Reforming the Procedural Rules for Business Litigation in Russia: To What End?

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Disputes are a sad fact of life in business. The optimism with which many commercial transactions begin can fall victim to problems arising as a result of changes in the economy or opportunistic behavior by one of the participants. Perfect knowledge, either about the economy or about trading partners, always lies just beyond our grasp. Written contracts offer protection from some of life's vicissitudes, although they are inevitably incomplete. Even the most detailed agreement cannot contemplate all possible outcomes. Law comes into play by setting substantive parameters for contractual relations and by establishing procedures for handling disputes. When problems arise, however, both the law and the terms of the contract often take a back seat to concerns over preserving the relationship. Especially where those involved have worked together for an extended period, they may be reluctant to resort to legalistic solutions that require them to don the cloak of adversaries, preferring to seek out a compromise that both can live with. Such negotiations take place in the shadow of the law. The nagging realization that any failure to reach an accord could result in a lawsuit influences behavior. The perceived fairness of the courts colors the precise nature of that influence, such as whether litigation is to be avoided at all costs or is regarded as a viable option. Procedural rules are critical in setting the tone in that they establish the rights and duties of all the involved parties.

The basic facts of business life hold true in Russia as they do elsewhere. Although the popular media and much of the scholarly literature has dismissed the relevance of law and legal institutions for Russian businessmen, those who have actually investigated the question empirically have come to recognize that law is not as marginal as is generally thought.[1] Just as in other market economies, businessmen in Russia rarely rush to the courthouse when dissatisfied with the performance of a trading partner. Rather, they try to find some way to settle the dispute to their mutual satisfaction. Perhaps they are more open to extra-legal

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solutions, including those that raise the specter of violence, than are their counterparts in the West. But just as in the West, informal strategies represent only part of the spectrum. The caseload data, together with the results of enterprise surveys, show that Russian businesses are also open to using the courts to resolve their disputes when negotiations prove futile.

In Russia, economic disputes are heard by *arbitrazh* courts, which are institutionally distinct from both the courts of general jurisdiction and the constitutional court. Elsewhere I have documented that the criticisms of these courts for being slow, expensive, incompetent, and corrupt have been overblown.[2] Although far from perfect, the *arbitrazh* courts have demonstrated a capacity to resolve basic commercial disputes in a relatively timely and low cost manner. Recognizing that room for improvement remained, policymakers embarked on an overhaul of the procedural code. A new code was passed by the legislature in the summer and went into effect in September 2002. In this article, I reflect on the changes introduced in that code in terms of five criteria that encapsulate what businessmen most need from courts.

- *Independence*. The Soviet heritage of "telephone law" magnifies the importance of ensuring the independence of the *arbitrazh* courts from outside influence, whether it emanates from those with political or economic power.
- *Competence*. Russian *arbitrazh* judges' experience in handling market transactions dates back only a decade, leaving some businessmen skeptical of their ability to comprehend and resolve complex commercial disputes.
- *Even-handedness*. Businessmen want a level playing field in the courts. They want assurances that their access to justice is not influenced by the relative wealth, courthouse connections, or prior legal experience of those involved.
- *Efficiency*. Speed is essential in processing commercial cases everywhere, though not at the expense of justice. The precarious financial condition of many Russian businesses make the need for speed even more pressing, given that their very survival may depend on the swift resolution of disputes.
- *Enforceability*. A favorable judgment means little if it cannot be enforced. Complaints about the difficulty of enforcing judgments have become commonplace among Russian economic actors.

The Independence of *Arbitrazh* Courts

Businessmen turn to the courts for dispassionate assessments of disputes that have resisted resolution through negotiation. If the courts are perceived as biased—whether due to judges' predispositions or procedural rules that systematically favor certain groups—businessmen will look elsewhere for assistance. The *arbitrazh* courts have had to fight an uphill battle to build trust. During the Soviet era, the independence of courts was trumpeted in the constitution but not respected in practice. Communist Party officials routinely interfered in their work in an effort to ensure that the outcomes reflected party doctrine.[3] In economic disputes that meant that the needs of the national economic plan often trumped the law in determining the results.[4] Consequently, some have viewed the proclamations of

judicial independence embedded in the 1993 Russian Constitution, as well as in virtually every piece of legislation relevant to the operation of the *arbitrazh* courts, with skepticism.[5] Over and over again, judges are implored to look only to the law when resolving disputes. But the elusive nature of independence combined with the hollowness of prior promises and rampant corruption makes it difficult to trust the words, however fervently declared.

Institutional design can affect independence by building in safeguards. Anything that makes outside interference more difficult tends to enhance the integrity of the judicial process. When the *arbitrazh* courts were first introduced in 1992, all decisions were made by three-judge panels. Because any bribe would have to be paid to at least two judges, this rule no doubt discouraged such efforts. But it had the unfortunate effect of slowing down the processing of cases. For this reason, the subsequent revisions of the procedural code in 1995 and 2002 have brought a steady reduction in the number of cases handled by three-judge panels. In 1995, inter-enterprise disputes were entrusted to single judges, whereas bankruptcies and cases involving the state as a party continued to be heard by three-judge panels.[6] Reasoning that the efficiency gains outweighed the danger of corruption posed when a case is in the hands of an individual judge, the current code further restricts the number of cases assigned to three-judge panels. Bankruptcies, which are the category of case in which allegations of influence-peddling arise most frequently, are still heard collegially,[7] as are cases involving a direct challenge to state action.[8] Regardless of whether the trial is handled by one judge or by a three-judge panel, the availability of appeals blunts the effectiveness of bribery by widening the circle of officials who must cooperate in the criminal enterprise. The 1995 revisions to the procedural code introduced a three-level appellate process that remains in place to this day.[9] All appeals are heard collegially and the new procedural code guarantees that the trial judge cannot be a member of the appellate panel.[10]

The rules governing the selection and retention of judges also play an important role in determining the parameters of judicial independence. For most of the Soviet era, judges were chosen through single-candidate elections. Not surprisingly, Communist Party officials carefully vetted the prospective candidates and any judge who failed to toe the party line would not be renominated in the next election cycle. Thanks to the reforms of the 1980s, the party was removed from the selection process. Judges are no longer elected, but are appointed by the president.[11] But the selection—especially for low-level courts—has been depoliticized by the introduction of a form of peer review. After meeting the threshold requirements (twenty-five years of age, legal education, five years of work experience in the legal field), prospective judges must pass muster with a judicial qualifications commission.[12] Once on the bench, *arbitrazh* judges have life tenure and full immunity. They can be censured or removed only if they engage in criminal behavior. They cannot be prosecuted or otherwise punished for decisions that run counter to the prevailing political winds.[13]

