# REMAKING THE ROLE OF LAW: COMMERCIAL LAW IN RUSSIA AND THE CIS

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Juris Publishing, Inc. 2007

Chapter 8

# HANDLING ECONOMIC DISPUTES IN RUSSIA: THE IMPACT OF THE 2002 ARBITRAZH PROCEDURE CODE

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The arbitrazh courts resolve economic disputes in post-Soviet Russia. These range in complexity and importance from the bankruptcies of former Soviet behemoth enterprises and the tax liabilities of Yukos to garden variety contractual breaches between trading partners and fines imposed by the tax ministry amounting to a few dollars. These courts were created in 1992 as the institutional successor to the Soviet-era state arbitrazh (or gosarbitrazh). Judged in terms of caseload data, the arbitrazh courts have grown in importance over their relatively short lifespan. As Table 1 indicates, the number of cases decided in 2004 represents an almost sixfold increase over the number a decade earlier. The types of the cases brought as well as their complexity has changed dramatically as Russia has weathered the transition away from state socialism toward a more market-influenced economy.

In response to these challenges, the procedural code that governs disputes brought to the arbitrazh courts has gone through a remarkable evolution. The initial code was substantially rewritten in 1995 and, after less than a decade of working under that code, policymakers determined that another overhaul was required. The result is the 2002 Arbitrazh Procedural Code (hereafter referred to as the 2002 APK). Although the basic structure of the arbitrazh courts was left intact, this new code brought a host of intriguing changes at the operational level, some more successful than others (Hendley, 2003).

In this article, I analyze one of the changes introduced in the 2002 APK as a solution to a nagging problem within the arbitrazh court. Judges had chafed under the requirement to resolve all

disputes within two months. This flat rule made sense in the court's early days when the bulk of cases involved straightforward debt collection, but as more complicated cases that required judges to sort through tangled claims of corporate ownership and overlapping claims of land ownership came to dominate the docket, the statutory time limit became more difficult to meet. The 2002 APK addressed this problem by reconfiguring the process. Rather than diving right into the substance of the case, the 2002 APK requires preliminary hearings, at which the parties are encouraged to lay out their cases for one another and the judge. They are designed to provide a relatively neutral forum to sort out thorny evidentiary questions or to determine whether additional parties need to be brought into the case. Only when the judge is convinced that both sides are prepared will she move forward with a hearing on the merits. At first glance, this statutory change seems to be an appropriate and thoughtful response to very real dilemma. But the law in action does not always play out as anticipated. Indeed, my field research during the summers of 2004 and 2005 may lead some to conclude that the solution is actually worse than the original problem.

## Methodology

I began my research by comparing the 2002 APK with its predecessor. The introduction of preliminary hearings immediately jumped out as a fundamental change. A full appreciation of what this change meant required field research. I spent the summers of 2004 and 2005 in Russia immersing myself in the operational reality of the arbitrazh courts. In both years, I began at the High Arbitrazh Court (*Vysshii Arbitrazhnyi Sud*). The staff at this court has assisted me with my research for many years, beginning during the term of V.F. Iakovlev as the chairman of the High Arbitrazh Court and continuing through the accession of A.A. Ivanov to this post in 2004. In both 2004 and 2005, they gave me access to the caseload statistics for 14 individual arbitrazh courts



as well as some summary statistics and prepared introductory letters to the chairmen of the arbitrazh courts in Moscow, St. Petersburg, Ekaterinburg, Omsk, and Saratov.

These letters opened the door to the courts. Though I have been doing field work in three of these courts (Moscow, Ekaterinburg, and Saratov) since 1996 and am personally acquainted with the chairmen of these courts and many of the judges, I still need permission from their bureaucratic superiors in Moscow every time I embark on a new project. I purposely keep the wording of the letter vague, in an effort to facilitate access to archived records, ongoing cases, as well as to courthouse personnel for interviews.[1] I spent three weeks at the Moscow City Court, and two weeks at each of the other courts. Upon arriving at each court, I would explain my project to the court chairman.[2] As a rule, I was then turned over to one of her subordinates, who became my "minder." She would obtain cases for me from the court archive or from judges' files and would negotiate with judges to allow me to observe their activities. In order to get a sense of the behavioral spectrum, I wanted to observe a variety of judges hearing different sorts of cases. I succeeded in doing so, though it required me to be a nudge; my "minders" were no doubt glad to see me leave.

