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Making Sense of Business Litigation in Russia

Kathryn Hendley¹

Russian industrial enterprises have been awash in debt for the past decade.² The new-found pressure to balance the books and make profits that came with market reforms has brought an end to the Soviet-era tradition of sweeping debts under the rug and has provided a powerful incentive for managers to go after delinquent customers. A common wisdom has emerged through journalistic and scholarly accounts suggesting that organized crime organizations have taken the lead in debt collection.³ Going after debtors through legal channels has been dismissed as ludicrous. The popular image of Russian courts as inept and corrupt fuels this vision of mafia-led debt collection.⁴ While not discounting the role of organized crime in Russian economic life, in-depth research in courts and industrial enterprises reveals that the courts are not as irrelevant as the mainstream literature would have us believe. A 1997 survey of over 300 enterprises found that over 70% of the respondent enterprises had initiated lawsuits during the preceding year, though typically only after informal methods proved futile.⁵ Further buttressing the argument that courts are

1. Support for the field research required for the article was generously provided by the National Council of Eurasian and East European Research. Assistance in organizing the follow-up surveys was provided by Irene Stevenson, Svetlana Mukhambetova, Aleksei Tselovalnikov, and Marina Nemytina. Research assistance was ably provided by Timofey Milovanov and Michael Morgalla. Support while writing the article was provided by the Woodrow Wilson International Center for Scholars and the Law School at the University of Wisconsin.
2. S. Caner & M. Mokhtari, "Arrears and Their Implications for Economic Performance in the Russian Federation", 36 *Russian and East European Finance and Trade* 2000, 27-53.
3. E.g., V. Volkov, *Violent Entrepreneurs: The Use of Force in the Making of Russian Capitalism*, Ithaca, NY 2002.
4. E.g., J. Hay & A. Shleifer, "Private Enforcement of Public Laws: A Theory of Legal Reform", 88 *American Economic Review* 1998, 398-403; A. Greif & E. Kandel, "Contract Enforcement Institutions: Historical Perspectives and Current Status in Russia", in E.P. Lazar (ed.), *Economic Transition in Eastern Europe and Russia*, Stanford, CA 1995, 291-321.
5. In 1997, I collaborated on a survey of 328 industrial enterprises from 6 cities across Russia. For details, see K. Hendley, P. Murrell & R. Ryterman, "Law, Relationships, and Private Enforcement: Transactional Strategies of Russian Enterprises", 52 *Europe-Asia Studies*, 2000, 627-56. Follow-up case studies of 6 of the surveyed enterprises provided greater insight into the factors that militated for and against litigation. See K. Hendley, "Beyond the Tip of the Iceberg: Business Disputes in Russia", in P. Murrell (ed.), *Assessing the Value of Law in Transition Economies*, Ann Arbor, Michigan 2001, 20-55. Another 1997 survey of 269 Russian enterprises found a similarly high percentage of disputes (54.4%) being submitted to the courts. S. Johnson, J. McMillan & Woodruff, "Contract Enforcement in Transition", 1999, mimeo on file with author.

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regarded as a viable option are the official caseload statistics, which document the steady increase in filings over the past decade.⁶ For example, the number of non-payments cases in the Moscow city economic court rose by 162% between 1993 and 2001. What is less clear from the available data is how and why economic actors are using the courts and what sort of experience they have in court.

Departing from the standard practice of transition specialists of studying economic behavior from the vantage point of enterprises, I take individual court cases as the unit of analysis. I focus on non-payments cases, both because they were the single most common type of case during the past decade⁷ and because they are one of the simplest types of cases brought to the Russian economic courts. By studying mundane cases, I am able to eliminate statutory uncertainties and the specter of political influence that hang over some more complicated cases involving questions of corporate governance or bankruptcy.⁸ My study is grounded in a set of 100 non-payments cases brought by one enterprise against another, supplemented by observations of court proceedings and interviews with courthouse personnel. I begin by reviewing the cases, detailing the amounts, the size and organizational structure of the litigants, and the pleadings. I then analyze what motivated creditors to initiate litigation. Finally I turn to what happened once the case was filed, examining the costs involved, the role of the judges and the parties' representatives, and the outcomes. I conclude by exploring the Russian case in light of the prevailing theories of socio-legal behavior and reflect on what the future may hold for debtor-creditor relations in post-Soviet Russia as well as other countries in transition from state socialism to market democracy.

6. With the permission of the Higher *Arbitrazh* court, I have collected caseload data collected from 10 regional *arbitrazh* courts annually since 1992. E.g., K. Hendley, "Suing the State in Russia", 18 *Post-Soviet Affairs* 2002, 148-81; K. Hendley & P. Murrell, "Dispute Resolution in Russia: A Regional Perspective", in H.G. Broadman (ed.), *Unleashing Russia's Business Potential: Lessons from the Regions for Building Market Institutions*, World Bank Discussion Paper No. 434, Washington, DC, March 2002.

7. Russian courts are hardly unique in having dockets dominated by debt. For a review of the comparative literature, see R.A. Kagan, "The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts", 18 *Law & Society Review* 1984, 323-71, at 324-25.

8. The Russian and English-language mass media have roundly condemned the *arbitrazh* courts for political bias and incompetence in their handling of bankruptcies and disputes over the ownership of oil and aluminum conglomerates. E.g., T. Clark, "In Search of Corporate Governance", *Moscow Times* 28 May 2001, 12. Much of the scholarly literature takes the same line. E.g., A. Lambert-Mogiliansky, K. Sonin & E. Zhuravskaya, "Capture of Bankruptcy: Theory and Evidence from Russia", 2001, mimeo on file with author.

The Russian judicial system segregates economic disputes into separate courts, known as *arbitrazh* courts.⁹ Notwithstanding the constitutional guarantee of public access to courts, entry is generally limited to the participants.¹⁰ The *arbitrazh* courts, like much of post-Soviet Russia, are rigidly hierarchical. No trial judge nor any chairmen of an individual court would risk authorizing a foreign researcher to work in their midst without the prior approval of the Higher *Arbitrazh* Court, which stands at the apex of the hierarchy. With letters from this court permitting my research, I was able to gain access to the regional *arbitrazh* courts where the case records are maintained.¹¹

I drew the 100 cases that make up my database from the archives of the courts in Moscow, Ekaterinburg, and Saratov.¹² Differences in the political economy among these regions as well as in the size and competence of the courts promised a rich mix of cases. During the month I spent at each of the courts in the spring of 2001, I worked with a low level court official who funneled case files to me. My control over case selection was limited. I had two basic criteria. I limited myself to cases involving inter-enterprise debt collection that had been decided at least six months earlier. This meant that all of

9. These courts evolved from the institution charged with resolving disagreements between state-owned enterprises during the Soviet era. S. Pomorski, "State *Arbitrazh* in the U.S.S.R.: Development, Functions, Organization", 9 *Rutgers-Camden Law Journal* 1977, 61-116. As part of the transformation from state *arbitrazh* (or *gosarbitrazh*) to full-fledged courts, the jurisdiction court was expanded to include privately owned enterprises as well as bankruptcy, and the roles of the judges and litigants was rethought. E.g., K. Hendley, "Remaking an Institution: The Transition in Russia from State *Arbitrazh* to *Arbitrazh* Courts", 46 *American Journal of Comparative Law* 1998, 93-127; G. Hendrix, "Business Litigation and Arbitration in Russia", 31 *International Lawyer* 1997, 1075-1103. One constant thread from the past to present is that only legal entities have standing; legal claims by individuals are shunted to the courts of general jurisdiction.

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

11. Russia is a federal system, composed of 89 *oblasti* and republics, each of which has an *arbitrazh* court. First-level appeals (which are *de novo*) are also heard at these courts. Further appeals are limited to legal errors and are heard by the 10 cassation courts. Like the US Courts of Appeal, the Russian cassation courts have jurisdiction over geographic regions. Final appeals can be made to the Higher *Arbitrazh* Court.

12. There are two *arbitrazh* courts in Moscow. One has jurisdiction over cases within the city and the other has jurisdiction over cases within the *oblast'*. My research was based in the Moscow city court, which is the single largest and busiest *arbitrazh* court.

my cases were filed and decided in 2000. Another aspect of the research (not addressed in this article) focused on the enforcement process which gave me a strong preference for cases that afforded the parties sufficient time to make some effort at collection.¹³ In addition to reviewing case files, I observed judicial proceedings in non-payments cases. Even though these cases presented different fact patterns and parties, they gave me a more hands-on perspective than could be gleaned from the paper record. After gathering the information from case files, I worked with groups of law students from local non-governmental organizations to contact the participants and ask them a set of standardized questions about why they had brought the case and their level of satisfaction with the experience.

Profile of Non-Payments Cases

The most striking feature of the non-payments cases I studied was their banality. They rarely presented cutting-edge issues of law. Nor was there much suspense about the outcome. The contracts were straightforward and airtight.¹⁴ Not surprisingly, the petitioner prevailed in 99 of the 100 cases though, as we will see, the court did not always award as much as requested in the complaint.¹⁵ The results from my sample reflects the overall trend for plaintiff victory, though not all defendants are as hapless as those in my sample (see Table 1).