Comparative experience shows that salary levels and other financial considerations can contribute to creating an atmosphere in the judicial system where

bribes are tolerated. After all, if judges and others within the system do not earn enough through their official salaries to provide for their families, they will have to seek compensation elsewhere.[14] The options for earning outside income are limited for *arbitrazh* judges. In an effort to preserve their independence, they are prohibited from engaging in any sort of business activity or working as an arbitrator for private arbitration services. The only permitted outside activity is teaching or scholarly writing.[15] Although such restrictions make good sense from the point of view of preserving the appearance and the reality of judicial independence, it can leave *arbitrazh* judges in a bit of a bind. The state tries to compensate by providing generous social benefits, including the right to free public transportation and assistance with obtaining housing, phone service, and admission to preschool for judges' children.[16] Those perquisites are, of course, reminiscent of those given to judges under the old Soviet system. Granting or withholding access to otherwise inaccessible services was one way that Soviet officials gained sway over judges. Although markets now exist for housing and phone service, a quiet word from a local or regional official can easily move a person up to first on an otherwise endless list. In interviews, *arbitrazh* judges have told me that they would prefer to have these benefits monetized, both to preserve the appearance of independence and to give them the option of how to use the resources. Whether local and regional officials have used their influence over service providers to gain a foothold with *arbitrazh* judges cannot be known, but is certainly possible. The compromised heritage of courts from the decades of Soviet power gives more weight than deserved to any hint of political sway.

A potentially greater danger that extralegal influences will be introduced is posed by the decision to facilitate the participation of laymen in the decision-making process. Over the objection of top *arbitrazh* officials, the Duma deputies inserted provisions that allow litigants in inter-enterprise disputes to petition to have two lay assessors (*arbitrazhnye zasedateli*) sit alongside the judge with an equal voice in the outcome.[17] The use of assessors in *arbitrazh* is a relatively recent innovation. It began as an experiment in 1996 and was soon incorporated into the procedural code.[18] It is never mandatory, but lies within the discretion of the litigants. The pool of assessors includes those over twenty-five years of age with relevant business experience.[19] When asked about his regrets regarding the new code, Venyamin Yakovlev, the chairman of the Higher *Arbitrazh* Court, highlighted that feature.[20] Although appreciating the desire of enterprises to have some say in who will decide their case, he feels that it is inappropriate in state-sponsored courts. If parties desire greater control, they have the option of submitting their disputes to private arbitration tribunals (*treteiskie sudy*). Explaining his rationale, he noted, "We objected because we are a state court. Above all, our courts must be absolutely impartial. And if there is some sort of conflict, such as the judge having some sort of connection with one side, then he cannot be a judge in that case. Despite our objections, the amendment was adopted."[21] Some commentators are more optimistic, pointing out that the presence of experienced businessmen (who are to serve as assessors) can be "productive" in complicated cases.[22]

The Competence of *Arbitrazh* Courts

The willingness to submit a business dispute to a court rests on the assumption that the judge is competent. If businessmen begin to question whether judges are up to snuff, then they may begin to pursue other options. The relatively short history of market relations in Russia complicates the task of earning trust for *arbitrazh* judges. Although the usual grumbling accompanies losses by enterprises in garden-variety contractual disputes, survey data show that most Russian managers have confidence in the courts. Complaints have been more strident with regard to matters of corporate governance. The press, both domestic and international, has also jumped into the fray, assailing the courts for what they regard as incompetence in the seemingly endless battles for corporate control that raged in the late 1990s.

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The procedural boundaries between the *arbitrazh* courts and the courts of general jurisdiction opened the door to shareholder battles. Traditionally the jurisdiction of the *arbitrazh* courts has been limited to disputes involving companies or other legal entities (including individuals who had officially registered as entrepreneurs), while all cases involving individuals have been heard by the courts of general jurisdiction.[23] For the most part, that division worked well, ceding business disputes to the *arbitrazh* courts and leaving the remainder to the other courts. Privatization, which gave rise to both individual and corporate shareholders, threw a wrench into the works. Companies often found themselves waging two-front wars as their corporate shareholders would challenge them in *arbitrazh* court and their individual shareholders would file suit in a court of general jurisdiction. The latter claims, which became known as *"babushkinie isky,"* were typically filed by shareholders with one or two shares with the sole goal of blocking some action planned by management. Often the petitioner-shareholder was a pensioner who had been paid handsomely for his services as a surrogate. The most notorious example occurred in 2001 when a single shareholder was able to paralyze Lukoil's exports of oil to Eastern Europe for several days based on allegations of the improper election of officers. The dueling norms for where cases were to be filed facilitated the confusion. Unlike *arbitrazh* cases, which must be filed in the court closest to the defendant, the courts of general jurisdiction allow petitioners to file in the court closest to them. The parallel processes often resulted in inconsistent decisions and left the company officials in a quandary about which judicial order to obey. As the vice chairman of the Chelyabinsk *arbitrazh* court noted, "This practice is destroying the judicial system because it creates doubt about the mandatory nature of judicial act."[24]

The expansion of their jurisdiction in the new procedural code promises to allow the *arbitrazh* courts to cut a broader swath across economic disputes.[25] *Arbitrazh* courts now have jurisdiction over all disputes between shareholders and management, regardless of whether the shareholder is a person or a legal entity.[26] That reform was enthusiastically endorsed by Dmitri Kozak, the head of the presidential commission on judicial reform, who commented:

> I consider that all cases connected with legal entities must be transferred for resolution to the *arbitrazh* courts, because otherwise we will have parallel processes for business conflicts. Having lost the case in *arbitrazh*, a company will give one share to a *babushka* from Kostroma and will add to the people's court a directly contradictory decision. Justice will end up in a dead end because the bailiff will have identical grounds for enforcing both decisions.[27]