## Preliminary Hearings

Recognizing that, in a market-driven business setting, justice delayed is often justice denied, the drafters of the 1995 APK imposed a two-month deadline for deciding cases (Art. 114, 1995

[1] Even so, I was stymied in my efforts to get access to case files in 2005. It turned out that the staff of the High Arbitrazh Court had inserted language that specifically prohibited me from looking at case files. Oddly enough, this same language had been in the 2004 letter, but no one (including me) had noticed it. This limitation did not undermine the research. I was still able to talk with judges and observe ongoing cases.

[2] Though there was a turnover in the chairmanship of the Moscow City Court between 2004 and 2005, it did not affect the way in which my research proceeded.

APK). At first glance, this might seem to be more than enough time. For simple cases that required only one hearing, it was. When a complaint arrived at the arbitrazh court, it would be assigned to a judge, who would send out an order (*opredelenie*), notifying both sides of the time and place of the hearing and letting them know what evidence they would be expected to bring. All notices were mailed, with return receipts requested. The slowness of the Russian postal service led judges to allow two weeks for each segment of the journey, meaning that they typically scheduled the first hearing for a month after receipt of the complaint. If both parties showed up with the necessary evidence in hand and no unexpected issues arise, then the case would be decided at that first hearing and would easily fall within the two-month deadline.

Resolving cases within a single hearing may strike some as unrealistic or even unwise. But those unfamiliar with the arbitrazh courts are likely unaware of how many cases brought to these courts during its first decade were mundane debt cases in which neither side disputed the outcome (Hendley, 1998: 390). For example, in my 2000 study of debt collection, 71 percent of the cases I studied were decided in a single hearing. Of those requiring additional hearings, the reason was rarely substantive. More often it was due to scheduling conflicts or the forgetfulness of the plaintiff (Hendley, 2004). But these petty debt cases, while numerous, did not make up the entire docket of the arbitrazh courts. The 1990s saw the rise of more complicated litigation, including fights over the control of newly privatized companies and bankruptcy. Resolving such cases in a single hearing would be absurd. Just as in other countries, it typically takes several meetings between the parties and the judge simply to sort out who ought to be participating in the case. Such cases routinely violated the two-month deadline. Also problematic in some courts were the cases that the 1995 APK required to be heard by three-judge panels, e.g., cases involving the state in any capacity and bankruptcy. The difficulty of accommodating the schedules of



three judges and the parties often resulted in processes that dragged on longer than two months.[3]

Experience revealed the flat two-month deadline to be a mixed blessing. To be sure, it served as a spur to judges. No one wanted to be seen as a laggard. Not only would it besmirch their reputation among colleagues and court insiders, but it also might affect their chances for promotions and raises. But what was the cost to the system of this need for speed? Judges were required to ride herd on litigants, always pushing them to prepare more quickly. Those who handled more complicated cases were left feeling like failures because they could not accomplish the impossible. Even those who were able to comply sometimes did so with a heavy heart. In casual conversations throughout the 1990s, judges frequently bemoaned the conveyor belt quality of justice they meted out. Yet they felt that the system left them with no choice. The extent to which the obsession with speed compromised substantive justice is unknowable. It is always easier to tabulate violations of a straightforward indicator like time than to assess how often cases were decided incorrectly. In my field research during the 1990s, I read hundreds of case files, mostly dealing with inter-enterprise debt. I found few in which I felt the judge had erred. Of course, there was little doubt of the outcome of the vast majority of these cases.[4] What is less clear is the cost in terms of justice in more complex cases. Even when the judge got it right, perhaps the litigants were left with a sense of being steamrollered that might discourage them from using the courts again, hardly a desirable outcome. In any event, when word got out that the procedural code was being redrafted, the most common wish expressed was that the deadlines would be eliminated or loosened.

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[3] Even so, the percent of cases violating the two-month deadline never exceeded 5 percent nationally (Hendley and Murrell, 2002; Sudebnaia-arbitrazhnaia statistika, 2006).

[4] For example, creditors prevailed in 99 of the 100 debt cases I collected for my 2000 study.