In most cases (80%), the dispute arose when the defendant failed to pay for goods supplied by the plaintiff. A small but significant group of cases (16%) presented the opposite situation where delivery of goods had not followed pre-

13. The *Arbitrazh* Procedural Code in force at the time of my study gives the victor six months to enforce the judgment by taking a court order (*ispolnitel'nyi list*) to the losing side's bank. Article 202, *Arbitrazhnyi protsesual'nyi kodeks Rossiiskoi Federatsii*, *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 1995 No.6, 25-79, (hereinafter 1995 APK). If this proves futile, the victor can seek the assistance of bailiffs (*sudebnye pristavy*) to collect on the judgment. See generally M.K. Yukov & V.M. Sherstyuk (eds.), *Komentarii k Federal'nomu zakonu Rossiiskoi Federatsii 'Ob ispolnitel'nom proizvodstve'*, Moscow 2000.
14. In his study of the evolution of debt collection in the US, Kagan argues that the propensity to litigate dissipated as contracts became ironclad because the outcome was no longer in doubt. Kagan, *op.cit.* note 7, 341. Though Russian contracts are professionally drafted and leave little room for maneuver among debtors, litigation remains commonplace.
15. The case where the titular plaintiff lost occurred in Saratov and is an example of a debtor rushing to the courthouse in a preemptive effort to deflect attention from its own behavior. The two parties, a children's theater and a props company, had previously been involved in litigation. The theater had been found liable for unpaid debts but refused to capitulate, filing a lawsuit against the props company alleging that it had shirked on separate earlier debts, leaving the two even. The props company counter-sued for interest on the preceding judgment. The court found the theater's claims without merit and piled on by validating the counterclaim, though the amount of the interest was reduced to a nominal 100 rubles (approximately \$3), signaling the court's displeasure with both sides. Precisely who should be seen as the plaintiff in this finger-pointing exercise is unclear.

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

A: % of cases in which plaintiff wins

B: average amount of petition in rubles (dollars)(1)

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

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

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

payment.¹⁶ Almost all of the underlying transactions (85%) were grounded in a written contract. Although Russian law does not require a writing to establish an enforceable obligation between the parties, written contracts can be helpful in clarifying the parameters of these obligations. Absent a written document, the default rules laid out in the Civil Code govern the transaction.

Much like their counterparts elsewhere, Russian manufacturers develop standardized contracts that are then adapted to the needs of each deal.¹⁷ A clear majority of the cases originated with a form contract (rather than with a contract that was drafted specifically for the deal). Along with price and quantity, which obviously vary from transaction to transaction, Russian business contracts also anticipate the need to tailor payment terms, often having alternative language for prepayment (full or partial), setting the number of days after shipment when payment is due, and/or penalties in the case of delinquent payment. Control over the form indicates greater power in the relationship in that the drafter can use subtle language changes to craft a document that better serves its interests.¹⁸ Prior research showed that form contracts generally

16. This latter type of case was most prevalent among the subset of cases from Ekaterinburg, with 10 cases, compared with only 2 and 4 cases in Moscow and Saratov, respectively.
17. E.g., J. Van Houtte, "Law in the World of Business: Lawyers in Large Industrial Enterprises", 6 *International Journal of the Legal Professions* 1999, 7-25, 15; S. Macaulay, "Non-Contractual Relations in Business: A Preliminary Study", 15 *American Sociological Review* 1963, 55-67.
18. M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", 9 *Law and Society Review* 1974, 95-160, 98.

originate with the seller¹⁹ and my cases confirm this finding. Of the 68 cases employing form contracts, only one did not emanate from the seller.²⁰ The absence of credit-rating services and the reticence of bankers to take on the role of financial sounding board for enterprises clouded assessments of credit-worthiness of potential customers. Consequently, sellers see contracts as a way of protecting themselves, often requiring prepayment or incorporating punitive remedies for non-payment that they would prefer not to invoke as incentives to encourage on-time payment.

Russian enterprises were notoriously cash-poor during the 1990s. They learned how to survive without having money not only by delaying and/or avoiding their obligations to trading partners and the state, but also by engaging in barter. By the late 1990s, in-kind exchanges accounted for more than half of all sales in industry.²¹ Earlier field research in the *arbitrazh* courts suggested that barter-based transactions were unlikely to find their way to court as a result of the strictly-enforced procedural rules requiring documentary evidence of all aspects of the transaction. In-kind exchanges were thought to be more likely to be based on a handshake than on a written contract. This set of cases indicates this assumption needs to be reexamined. One-fourth of the cases involved barter. Virtually all (22 of 24) of these were memorialized in written form, often in baroque detail. Indeed, a higher percentage of barter cases had written contracts than did the monetized cases. Only two of the barter cases asked the court to enforce the underlying agreement to exchange goods.²² The remainder eschewed equitable remedies in favor of monetary damages.

At the same time, we should not lose sight of the fact that the bulk of the cases (76%) were straightforward sales of goods or services for money. The amounts petitioned for varied widely, ranging from a dollar equivalent of less than \$100 to over \$4 million. With only two exceptions, plaintiffs asked for rubles. Assuming an exchange rate of 30 rubles to the dollar (which was the

19. K. Hendley, P. Murrell & R. Ryterman, "Do 'Repeat Players' Behave Differently in Russia? An Evaluation Contractual and Litigation Behavior of Russian Enterprises", 33 *Law & Society Review* 1999, 1401-35.

20. In this case, a Moscow manufacturer sold equipment to a military base and the Ministry of Defense (which was a co-defendant) insisted on using its form.

21. A. Yakovlev, "Barter in the Russian Economy: Classifications and Implications (Evidence from Case Study Analyses)", 12 *Post-Communist Economies* 2000, 279-91.

22. Both cases arose in Saratov. One was settled by the parties before the court could address the merits. The other case was brought by a dairy plant against a milk producer. The contract called for the plaintiff to supply parts for agricultural machinery in return for milk. While the plaintiff lived up to its obligations, the defendant breached. The plaintiff sued to get a court order compelling the defendant to supply milk. The Saratov *arbitrazh* court found in favor of the plaintiff but refused to issue the desired order for specific performance. Instead it awarded the dairy plant the value of the undelivered milk (133,827 rubles or approximately \$4,461).

average for the period when these claims were being brought), one-third of the claims fell between \$167 and \$1,667, with another third falling between \$1,667 and \$16,667 (see Table 2). These seemingly small amounts are actually in line with, if not greater than, non-payments cases more generally. Table 1 sets forth the amount of the average petition filed in these courts for each of the past three years. Only in Moscow has it exceeded the equivalent of \$100. Indeed, the average Saratov non-payments case has yet to exceed \$30. This raises the question of why Russian enterprises bother suing over such paltry sums. But as the caseload data imply, amounts that might seem trivial to an

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

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

American reader can be monumental to a Russian enterprise teetering on the brink of insolvency.²³ Moreover, as we will see, the costs of bringing suit are negligible and the chances of victory are excellent, leaving only the risk of damage to the relationship as a deterrent to suing.²⁴

Just as intriguing is the question of why the more substantial claims, which surely exist, are not being brought to the *arbitrazh* courts. This pattern is reminiscent of what Hurst found in his study of the Wisconsin lumber industry.²⁵

23. To put these sums in context, the average monthly income for a Russian during 2000 was 2,193 rubles (approximately \$73), up from 1,630 (approximately \$54) the year before (Goskomstat 2001:173).

24. E.g., M. Galanter & J. Rogers, "A Transformation of American Business Disputing? Some Preliminary Observations", Institute for Legal Studies Working Paper DPRP 10-3, 1991; G.L. Priest & B. Klein, "The Selection of Disputes for Litigation", 13 *Journal of Legal Studies* 1984, 1-55, 13; Macaulay, *op.cit.* note 17.

25. J.W. Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915*, Cambridge, MA 1964, 321-29.

His review of the Wisconsin Supreme Court's docket revealed that the amounts of the cases were modest, notwithstanding the economic boom being experienced by the industry. He concluded that the lumber giants had no need to resort to litigation because they "possessed a bargaining weight which would often substitute for lawsuits, and [had] gained experience in negotiation and administration which kept [them] out of court".²⁶ Lawsuits were used sparingly as a signaling device to the industry. Just as in the 19th century in the United States, large-scale transactions in present-day Russia typically bring together enterprises with long trading histories and well-established traditions for sorting out problems. Like Hurst's lumber magnates, they seem to prefer to resolve disputes involving substantial sums privately. Consequently, my database is dominated by trading partners with short histories together. Slightly less than half of the transactions involved first-time transactions. The average length of the trading relationship for those who have interacted previously was about two years. Prior problems between them over payments had arisen for almost half, though only a few (3) had previously resorted to litigation. The patterns I observe fit with those of Macaulay's "preliminary inquiry",²⁷ indicating that the almost paralyzing uncertainty that has gripped the Russian economy for the past decade and has hampered the growth of long-term relationships has had the unintended consequence of spurring small-scale litigation.

