

Are Russian Judges Still Soviet?

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Abstract: The Soviet model of judging incorporated an educational and political role for judges. In addition to resolving disputes, judges were expected to use cases as a way of inculcating Soviet values. They could sidestep the law when it conflicted with the interests of the state and/or the Communist Party. In recent years, reforms aimed at raising the status of judges and stripping away their Soviet veneer have been introduced. In theory, the introduction of the principle of adversarialism should shift responsibility away from judge and onto litigants. The article explores how these reforms have played out. It draws on field work in *arbitrazh* courts, including observations of judicial proceedings, conversations with judges and litigants, and review of case files.

The transition under way in the countries of the former Soviet bloc from state socialism to various forms of market democracy has required a parallel transformation of their legal systems. The independence of the judiciary has emerged as a commonly-held goal across the region. Not only has it been embedded into post-Soviet constitutions, but critical institutional changes have been made to the rules governing selection and retention of judges that are aimed at insulating the judiciary from politics. These reforms have met with varying degrees of success (Trochev, 2006). At the same time, a parallel but less high profile effort has been under way to strip the judiciary of its Soviet veneer. The Soviet model of judging, though grounded in a civil law tradition, had two features that distinguished it—namely, instrumentalism and proselytism. This gave rise to an almost schizophrenic combination of dependence and discretion. On the one hand, these judges always had to be mindful of the goals of the regime and had to be prepared to bend the written law to its political or economic needs, giving rise to the Soviet judiciary's well-deserved reputation for

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dependence (e.g., Ulč, 1972). On the other hand, Soviet judges were expected to use the cases that came before them to educate litigants about how to be better citizens, which gave them tremendous discretion, though always exercised within boundaries that were invisible yet clearly understood (Markovits, 1986; Feifer, 1964; Berman, 1963). As part of the transition away from state socialism, these attributes of the legal system have been recognized as dysfunctional and have been disavowed. But whether they have disappeared from judicial behavior is a tougher question that has not been much studied.²

My research focuses on Russia. It might be thought that judges in Russia, as the birthplace of the Soviet model, would be most resistant to change. But Russia's status as a nuclear power has prompted Western governments and multilateral institutions to lavish more attention on it than on any other single former Soviet bloc country. Untold millions have been devoted to assisting the Russians with reforms to their procedural rules that are aimed at reshaping the role of judges as well as to exchange programs that exposed Russian judges to Western models of judging (both European and Anglo-American).³ Yet my research shows that judges have been disinclined to abandon certain key aspects of the Soviet model. Understanding the reasons for their reluctance can help us understand about the barriers to institutional transformation, especially when the reforms call for behavioral changes on an individual level.

My interest in the topic arose somewhat accidentally. I spent the summers of 2004 and 2005 in Russia studying how several critical reforms to the procedural code governing the *arbitrazh* (or economic) courts aimed at enhancing efficiency were actually working in practice. As I was observing the judicial process, I was struck by the extent to which judges shied away from some of the new powers and responsibilities that they had been given. At first, I thought it was a quirk of the judges I was observing, but as I talked to more and more judges and moved around to different parts of Russia, I came to realize that it was a fairly general pattern. Moreover, the behavior was not isolated to those who were carryovers from the old Soviet system, but was also present among the younger judges who had come to the bench during the 1990s. This gave rise to a new set of questions for me, which I pursued along with the project on statutory reform.

²Markovits (1995) provides a snapshot of the thinking of East German judges at the moment of reunification, but does not track them as they adjust to post-Communist life. Others who have examined judicial behavior in the aftermath of the collapse of the Soviet empire tend to focus on more discrete questions (e.g., Annus and Tavits, 2004).

³The interview with Chief Judge Paul A. Magnuson, who has been the chair of the Judicial Conference Committee on International Judicial Relations since 1999 and has spearheaded the exchanges with countries of East Europe and the former Soviet Union, is instructive (www.uscourts.gov/ttb/may01ttb/interview.html, last visited on January 19, 2007). Also useful is McGuire's commentary on the relationship between the judicial corps of New Hampshire and Vologda Oblast' in Russia (www.nhbar.org/publications/archives/display-journal-issue.asp?id=104, last visited on January 19, 2007). See also Weinstein (1993) for his reflections on the legal systems of Kyrgyzstan and Kazakhstan after a visit.