The drafters of the 2002 APK granted this wish, which brings to mind the familiar cautionary warning, namely that we should be careful of what we wish for, because we just might get it. In this instance, the flat two-month deadline was replaced with another flat rule. The good news is that the introduction of a two-month preparatory period gave judges more breathing room. The bad news is that it did not contemplate that this extra time might not always be needed or helpful. Like the old rule, the new rule is mandatory across the board, leaving no room for judicial discretion.[5]

The current code requires judges to begin every case with a "conversation and preliminary hearing" (*sobesedovanie i predvaritel'noe zasedanie*), which can extend for to two months. The code contemplates that during this time judges will meet with the parties to work through the arguments likely to be raised and the relevant evidence. The parties are encouraged to bring motions during this period, such as requests to bring in third parties or to seek expert evaluation of assets (art. 135-136, 2002 APK). Only when the judge deems the parties and the case itself to be ready do they proceed to a hearing on the merits. If the parties are present and amenable, this trial can follow on immediately after the preliminary hearing. When the parties reach a compromise settlement, the case terminates with the preliminary hearing.

Looking past how preliminary hearings are supposed to work under the 2002 APK to the rough and tumble of actual arbitrazh

[5] Arbitrazh judges disagree over whether preliminary hearings are mandatory in all cases. The 2002 APK establishes a 15-day deadline for hearing certain types of administrative disputes. While conceding that the new code does not specifically exempt such cases, several Ekaterinburg judges told me in 2004 that they did not hold preliminary hearings in such cases. To do so, in their view, would have made it literally impossible to meet the deadline. Their choice was intriguing because it suggested a willingness to engage in create problem-solving. By 2005, their intuition that the drafters of the 2002 APK could not have meant to include this category of case was regularized as an internal norm of the arbitrazh courts, though the 2002 APK was not formally amended.



practice, I found a mixed record. There is no question that preliminary hearings are a boon in some cases. They are particularly helpful in complex cases. For example, during the summer of 2004, I observed innumerable cases in the Moscow City court that revolved around the ownership of commercial real estate. These cases typically involved multiple defendants and third parties and a byzantine evidentiary record due to the fits and starts by which commercial real estate was privatized. Thanks to the changes in the 2002 APK, these procedural questions were raised and resolved during preliminary hearings, rather than giving rise to endless delays of the trial itself (as would have been the likely outcome under the 1995 APK).[6]

When in Omsk in the summer of 2005, I saw several cases between large companies over unresolved debts. The preliminary hearings were lively and provided an opportunity for the parties to query one another about the underlying evidence. Although I was unable to stay long enough to learn how the cases were resolved, the availability of the preliminary hearings may have allowed the trials to proceed more expeditiously. But it is worth noting that this is possible only when both sides show up and participate actively in the preliminary hearings, which is more the exception than the rule (as I discuss below).

Another possible appealing feature of preliminary hearings is that they can stave off trials. The 2002 APK encourages settlements whenever possible and the preliminary hearing is an ideal vehicle to promote such compromise outcomes.[7] Though

[6] The 2002 code loosens up the rules as to when the court can proceed in the absence of the parties, which has lessened the need for continuances. If the record contains evidence that all parties have been notified, then the hearing can proceed regardless of whether they are present. The 1995 APK made this allowance for defendants, but halted proceedings for a missing plaintiff, even if clearly notified, unless the plaintiff had specifically authorized the court to proceed in its absence.

[7] The 2002 APK has an entire chapter devoted to settlements (arts. 138-42). The fact that filing fees (*gosposhlina*) are split between the parties in the event of settlement creates a material incentive to compromise.

judges are supposed to remain open-minded, they are certainly capable of telegraphing (some more pointedly than others) whether the claimant can expect more at the conclusion of a trial.[8] How frequently this happens is unclear.[9] I saw only a few cases that fit this pattern. For example, in the Moscow City court, I observed a preliminary hearing involving failure to pay for cattle. Initially the defendant claimed that he had not paid because the cattle were diseased. After some discussion, he agreed to pay the debt if the plaintiff would forego penalties and interest. Absent the preliminary hearing, it is unlikely that this settlement would have happened. At the same time, not all defendants folded. Of the hearings I observed at which both sides were present, the majority held out for trial. Perhaps their motivation was a desire to put off the inevitable or a hope that their fortunes might turn around.