The enterprises in my database were not neophytes. During 2000, each had, on average, filed 18 lawsuits. As Table 3 shows, most non-payments cases were brought by and against privately held corporations.²⁸ Most (82%) were between entities from the same region (*oblast'*), rendering moot any concern over preferential treatment for local parties.²⁹ Large enterprises (open joint-stock companies) were the most common plaintiffs, whereas smaller enterprises (closed

26. *Ibid.*, 327.

27. Macaulay, *op.cit.* note 17.

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

29. Cases are heard in the *arbitrazh* court closest to the defendant, unless otherwise specified in the contract. Article 25, 1995 APK. The Moscow city court is widely regarded as the most experienced and competent. In over a third of the cases sampled from Moscow, the underlying contracts stipulated that disputes were to be heard in this court. Most did not have to rely on the forum clause because the debtors were from Moscow. Forum clauses were also found in about a quarter of the contracts in the Saratov cases and, as in Moscow, only a few ended up having to rely on the contractual language to establish jurisdiction. Yet the presence of such forum clauses is worth noting because it suggests that enterprises in these regions are skeptical of their ability to get fair treatment when off their home turf.

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

Plaintiffs	Defendants					
	Large companies (Open joint-stock companies)	Small companies (Closed joint-stock companies)	State-owned companies	State agencies	Agricultural firms	Individual entrepreneurs
Large companies (Open joint-stock companies) (%)	8 (18)	24 (53)	0	6 (13)	3 (7)	2 (4)
Small companies (Closed joint-stock companies) (%)	7 (21)	20 (59)	2 (6)	1 (3)	0	2 (6)
State-owned companies (%)	0	4 (50)	3 (38)	1 (12)	0	0
State agencies (%)	1 (20)	0	1 (20)	3 (60)	0	0
Agricultural firms (%)	2 (100)	0	0	0	0	0
Unknown	2	1	0	1	0	1

joint-stock companies) were most likely to emerge as defendants.³⁰ These smaller enterprises also sued one another with some regularity. Although Galanter's concept of "repeat players"³¹ might seem apt, given their proclivity to use the courts and their control over the form contracts, the non-precedential nature of the system means that Russian managers do not have the same concerns when deciding whether to sue as do their American counterparts. It is not possible to "play for the rules" in the Russian system, nor is litigation seen as a way to establish or burnish a "bargaining reputation". Instead, the behavior has to be considered in light of certain basic realities of Russian economic life. First, most large enterprises have legal departments inherited from the Soviet era when they were state-owned enterprises. Although legal representation is not essential to bring a claim in *arbitrazh* court, it helps (as we will see). These open joint-stock companies act strategically, settling cases with long-standing partners while pursuing less desirable trading partners to court. Second, small enterprises have a shorter track record, becoming legally recognized only in the early 1990s. As a result, they stand a slimmer chance of having the sort of long-term relationship with their creditors that could withstand an inability to pay on-time. Finally, smaller enterprises tend to be on shakier financial ground and some compensated by dodging creditors and even reincorporating under different names in an effort to stay one step ahead of their debts. Table 4 buttresses these conclusions by showing that the larger enterprises tend to bring sizable claims while smaller enterprises' claims are more modest. For example, a plurality (41%) of open joint-stock companies brought substantial claims ranging from 50,000 to 500,000 rubles (approximately \$1,667 to \$16,667). By contrast, the same percentage of closed joint-stock companies brought smaller claims, ranging from 5,000 to 50,000 rubles (approximately \$167 to \$1,667).

30. Closed joint-stock companies emerge as the most frequently sued in all regions, though the thresholds vary. While 60% of the cases examined in Moscow and 53% of those in Saratov were brought against these smaller enterprises, it was only 39% of cases in Ekaterinburg (with larger enterprises not far behind with 30%). By law, closed joint-stock companies cannot have more than 50 shareholders, whereas open joint-stock companies can have an unlimited number of shareholders. Article 7, "Ob aktsionernykh obshchestvakh", *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* 1996 No. 1 item 1. Because privatization yielded stock ownership for workers in the majority of Russian enterprises, the number of shareholders can be taken as a crude proxy for the number of workers and, hence, for the size of the plant. I pursued this question in interviews, but a significant percentage of respondents (more than half of the Moscow enterprises) declined to respond, on the grounds that such information constituted a commercial secret. It is not, though information about the size of the workforce was closely held during the Soviet era.

31. Galanter, *op.cit.* note 18.

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

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

Motivations for Seeking Repayment Through the Arbitrazh Courts

In Russia, as elsewhere, litigation is rarely the first course of action. Previous survey-based research supplemented by enterprise case studies demonstrate the widespread use of relational methods.³² In this article, I have isolated the proverbial "barking dogs" by focusing on case files drawn from court archives. Even though success in court was a foregone conclusion, the creditors I studied did not rush to the courthouse. On average, about 11 months passed from the time the debt arose until litigation ensued.³³ During this time, most creditors made some effort at resolving the case, usually starting with phone calls and ratcheting up to telegrams, letters, and personal visits as time went by. About half of them sent written notices to their delinquent contractual partners clarifying their intent to initiate proceedings in the *arbitrazh* court if payment was not forthcoming.³⁴ Often these *pretenziia* (as they are known in Russian) warned debtors that penalties and/or interest would be added to the balance of the debt if the cases proceeded to court. They reminded the debtors that, if they lost, they would also be liable for court costs (including the filing fees discussed below). Although these written communications did not hint at violent consequences if the debts were not paid, it is possible that such threats were made orally though ties with so-called private enforcers did not emerge as a theme in the interviews.³⁵

In a series of follow-up questions to the victorious plaintiffs posed to the person who had handled the lawsuit, I explored motivation. Not surprisingly, repayment of the debt served as inspiration for virtually everyone (see Table 5). More interesting are the less obvious catalysts. Some issues that would probably emerge as significant in an adversarial setting, such as the United States, fade in importance in Russia. Very few creditors use litigation as a signal to other customers of the parameters of acceptable behavior. This makes sense given that

Table 5: Motivations for Initiating Litigation

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

(1) 11 enterprises refused to respond to the question

case decisions are unpublished and apply only to the parties involved. Third parties (including customers) are unlikely to learn of the outcomes and, if they do, would not take them as a warning because the variation in the facts of a case involving them might give rise to a different result. Even fewer creditors regard litigation as a mechanism for punishing a undisciplined trading partner. As we will see, the assumptions underlying this view of the judicial process as onerous and unpleasant, namely that the experience will be lengthy and expensive and that it will wreak havoc on existing relationships, are not borne out in the context of the Russian *arbitrazh* courts.

Factors that are specific to Russia turn out to be more relevant. The uncertainty of the economic transition left the rules about when debts could be written off in flux.³⁶ In conversations predating the study, some enterprise managers had reported that having a court judgment in hand before writing off debt made them more secure. Along similar lines, I was also told that they occasionally resorted to the courts—even when the chances of collecting on a judgment were slim—in order to prove the genuineness of a debt to the state authorities. A practice of manufacturing debt in order to hide income and had developed during the mid-1990s among enterprises desperate to avoid taxes. Manipulating the debt level is not uncommon among firms heading toward bankruptcy. According to managers, an *arbitrazh* court judgment was viewed as definitive proof that a debt was not illusory. In a macabre twist on this logic, it seems that some organized crime groups insist on an *arbitrazh* court judgment before involving themselves in debt collection.³⁷

36. Although the specific nature of the instability within the financial system is unique to Russia, Kagan shows that analogous instability in the U.S. financial system in the late 19th century contributed to a predisposition on the part of creditors to go after debts via the legal system. Kagan, *op.cit.* note 7, 339-43.

37. Volkov, *op.cit.* note 3, 46.

32. In the 1997 enterprise survey, we found that bilateral solutions were the most common reaction to problems with suppliers. For example, three-fourths of our sample responded to problems with suppliers by arranging meetings between managers at various levels. Hendley, Murrell, & Ryterman, *op.cit.* note 5. More in-depth case studies only confirmed the relevance of relational factors in dealing with contractual breaches. Though enterprises with inter-changeable customers litigated routinely, the propensity to go to court decreased as the relationship grew more complicated. Hendley, *op.cit.* note 5.

33. Article 196 of the Civil Code gives creditors three years to collect their debts. P. Maggs (ed. & trans.), *The Civil Code of the Russian Federation, Parts 1 and 2*, Moscow 1997.

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

35. Cf. Volkov, *op.cit.* note 3.

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

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

Table 5 shows that concerns over tax and accounting implications motivated a significant group of plaintiffs. But Table 6 suggests that these worries may be concentrated in Saratov.³⁸ While accounting issues influenced only about a quarter of the Moscow and Ekaterinburg enterprises, they were a catalyst for two-thirds of the Saratov enterprises. The situation is even more lopsided *vis-à-vis* tax issues. Given the small sample size, reading too much into these results would be premature, though they certainly warrant further investigation.³⁹

An analysis of what structural conditions provoke concern over accounting and/or tax consequences provides some intriguing leads as well as some dead ends. Having access to legal expertise turns out to have little effect, probably because neither tax issues nor accounting matters are within the purview of in-house lawyers.⁴⁰ More telling is the length of the relationship between the parties. Petitioners are unlikely to have tax or accounting concerns in cases involving a first-time transaction but, as the length of the relationship grows, such

concerns become more pressing. This makes sense. As the lifespan of business relationships increases so too does the likelihood of having side arrangements that might not stand up to scrutiny. Organizational structure turns out to matter, though not equally everywhere. Its effect is strongest in Saratov, where large enterprises (open joint-stock companies) emerge as the uneasiest over tax and accounting consequences. I had thought that the amount of the case would matter, hypothesizing that management's desire to have debts recognized as legitimate would intensify with the size of the debt. The data reveal a murkier picture. Once again, there is regional variation. My hypothesis is born out only in Moscow, where the odds of being motivated by tax or accounting issues spike for cases in excess of 500,000 rubles (approximately \$16,667).⁴¹ But in Saratov and Ekaterinburg, such concerns are most likely to be manifested for smaller cases, e.g., cases ranging from 50,000 to 500,000 rubles. Precisely why they are absent from the larger cases is a puzzle.