Doubts were expressed by members of the Russian Supreme Court as well as some lawyers on the grounds that the *arbitrazh* courts, which are located only in regional capitals, are less accessible than are the courts of general jurisdiction.[28] The receptivity of the *arbitrazh* courts to hearing cases in camera when the parties are unable to appear mutes this objection. On the question of competence, lawyers uniformly praised the shift of forum. For example, one Moscow lawyer commented: "The transfer of petitions of shareholders to *arbitrazh* is a positive thing. To bring cases to the people's courts is simply unpleasant. The qualifications of *arbitrazh* judges with regard to economic disputes is incomparably higher than the qualifications of the judges of the courts of general jurisdiction."[29]

Whether this shift in the jurisdictional boundaries will bring an end to opportunistic litigation by corporate gadflies remains to be seen. The most obvious loophole has been closed. Agitators can no longer use last-minute court orders from far-flung courts to discombobulate annual meetings. Lyudmilla Maikova, the chairman of the cassation court for the Moscow okrug, believes that the practice will die out. "Now if such cases will be brought, it will be only in the *arbitrazh* courts. But I very much doubt that they will arise in the same numbers as now. It's not a secret to anyone that such cases have been brought only as a ruse in order to drag out the process."[30] The editors of *Vedomosti*, a leading Moscow business newspaper, are less sanguine. In an editorial written about six weeks after the new rules came into effect, they noted that, "[t]he new *arbitrazh* procedural code cannot stop the wave of questionable decisions of the people's courts on the basis of which headquarters have been stormed and the leadership and shareholders' lists of companies have been changed." They argue that lawyers are ferreting out and exploiting loopholes unperceived by legislators and call on the Supreme Court and the Higher *Arbitrazh* Court to end the confusion by issuing decrees that effectively stop the courts of general jurisdiction from hearing conflicts between shareholders and management.[31]

The chairman of the Higher *Arbitrazh* Court sees this procedural innovation as offering widespread benefits. "In my view, the reward is not for the courts, but for the litigating parties and for our economy."[32] Litigation now offers more certainty to shareholders and management alike, which should act to build confidence in the competence of the *arbitrazh* courts.

The data collected by the *arbitrazh* courts for the last quarter of 2002, during which the new APK was in effect, indicate that these two procedural innovations are not laying dormant. For example, in each of six *arbitrazh* courts for which I obtained caseload statistics for 2002, the court had heard cases involving litigants that were neither legal entities nor registered entrepreneurs. These are cases that, under the 1995 APK, would have been ceded to the courts of general jurisdiction. The numbers of these cases varied widely, from 341 in the Moscow City court to 1 in Saratov and their likely impact has been minimal, but the mere fact that they have been brought is worthy of note.[33] Along similar lines, these data show that the courts of general jurisdiction have begun to transfer cases to the *arbitrazh* courts. Though the numbers of cases involved are larger than those of individual petitioners, they still represent less than 5 percent of the cases heard by the courts during these final three months of 2002.

The Evenhandedness of *Arbitrazh* Courts

Equal treatment of all parties is what distinguishes a kangaroo court from a respected state-sponsored court. Not surprisingly, the procedural rules governing the *arbitrazh* courts have consistently emphasized the equality of parties.[34] Touting the foundational role of equal treatment may not be sufficient to achieve it in practice. Many factors contribute to the degree of equality experienced by litigants. The nonadversarial nature of the *arbitrazh* process renders the neutrality of judges critical. Although parties have the right to be represented by counsel and usually are, judges carry out most of the questioning and, of course, interpret the evidence and decide which side has carried the day. If judges are not open-minded in resolving disputes, it undermines the integrity of the institution. The process of selecting judges (described above) is intended to weed out both the incompetent candidates and those with an agenda. If one of the parties believes the assigned judge to be biased, they have the right to petition for his or her recusal. This right has been in place since the advent of the *arbitrazh* courts, although the bases for it have been expanded in the most recent procedural code.[35] Such petitions have been relatively rare over the history of the system and are often perceived by the judge and the other parties as a stalling tactic.[36] They are referred to the chairman of the court.

Just as important to ensuring evenhandedness as judicial objectivity are the underlying procedural rules. Sometimes rules that seem fair turn out to affect certain parties disproportionately. For example, the procedural codes in effect during the 1990s called on both sides to show up for the hearing with their evidence in hand. Although such a rule appeared to be unbiased, it had the effect of preferencing better-financed and more experienced parties who could marshal their evidence effectively. Such parties were often able to ambush the other side at the hearing, overwhelming the court with evidence and leaving the other side incapable of responding. That was most common in complex litigation, such as cases involving questions of corporate ownership. In an effort to discourage such "Perry Mason moments," the new procedural code introduces a

preliminary stage of the process for complex cases. Judges now have two months to work with the parties to make sure that all of the relevant evidence is assembled before the case is set for a hearing.[37] The parties now have an affirmative obligation to make the other side aware of their arguments before the hearing commences.[38] Yakovlev has described the introduction of this quasi-discovery stage as one of the key innovations of the new code, noting that, "the process is more open and transparent, allowing the parties to be better prepared and the courts to make legal and well-grounded decisions."[39]

Observers of the U.S. legal system are keenly aware of the extent to which unevenness in the quality of representation of the parties can affect outcomes. In judge-centered systems such as Russia's *arbitrazh* courts, the impact of poor lawyering is less devastating but can still give rise to inequities. Being represented has grown commonplace over the decade of these courts' existence.[40] But the procedural rules in effect for much of the period were lax about who could serve as a representative.[41] Indeed, literally anyone could act in that capacity, provided that they had been authorized to do so by the company charter or held a valid power of attorney (*doverennost'*). As a result, the caliber of the representation was inconsistent and, in my experience of observing several hundred hearings during the 1990s, seemed to have little to do with whether the representative had legal education. Irrespective of their background, representatives had a tendency to show up in court unprepared. Judges complained vociferously about this practice in interviews, but felt themselves unable to do much about it because of the cumbersome procedures for civil contempt.