Along similar lines, one judge used the preliminary hearing to terminate a case against an individual entrepreneur when he was able to produce proof that he had paid the back taxes and penalties. The lawyer for the Omsk tax inspectorate was dithering over whether she had the authority to withdraw the complaint when the judge peremptorily took action. The goal of justice was surely served by not forcing this businessman to come to court again for the formality of getting a decision in his favor. It is worth noting that not all judges are willing to overlook the technicalities in favor of the big picture and that doing so is frowned upon by authoritative commentators. In a case I observed in the Moscow oblast' court in 2005, the plaintiff-creditor arrived at the preliminary hearing prepared to withdraw its complaint (*otkaz ot iska*) because the defendant-debtor had paid. The judge refused to accept the motion, saying that such motions could only be entertained at a hearing on the merits, which she scheduled for several weeks later. Interestingly, Iakovlev and Iukov endorse this approach in their commentary, arguing that "under the new Code, questions about terminating a case can be resolved only at the stage of a hearing on the merits" (2003: 437). Perhaps the letter of the law requires an additional hearing, but what of justice.

[8] A typical case was one I observed in Ekaterinburg. The creditor sought the overdue debt plus interest. The defendant was a state-supported institution. It conceded the debt, but argued that it should not be liable for the interest. The judge made it clear that she agreed with the defendant. The plaintiff settled for repayment of the debt.

[9] Statistical data about preliminary hearings is elusive. The arbitrazh courts do not keep records on any aspect of preliminary hearings, including their outcomes.



The enthusiasm for preliminary hearings among judges waned with regard to simpler cases. This is not to say that they cannot facilitate speedier trials in such cases. I observed a three-minute trial in Moscow in which the creditor-plaintiff prevailed. All of the evidence had been presented at the preliminary hearing, allowing the hearing on the merits to proceed like lightning. As the plaintiff left, the judge turned to me and commented that this was how it ought to work. The clear implication was that it usually did not.

Indeed, for simple cases, the requirement to have a preliminary hearing had the effect of lengthening the process. As I found in my earlier research, most inter-enterprise debt cases were resolved in a single hearing under the 1995 APK (Hendley, 2004). Now the same cases take twice as long because they require two hearings – a preliminary hearing and a hearing on the merits – before they can be resolved. For example, a dispute between a temp agency and a company for whom they supplied workers for non-payment of 30,100 rubles was accepted by the court on November 20, 2003. The preliminary hearing was held about a month later, on December 17, 2003. Not surprisingly, the defendant did not show up nor did it file any sort of response. The plaintiff sent two representatives. The APK allows hearings to go forward without the parties if they have been notified (art. 156, 2002 APK). The return postcard from the defendant was in the file. At this hearing, the judge checked the documents filed with the complaint against the originals and then set the case for a

hearing on the merits on January 19, 2004. Once again the defendant was absent. The case was decided in favor of the plaintiff. The outcome would have been the same under the 1995 APK, but would have taken half the time.

The usefulness of preliminary hearings hinges on the willingness of the participants to show up. The 2002 APK is a bit inconsistent in its attitude toward those who refuse to take part. On one hand, it states that "parties have the right to present evidence, make petitions and arguments in response to questions that arise during the [preliminary] hearing" (art. 136, 2002 APK). Taken at face value, this language fails to make their participation mandatory; no duty is imposed upon them. On the other hand, the Iakovlev-edited commentary argues that "the disclosure of evidence [during preliminary hearings] constitutes an obligation for the parties" (Iakovlev and Iukov, 2003: 393). Perhaps this interpretation draws on the principle of adversarialism (*sostiazatel'nost'*), which is established at the outset of the new code as being essential to arbitrazh process. This same article states that "those participating in a case have the right to know each other's arguments before the start of the hearing on the merits." It goes on to warn participants of the risk of violating procedural norms, though specifies no punishment (art. 9, 2002 APK). Iakovlev and Iukov suggest one possibility. They contend that judges are entitled to impose court costs on non-compliant parties (Iakovlev and Iukov, 2003: 393).[10]

The wishy-washy language of the code undercuts the usefulness of preliminary hearings. Judges feel hamstrung when parties disregard their exhortations to participate, either by failing to show up or by refusing to share their evidence if they do show up. Fines are extraordinarily rare in the arbitrazh courts, even when they are specifically authorized by the code. I encountered

[10] Interestingly, the section of the code to which they refer (art. 111) says nothing about its use for this purpose. Nor do they mention the possibility in their own commentary to article 111 (Iakovlev and Iukov, 2003: 338).