Processing Non-Payments Cases Through the Arbitrazh Courts

Socio-legal research has shown that the tangible costs of litigation, measured in terms of time and money, are critical to businessmen as they contemplate whether to turn to the courts for help in collecting debts.⁴² Although the *arbitrazh* courts have been much maligned on both counts,⁴³ a careful review of the data shows that such criticism has little foundation and likely reflects the inevitable complaints of litigants disappointed by the outcomes in their cases.⁴⁴

In a climate where enterprises are barely clinging to solvency, the financial burdens associated with going to court would seem to be a powerful deterrent. In reality, however, litigating in the *arbitrazh* courts is surprisingly cheap for creditors. Unlike creditors elsewhere who are weighed down by the ever-increasing cost of legal counsel, Russian creditors rarely hire lawyers to represent them in *arbitrazh* proceedings. Instead, they either rely on in-house counsel or forego counsel and send an accountant or other manager as their representative. As a result, no out-of-pocket costs are incurred.

38. The post-judgment interviewing was carried out by students associated with NGOs in each city. There is a danger that the student interviewers in Saratov somehow encouraged respondents to respond affirmatively to these questions.
39. Particularly surprising is the relative lack of concern about tax implications on the part of Ekaterinburg enterprises. A comparative analysis of regional caseload data demonstrates that the Ekaterinburg authorities are unusually aggressive in their pursuit of alleged tax dodgers. Hendley, *op.cit.* note 6.
40. K. Hendley, P. Murrell, & R. Ryterman, "Agents of Change or Unchanging Agents? The Role of Lawyers within Russian Industrial Enterprises", 26 *Law & Social Inquiry* 2001, 685-715.

41. The two dollar-denominated cases, both of which involve amounts in excess of \$2 million, arose in Moscow. In neither of these cases was the petitioner motivated by tax or accounting concerns. Perhaps this is because the parties were well-established and successful subsidiaries of foreign corporations and, therefore, unlikely to be accused of booking illusory debts.
42. C. Silver, "Does Civil Justice Cost Too Much?", 80 *Texas Law Review* 2002, 2073-2121; M. Heise, "Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time", 50 *Case Western Reserve Law Review* 2000, 813-849; Priest & Klein, *op.cit.* note 24.
43. E.g., Hay & Shleifer, *op.cit.* note 4; Greif & Kandel, *op.cit.* note 4.
44. Hendley & Murrell, *op.cit.* note 6.

The law does require petitioners to pay a filing fee (*gosposhlina*) based on a percentage of the amount sought.⁴⁵ At first glance, this would seem to shut out many potential claimants. Although the filing fees are added to the judgment imposed on the defendant if the petitioner prevails, this is of little solace to cash-poor enterprises. Responding to an obvious need, the Higher Arbitrazh Court issued a decree in 1997 sanctioning the ad hoc solution that trial courts had devised of delaying the payment of filing fees until the conclusion of the case if the petitioner could demonstrate its lack of cash resources.⁴⁶ The cases I studied were fairly evenly split between those who paid up front and those who sought relief. Table 7 lays out the regional variation which generally tracks the overall patterns for these courts. Quite logically, asking for deferments grew more common as the size of the case increased. While about two-thirds of all plaintiffs who were seeking less than 50,000 rubles (approximately \$1,167) paid their filing fees with no complaint, the situation was reversed for those with claims in excess of this amount. Two-thirds sought deferments which were typically granted by the courts. Because the explanation of how to go about delaying filing fees was contained in a decree of the Higher Arbitrazh Court (rather than in the APK), I had hypothesized that enterprises with access to legal professionals would be more likely to take advantage of this procedural loophole. Oddly enough, when I isolated this as a factor, it turned out that enterprises with in-house legal departments were slightly less likely to petition to have the fees postponed.⁴⁷ This indicates that knowledge of this strategy has now spread beyond legal insiders.

Businessmen the world over are impatient to get disputes resolved in order to be able to move on. The financial precariousness of most Russian enterprises

45. *Gosposhlina* is assessed at 5% of the amount sought for the first 10 million rubles, with a sliding scale for amounts in excess. Given that most of my cases are only a small fraction of this cutoff figure, the petitioners can be assumed to have paid 5%. Article 4.2, "O vnesenii izmenenii i dopolnenii v Zakon RF 'O gosudarstvennoi poshline'", *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* 1996 No.1. The law does not require state organs to pay *gosposhlina*.

46. "O nekotorykh voprosakh primeneniya arbitrazhnykh sudami zakonodatel'stva Rossiiskoi Federatsii o gosudarstvennoi poshline", *Postanovlenie Plenuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*, No.6, 20 March 1997, *Rossiiskaia gazeta* 22 April 1997. Plaintiffs are required to submit affidavits (*spravki*) from their bank(s) verifying that they lack sufficient funds to pay the filing fees as well as from the tax inspectorate confirming the location of their bank accounts. See K. Hendley, "Growing Pains: Balancing Justice & Efficiency in the Russian Economic Courts", 12 *Temple International and Comparative Law Journal* 1998, 302-32, for a discussion of the evolution of the practice of deferring filing fees.

47. The presence of a legal department can sometimes operate as a crude proxy for size and age of enterprises. During the Soviet era, legal departments were *de rigueur* for large state-owned enterprises and they were mostly retained when the enterprises privatized. But among the cases I reviewed, organizational type had no noticeable impact on the propensity to seek delays in payment of filing fees.

Table 7: Petitions for Delayed Payment of Filing Fees

A: Petitions for delay of *gosposhlina* as percent of cases filed in which petitioners were required to pay *gosposhlina*

B: Percent of petitions granted

	Within the sample		Results from official caseload statistics (1)					
	A	B	2001		2000		1999	
			A	B	A	B	A	B
All	51.1	100	N/A	N/A	N/A	N/A	N/A	N/A
Moscow	17.9	100	18.8	79.1	18.2	80.2	25.3	77.1
Ekaterinburg	53.1	100	29.2	78.7	38.1	79.1	42.7	74.1
Saratov	78.1	100	67	97.9	72.5	98.7	74.7	95.4

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

made managers even more anxious. Russian policy makers have established a benchmark for how long cases should take to get through the arbitrazh system. The 1995 APK sets a deadline of two months from filing to deciding.⁴⁸ Both trial judges and court administrators take the deadline seriously. Although delays have been inching upwards, they have yet to exceed 5% of cases decided in the arbitrazh courts nationally.⁴⁹ Records are maintained for each judge; the ability to process cases quickly colors perceptions of competence. Whether this quick turnaround compromises the integrity of the process is a difficult question. One Moscow judge grumbled about being part of a "conveyor belt of justice", but still told me that she favored the two-month deadline as a means of keeping things moving.

48. Article 114, 1995 APK. The new procedural code which went into effect in September 2002 abandons this flat rule in favor of a more differentiated system that moderates deadlines based on the perceived complexity of the case. For most cases involving the state, the two-month deadline is retained. E.g., Article 194, Arbitrazhnyi protsesual'nyi kodeks Rossiiskoi Federatsii, *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 2002, special supplement to No.8 (hereafter cited as 2002 APK). But a two-stage process is introduced for complex litigation which gives judges two months from the date of filing to hold the first hearing, and requires them to render their decision within a month of that hearing. Articles 134, 152, 2002 APK. An entirely separate process has been created for petty debts that bypasses hearings in favor of *in camera* hearings based solely on documentary evidence. Articles 226-229, 2002 APK.

49. Hendley & Murrell, *op.cit.* note 6.

Table 8: Percentage of Cases Violating Statutory Requirement for Resolution within Two-Months of Filing

	Within the sample	Results from official caseload statistics					
		2001		2000		1999	
		All cases	Contractual cases	All cases	Contractual cases	All cases	Contractual cases
All (1)	14.3	4.6	N/A	4.6	N/A	3.9	N/A
Moscow (2)	12.9	7.1	7.5	8.3	6.9	5.1	5.95
Ekaterinburg (2)	11.8	9.1	3.5	20.7	4.4	3.4	3.6
Saratov (2)	18.2	1.5	2.3	0.9	0.5	0.8	1.15

(1) Source: "Sudebno-arbitrazhnaya statistika: Osnovnye pokazateli raboty arbitrazhnykh sudov Rossiiskoi Federatsii v 2000-2001 godakh", *Vestnik Vysshego Arbitrazhnogo Suda* 2002 No.4, 20-29; "Sudebno-arbitrazhnaya statistika: Osnovnye pokazateli raboty arbitrazhnykh sudov Rossiiskoi Federatsii v 1999-2000 godakh", *Vestnik Vysshego Arbitrazhnogo Suda* 2001 No.4, 12-18.