In some ways, it is a project that has been simmering for many years. I have been exploring various aspects of the *arbitrazh* courts since they were created in the early 1990s (e.g., Hendley, 1998, 2003). All of these projects have been grounded in field work and have required me to spend time observing and talking with judges. Regardless of the specific goal of these projects, I have always talked with judges about how they see themselves and how their role has changed. I have had the good fortune to enjoy unusual access to the *arbitrazh* courts, which has allowed me to collect unpublished caseload data for 14 courts and to spend time in courts observing the process, reviewing case files, and talking with courthouse personnel. Each year, I meet with officials at the top court of the *arbitrazh* system, the Higher *Arbitrazh* Court. They provide me with a letter of introduction that authorizes my research.⁴ For the most recent project, I spent time in the city court for Moscow and the regional courts for Moscow, St. Petersburg, Yekaterinburg, Saratov, and Omsk. In previous years, most of my work had been concentrated in Moscow, Yekaterinburg, and Saratov. Table 1 lays out some basic information about these six locales. In my analysis, I have drawn on what I have learned over the past 15 years about the *arbitrazh* courts, both in my field work and in my review of the doctrinal literature.

FROM GOSARBITRAZH TO ARBITRAZH COURTS

Before turning to my findings, a bit of background on the institutional context is needed. Contemporary Russia has three types of courts, two of which are post-Soviet innovations. During the Soviet era, the only courts were the courts of general jurisdiction. These courts continue to hear the vast majority of disputes. Indeed, they hear all disputes involving individuals (Solomon and Foglesong, 2000). In 1991, Russia introduced a stand-alone constitutional court, modeled on the Federal Constitutional Court in Germany. This court reviews legislation and executive actions for compliance with the constitution and hears complaints from citizens about violations of their constitutional rights (Trochev, 2005).

My research focuses on a third type of court, namely the *arbitrazh* courts. These courts handle all economic disputes involving legal entities, including bankruptcy. Their annual caseload represents less than 10 percent of that of the courts of general jurisdiction.⁵ They are a successor in interest to a Soviet-era institution known as "state *arbitrazh*" (*gosudarstvennyy arbitrazh* or *gosarbitrazh*) (Pomorski, 1977). *Gosarbitrazh* lacked the status

⁴Without such a letter, I would not have been able to get any sort of systematic access. Notwithstanding the constitutional declaration that Russian courts are open to the public, access is generally limited to those with business before the court. All courts have security guards that check credentials. Socio-legal research is a new enterprise in Russia. Judges are puzzled by it and tolerate it only because their superiors have authorized it. Like other civil law systems, the Russian courts are a civil service-style bureaucracy.

⁵For a comprehensive overview of the caseload trends, see Hendley (2006).

Table 1. Basic Information About the Russian Federation, the Cities of Moscow and St. Petersburg, and the Oblast's of Moscow, Leningrad, Saratov, and Yekaterinburg (2004)

	Population (in millions)	Population density (people/ sq km)	Percent of population in urban areas	Average monthly income in rubles (dollars) ¹	Number of theater-goers (per 1000 persons)	Recorded crimes (per 100,000 persons)	Unemploy- ment rate	Life expectancy (male/female)
Russian Federation	143.5	8.4	73	6383 (\$243.35)	196	2012	8.2	65.3 (58.89/72.3)
City of Moscow	10.4	221.4	100	20899 (\$796.76)	507	1342	1.6	70.77 (69.89/75.68)
Moscow Oblast'	6.6	141.1	80.5	5806 (\$221.35)	58	1977	3.7	65.57 (59.02/72.6)
City of St. Petersburg	4.6	53.55	100	8855 (\$337.59)	583	1541	2.7	67.34 (60.97/73.74)
Leningrad Oblast'	1.65	19.2	66.4	4014 (\$153.03)	217	1931	6.8	61.97 (55.16/70.0)
Yekaterinburg Oblast'	4.4	26.2	83	6643 (\$253.26)	219	2704	7.3	64.42 (57.8/71.75)
Saratov Oblast'	2.6	26.2	73.6	3995 (\$152.31)	203	1635	9.9	65.63 (59.15/72.74)
Omsk Oblast'	2.0	14.65	69	5427 (\$206.90)	338	2264	9.1	65.65 (59.41/72.32)