The new procedural code takes a more restrictive approach.[42] Enterprises are still free to send any employee to represent them in *arbitrazh* court, regardless of whether he or she has any legal training. But if they look outside for representation, they are limited to *advokaty*.[43] Within Russia's divided legal profession, *advokaty* are the lawyers who specialize in litigation, though to date they have concentrated mostly on criminal defense work. During the 1990s, as the Soviet-era restrictions on lawyers dissipated, lawyers who were not *advokaty*, namely *yuristy*, began to open law firms and to develop corporate practices. Although outside counsel remained the exception rather than the rule in *arbitrazh* courts during the 1990s (especially outside Moscow), when they did appear, they were more likely to be *yuristy* than *advokaty*. That makes the choice to preference *advokaty* in the new code curious. Alexander Buksman, who heads the office (*glavnoe upravlenie*) of the Ministry of Justice for the city of Moscow, explained it in this way:

> The *advokaty* succeeded in convincing [the drafters] that they behaved the most professionally and were best able to carry out the function of representation in the *arbitrazh* courts. Thus the so-called legal firms, which factually carry out *advokatskii* activities but are not *advokaty*, must leave the arena. Now it will be clear to the court: whether before them is an *advokat* or whether it is another representative of the enterprise or organization. But I for one do not think that this infringes on the rights of *yuristy*. I consider that this norm of law clarifies their place.[44]

Top officials of the Higher *Arbitrazh* Court likewise stressed concerns over the competence of counsel when justifying the change.[45] Others on the high court contend that the priority given to *advokaty* was mandated by the new law on the legal profession.[46] An editorial in Vedomosti published soon after the code had cleared the final hurdles in the legislature took a more conspiratorial view, questioning whether the provision might not be a way of getting rid of the competition posed by foreign law firms.[47] The attitude of the *yuristy* has been less hysterical than might be expected. To be sure, they are annoyed, but they have already figured out a way around the apparent ban by making the *yurist* an employee of the client enterprise during the trial. They have expressed exasperation at having to exploit loopholes to represent longstanding clients.[48]

The tightening up of the rules relating to representation coincides with a broader reform of the legal profession, embodied in a new law governing the *advokatura*. The goal is to bring some structure to a profession that has existed in a free-form state for the past decade. The bravado of the *yuristy* who have publicly vowed to flout the prohibition on their participation in *arbitrazh* cases suggests that they will not go easily into the night. How all of this will affect the quality of representation in *arbitrazh* courts is unclear. In Moscow, where a business bar has begun to develop, my observation of court proceedings in the late 1990s revealed that parties who had competent in-house counsel or had retained qualified outside counsel had a distinct advantage over ill-prepared opponents (both represented and unrepresented). Only time will tell whether the reforms will stem this trend or contribute to it.

The Efficiency of *Arbitrazh* Courts

Petitioners' desire for quick resolution of their business disputes is self-evident. Just as obvious is the presence of countervailing forces. In unified judicial systems, business disputes have to jockey for the court's time with criminal cases, which take priority. Moreover, defendants in business disputes rarely crave speed, particularly if liable, preferring to delay the day of reckoning for as long as possible. They learn to manipulate the procedural rules to drag out the proceedings. Not wanting to sacrifice justice to efficiency, judges are loath to cut defendants off.

The Russian *arbitrazh* courts hear only business disputes and so need not balance concerns for economic justice with those of personal liberty. Although they have a reputation for dilatoriness within the popular press and scholarly literature,[49] a careful review of the data reveals the criticism to be overstated.[50] From the outset, those courts have demonstrated a strong interest in processing cases expeditiously. Rather than leaving the timetable up to the discretion of judges (thereby opening the door for defendants to engage in delaying tactics), the procedural rules in effect during the 1990s established a firm two-month deadline for processing cases.[51] That put enormous pressure on judges, who had to review the complaint, send out the notice of the time and place of the hearing, hold the hearing, and render the decision within the relatively short two-month window. Further complicating matters is the patent unreliability of the Russian mail service. If either party fails to receive notice of the hearing (as evidenced by the

appearance of the plaintiff at the hearing and the receipt of the notice of delivery of the complaint to the defendant), then the hearing has to be postponed, risking violation of the deadline. Given all of those difficulties, combined with the growing complexity of the claims brought to the *arbitrazh* court, the record is truly remarkable. Nationally the number of decided cases that violate the two-month deadline has never exceeded 5 percent.[52] As this suggests, the shadow of the deadline hangs over all proceedings. Judges are acutely aware of it and strive to meet it. Their record in doing so shapes their reputation among their colleagues and affects their chances for promotion and raises.[53] Interviews with *arbitrazh* judges conducted periodically throughout the 1990s indicate that some judges are uncomfortable with the heavy emphasis on speed, likening the judicial process to a conveyor belt.

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The new procedural rules adopt a more nuanced approach. Rather than a flat rule for all cases regardless of their complexity, the code now divides *arbitrazh* cases into three categories, each of which has separate timetables. Cases involving the state as a party, which are known as administrative cases, retain the traditional two-month deadline.[54] At first glance, that choice seems odd. For the past few years, administrative cases have had a markedly higher rate of delay than have cases between two private parties (known as civil cases).[55] But the primary reason for the tardiness was not sloth but the requirement that all such cases be heard by three-judge panels, which bogged down scheduling. As I noted above, the new rules allow most administrative cases to be heard by a single judge (just like civil cases), which should speed up their resolution, especially given that tax-related disputes, the single largest category of administrative cases, are no longer required to be heard by a panel.

Cases that call on the court to act as a debt collector constitute the second category. As inter-enterprise arrears mounted during the 1990s, enterprise managers increasingly turned to the *arbitrazh* courts for relief.[56] Nonpayment cases made up the majority of civil cases heard by the courts during the 1990s.[57] As a rule, the debtor-defendant did not contest the amount owed—often they did not even participate in the process—but the procedural rules still required a full-fledged hearing.[58] In an effort to streamline those sorts of cases, the new code establishes a "summary" procedure (*uproshchennoe proizvodstvo*).[59] Yakovlev explained that it will be "shorter and simpler," noting that it

> can even take place without holding a judicial hearing, only on the basis of written documents. But this form is permitted when the parties have no objection to it, and also when the cases have no question at issue (*bessporno*) or involve small (*neznachitel'no*) sums. For example, an energy-supplying organ provides energy,

> but isn't paid. Where's the dispute? The entity not paying says that it has no money. Here everything is clear, but still we handle such disputes according to the general procedure which is complicated and difficult. Now everything proceeds differently. As a result, the resolution will be quicker for simple or small cases and, consequently, the time of judges will be freed up for resolving more complicated cases.[60]

Cases that fall into this category will be decided by judges on the basis of the pleadings and other documentary evidence submitted by the parties. The turnaround time is quick; the judge has only a month to render a decision. Either side can opt out of the "summary" procedure with no prejudice. As Yakovlev notes, the appeal of this alternative is obvious for utilities and other companies that frequently find themselves in arbitrazh court as plaintiffs. Whether it will be as enthusiastically embraced by debtors or by creditors who are less familiar with, and perhaps less trusting of, the courts remains to be seen. The introduction of this "summary" procedure has been seen as a bold and necessary reform that has the potential to dramatically reshape debtor-creditor relations in Russia.