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

During these two months, the judge has to send out a notice of the hearing to the parties, hold the hearing, and make her decision. Substantively the cases may present few complications but the uncertainty of the Russian mail can result in slowdowns. If the return-receipt postcard from the defendant is not in hand by the time of the hearing, the judge has no choice but to postpone in order to guarantee due process to the defendant.⁵⁰ The mostly local nature of the disputes I sampled mitigated this factor. Indeed, 84% were decided within the two month deadline with the Saratov cases showing a greater tendency to get bogged down than those from Moscow or Ekaterinburg. As Table 8 shows, this runs counter to the aggregate results for these courts, suggesting that my Saratov sample had an unusual concentration of delayed cases. Even so, most (71%) of the cases I reviewed were resolved in only one hearing.⁵¹ When additional hearings were required, it was typically because one of the parties' representative was sick or unprepared. In only 2 of 26 cases were the additional hearings needed to resolve some substantive issue.

This expeditiousness is possible because judges maintain tight control over every aspect of the process, as is the norm in countries with civil law

50. Articles 115, 119 1995 APK; V.F. Iakovlev (ed.), *Kommentarii k Arbitrazhnomu protsessual'nomu kodeksu Rossiiskoi Federatsii*, 2d ed, Moscow 1999, 286-87.

51. Eighty percent of cases requiring more than one hearing were decided in two hearings.

traditions. Their penchant for control is evident from the outset. Since 1995 when a new APK was passed, the burden of assembling evidence relevant to their claim (or defense) has ostensibly been placed on the litigants.⁵² My earlier research documented the minimal impact of this change in the law by showing how *arbitrazh* court judges persisted in their Soviet-era practice of listing the documents that should be produced at the hearing in the decree (*opredelenie*) notifying the parties of the time and place of the hearing, effectively assuming the burden of proof themselves. In interviews, judges rationalized their behavior on grounds of efficiency and justice.⁵³ They argued that if left to their own devices, the parties would show up empty handed and, even though the 1995 APK allows for dismissal in such cases, doing so would only add to the burden of the appellate courts. They further contended that the need for their helping hand would dissipate as the new rules worked their way into practice. My data show suggest that the learning process has stagnated, due in no small part to the judges' enabling behavior. I found old-style *opredelenie* (containing a detailed list of evidence to be presented) in over 80% of the cases I reviewed. Thus, in practice, the parties continue to lean on judges and to dodge responsibility for assembling their own cases. This pampering no doubt makes litigation more palatable. Behavioral changes will come only if trial judges are tougher and appellate judges are inured to the pleas of those whose claims have been dismissed peremptorily. But my conversations leave me dubious of the likelihood of such a behavioral change in the near future. At this point, helping litigants through the process is clearly central to the self-image of *arbitrazh* judges.

The push to meet the two-month deadline leaves judges little time for reflection. In the courts where I spent time, judges reserved one day a week for opinion writing and heard cases the other days.⁵⁴ Though article 134 of the 1995 APK requires them to inform the parties of the outcome of the case immediately following the hearing, it gives them a three-day grace period for producing the full opinion. The opinions produced tend to be terse. This is, of course, not uncommon in legal systems with a civil law tradition. Moreover, those judges who are carryovers from Soviet-era *gosarbitrazh* were trained to write no-frills opinions. In an effort to enhance the professionalism of the *arbitrazh* court judges and build up the legitimacy of the institution, the 1995 APK mandated that opinions include an explanation of how the judge came to her conclusion, rather than merely revealing the outcome.⁵⁵ Yet the cursory style of the majority (60%) of the opinions I read would not have been out of place in *gosarbitrazh*. As a rule, they included a summary of the facts (often

52. Article 53, 1995 APK; Iakovlev, *op.cit.* note 50, 116-23.

53. Hendley, *op.cit.* note 46.

54. During 2000, *arbitrazh* judges in Moscow, Ekaterinburg, and Saratov had an average monthly caseload of 32, 37, and 38 cases, respectively. Nationally the average number of cases heard by *arbitrazh* judges each month was 28.

55. Article 127, 1995 APK; Iakovlev, *op.cit.* note 50, 305-8.

taken verbatim from the complaint) and a list of relevant statutes, followed by a one-sentence statement of who won and how much. Judges who wrote pro forma opinions were also highly likely to send out *opredelenie* that dictated the evidence to be brought to the hearing. About 60% of the judges I followed behaved in this old-style manner.

How to interpret this finding is unclear. Perhaps we should be encouraged that a significant percentage (40%) broke with tradition, albeit within the limits to be expected in a non-precedential system. Rarely do they make any attempt to distill general principles from the case, preferring instead to concentrate on the situation at hand.⁵⁶ On the other hand, maybe we should be discouraged that most still adhere to the old customs rather than respecting the new rules. It is also possible that judges' behavior is not uniform, but that it is influenced by the specifics of the case. When the parties are represented, the odds of getting a nuanced opinion increase. Judges are also more likely to write careful and well-reasoned opinions when they award the plaintiff more than originally requested than they are when they accede to, or diminish, the plaintiff's demands. This may reflect trial judges' fear of reversal. Presumably the chances of reversal are less if the logic of the opinion is laid out clearly.

The Outcomes of Non-Payments Cases

At the outset I noted that petitioners in the non-payments cases I reviewed uniformly won in the Russian *arbitrazh* courts. But what does it mean to win? Table 9 provides more insight by differentiating cases in which the plaintiff's demands were fully satisfied from those in which it got less (or even more) than was requested in the original complaint. Also delineated are cases in which the parties reached a settlement after the lawsuit was initiated⁵⁷ as well as those that were dismissed due to the failure of the plaintiff to appear for trial.⁵⁸ The table

56. In only 9 cases did the judges weave the facts and law together to make a coherent argument. In the remainder, judges merely had a long string citation of relevant statutory provisions.

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

58. The *arbitrazh* courts cannot hear a case in the plaintiff's absence unless the plaintiff has specifically authorized the case to go forward without them. Article 87, 1995 APK. Plaintiffs resist doing this, but when litigating in regions far from home are sometimes forced to allow hearings to proceed without them because they cannot afford to send a representative. The new APK eliminates this requirement, allowing the judge to go forward with a case in the plaintiff's absence so long as notice has been given. Article 156, 2002 APK.

Table 9: Case Outcomes
(percentage of cases for region with given outcome)

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

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

shows that plaintiffs received exactly what they asked for in a majority of the cases that proceeded to judgment. Taken together with the pro forma nature of most opinions and the haste to resolve disputes, it is tempting to conclude that non-payments cases are being processed in a rote manner with little regard for the substance of the individual disputes. My review of the decisions made in the cases convinces me that the outcomes generally followed the dictates of the law. The parties evidently agreed as did the appellate courts. Only 7 of the cases were appealed and the lower court was upheld in 5 of them. During my months in the *arbitrazh* courts in 2001 (as well as during earlier field research), I have been consistently impressed by the judges' commitment to getting at the essence of what happened in the transaction under scrutiny. To be sure, their style tends to be brusque but they do not steamroller the litigants unless it is warranted.

Table 9 demonstrates that a majority of plaintiffs got precisely what they wanted. This outcome was most likely when the petition was limited to debt (excluding penalties or interest). Illustrating this, 63% of cases in which the outcome mirrored the complaint involved only debt.⁵⁹ At the same time, Table 9 also confirms that the courts do not act as a rubber stamp for creditors. More than a third of the petitioners received less than the amount originally requested. The reductions were not overwhelming, averaging about 15%. These results for the cases in my database are more plaintiff friendly than are outcomes more generally, where reductions of up to 50% are commonplace (see Table 10).

Within my sample, reductions usually turned on arithmetic rather than on cutting-edge legal issues. Most petitioners were able to document the existence of the debt to the courts' satisfaction, but their efforts to obtain penalties or interest were more unpredictable. In the early years of the transition, creditors commonly asked for both penalties and interest, but a July 1996 decree from a

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

Table 10: Average Percent of the Original Petition Awarded to the Plaintiff by the Court

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

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

joint plenary session of the Russian Supreme Court and the Higher *Arbitrazh* Court denounced this practice as "double dipping" and mandated that creditors choose one or the other.⁶⁰ About two-thirds of the petitions included claims for either interest or penalties in addition to debt, divided fairly evenly between the two remedies.⁶¹

In almost half of the cases (45%) involving penalties, the petitioners' claims for these punitive damages were reduced. Interestingly, the impetus to cut back penalties most often came from the court rather than at the request of the defendant. A 1997 informational letter from the Higher *Arbitrazh* Court explicitly authorized trial courts to take up the question of the fairness of penalties on their own initiative.⁶² No doubt the low participation rate for defendants contributes to this tendency, but so too does the increasing activism of the *arbitrazh* courts. In recent years, they have been emboldened by a provision of the Civil Code (Article 333) that gives them discretion to reduce

60. Postanovlenie No.6/8 Plenuma Verkhovnogo Suda RF i Vysshego Arbitrazhnogo Suda RF "O nekotorykh voprosakh, svyazannykh s primeneniem chasti pervoi Grazhdanskogo kodeksa RF", *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 1996 No.9, 5-20, 17. For a fuller discussion of the policy shifts regarding the obligation of debtors to pay penalties and/or interest, see K. Hendley, P. Murrell & Ryterman, "Punitive Damages for Contractual Breaches in Comparative Perspective: The Use of Penalties by Russian Enterprises", *Wisconsin Law Review* 2001 No.3, 639-79.