Source: Goskomstat (2005)

¹Calculated at an exchange rate of 26.23 rubles to the dollar (February 17, 2007).

of a court. Its purpose was to resolve disputes that arose between state-owned enterprises. It proved ill-suited to the needs of the market economy. In 1992, *gosarbitrazh* was transformed into a hierarchy of *arbitrazh* courts, with a concomitant increase in status for the institution and for those charged with resolving disputes. At the same time, the jurisdiction was expanded to include several types of disputes that would have been unthinkable under state socialism, but which became commonplace with the transition to a market economy. These included disputes involving privatized (and start-up private) companies, disputes between any sort of legal entity and the state, and bankruptcy. Yet many of the procedural norms from *gosarbitrazh* were retained, including the strong preference for evidence in documentary rather than testimonial form, with the only record of what proceeded being the judges' handwritten notes.

Over the 15 years of their existence, the *arbitrazh* courts have been the subject of considerable institutional innovation. They have gone through three procedural codes. The initial code, adopted hastily in 1992 (1992 APK), gave way to a more thoughtful code in 1995 (1995 APK). This code institutionalized the current hierarchical system, which allows for three levels of review. Litigants have the option of a *de novo* review at the appellate court, followed by a review for legal errors at the intermediate appellate or cassation court, with the possibility of review at the discretion of the Higher *Arbitrazh* Court.⁶ The 1995 code continued the tradition of *gosarbitrazh* by instituting strict deadlines for hearing cases. At the trial level, cases were to be decided within two months of filing. Appellate and cassation cases were to be resolved within a month of filing. Similar deadlines also existed within the courts of general jurisdiction, but were mostly ignored (Solomon and Foglesong, 2000). By contrast, they were strictly observed in the *arbitrazh* courts (Table 2), giving rise to concerns over whether the desire for speed was compromising the goal of achieving justice. With an eye to fixing this problem as well as several others, the procedural code was reworked in 2002 (2002 APK). The basic structure of the *arbitrazh* courts remained intact, but a myriad of reforms were introduced with the goal of maximizing both efficiency and justice.⁷

Whether and how the *arbitrazh* courts are being used by the economic actors for whom they are intended has been the subject of considerable debate among social scientists. The data would seem to tell a fairly straight-

⁶The *arbitrazh* court system has three levels of appeal. Trial courts are known as the "courts of first instance" (*sudy pervoy instantsii*). Those dissatisfied with outcomes at trial can turn to the "courts of the appellate instance" (*sudy apellyatsionnoy instantsii*) and, if they remain dissatisfied, they can appeal to the "courts of the cassation instance" (*sudy kassatsionnoy instantsii*). The 82 trial courts feed into 20 appellate courts, which feed into 10 cassation courts. The court of last resort within the *arbitrazh* system is the Higher *Arbitrazh* Court (*Vyshhiy Arbitrazhnyy Sud*).

⁷See Hendley (2003) for a more in-depth discussion of the changes. Beginning in 2004, stand-alone appellate courts were introduced (previously the appellate bench had been an administrative unit of the trial court); see Reshitnikova (2006) for an assessment of this reform.

Table 2. Percentage of *Arbitrazh* Cases Not Decided Within the Statutory Deadline (Delay as Percentage of the Total Number of Cases Decided)

Court	1993	1995	1997	1999	2001	2003	2005
All <i>arbitrazh</i> courts	3.4	1.6	4.1	3.9	4.6	3.7	3.5
Moscow City	13.3	2.2	7.2	5.4	7.1	10.3	3.4
Moscow Oblast'	9.1	4.6	6.4	6	10.3	4.4	2.9
Leningrad/ St. Petersburg	1.9	1.0	4.8	5.4	4.1	5.8	6.5
Yekaterinburg	2.9	1.1	1.7	10.6	9.1	1.1	0.4
Saratov	0.1	1.2	0.8	0.8	1.5	16.7	4.8
Omsk	N/A	N/A	N/A	2.4	3.8	3.4	17.4