The caseload data for the last quarter of 2002 indicate that this procedural change has been embraced enthusiastically by creditors, especially in Moscow. For example, more than 60 percent of the non-payments cases brought in the Moscow City court were diverted to this "summary" procedure. Elsewhere litigants took a slightly more measured approach, as the experience of the Novosibirsk and Saratov courts illustrate, where approximately 30 percent of the cases brought in the last three months of 2002 were heard using this new procedure.

The remainder of the cases brought to the *arbitrazh* courts will go through the two-stage process, beginning with discovery and proceeding to trial (as described above). Included within this third category is complex civil litigation as well as debt cases involving large sums or parties that want their day in court. Those cases will go through a preparatory period that is not supposed to exceed two months. During that time, the parties will lay out the contours of their cases for each other and for the judge. When the judge determines that the parties are prepared, the case will be set for trial.[61] The decision must be rendered within a month of that date.[62] Although the timetable has ostensibly been loosened for complex cases, judges have been assigned additional tasks, making the extra time something of a mixed blessing.

Although the introduction of separate deadlines based on the nature of the case reflects a desire to enhance the efficiency of the *arbitrazh* courts, it is a measured effort. The drafters carefully considered the demands of the various types of cases and set deadlines that they deemed reasonable. At the same time, they have reshaped the role of the judge. In complex litigation, judges are now expected to assume a more managerial role; they are supposed to make sure that relevant evidence is assembled before everyone's time and money is wasted on a trial. The new code also expresses a strong policy preference for settlements (*mirovye soglasheniya*) and directs judges to do whatever possible to encourage feuding parties to find some middle ground, thereby economizing on state resources.[63] Taken as a whole, however, the new code is unquestionably more complicated. With the customized procedural rules comes a risk that laymen will find them

impenetrable. One of the advantages of the prior code was its simplicity, but it may have outlived its usefulness.

The Enforcement of *Arbitrazh* Court Judgments

In an interview given in the mid-1990s, Yakovlev characterized enforcement as the "Achilles' heel" of the *arbitrazh* system.[64] Survey data indicate that the users of the *arbitrazh* courts agree with his negative assessment. When asked to rate the extent to which difficulties with enforcement constituted an obstacle to using the *arbitrazh* courts on a zero to ten scale in a survey fielded in mid-1997, 61 percent of enterprise managers responded with scores of eight or higher, indicating that they viewed it as a serious impediment.[65] Those derisive attitudes are borne out by the behavior of litigants. In spring 2000, I tracked one hundred nonpayments cases in Moscow, Saratov, and Ekaterinburg. Although the petitioners uniformly prevailed in court, only six of the debtor-defendants paid voluntarily. Most of the petitioners ultimately ended up getting some portion of what the court awarded them, but only after considerable effort on their part.

Clearly the enforcement system is not meeting the needs of litigants. Untangling the reasons why is difficult. The fact that the courts have shouldered much of the blame is ironic given that they have little responsibility for, or control over, the enforcement process. For the most part, judges' involvement ends when their judgments are issued. Judges can issue orders compelling the losing side to pay, but these only duplicate the decision. If a party chooses to defy the court, it is unlikely that further exhortations from that quarter will make much difference. The more troubling question is why flouting the court has become the norm in post-Soviet Russia. That behavior is not limited to financially strapped enterprises where it could be excused on grounds of expediency. Rather it has become a way of life for run-of-the-mill enterprises and seems to carry no consequences. Those who fail to pay are not branded as shirkers nor are they ostracized. A full exploration of the reasons why is beyond the scope of this article, but there can be little doubt that a lack of respect for the courts is partially responsible. Thus far, the efforts to improve enforcement have avoided explanations grounded in legal culture and have, instead, concentrated on fixing the institutional structure. In the late 1990s, a wholesale reform was undertaken.[66] The officials charged with implementing decisions, known as bailiffs or *sudebnye pristavy*, were given more authority to go after delinquent defendants. Incentives designed to encourage those officials to pursue judgments aggressively (including financial bonuses) were embedded in the new institutional structure. Although the reforms represent an improvement, problems persist. Bailiffs answer for judgments of both the *arbitrazh* courts and the courts of general jurisdiction.[67] The bulk of their time is devoted to chasing down deadbeat dads for child support, leaving little time for going after corporate debt.

Because the courts do not answer for the enforcement of their judgments, the potential impact of new procedural rules is naturally circumscribed. But recog-

nizing the dire need to signal their concern with the problem, the drafters increased the number of articles in the code relating to enforcement. They have attempted to strengthen the capacity to collect judgments. One small but potent change increased the period during which a court order compelling payment (*ispolnitel'nyi list*) is valid from six months to three years (compare art. 201, 1995 APK, with art. 321, 2002 APK). If the losing side does not pay of its own accord, the victor can obtain an *ispolnitel'nyi list* from the court and on presenting it to the loser's bank is entitled to receive the amount of the judgment. Sounds simple enough, but the illiquidity of most Russian enterprises has left insufficient funds to satisfy judgments. When that happens, the *ispolnitel'nye listy* stack up and are paid, as among private creditors in the order received whenever money comes into the account. Extending the validity of the court orders to three years would seem to make them more viable. Although enterprises can hide assets and avoid using their bank account(s) to elude responsibility, having to do so for three years—as compared to six months—will be a greater inconvenience.

The institutional reforms to the enforcement system are reflected in the new procedural code. The earlier code focused solely on the potential for bank misfeasance,[68] but the new rules also allow bailiffs (*sudebnye pristavy*) to be called to answer for their actions as well as for their failure to act.[69] The court's powers with regard to such claims go beyond a right to order bailiffs to alter their behavior to contemplate the possibility of monetary damages.[70] To make it easier for disgruntled litigants to air their dissatisfaction with *sudebnye pristavy* in court, all filing fees are waived for such cases.