61. In research in the *arbitrazh* courts in 1997, I found that two-thirds of the 52 non-payments cases I reviewed included claims for penalties, suggesting that the appeal of penalties is fading. Hendley, *op.cit.* note 46.

62. "Obzor praktiki primeneniia arbitrazhnyimi sudame stat'i 333 Grazhdanskogo kodeksa Rossiiskoi Federatsii", *Vestnik Vysshego Arbitrazhnogo Suda* 1997 No.9, 75-80.

penalties that are inappropriately high in the interest of justice.⁶³ Judges have used this provision to discourage malingering on the part of plaintiffs. In other words, they have lost sympathy for plaintiffs that wait until the 3 year statute of limitations expires and then go after penalties for the entire period.⁶⁴ Given that penalties are calculated as a percentage of the debt owed (usually from 0.1 to 0.5%), cases in which the actual debt was dwarfed by the penalties were not uncommon in the early and mid-1990s.⁶⁵ This no longer happens. Interviews with judges reveal an informal rule capping penalties at the amount of the debt which was generally reflected in the case files I reviewed.⁶⁶ Plaintiffs have already begun to adapt their behavior by trimming their demands for penalties at the outset. For the most part, the courts ratified these reduced demands, but they occasionally cut penalties even further.⁶⁷

The courts were even more fickle when it came to claims for interest. Almost 60% of such claims were readjusted downward by the court. Once again, judges took a leading role. In only a few cases did reductions in interest

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

64. In the informational letter, the Higher *Arbitrazh* Court pointed with disfavor to a state agency who had asked for penalties of 102 million rubles on an outstanding debt of 14 million. This case was presented as paradigmatic example of when the trial court should use its discretion to reduce penalties. Obzor, *op.cit.* note 62, 76. For the most part, trial judges whole-heartedly endorsed this policy change, though one Ekaterinburg judge told me that she thought it contradicted the principle of freedom of contract which is at the heart of the post-Soviet civil code. E.g., I.V. Tsvetkov, "O dogovornoj distsipline i roli arbitrazhnykh sudov v ee ukreplenii", *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 2002 No.9, 159-164. She agreed that high penalties were distasteful, but felt that they ought to be enforced if that was the agreement of the parties. She was uncomfortable rewriting contracts, though said that she routinely reduced penalties because she knew that otherwise her decisions would be reversed.

65. Hendley, *op.cit.* note 46.

66. In two Moscow cases, the penalties demanded and awarded slightly exceeded the debt.

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

come at the behest of the defendant. More often, they resulted from arithmetic mistakes made by the plaintiffs when calculating interest. Judges are not supposed to accept the figure proposed by the plaintiff—even if the defendant is in agreement. They are obliged to determine for themselves whether the final figure is correct. The rules governing interest on overdue debt are complicated and frequent errors by the uninitiated are not surprising. In a few of the cases I reviewed, judges seemed to be moving away from a concept of interest as compensatory. Instead, they treat it as a punitive remedy only to be imposed when fault is present.⁶⁸ An Ekaterinburg case involving a lawsuit by a wholesaler against a metallurgy plant for an unpaid bill for aluminum presents the most extreme example. The wholesaler had prevailed in an earlier lawsuit for the debt and was back in court seeking interest on the debt (which remained unpaid). The court conceded that the plaintiff had correctly calculated the interest due under the law, but cut that amount in half (from 210,200 rubles to 103,100 rubles) on grounds of fairness because it believed that the “unpaid obligation had ensued due to the fault of both parties, with some blame for the plaintiff which failed to demand payment for the goods shipped from the defendant”. The court is working hard to excuse the defendant’s delinquency and imposing duties on the plaintiff that are contemplated neither by the law nor by the contract. Other judges (in all three jurisdictions) invoked Article 333 of the Civil Code, notwithstanding the fact that its language is limited to penalties. All of this indicates that the line between penalties and interest is becoming ever more blurred. I found complaints and opinions in all three courts in which the terms were used interchangeably, though legally they are distinct remedies.

What influences outcomes? Certain factors which intuitively would seem to matter turn out to be largely insignificant. For example, size and organizational structure have almost no impact. Large enterprises (open joint-stock companies) turn out to have the same odds of getting more, less, or the same amount as petitioned for as do smaller enterprises (closed joint-stock companies). Likewise the amount of the petition has only limited explanatory power. Regardless of whether the case involves a few rubles or millions of rubles, the most common outcome is an award in the amount originally requested (see Table 11). Yet petitions ranging from 50,000 to 500,000 rubles (approximately \$1,667 to \$16,667) stand the greatest likelihood of ending up with what they wanted. Getting the court to increase the judgment is fairly unusual, but is most likely for petitioners with modest demands (less than 5,000 rubles or about

68. This interpretation was endorsed by the Chairman of the Higher Arbitrazh Court in an October 2002 interview. E. Samokhina, “Shag Navstrechu Predprinimateli”, *Zakon* 1 October 2002. The 2002 APK, which requires judgments to be indexed to take account of inflation, may bring an end to the conflation of penalties and interest (Article 183). Under the 1995 APK, claims for interest were used in lieu of indexing.

Table 11: Impact of Size of Petition on Outcome
(percentage of cases of specified size with given outcome)(1)

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

(1) Excludes cases that were dismissed or settled.

\$167). Often the increases come at the behest of the plaintiffs who decide to tack on additional amounts after the case has been filed. By the same token, this group is the least likely to have the court reduce their requests. Such curtailments are most common among those with more ambitious designs, e.g., petitions in excess of 500,000 rubles which typically include demands for either penalties or interest.

Traditionally, complaints filed with *arbitrazh* courts have been succinct, rarely exceeding more than two pages (including the list of attached documents).⁶⁹ My data indicate that this may be changing. Although a majority persist with the familiar cryptic style, devoting more space to the calculations than to the textual argument, a significant (27%) percentage filed petitions with detailed arguments supporting their claims. Their efforts paid off at the margins. Plaintiffs who went the extra mile show a slightly greater tendency to get more than their original complaint, whereas those who did the bare minimum seem to get the amount originally petitioned for or less.⁷⁰ This lends further credence to my argument that judges read case files carefully. Plaintiffs appear to benefit when they lay the groundwork for the court by weaving together their factual situation with the relevant legal standards. Whether a trend toward greater specificity in complaints will gel remains to be seen.

In many legal systems, advocates play a crucial role in determining outcomes. Whether this would be true in the case of the Russian *arbitrazh* courts

69. Hendley, *op.cit.* note 9.

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

was uncertain for several reasons. For one thing, the system is not adversarial. Litigants need not send a lawyer as their representative.⁷¹ In the early 1990s, lawyers were more the exception than the rule. More often the general director would go himself or send a top lieutenant. This has changed over the years.⁷² Petitioners typically send a lawyer to represent their interests at the hearing. Usually it is an in-house lawyer, though firms specializing in *arbitrazh* practice have emerged in Moscow (the development of this sort of specialized bar has lagged elsewhere).

Even when lawyers are present, most of the questioning is done by the judge as in other countries with civil law traditions. Hearings begin with the judge summarizing the case.⁷³ Each party is then given an opportunity to lay out its case. This is done in narrative form. For plaintiffs, it usually amounts to reading the text of the complaint aloud (often very quickly and in a monotone). Questions from the judge come both during and following the presentation. They focus on the documents that make up the transaction. Oral testimony is rare, though if multiple representatives are present, the effect may be the same as the judge pinpoints her questions to take advantage of the expertise of those present.⁷⁴ But the court will not take notice of any aspects of a transac-