Sources: For the national-level data: *Sudebno-arbitrazhnaya statistika* (1995, 1997, 1998, 2000, 2002, 2004, 2006); for the *oblast'*-level statistics: *Otchet o rabote* for each court (1993, 1995, 1997, 1999, 2001, 2003, and 2005).

forward story. As Table 3 indicates, the caseload of the courts rose sixfold between 1995 and 2005. Interestingly, the caseload has shifted over the years. In the mid-1990s, the docket was dominated by debt-relief cases, but a decade later, a majority of cases involve tax disputes (with a mix of cases brought by the state and by the taxpayers). Survey data suggest that the use of these courts is fairly widespread and uniform. A survey fielded in 1997 revealed that over 80 percent of the enterprises surveyed had been in the *arbitrazh* courts during the previous year (Hendley, Murrell, and Ryterman, 1999). Not everyone agrees with my interpretation of these data. Indeed, the more commonly held view is that the *arbitrazh* courts are hopelessly corrupt and incompetent and, if used, are functioning to prop up informal mechanisms of debt collection (e.g., Ledeneva, 2006; Hay and Shleifer, 1998). I have addressed these interpretations elsewhere (e.g., Hendley, 2004; 2002) and have no intention of rehashing the debate here, but do want to note that they tend to be grounded in anecdotal evidence gathered from disgruntled litigants. Few of those who adhere to this view have ever spent time in the *arbitrazh* courts, nor have they immersed themselves in the caseload data.

FROM ARBITERS TO JUDGES: THE REFORMS IN THEORY

For my purposes, the more important question is how the role of *arbitrazh* judges has evolved over the life of these courts. Common sense

Table 3. Caseload Trends for the *Arbitrazh* Courts—1993–2005

Court	1993	1995	1997	1999	2001	2003	2005
All <i>arbitrazh</i> courts	275,304	237,291	341,537	496,739	638,287	869,355	1,467,368
Moscow City	24,604	18,208	29,348	43,014	44,389	50,688	73,662
Moscow Oblast'	8,585	6,154	9,087	13,848	18,916	19,501	25,987
Leningrad/ St. Petersburg	14,473	8,813	16,651	28,642	33,297	41,222	49,376
Yekaterinburg	10,453	8,000	8,464	14,579	23,277	30,442	39,600
Saratov	6,193	4,002	5,412	9,552	15,929	13,372	31,132
Omsk	N/A	N/A	N/A	8,871	10,867	10,393	16,251

Sources: For the national-level data: Sudebno-arbitrazhnaya statistika (1995, 1997, 1998, 2000, 2002, 2004, 2006); for the *oblast'*-level statistics: Otchet o rabote for each court (1993, 1995, 1997, 1999, 2001, 2003, and 2005).

dictates that the conception of their role was initially shaped by the behavioral norms governing the decision-makers within *gosarbitrazh*. After all, many of these arbiters stayed on to become judges in the new system. But their socialization as arbiters was an inescapable influence on, though not entirely determinative of, their behavior. As arbiters, their function was to resolve disputes between state enterprises. Most of these disputes were mundane, typically involving failures to deliver goods on time or poor quality goods. Though there were laws on the books that governed such obligations, arbiters were less concerned with living up to the letter of the law than with ensuring plan fulfillment. In this way, arbiters acted as an instrument of state planning rather than as independent fact finders, and their decisions were political. Arbiters made their decisions solely on the basis of documentary evidence. Given what we now know about the widespread use of informal mechanisms to ensure on-time delivery (the so-called "second economy"), this insistence on written proof gave the *gosarbitrazh* process an air of unreality. It also deemphasized the importance of lawyers. If litigants had in-house legal departments, then their lawyers would present the evidence, but their rhetorical skills were largely irrelevant. Enterprises without legal departments sent other managers, usually those familiar with the transaction at issue. Arbiters would assist them with any technical legal questions. As a result, a lack of legal knowledge did not put litigants at a disadvantage. In the course of working through the evidence, arbiters did not shy away from lecturing enterprise officials about deviations from Soviet norms and the importance of setting a good example. The actual decisions followed the civil law convention of brevity.