Taking a broader view of the problem of enforcement, the drafters attempted to beef up the capacity of the court to impound assets during the trial. Whether those efforts will bear fruit is uncertain. Judges have long had the right to freeze the assets of parties (usually defendants) at any point during the judicial process if they are convinced that the assets might mysteriously disappear and be unavailable to satisfy a judgment.[71] In practice, however, many judges have been reluctant to grant such petitions, fearing that defendants' businesses would suffer from having their working capital frozen. They have demanded clear and compelling evidence that the judgment will not be paid before issuing any order. Petitioners have found themselves in a classic catch-22—the definitive proof is available only when the case is concluded and the defendant's coffers are empty, but then it is too late. That high burden of proof was not mandated by statute, but evolved as an informal norm among *arbitrazh* judges and seemed to dampen the enthusiasm of creditor-petitioners for the procedural tool.[72] The new code expands the provisions relating to freezing assets. The new language clarifies that a petitioner can seek an order freezing the defendant's assets when the complaint is filed.[73] At the same time, a provision is included that gives the defendant the right to demand that the petitioner post a bond in case the defendant prevails in the case and suffers damages due to having its assets frozen.[74] Although reasonable on its face, that provision may well dissuade petitioners, especially those in a precarious situation, from protecting themselves.

Conclusions

The increased intricacy of the procedural rules governing the *arbitrazh* courts in the new codes represents a leap forward in terms of the professionalization of the courts. Over the past decade, they have successfully shed their Soviet heritage of being a mouthpiece for the state and have emerged as a trusted and respected tribunal. The gradual increase in the number of cases heard and resolved (after a decline between 1992 and 1994) speaks to this as well.[75] The new rules allow the courts to measure their responses to cases based on the parties involved, the amount at stake, and the complexity of the issue raised. If all goes as planned, both justice and efficiency should be maximized. Judges will be able to streamline cases in which there is no real disagreement, leaving them more time to devote to complicated disputes. The imposition of a mandatory preparatory stage for such cases should ensure that courts do not spin their wheels waiting for relevant evidence to be produced. That rosy scenario depends on judges as well as litigants and their representatives complying with the new procedural rules as written, which is unlikely. The very nature of a trial encourages both sides to interpret the rules to suit their purposes. What sort of permutations will emerge through practice remains to be seen. Although some of the experiments may not work out as expected, what is certain is that the work of the *arbitrazh* courts will be remade as a result of this new procedural code.

NOTES

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1. For example, Kathryn Hendley, Peter Murrell, and Randi Ryterman, "Law, Relationships, and Private Enforcement: Transactional Strategies of Russian Enterprises," *Europe-Asia Studies* 18, no. 4 (2000): 627–56; Simon Johnson, John McMillan, and Christopher Woodruff, "Contract Enforcement in Transition," (Mimeo, 1999).

2. Kathryn Hendley, "Suing the State in Russia," *Post-Soviet Affairs* 18, no. 2 (2002): 148–81. See Kathryn Hendley, "Temporal and Regional Patterns of Commercial Litigation in Post-Soviet Russia," *Post-Soviet Geography and Economics* 39, no. 7 (1998): 371–90. See also Kathryn Hendley and Peter Murrell, "Dispute Resolution in Russia: A Regional Perspective," in *Unleashing Russia's Business Potential: Lessons from the Regions for Building Market Institutions*, edited by Harry G. Broadman, World Bank Discussion Paper No. 434 (March 2002).

3. Louise I. Shelley, "Soviet Courts As Vehicles for Political Maneuver," *Soviet Union* 13, no. 2 (1986): 163–86.

4. The *arbitrazh* courts were built on the institutional foundation of state *arbitrazh* (*gosudarstvennyi arbitrazh* or *gosarbitrazh*), which operated during the Soviet era. See Stanislaw Pomorski, "State *Arbitrazh* in the U.S.S.R.: Development, Functions, Organization," *Rutgers-Camden Law Journal* 9, no. 1 (1977): 61–116. *Gosarbitrazh* was not a court, but was more akin to an administrative agency. Given the shortages that plagued the Soviet economy, it is no surprise that most disputes revolved around late deliveries. Monetary damages were an afterthought.

5. *Konstitutsiya Rossiiskoi Federatsii* (Moscow: NORMA-INFRA-M, 1998): art. 119. See "O statuse sudei v Rossiiskoi Federatsii," *Sobranie zakonodatel'stva Rossiiskoi Federatsii*, no. 51, item 4834, art. 3, 17 December 2001. See also Federal'nyi konstitutsionnyi zakon "O sudebnoi sisteme Rossiiskoi Federatsii," *Sobranie zakonodatel'stva Rossiiskoi Federatsii*, no. 51, item 4825, art. 1, 17 December 2001 [hereafter referred to as FKZoSS]. See also Federal'nyi Konstitutsionnyi Zakon "Ob Arbitrazhnykh sudakh v Rossiiskoi Federatsii," *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, no. 18, item 1589, art. 6, 1995 [hereafter referred to as FKZoAS].

6. Arbitrazhnyi protsesual'nyi kodeks Rossiiskoi Federatsii, *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*, no. 6, art. 14, 1995 [hereafter referred to as 1995 APK].

7. Arbitrazhnyi protsesual'nyi kodeks Rossiiskoi Federatsii, *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*, special supplement to no. 8, art. 194, 2002 [hereafter referred to as 2002 APK].

8. Ibid, art. 223.

9. The first appeal (*appelliatsionnaya instantsiya*) amounts to a rehearing of the case, which allows the appellate panel to correct both factual and legal errors made by the trial court. The second appeal (*kassatsionnaya instantsyia*) is limited to legal errors. The Higher *Arbitrazh* Court stands at the apex of the system.