no trial judge in any of the courts I visited who was open to the idea of fining non-participants in preliminary hearings. To a person, they did not see such an option as being authorized by the code. They read the language of the code literally to say that parties have a right, but not a duty, to participate in preliminary hearings. Though they are openly frustrated by this loophole, they feel themselves to have no choice but to allow litigants to take advantage of it. The stories they told were familiar to anyone conversant in business litigation in a market setting. Well-heeled defendants and their lawyers use the preliminary hearing as a mechanism for dragging the case out. Moreover, because the preliminary hearing is optional, many litigants simply skip it, preferring to conserve their energies for the hearing on the merits. One St. Petersburg judge told me that litigants regard preliminary hearings as a "lark" (*progulka*) to which they might or might not show up and, if they appeared, they might or might not produce the evidence needed to substantiate their claims. Others echoed this sentiment. A number of judges advanced cultural arguments to explain this behavior, saying that the "thinking" (*myshlenie*) of most litigants could not grasp the potential benefits of the preliminary hearings. Especially in Ekaterinburg, judges lamented the persistence of what they characterized as a naïve belief in the ability to prevail by surprising the other side. In my field work in the Moscow, Saratov, and Ekaterinburg courts in the summer of 2004, I routinely asked judges to estimate what percentage of preliminary hearings were "empty" (*pustoi*) and most told me that about a third fit into this category, thanks to parties that were either absent or obstreperous. My conversations with judges during my field work in the Moscow and Omsk courts in 2005 echoed these sentiments.

Not all judges were naysayers. One Ekaterinburg judge who mostly handled tax disputes extolled the virtues of preliminary hearings when we spoke in July 2004. She reported a good attendance record among those who came before her. It is not surprising that those fighting the tax inspectorate would show up.

The willingness of the representatives of the tax inspectorate is more of a surprise, especially given that other judges had reported them to be no-shows. But this judge clearly established her own norms. No doubt she had made it clear that failure to appear would earn her ire, and the tax authorities learned that annoying her was not productive. She reported that about half of her preliminary hearings transform themselves into hearings on the merits, allowing her to dispose of the cases in a single hearing. If only her experience were more typical.

Though the failure of the arbitrazh courts to collect information systematically on preliminary hearings limits us to impressionistic data.[11] An overview of the case files I reviewed in Saratov and St. Petersburg in 2004 provides some sense of what is going on. Of the 51 Saratov cases, 13 employed the accelerated procedure (*uproshchennoe proizvodstvo*), obviating the need for preliminary hearings. The remaining 38 should have had preliminary hearings. I confronted only 2 cases in which judges did not bother with this stage. Of the 36 cases in which preliminary hearings were held, they seemed to serve some useful purpose in 8, and in 3 of these cases, the preliminary hearing transitioned into a hearing on the merits, allowing the case to be resolved. In the remainder (28 or 77.8 percent), there was no apparent value-added from the preliminary hearing. Of the 43 St. Petersburg cases, there were only 6 (14 percent) in which the preliminary hearing transitioned into a hearing on the merits and a decision. An additional 9 were dismissed or postponed in anticipation of a settlement. Of the 28 remaining preliminary hearings, 21 (75 percent) were empty.

[11] The larger courts, such as Moscow, St. Petersburg, and Ekaterinburg, have statistical specialists on staff. None had looked into the effectiveness of preliminary hearings. When I asked why not, I was told that their research agenda was set by the High Arbitrazh Court, which had not identified this as a priority. As a result, it is impossible to determine whether cases that are coded as delayed violated the 2-month deadline for completing the preliminary hearing or the 1-month deadline for completing the trial.



I had the opportunity to observe 112 preliminary hearings during my 2004 field work. More often then not, these hearings had a rote quality. Recognizing this, judges tended to consolidate them, scheduling them to follow one after another at 20 or 30 minute intervals. Occasionally one might turn into a genuine discussion among the parties, but the more common tendency for only one side or neither side to show up would compensate for any disruption in the schedule. Judges came to preliminary hearings with low expectations. Notwithstanding Iakovlev and Iukov's celebration of the expansion of adversarialism as a result of the 2002 APK (2003: 45), parties still shied away from taking responsibility. Judges dominated these hearings. When opportunities arose to question one another, few took advantage.[12] I observed 44 preliminary hearings during the summer of 2005 and the situation seemed mostly unchanged. With a few notable exceptions, judges continued to run the show and parties' attendance remained spotty. When they showed up, their lack of preparedness often made the hearings empty. One of the few consolations of the preliminary hearings for judges was that the code does not require a written record (*protokol*) for these hearings as it does for hearings on the merits.