No effort was made to explain the legal rationale for the outcome. Instead, the primary focus was on the specifics of each case.

How has the role of the decision maker changed with the transition from *gosarbitrazh* to *arbitrazh* courts? At first glance, it might seem as though becoming a court was simply a matter of semantics. The basic function has remained the same—namely, resolving economic disputes. But beginning in 1992, the context changed radically. The introduction of market mechanisms gave rise to different sorts of disputes. The recognition of private property rights meant that disputants were no longer limited to state-owned enterprises. Parties now ran the gamut from state-owned enterprises to privatized enterprises to start-up private firms. Eventually individuals who had registered as entrepreneurs were also given standing to use the *arbitrazh* courts. The resulting differentiation between state interests and private interests meant that disputes could and did arise between the state and various types of legal entities. If *arbitrazh* judges were to be seen as honest brokers in such disputes, then they had to abandon their charge to uphold the state's interests. The procedural codes governing the *arbitrazh* courts trumpeted their independence and proclaimed that all parties were equal before it. This represents an institutional break between *gosarbitrazh* and *arbitrazh* courts. Of course, declaring judicial independence is easier than achieving it in practice.

The reasons why disputes were brought forward also changed. During the Soviet era, enterprises used *gosarbitrazh* as a way of signaling their industrial ministerial supervisors that they were not to blame for failures to meet production targets established under the plan. The market transition eliminated the oversight function of these ministries (as well as many of the ministries). More importantly, it replaced plan fulfillment with profitability as the key success indicator. This hardening of budget constraints meant that firms now brought cases for non-payment seeking meaningful damages for contractual breaches. Cases about late delivery, which had dominated the docket of *gosarbitrazh*, quickly disappeared. The skills required to resolve these different types of cases were different. Judges had to learn to pay more attention to the financial bottom line, an issue that had been mostly irrelevant under state socialism.

Not only did the types of contractual breach case change, but the transition toward the market brought a myriad of issues before the court that would never have arisen under a planned economy. Among these are bankruptcy, intellectual property, corporate governance, tax, and harm to business reputation. Much like the question of damages, this change in the docket highlights the increased need for competence. No longer can decision-makers use plan fulfillment as their lodestar. Rather, they have had to master a complicated set of legal rules that are new, not just in their content but in their very conceptualization in the Russian context. Even if we take a cynical approach to the Russian courts (as seems to be the fashion) and assume that judges are guided by Kremlin preferences in their decisions, the judges would still have to be sufficiently conversant in the law to write opinions that mask political will in legal language.⁹ In contrast to the Soviet

era, they can no longer be sure that unsuccessful litigants will go away quietly; the *arbitrazh* court hierarchy offers several levels of appeal, and the Russian press has developed an interest in legal matters.

Indeed, the procedural codes governing the *arbitrazh* courts now require judges to justify their decisions. A distinction is drawn between the "resolution part" (*rezolyutivnaya chast'*) and the "motivated part" (*motivirovochnaya chast'*) of decisions (art. 127, 1995 APK; art. 170, 2002 APK). The latter is an innovation that came with the status as a court and represents a clear break with *gosarbitrazh* traditions (as well as a step away from civil law norms). Recognizing that it may take longer to lay out the reasoning than to determine the winner, the procedural codes allow additional time for judges to write up the justification. While the "resolution part" of the decision must be announced at the conclusion of the court session, judges are given a week to prepare the "motivated part" of their decisions. But as with independence, the tougher question is the extent to which the way decisions are written has actually changed in response to the requirements of the law.