10. 2002 APK, art. 22. Although this prohibition on having the same person sit as both the trial and appellate judge closes a loophole that existed in the prior code, it is not really responsive to the concerns of litigants. I am unaware of any instance in which a judge double-dipped in this way. The ethical impropriety would have been too blatant. The bigger problem is with the appearance of collusion that inevitably comes from the fact that trial and first-level appellate judges both report to the same chairman. Indeed, there is no sharp distinction between them. A judge might sit as a trial judge one day and as part of an appellate panel the next. Litigants feel that this discourages them from overturning trial court decisions. The drafters of the new code were aware of these concerns, but felt constrained from splitting the trial and first-level appeals courts into two distinct units on fiscal grounds. As it is, *arbitrazh* judges sit in cramped quarters. Few have access to courtrooms and so have to hear cases in their chambers. The drafters realized that the chances of getting new buildings allocated to the first-level appeals courts were nil. Some viewed this choice as short-sighted. Boris Abushakhmin, a Moscow *advokat*, commented: "it is very expensive to divide the *arbitrazh* court that is currently in a single building and to hire more people. But at the same time, it is much more expensive for the state to get around the ramparts of deliberately unjust decisions when the judges of the first and second instance are controlled by a single chairman who is himself controlled by the governor. It is an outrage that the Higher *Arbitrazh* Court didn't have sufficient political will to get its own way." Natal'ya Melikova and Bulat Stolyarov, "Nachalas' sudebnaya reforma," *Vedomosti*, 12 April 2001. The desire for a separate system of appellate courts was finally satisfied with the passage of a July 2003 amendment to the FKZoAS, which provides for such a system to be operational by 2006. Yuliya Prosuryakova, "Pozhaluite na apellyatsiyu," *Rossiiskaya Biznes-gazeta*, 29 July 2003, 1–2.

11. The Chairman of the Higher *Arbitrazh* Court gathers recommendations for judicial candidates who have been approved by judicial qualifications commissions and presents them to the President, see supra note 5, "O statuse sudei v Rossiiskoi Federatsii," art. 6.

12. Article 4-1 of the Law on Status of Judges lays out the threshold requirements. The role of the qualifications commission is specified in article 8-3 of the constitutional law on the *arbitrazh* courts (FKZoAS 1995) and articles 5 and 6 of the Law on Status of Judges, supra note 5 "O statuse sudei v Rossiiskoi Federatsii."

13. FKZoSS, art 16; supra note 5, "O statuse sudei v Rossiiskoi Federatsii" art. 13, 14.

14. The *arbitrazh* courts are arguably in a better position than the courts of general jurisdiction. They are funded from, and have a separate line in, the federal budget (art. 46, FKZoAS). They also generate considerable income through their filing fees (*gosposhlina*) which are calculated as a percentage of the amount sought. This is not to say that the chair-

men of some regional *arbitrazh* courts have not turned to regional or local officials for financial assistance, but that the shortfall is not as profound or persistent as in the courts of general jurisdiction.

15. Supra note 5, "O statuse sudei v Rossiiskoi Federatsii," art. 3-3. This same provision also bars judges from joining political parties or movements. The prohibition on serving as a private arbitrator is most relevant to *arbitrazh* judges, many of whom supplemented their income with such work during the 1990s.

16. Supra note 5, "O statuse sudei v Rossiiskoi Federatsii," art. 19-3.

17. 2002 APK, art 17, 19.

18. "Polozhenie ob eksperimente po rassmotreniyu del s privlecheniem arbitrazhnykh zasedatelei," *Vestnick Vysshego Arbitrazhnogo Suda*, no. 5 (1997): 23–26.

19. "Ob arbitrazhnykh zasedateliakh arbitrazhnykh sudov sub"ektov Rossiiskoi Federatsii," *Rossiiskaya gazeta* 138–39, 20 July 2002, art. 2.

20. To a person, the trial judges I have interviewed over the past few years echoed this distaste for lay assessors, though they noted that litigants rarely exercise their right to involve assessors.

21. Ekaterina Samokhina, "Shag navstrechu predprinimatelyam," *Russika Izvestiya—Zakon*, 1 October 2002.

22. I. O. Evsikova, O. A. Krasnoperova, and E. V. Fil'kina, *Kommentarii k Arbitrazhnomu protsessual'nomu kodeksu Rossiiskoi Federatsii (postateinyi)*. (Moscow: OOO "TK Belbi," 2002): 17.

23. 1995 APK, art. 22. See V. F. Iakovlev, *Kommentarii k Arbitrazhnomu protsessual'nomu kodeksu Rossiiskoi Federatsii,* 2d ed. (Moscow, INFRA-M, 1999): 40–66.

24. Sergei Blinovskikh, "Sudy protiv 'babushkinykh iskov,'" *Chelyabinskii Rabochii*, 31 August 2002.

25. 2002 APK, art. 27-4. See T. K. Andreeva and A. G. Zaitseva, "O novellax novogo Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii (okonchanie)," *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*, no. 10 (2002b): 6–8. See also V. M. Sherstyuk, *Novye polozheniya tret'ego Arbitrazhnogo Protsessual'nogo Kodeksa Rossiiskoi Federatsii.* (Moscow: MTsFER, 2003): 52–55.

26. 2002 APK, art. 33.

27. Melikova and Stolyarov, supra note 10.

28. Ibid; "Prognozy dnya: Pomozhet li novyi APK bolee deistvenno razreshat; korporativnye spory?" *Vedomosti*, 13 April 2001.

29. Ibid. ["Prognozy dnya"].

30. Anna Zakatnova, "Novyi 'kryshei' dlya biznesa stanet arbitrazh," *Nezavisimaya gazeta*, 30 August 2002.

31. "Khitrye sudi," *Vedomosti*, 23 October 2002.

32. Iuliia Proskuryakova, "Venyamin Yakovlev: Biznes poluchil novye pravila resheniya spornykh voprosov," *Rossiiskaya Business–Gazeta*, 30 July 2002.

33. Assessing impact is always difficult. One approach is to look at the cases as a percentage of the total cases considered by the court during the last quarter of 2002. This confirms the impression conveyed by the raw numbers. For example, the 341 cases brought in the Moscow Court constitute 3 percent of those heard during this period. For the other courts, the percentages are even lower. For the Moscow Oblast court, the 85 cases make up 1.8 percent; for the St. Petersburg court, the 78 cases make up 0.83 percent; for the Novosibirsk court, the 56 cases make up 0.9 percent; for the Ekaterinburg court, the 130 cases make up 1.9 percent; and for the Saratov court, the single cases is an infinitesimal percent of the cases heard.