71. The early drafts of the 2002 APK threatened to tighten up the rules. While retaining the option for litigants to send in-house personnel (both lawyers and others) to represent them, Article 62 of the draft of July 2000 limited representation by non-insiders to lawyers who had been certified by the *arbitrazh* courts. V.M. Sherstyuk, *Novye polozheniia proekta tret'ego Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii*, Moscow 2001, 134-35. Instead a compromise provision which mandated that outside representatives be *advokaty*, thereby disenfranchising those with legal training who had never joined the *advokatura* (art. 59, 2002 APK). Like many European countries, Russia has traditionally had a divided legal profession, with *advokaty* as litigators and *iuristy* as the business lawyers. Many *iuristy* (especially in Moscow) took advantage of the legislative vacuum during the 1990s to open full-service law firms. They argue that the new rule is short-sighted in that few *advokaty* have significant experience in the *arbitrazh* courts. E.g., "Nichego khoroshego v etom novovvedenii ya ne vizhu", *Kommersant* 19 September 2002. In the grand Russian tradition, they are already working out how to maneuver around the new rule. E.g., N. Neimysheva, "Grazhdanka Egorova zaplatit za vse", *Vedomosti* 3 September 2002. The impact of this new rule, which went into effect in September 2002, remains to be seen.
72. Non-lawyers again dominated hearings in the wake of the 1998 financial crisis. Defendants sent their accountants in an effort to explain why they were not at fault for overdue debts. The accountants presented documents showing that the defendant ostensibly had money in the bank and had ordered the bank to make payment to the plaintiff, but the bank had not done so. Judges had the unenviable task of explaining why the collapse of their bank did not excuse a failure to pay their debts—a task made more difficult by the lack of legal literacy on the part of the accountants.
73. Judges' presentations are usually concise, but not always. One Moscow judge painstakingly listed the documents contained in the case file, often reading portions of them aloud. Her summaries dragged on for more than 30 minutes, providing a contrast to the norm of brevity (less than 5 minutes) I observed in other cases.
74. Testimony is permitted when the judge is convinced that there is no alternative. Articles 66-69, 1995 APK; Iakovlev, *op.cit.* note 50, 160-73.

tion that cannot be verified through documentary evidence.⁷⁵ Judges do not view this restriction as inhibiting but as a guarantee of objectivity. They are uncomfortable with assessing witnesses' credibility, preferring to ground their decisions in analyses of documents.⁷⁶ They note that this facilitates impartial appellate review because the appeals court will have exactly the same record before them as did the trial court. In their view, this policy has had the effect of disciplining firms to memorialize all aspects of transactions in written form, which can be useful out of court as well as being essential in court. The 1995 APK opened the door for a move toward greater adversarialism by giving the parties (or their representatives) the right to question one another. When sitting in on hearings, I noted that relatively few litigants took advantage of this opportunity, preferring instead to rely on the judge to ferret out the relevant information. For example, in only 4 of the 12 cases I observed in the Moscow *arbitrazh* court in which both sides were represented was there any questioning of one party by another and, even then, it was mostly ineffective. Judges tend to compensate for unrepresented parties by explaining the legal implications of various developments. They will also take a more pro-active role in the questioning if it becomes obvious that the party is unable to articulate his claim in legal terms.

The time I spent sitting in on *arbitrazh* proceedings over the years left me skeptical as to whether lawyers represented a value added for enterprises.⁷⁷ I

75. Article 60, 1995 APK.
76. Occasionally this leaves them scrambling to avoid unjust results as in one of the cases I observed in Ekaterinburg. The plaintiff was a construction company that had ostensibly built a school. The school director had signed an affidavit stating that the construction had been completed and the construction company was suing to collect the balance owed. In the hearing, the director divulged that he had signed the affidavit under duress, that the construction company had told him that its workers would not return to finish the job unless the affidavit were signed. The plaintiff's lawyer urged the court to limit itself to the documentary evidence which said that the construction company had fulfilled its obligations under the contract. Technically the judge should have found in favor of the plaintiff but was reluctant to do so because she believed the school director. The judge postponed the case and urged the parties to make a joint inspection of the school to ascertain the true state of affairs and to reach a settlement. She was visibly nervous when waiting for the parties to show up for this second hearing because she realized that if they had not reached an accord, she would have no choice but to rule for the plaintiff. She was relieved to learn that they had settled the case among themselves and agreed to endorse the settlement.
77. This finding as well as the broader conclusion that lawyers are not terribly competent flies in the face of what had been thought of *iuriskonsul'ty* during the Soviet era. Shelley argued that in-house lawyers were commonly sent to represent their enterprises at *gosarbitrazh* and were critical to ensuring victory. She concluded that the arbiters (the decision-makers in *gosarbitrazh*) depended on the *iuriskonsul'ty* to walk them through the cases. L. Shelley, "Law in the Soviet Workplace: The Lawyer's Perspective", 16 *Law & Society Review*, 1981-82, 429-63, 438-40. Her study was grounded in in-depth interviews with émigré *iuriskonsul'ty* who may have aggrandized their role and influence.

have consistently been struck by their poor preparation. They were often unable to answer basic questions about the underlying transaction. Perhaps this lack of knowledge can be explained by the fact that in-house enterprise lawyers are not part of the inner circle of management and only become involved in a transaction when it goes sour.⁷⁸ More unsettling was the lack of basic legal knowledge among some.⁷⁹ The absence of any sense of shame on the part of lawyers whose ignorance had been exposed indicates a low level of professionalization among these in-house lawyers who inhabit the *arbitrazh* courts. In private conversations, judges regularly decried the quality of lawyering, but felt they had no mechanism for remedying the situation. In theory they could fine those who showed up unprepared but resisted doing so because it only created more work for them.⁸⁰ As problematic as the lawyering seemed to be during my time in the *arbitrazh* courts in 2001, it was noticeably better than it had been only a few years earlier. Conversations revealed judges to be heartened by the improvements, though far from satisfied. Indeed, one Moscow judge waxed nostalgic about the days when she only had to worry about incompetence. She decried the emergence of cunning lawyers who play the sort of multi-level games familiar to observers of the US legal profession. Other judges criticized lawyers for behaving as quislings *vis-à-vis* their clients, e.g., making legal arguments that are patently absurd at the insistence of their clients.

The quality of legal expertise provided in the cases in my database remains somewhat elusive because my information was gleaned from the case file and not from observing the proceedings.⁸¹ What emerges inescapably from these case files is the ubiquity of representatives for plaintiffs. As Table 12 shows, 84

78. In field research in the Ekaterinburg court in 1997, the judge grew so exasperated with the inability of the lawyer to respond that she suspended the hearing and ordered the lawyer to bring her general director with her for the resumption of the hearing the next day.

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

80. The 1995 APK authorizes fines (Article 54), but no judge in Saratov or Ekaterinburg imposed fines in any case brought in 2000 or 2001. Fines were imposed in only one case (out of more than 40,000 decided annually) in Moscow in 2000 and 2001. Unlike civil contempt in the US, where the judge can levy fines in the course of a trial, *arbitrazh* judges would have to hold a separate hearing with all the attendant paperwork. To already overworked judges, this seems to be more trouble than it is worth.

Table 12: Presence of Representatives for Litigants at the Hearing(s)

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

of the 100 plaintiffs sent someone to the *arbitrazh* court on their behalf. Most of them (67 of 84) sent someone with legal training. As might be expected, local plaintiffs were more likely to send someone than were plaintiffs from other regions.⁸²

Because plaintiff representatives were so commonplace, isolating their effect is difficult. Their impact comes into sharper focus when we compare what happened in cases in which the plaintiff representative had the field to himself and those in which both parties were represented (see Table 13). The category of cases in which the plaintiff got more than originally requested is most striking. The plaintiff was represented in all these cases and, in 5 out of 6, was the sole advocate present. At the other end of the scale, among the cases in which the plaintiff ended up with less than desired, the influence of representatives is apparent. When only the petitioner was represented, the odds favored getting the amount requested rather than less. But when both sides have representation, getting less emerges as the most likely outcome. This suggests that being able to present their side, even when some liability is a foregone conclusion, inures to the benefit of debtor-defendants. As I noted above, the presence of representatives tends to raise the quality of the opinion. In almost all (96%) of the cases in which I found a well-reasoned opinion, either one or both sides were represented at the hearing(s). Among a slight majority (12 of 23) of these cases, both sides had advocates. In the remainder (10 of 23), only the petitioner was represented.

Yet a majority (55%) of defendants did not participate in the cases filed against them. They neither filed responses of any kind to the complaint nor did

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

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

Table 13: Impact of Representation (percentage of cases with given outcome that had specified level of representation)

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

they appear at the hearing. Indeed, if we exclude the cases that were dismissed or settled, the percentage rises even higher (53 of 86 or 62%). Both providing a written answer as well as participating in the hearing are optional for defendants.⁸³ Participation correlates with locale though not as strongly as expected. Local debtor-defendants were only slightly more likely to take part than were those who had the added hardship of distance. Larger enterprises showed a greater tendency to participate in hearings than did other types of defendants. Interestingly, the propensity to send a representative was not linked with the presence of a legal department. State enterprises, which uniformly had legal departments, sent a representative in only 1 of 6 cases (8%), compared with large enterprises, where 11 of 20 (55%) sent representatives, even though not all of them had in-house legal departments. The amount of the cases did not serve as much of a motivation for defendants. The odds of having a do-nothing defendant were about the same for all of the ruble-denominated cases. The two cases in which the damages were dollar-denominated were fully contested.

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

But ultimately the most important question is whether participating affects outcomes. Does it matter? The evidence is mixed. As Table 13 shows, do-nothing defendants were most likely to end up owing the amount originally set forth in the complaint, which is the most common result for the sample as a whole. The fact that participation by the defendant appeared to improve the chances of having the court reduce the petition is undercut by the similar result for having the court increase the amount, leaving open the question of whether participation is worth the time and effort.