One change that I observed in 2005 was an apparent increase in the use of preliminary hearings as a tactical tool. In one particularly egregious example in Omsk, a shareholder-initiated case filed in August 2004 was still stuck in the preliminary stage in July 2005 because the shareholder-plaintiffs refused to concretize their cause of action. The judge humored them by continuing to hold preliminary hearings, most of which lasted no more than the few minutes needed to request a further delay. In a more typical case, a defendant-debtor refused to allow the judge to convert a preliminary hearing into a hearing on the merits, even though it had acknowledged its liability, because it lacked the money to pay

[12] I observed the same pattern of passivity at hearings on the merits, which suggests that the principle of adversarialism has yet to take hold.

the debt owed and hoped that its financial situation would improve before the next hearing.

To the critical question of whether the introduction of preliminary hearings has been helpful, there is no easy answer. While it has certainly eased the pressure on trial judges to resolve cases quickly, it has given rise to new problems. There is little or no accountability for judges during the pretrial period. The official statistics only tell us whether the case was resolved within the period allowed under the APK. If there is a violation, they do not specify whether it occurred during the pretrial period or during the one-month period allotted for hearings on the merits (art. 152, 2002 APK). Nor is there any way to figure this out on the ground at the courts, other than a manual search of the thousands of case files.

But the bigger problem arises from the requirement that preliminary hearings take place in all cases. While the arbitrazh judges I interviewed uniformly agreed that these hearings served as a valuable sorting mechanism in complicated cases, they were just as unanimous in their sense of frustration at having to go through the motions of having preliminary hearings in open-and-shut cases. A perhaps apocryphal anecdote that was repeated to me at each of the four courts I visited indicates the growing attitude towards preliminary hearings by judges. It is said that a judge at the Krasnodar arbitrazh court sends out notices to parties that cover both preliminary hearings and hearings on the merits, with the latter scheduled to commence 10 minutes after the former. Some judges even questioned whether it tends to undermine the legitimacy of the arbitrazh system, reasoning that having to show up for hearings that are mostly empty of content makes parties second-guess their choice to take their case to the arbitrazh courts.

If arbitrazh judges had the discretion to decide when preliminary hearings were needed and to forego them in other cases, the 2002 APK would operate more efficiently while still preserving the rights of all concerned. But allowing judges to



exercise this sort of discretion is not a hallmark of the Continental legal tradition that provides the foundation for the Russian legal system. Indeed, when I suggested it to arbitrazh judges, I got a wide spectrum of responses. Some welcomed the idea and the attendant increase in judicial responsibility. But the majority was more hesitant, expressing a reluctance to give over this sort of power to judges. Giving untethered latitude to judges in procedural matters is a hallmark of the Anglo-American legal tradition. Expecting it to be incorporated into a revised APK is probably a pipe dream.

## Conclusions

Preliminary hearings were introduced as part of the 2002 APK to enhance efficiency. But then again, the goal of the two-month deadline in the 1995 APK was also to keep the process moving at a steady clip. As the saying goes, the road to hell is paved with good intentions. Each of these rules was introduced with the goal of improving the process. Each was designed to remedy a shortcoming that had been part of the system. Each did so to a certain extent but, at the same time, each created new and unanticipated problems. Efficient case management is perhaps unattainable. Legal systems the world over struggle with how to ensure that cases are heard and resolved promptly, while not leaving either side with the feeling of having been steamrollered. The Russian arbitrazh courts are no exception.

Preliminary hearings make sense in complex cases. Judges in such cases were undoubtedly too rushed under the rigid two-month deadline of the 1995 APK. But the 2002 APK seems to have replaced one ill-fitting general rule with another. Now the rule is geared to suit complex cases and undermines the handling of simpler cases. Because trial judges have been given no discretion to determine when preliminary hearings are warranted, disputes between firms over unpaid debts, which used to be routinely handled in a single hearing, now require at least two hearings and

often take twice as long. Surely that was not the reformers' intent. Yet this sort of incongruity is probably inevitable if legislators are determined to impose flat rules. By lengthening the time needed to resolve cases, the new rule arguably limits the efficiency of the system. Perhaps this is an improvement on the 1995 APK, whose rigid deadlines were viewed as potentially undermining the capacity of judges to reach just outcomes.