34. 2002 APK, art. 7. See 1995 APK, art. 7.

35. 2002 APK, art. 21.

36. For that reason, article 24 of the 2002 APK differs from the analogous section of the 1995 code by stipulating that the same party cannot make repeated petitions for the recusal of the judge.

37. 2002 APK, arts. 133–137.

38. 2002 APK, arts. 9, 65.

39. Supra note 21.

40. For example, in a study of one hundred nonpayments cases drawn equally from the Moscow city, Saratov, and Ekaterinburg *arbitrazh* courts carried out in the spring of 2000, I found that one or both of the parties was represented in eighty-eight of the cases. Not surprisingly, plaintiffs are much more likely to have representation than are defendants. While 84 percent of all plaintiffs were represented, only 34 percent of defendants had any sort of assistance.

41. 1995 APK, arts. 47–49. See V. F. Yakovlev, supra note 23, 104–05.

42. Earlier versions of the procedural code were even more draconian. For example, the draft of July 2000, which survived the first reading in the Duma with only three votes against it, called for the *arbitrazh* courts to create a registry of lawyers authorized to practice in the system, see *Arbitrazhnyi protsesual'nyi kodeks Rossiiskoi Federatsii* [2000 Draft APK], arts. 60–61 (Mimeo, Draft of 31 July 2000). The draft never laid out the specifics of the accreditation process and was regarded as "absurd" by lawyers, see supra note 11. Though it might have contributed to better representation, this idea was later abandoned as unworkable with the consent of the Higher *Arbitrazh* Court. See Alexander Levnisky, "Interview with Venyamin Yakovlev," *Izvestiya*, 8 August 2002.

43. 2002 APK, art. 59.

44. "Eta norma zakona vse rasstavliaet na svoi mesta" [Interview with Alexander Buksman], *Kommersant*, 19 September 2002.

45. Supra note 41. See "Novyi APK i predprinimatel," *Birzha,* 2 September 2002.

46. Andreeva and Zaitseva, supra note 26: 9. See "Ob advokatskoi deiatel'nosti i advokature v Rossiiskoi Federatsii," *Sobranie zakonodatel'stva Rossiiskoi Federatsii*, no. 23, item 2102, art. 2, 10 June 2002.

47. "Zhadnye advokaty (Gendarmskii advokaty)," *Vedomosti*, 9 July 2002.

48. Natal'ya Neimysheva, "Grazhdanka Egorova zaplatit za vse," *Vedomosti*, 3 Sept 2002. See "Nichego khoroshego v etom novovvedenii ya ne vizhu" [Interview with Natal'ya Malofeeva, general director of an auditing-consulting company "Mezhdunarodnyi konsul'tativno-pravovoi tsentr po nalogooblazheniyu"], *Kommersant*, 19 September 2002.

49. Vadim Volkov, *Violent Entrepreneurs: The Use of Force in the Making of Russian Capitalism* (Ithaca, NY: Cornell University Press, 2002). See Avner Greif and Eugene Kandel, "Contract Enforcement Institutions: Historical Perspectives and Current Status in Russia." In *Economic Transition in Eastern Europe and Russia*, edited by Edward P. Lazar (Stanford: Hoover Press, 1995): 291–321.

50. See Hendley and Murrell, supra note 2; Hendley (1998), supra note 2.

51. 1995 APK, art. 114.

52. "Sudebno-arbitrazhnaya statistika: Osnovnye pokazateli raboty arbitrazhnykh sudov Rossiiskoi Federatsii v 2000-2001 godakh." *Vestnik Vysshego Arbitrazhnogo Suda*, no. 4 (2002): 20–29. See Hendley and Murrell, supra note 2.

53. Efficiency criteria commonly serve as the basis for advancement in judicial systems in countries with civil law legal traditions. See John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2d ed. (Stanford: Stanford University Press, 1985).

54. The new code differentiates between types of administrative cases in contrast to the prior code which treated administrative cases as a unitary class, see Andreeva and Zaitseva, supra note 26: 5. See also 2002 APK, arts. 194, 200, 215.

55. Hendley (2002), supra note 2.

56. Hendley, Murrell, and Ryterman, supra note 1.

57. Hendley (1998), supra note 2.

58. In my 2000 study of one hundred nonpayments cases, I found that a majority of defendants (55 percent) made absolutely no effort to participate in the process, either by

appearing at the hearing or sending a written response to the complaint (*otzyv*), making the hearing superfluous but still legally required.

59. 2002 APK, arts. 226–29.

60. Proskuryakova, supra note 32.

61. 2002 APK, arts. 136–37.

62. 2002 APK, art. 134.

63. 2002 APK, art. 138.

64. Marina Vasil'eva, "Nel'zya zhit' po zakonam dzhunglei." *Chelovek i zakon*, no. 7 (1996): 54–59.

65. The survey encompassed 328 enterprises divided among six cities. We queried the respondents about a variety of possible obstacles, including cost, time, procedural complexity, confidentiality, judicial bias and incompetence. Concerns over enforcement emerged as the single most pressing problem. For more on the survey, see Hendley, Murrell, and Ryterman, supra note 1.

66. "Ob ispolnitel'nom proizvodstve," *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*, supplement to no. 10 (1997): 15–50; "O sudebnykh pristavakh," *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*, supplement to no. 10 (1997): 4–15.

67. Only in Moscow and St. Petersburg has the collection of debt arising from *arbitrazh* court proceedings been consolidated into a separate bureau of *sudebnye pristavy*.

68. 1995 APK, art. 206.

69. 2002 APK, art. 329.

70. 2002 APK, art. 330. See A.N. Guev, *Postateinyi kommentarii k Arbitrazhnomu protsessual'nomu kodeksu Rossiiskoi Federatsii* (Moscow: INFRA-M, 2003), 362.

71. 1995 APK, arts. 75–76.

72. For example, in the Moscow city court, which is the busiest *arbitrazh* court, the number of petitions to freeze assets decreased (when calculated as a percentage of all the cases heard) between 1997 and 2001. At the same time, the likelihood of obtaining such an order decreased from 39 percent in 1997 to 26 percent in 2001.

73. 2002 APK, art. 99.

74. 2002 APK, art. 94.

75. Hendley and Murrell, supra note 2.