Conclusions

Russian industrial enterprises are turning to the courts for assistance in recovering overdue debt in ever-increasing numbers. They are not, however, suing indiscriminately. Several patterns are clearly discernable. For the most part, creditors are using the courts to go after relatively small amounts and are doing so routinely. Almost without exception, they prevail, often receiving the full amount demanded in the original complaint. These lawsuits tend to involve trading partners with minimal histories together. It follows that the big-ticket disputes between long-term partners are being handled with informal relational methods. Most of the creditors were represented in the *arbitrazh* proceedings and the data indicate that their presence was beneficial to their clients' interests.

Certain aspects of creditors' experience in the *arbitrazh* courts stand out as well. Perhaps the most striking are the low costs associated with commercial litigation in Russia. Few participants bother to hire outside lawyers, preferring to rely on in-house counsel or to forego the use of lawyers entirely. The filing fees are less of an obstacle than they first appear to be. The need to master the procedural intricacies of the system is mitigated by the willingness of *arbitrazh* judges to help uninitiated and even incompetent litigants through the process. This coddling may hamper the growth of the *arbitrazh* courts institutionally, but it unquestionably acts to even the playing field between experienced and inexperienced players. As a result, size and/or financial wherewithal do not play the decisive role that might be expected.

The patterns found in Russian commercial litigation are basically consistent with what is predicted by the literature, though the specifics of the Russian case illustrates some of its limitations. Priest and Klein argue that creditors will go to court when the anticipated judgment exceeds the costs of going to court.⁸⁴ Given the low cost of litigating in Russia and the virtual certainty of victory, the mystery is not why creditors are using the courts, but why they are not flocking to the courts in even greater numbers. Part of the explanation is provided by Galanter and Rogers' critique⁸⁵ of the failure of Priest and Klein's

84. Priest & Klein, *op.cit.* note 24, 13-14.

85. Galanter & Rogers, *op.cit.* note 24.

cost-benefit model to take strategic behavior into account. Not all costs can be monetized. Litigation brings with it a danger of rupturing an ongoing business relationship. Though the non-adversarial nature of *arbitrazh* proceedings mutes this risk, it does not eliminate it entirely. A dispute is inherently contentious and, especially when large sums and/or friendships are involved, the relationship is unlikely to emerge unscathed. Thus, the reluctance of suppliers to US auto assembly plants to bring their disputes to court for fear of severing the relationship is mirrored in the singular absence of Russian creditors with long-term relations from the docket of the *arbitrazh* courts.⁸⁶

The literature highlights economic instability and uncertainty as factors that tend to stimulate litigation. The argument is that "[t]hey reduce the likelihood of long-term stable relationships among familiar parties, and thereby foster opportunism and mistrust. The basis for reliance on informal dispute resolution is eroded".⁸⁷ The disintegration of the Soviet Union brought economic collapse akin to the Great Depression in the US. Its impact on trading relations had some interesting twists and turns. Initially enterprises found freedom of contract exhilarating but the thrill wore off as inter-enterprise arrears mounted. Not paying became the norm and one's reputation seemed to be enhanced by an ability to pile on more and more debt without tipping over into bankruptcy. The ability to shirk debt became a source of pride rather than shame. Moreover, the efforts of creditors to prevent delinquency fell flat. In the absence of reliable credit-rating agencies and/or a workable system of collateral, creditors were limited to demanding prepayment. But the existence of competitors willing to underbid on the percentage of prepayment required limited the ability of creditors to mitigate risk by insisting on full prepayment. Absent prepayment, only the existence of a long-term relationship provided some minimal insurance that payment would be forthcoming. They came with a safety net of inter-personal relations among mid-level managers that had been forged over decades in oppressive conditions of constant material shortages. Not surprisingly enterprises valued these long-term relationships and were loathe to risk them through litigation. Instead, they took more their newer customers to court, reasoning that they had little to lose if the relationship soured, though most indicated in the interviews that they did not expect that outcome. Much like their counterparts in the US in the late 19th century who did not have access to reliable credit ratings,⁸⁸ contemporary Russian manufacturers have no choice but to sell their goods to new and untested customers and hope for the

best. Like their predecessors, they use the courts aggressively to collect these debts. Whether the emergence of a more stable financial system will bring an end to the practice of bringing petty debts to the courts (as happened in the US) remains to be seen.

Looking beyond bilateral relationships, the distaste for litigation among enterprise managers is no doubt motivated in part by the lingering skepticism toward law and legal institutions that persists as a legacy from the Soviet era. Notwithstanding the efforts at reform since the late 1980s, many enterprise managers remain openly dismissive of the capacity of the legal system to resolve disputes. Those who resort to it seem to do so without any expectation that they will actually collect the full amount owed, but with a sense that the lawsuit may marginally improve their chances of collecting some fraction of it. The low levels of voluntary compliance with the judgments of *arbitrazh* courts speaks vividly to the lack of respect of most litigants for these courts. For example only 6 of the 100 debtors in my sample paid any part of the judgment voluntarily. In such an environment, going to court is inevitably just one of a multitude of strategies that enterprises employ to encourage their customers to pay their debts.

Although the willingness of creditors to bring their complaints to the *arbitrazh* courts can fairly be seen as a hopeful sign in the struggle for the "rule of law" in Russia, the use of the *arbitrazh* courts for small-scale debt collection is hardly the most efficient use of limited judicial resources. As my data indicate, most of the cases are disputes in name only, in that the debtor has either explicitly acknowledged the debt or has done so implicitly by not challenging the creditor's petition. In the new procedural code, these cases will no longer receive full-fledged hearings, but will be diverted into a "summary" process (*uproschennoe proizvodstvo*).⁸⁹ V.F. Iakovlev, the long-time chairman of the Higher *Arbitrazh* Court explained that the new procedure would 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.⁹⁰

86. L. Kenworthy, S. Macaulay, & J. Rogers, "The More Things Change.... Business Litigation and Governance in the American Automobile Industry", 21 *Law & Social Inquiry* 1996, 631-78, 653.

87. *Ibid.*, 633.

88. Kagan, *op.cit.* note 7, 339-40.

89. Articles 226-229, 2002 APK.

90. Iu. Proskuriakova, "Veniamin Iakovlev: Biznes poluchil novye pravila resheniia spornykh voprosov", *Rossiiskaia Business-Gazeta* 30 July 2002.

Whether the expectations of Russian policy-makers that judges will be liberated from processing these petty debt cases will be met remains to be seen. Blankenburg's study of how such a regime worked in West Germany and The Netherlands demonstrated the powerful influence of the institutional structure in which the regime is embedded.⁹¹ The existence of a dense network of litigation alternatives diverted most Dutch creditors before they get to court. By contrast, the low cost and efficiency of the West German process had the effect of promoting the use of courts. Given the current institutional environment in Russia, the West German outcome seems more likely. Russian economic actors have been slow to embrace alternative dispute resolution and encouraging them to do so is a low priority for the Russian state. Given the novelty of the legislative change (which become effective only in September 2002), precisely how creditors will respond is unclear. Policy-makers are clearly expecting that most will waive their right to a full hearing on the merits. But my data show that litigants who sent a representative to make their case before a judge were rewarded with better results. If litigants had lived in a world of perfect information, this might well be their reaction. But interviews with managers suggest that their main goal is to get through the *arbitrazh* process as quickly as possible and, therefore, they are likely to embrace the new "summary" with open arms.

The Bar's Triumph or Shame? The Founding of Chambers of Advocates in Putin's Russia

Eugene Huskey¹

Professional regulation is a contested issue in all modern societies. Members of the professions generally prefer to set their own fees and to accept, discipline, and remove their members within the framework of self-governing associations. For its part, the state has an interest in insuring the accountability of the professions to government and the availability of professional services to society. How a political system manages this tension between professional and state interests and professional freedom and responsibility reveals much about the relationship between a country's public and private spheres.²

During the last fifteen years, professional regulation of the Bar in Russia has been in transition, like so much else in the country.³ Prior to the Gorbachev era, members of the Bar, known as advocates, worked in legal consultation offices, which were branches of regionally-based colleges of advocates. Although these colleges enjoyed an unusual degree of autonomy by Soviet standards, they nonetheless remained subject to political pressure from the Communist Party, the Ministry of Justice, and other state institutions. Not surprisingly, the collapse of communist rule reduced considerably the profession's accountability to the state. It also led to the proliferation of alternative forms of legal practice

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2. It is tempting for American scholars and jurists to assume that the professionalization of the Bar in the United States occurred early in the country's history, whereas in fact it only emerged in the 20th century. In Florida, for example, the modern framework for the Bar took shape around 1950, or over 100 years after the founding of the state. See G. Blankenship, "The Story of the Florida Bar", 74 *Florida Bar Journal*, 2000, 18-31. For an introduction to professional regulation of the Bar in the US, see G.C. Hazard, Jr. & D.L. Rhode, *The Legal Profession: Responsibility and Regulation*, 3rd edition, Mountain View, CA 1994. On the field of health care, see T.S. Jost (ed.), *Regulation of the Healthcare Professions*, Chicago, IL 1997.
3. The leading Western specialist on the postcommunist Bar in Russia is Pamela Jordan, whose works include "The Russian Advokatura (Bar) and the State in the 1990s", 50 *Europe-Asia Studies* 1998, 765-791.

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91. E. Blankenburg, "The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in The Netherlands and West Germany", 28 *Law & Society Review* 1994, 789-808.