as a credible arbitral forum. The general courts have established a track record of recognizing arbitral awards in favor of foreign parties, including awards rendered in other countries, and the *arbitrazh* courts are growing into their role as specialized commercial courts. In appropriate circumstances, Western parties can and should resort to Russian courts and arbitral institutions to vindicate their rights.

Unit, *Russia Politics: Court System Sheds Shabby Image*, EIU ViewsWire (May 14, 1997), available in LEXIS, World Library, ALLEIU file; Telephone interview with Richard Steffens, U.S. Foreign Commercial Service Officer, in Moscow (Oct. 8, 1996).

224. Jeremy Weinburg, *Overcharged? Taking the Tax Man to Court*, MOSCOW TIMES, April 8, 1997, at 4 (noting that "the major international accountancies report almost no setbacks in dozens of [tax] cases in Moscow they have handled"); Matthew Kaminski, *GE to Close Down Moscow Subsidiary*, FIN. TIMES, March 20, 1997, available in 1997 WL 3781497 (noting that "U.S. pharmaceuticals company Johnson & Johnson has won nine of the 10 cases it has brought against the tax police"); Telephone interview with Michael Malloy, Counsel, Arthur Anderson, in Moscow (Oct. 2, 1996). For a discussion of *arbitrazh* court practice in tax cases, see O. Boikov, *Rassmotrennie arbitrazhnykh sudami nalogovykh sporov* [Examination of Tax Disputes by the Arbitrazh Courts], ROSS. IUST., Nov. 1996, at 22.

225. See, e.g., *Russia Steps Up Enforcement of Intellectual Property Rights*, 7 RUSSIA & COMMONWEALTH BUS. L. REP., July 29, 1996; Astrid Wendlandt, *Microsoft Hails Court Decision on Piracy*, MOSCOW TIMES, Sept. 27, 1996.

226. Even in U.S. courts, foreign parties appear to pick and choose cases for litigation very carefully. A recent study of 94,142 cases concluded that in actions between an American and a non-American, foreigners win 63% of the time. Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996). According to the authors of the study, the most likely explanation for this result is "the apprehension [by foreigners] that American courts exhibit xenophobic bias and the pecuniary and nonpecuniary distastes for litigation in a distant place. Foreigners abandon or satisfy most claims and, presumably, persist in the cases that they are most likely to win." *Id.* at 1133-34.

227. Learned Hand, quoted in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 642 (1985).