The unwillingness of parties to make active use of the preliminary hearings is frustrating for arbitrazh judges. They are left unsure of whether to follow the Soviet path and try to educate these litigants as to the potential usefulness of such hearings or to veer off in a more market-oriented direction by using the limited negative incentives (fines) available to them to stimulate participation. Precisely why disputing parties resist the opportunity to present their arguments and evidence to one another is unclear. The argument that they prefer to wait and surprise the other side is not very convincing, given that typically the other side would be given time to organize their response. When the preliminary hearing system works as designed, both parties benefit. Because they know what sorts of arguments the other side will make, the hearing on the merits is able to proceed more quickly. In my field research in Moscow, I was able get occasional glimmers of how a well-functioning system might operate. But elsewhere the preliminary hearings seemed mostly an annoyance to both judges and litigants.

What does this investigation into the introduction of preliminary hearings reveal about the viability of reform more generally? What does it reveal about the capacity of the arbitrazh courts to remake themselves? At least one inescapable conclusion is that the legislative reforms are out ahead of the curve. The statutory language is not reflective of actual practice. Whether this is desirable is debatable. Some argue that ambitious legislation can spur societal change, but this has rarely been the Russian experience. Rather, the typical Russian response to



legislation that fails to fit societal reality is to ignore the legislation. Here the goal is not social engineering, but a change in how arbitrazh courts handle cases. Though the reform was arguably needed to remedy shortcomings under the preceding code, it is not working as intended.

This suggests a more profound dilemma, namely the persistence of a disconnect between what the elite within the arbitrazh system think is going on at the trial level and what is actually happening. This lack of knowledge was understandable during the Soviet period, but could be remedied in the present day. Those who are responsible for drafting the new procedural norms could be better informed about the constraints of trial court judges. Instead, most of their time goes to reviewing case decisions, which is certainly important, but cannot possibly provide a full view of the challenges faced at the trial level. This tendency to legislate in a vacuum is hardly unique to the arbitrazh courts or even to Russia. In fact, there may be less of a gap here than in many other areas of Russian law. But it is a continuing problem for post Soviet legal systems and one that tends to corrode whatever minimal respect for law may exist.

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**Table 1: Basic Information about the Arbitrazh Courts**

| | Number of judges (2004) | | Monthly per judge caseload (2004) | Cases decided on trial level (2004) | Change in docket: 2004 cases decided as % of 1994 cases | Success rates - % of cases in which plaintiff prevails (2004) | | | |
|---|---|---|---|---|---|---|---|---|---|
| | Budgeted | Actual | | | | All cases | Inter-firm disputes | Tax - state is pl | Tax- firm is pl |
| All *Arbitrazh* Courts | 2926 | 2477 | 61.6 | 1215590 | 594 | 68.6 | 65 | 71 | 73 |
| Moscow City Court | 180 | 147 | 55.4 | 60566 | 348 | 65 | 71 | 69 | 87 |
| Moscow Oblast' Court | 74 | 58 | 53.3 | 24539 | 420 | 61 | 59 | 63 | 84 |
| St. Petersburg & Leningrad Oblast' Court | 120 | 67 | 94.1 | 50170 | 563 | 76 | 71 | 77 | 83.7 |
| Ekaterinburg Oblast' Court | 93 | 73 | 65.5 | 39054 | 496 | 74 | 67 | 78.8 | 75.9 |
| Saratov Oblast' Court | 50 | 36 | 77 | 22085 | 599 | 67 | 56.7 | 81.1 | 76.4 |
| Omsk Oblast' Court | 38 | 28 | 72 | 14471 | 163* | 65 | 71 | 69 | 87 |

Source for number of judges and per judge caseload: "Spravka o nagruzke po rassmotreniiu del i zaiavlenii arbitrazhnymi sudami Rossiiskoi Federatsii v 2002-2004 gg."

Source other columns: for all arbitrazh courts: "Otchet o rabote arbitrazhnykh sudov sub" ektov Rossiiskoi Federatsii v 2004 godu;" Sudebno-arbitrazhnaia statistika (1995); and for the individual courts: the Annual Reports on Activities, submitted by arbitrazh courts to the Higher Arbitrazh Court for 2004 and for 1994.

*Comparison between 1999 and 2004, the earliest year for which Omsk data are available.