A more straightforward and easily documented change is the shift away from collegial judging to single judges at the trial level. *Gosarbitrazh* decisions were always made by three-judge panels. That system was retained in the 1992 code. The 1995 code changed the default rule for inter-firm disputes, providing that all such disputes would be heard by a single judge unless one of the parties made a special plea for collegial decision-making or the judge felt he or she needed assistance because of the complexity of the case (art. 14). The three-judge panels were retained for cases involving the state and for bankruptcy cases. The 2002 code expanded the categories of cases to be heard by single judges. Collegial decision-making is now required only for bankruptcy cases and for cases in which a normative act is being challenged (art. 17). This latest code also gives parties the option of requesting the participation of so-called "*arbitrazh* assessors" (*arbitrazhnyye zasedateli*) (art. 19). These assessors are local business and legal experts who sit alongside *arbitrazh* judges with equal rights.⁹ They resemble the Soviet-era lay assessors, who were a standard feature of the courts of general jurisdiction (but not *gosarbitrazh*), but are intended to take a more active role than their namesakes, who were often referred to

⁸The extent to which the Kremlin dictates outcomes in Russian courts is ultimately unknowable. There is no question that judges have kowtowed to its wishes in highly politicized cases. The Yukos case exposed the fissures in both the *arbitrazh* courts (which handled the tax charges against Yukos) and the courts of general jurisdiction (which handled the criminal case against Khodorkovskiy). The first *arbitrazh* judge assigned to the case withdrew because of the pressure. The decision in favor of the state in the tax case surprised no one. But should we take this case (and others like it) as an indictment of the entire system? My research suggests that routine cases are resolved in accordance with the law. Indeed, it strains credulity to imagine that Kremlin officials are involved in resolving the hundreds of thousands of cases that are heard by the *arbitrazh* courts each year, much less the millions heard by the courts of general jurisdiction.

⁹For more detail on how assessors are selected, see "Ob arbitrazhnykh" (2001).

as "noddors," for their propensity to go along with whatever the judge decided.

Another intriguing change introduced by the procedural codes is competitiveness (*sostyazatel'nost'*) between the parties, which could fairly be viewed as a form of adversarialism.¹⁰ This element has crept into the procedural norms gradually. It was absent in the initial 1992 code. The 1995 code included a brief mention: "The judicial process in *arbitrazh* court is based on competitiveness and equality of rights between the parties" (art. 7). The interpretation of *sostyazatel'nost'* as embracing adversarialism is strengthened by a later provision that clearly assigns the burden of assembling the evidence necessary to prove their claim to the parties (art. 53). The 2002 code expands on *sostyazatel'nost'* with several paragraphs detailing the rights of parties to be aware of the arguments and evidence of the opposing side in advance of any hearing on the merits (art. 9). It reconfirms the parties' obligation to put together their own cases, supplementing the 1995 language with additional provisions clarifying their obligation to share evidence with the other side, going so far as to forbid the introduction of evidence of which the other side has not been notified (art. 65). The introduction of a preliminary hearing (*predvaritel'noye sudebnoye zasedaniye*) to the *arbitrazh* process, during which the parties are supposed to share their evidence and theory of the case with the court and the other side, helps make sense of how this new openness was intended to be operationalized (arts. 133–137). This move towards adversarialism represents yet another step away from Russia's civil law heritage and an inching toward a common law approach.

From Arbiters to Judges: The Reforms in Practice

The transition from arbiter to judge connotes an enhanced status. In some ways, the task has been simpler for *arbitrazh* courts than for the courts of general jurisdiction. The *arbitrazh* courts brought less baggage from the Soviet era (Ginsburgs, 1985). Though they were no less instrumental in the way they manipulated law, the consequences were less heinous. Unlike the courts of general jurisdiction, they played no role in the Stalinist terror. Their instrumentalism reflected itself in preferential treatment for well-connected enterprise directors and for industries deemed essential to the militarized Soviet economy, not in death or imprisonment in the notorious gulags. The boutique nature of the *arbitrazh* courts also makes the task

¹⁰The principle of *sostyazatel'nost'* is also contained in article 123 of the Russian Constitution, adopted in 1993. It has been translated in various ways. The official government website translates it as "controversy," leading to a nonsensical phrase in English: "Judicial proceedings shall be held on the basis of controversy and equality of the parties" (www.constitution.ru/en/10003000-08.htm, last visited on January 17, 2007). Translators more familiar with English have opted for "adversarial" in lieu of "controversy." "The trial shall be conducted on an adversarial and equal basis" (www.departments.bucknell.edu/russian/const/ch7.html, last visited on January 17, 2007). In a recent article addressing *sostyazatel'nost'* in criminal cases, Pomorski (2006) translated it as "adversarial."

easier. Much of the general public in Russia is unaware of their existence. Their clientele is limited to those engaged in entrepreneurial activity.

Raising the status of judges cannot be accomplished by edict, but the law can mandate symbolic behavioral changes that, over time, may lead to shifts in attitudes. From the outset, the places where judges met with parties (whether in courtrooms or in their offices) were outfitted with the flag and crest of the Russian Federation. More interesting was the choice to mandate that judges wear robes.¹¹ Robes were disdained during the Soviet period as a bourgeois affectation. *Arbitrazh* judges did not immediately take to the practice of wearing robes. But gradually over time, it has become *de rigueur*. I saw variation between courts, which was driven by the policy of the court chairmen and by the weather (with some chairmen allowing judges to forgo robes in the dog days of summer).

Along similar lines, the 1995 code instituted a requirement that parties stand when judges enter the courtroom and when judges are rendering their decisions (art. 116(1)). The code also called for parties to stand when addressing the court unless given leave to sit by the judge (art. 116(2)). The code said nothing about how parties were to address judges, leading to some amusing moments in court. Mimicking what they saw on U.S. television programs, some litigants took to calling judges "your honor" (*Vasha chest'*), but the phrase is awkward in Russian. Judges disliked that honorific. The 2002 code mirrored the rules from the earlier code on when parties are required to stand, but clarified that judges were to be called "esteemed judge" (*uvazhayemyy sud*) (art. 154). Judges are sticklers when it comes to having the parties stand when they enter and when they read their decisions, but many relent when it comes to standing to address the court. They tend to enforce the rules more rigorously when parties evidence a lack of respect; the rules become a mechanism for putting such parties in their place.

The physical condition of the *arbitrazh* courts has hampered the effort to enhance the status of judges. Because of the relative unimportance of *gosarbitrazh*, the buildings where they were housed tended to be unappealing. In many parts of Russia, the *arbitrazh* courts were relocated to abandoned Communist Party facilities. Though these buildings represented an improvement, they were not designed for hearing cases and so had few courtrooms. For example, the building where the Saratov *arbitrazh* court ended up had only one room that could be used as a courtroom.¹² The facilities in Yekaterinburg and Moscow are likewise short of courtrooms. As a result, most cases are heard in the cramped quarters of judges' offices,

¹¹This requirement was not included in the procedural code, but was buried in the more detailed regulations (*reglament*) governing the *arbitrazh* courts.

¹²The rest of the three-story building was like a rabbit warren, with offices that opened directly off the corridor, making it impossible to create antechambers where the judges' staff could work or where litigants could wait. The Saratov judges made do. Indeed, every time I returned, I was amazed at how they were able to find room for more people to work. In 2007, the court moved to a new facility, built to its specifications.

leaving little physical distance between the litigants and the judge and facilitating an atmosphere of informality. Only St. Petersburg took a different tack. The chairman had reconstructed the ground floor of the building with 10 courtrooms. As a rule, all cases were heard in these courtrooms. But this created its own weirdness. In order to accommodate all of the judges, each judge could have at most one day a week in the courtroom. This required them to have marathon sessions, sometimes scheduling 20 or 30 cases per day, and rushing the parties through the presentation of their evidence. Yet it did succeed in giving the process a more formal quality.

Plans are afoot in most jurisdictions to construct new facilities that are to be built to the specifications of the *arbitrazh* courts. It will be interesting to see whether the increased use of courtrooms leads to a formalization of the process and, in turn, whether this affects the esteem in which judges are held.

The Move Away from Collegial Judging

The record of the *arbitrazh* courts in realizing the other reforms has been mixed. Looking first at the technical changes in the role of judges, some success can be reported. In my conversations with judges over the years, I have yet to encounter a judge who did not support the transition away from collegial decision-making at the trial level, though they sometimes look back fondly on the days when they could discuss their cases openly with their colleagues. But they see the systemic advantages to having a single judge. They consistently remark on the gains in efficiency made possible by the ability to hear cases on their own. Coordinating the schedules of three judges is more difficult at the trial level than on appeal, owing to the number of delays resulting from failures to assemble the evidence in a timely manner. Judges do not feel that justice has been sacrificed for this gain in efficiency. They reminded me that even when cases were heard collegially, the chairperson of the panel took primary responsibility for running the case and writing the opinion. Moreover, if litigants are dissatisfied, they have the opportunity for a *de novo* review by a three-judge panel at the first level of the appellate process.

The 1995 procedural code left some wiggle room. Even when the default rule would dictate a single judge, the chairman of the court had the authority to mandate collegiality (art. 14). The code is silent as to what might motivate such a choice. The most authoritative commentary on this code, which was edited by the then-chair of the Higher *Arbitrazh* Court, V. F. Yakovlev, says that such decisions can be made either on the initiative of the court due to the complexity of the case or by a well-reasoned petition by the litigants (Yakovlev and Yukov, 1996, p. 34). On the basis of my field work in the courts over the past decade, I had the impression that such requests were quite rare. But the data tell a somewhat different story. Table 4 sets forth the percentage of cases that were heard collegially, despite being originally set for a single-judge hearing. It shows a wide variation in the

Table 4. Percent of *Arbitrazh* Cases Statutorily Designated to Be Decided by Single Judges That Were Decided Collegially Under the 1995 Procedural Code

Court	1996	1997	1998	1999	2000	2001	2002
Moscow City	3	4.3	6.6	8	13.3	20.6	12.1
Moscow Oblast'	12.3	7.1	7.6	6.1	7.6	18.2	12.4
St. Petersburg/ Leningrad Oblast'	4.4	5.8	6.9	8.5	N/A	19.9	15.3
Yekaterinburg	8	9.6	8.1	7.1	9.2	11.5	4.4
Saratov	3.4	4.3	6.6	2.5	5.8	7.3	6.1
Omsk	N/A	N/A	N/A	N/A	10.4	8.6	25.5

Sources: Otchet o rabote for each court (1996, 1997, 1998, 1999, 2000, 2001, and 2002).

number of cases heard collegially. It is not surprising that the incidence of such cases is higher in Moscow and St. Petersburg, where there tends to be a higher concentration of complicated cases as well as more aggressive lawyering than in provincial centers like Saratov.¹³

The 2002 code eliminated this wiggle room. Whether a case is heard by a single judge or collegially is now determined solely by the code (art. 17). It is fair to see the 1995 code as an experimental transition away from collegial judging that was solidified by the 2002 code. But this most recent code introduced a new wrinkle. As I noted above, litigants are now entitled to request that *arbitrazh* assessors be brought into the case. Such requests need not be justified; they need only be made in a timely fashion—*i.e.*, at least one month before the hearing on the merits is to commence (art. 19; Yarkov, 2004, pp. 33–34). Because the two assessors have the same powers as the sitting judge, the practical effect is to introduce collegiality by creating a panel of three decision-makers. This reform was not part of the code, as drafted by staff of the Higher *Arbitrazh* Court, but was included at the insistence of the legislature (Hendley, 2003). During my fieldwork in 2004 and 2005, judges were lukewarm at best. They believe that most requests are motivated by a desire to delay the proceedings. Finding times when these volunteer assessors are available is difficult, and they often fail to turn up for scheduled hearings. One Moscow City *arbitrazh* judge told

¹³What explains the fact that a quarter of all cases were heard collegially in Omsk in 2002 is a mystery. Both Omsk and Saratov were centers of military industrial production during the Soviet era. Both have fallen on hard times in the post-Soviet era. Omsk, with a population of 1.2 million, is bigger than Saratov, with a population of 920,000. Unfortunately, I had not done these calculations when I visited either Omsk or Saratov.

Table 5. Use of *Arbitrazh* Assessors: Number of Times Used, and That Number as a Percentage of All Cases (Nationally) in Which Assessors Were Used

	2004		2005	
	No. of cases that used <i>arbitrazh</i> assessors	As percent of total cases heard using <i>arbitrazh</i> assessors (n = 870)	No. of cases that used <i>arbitrazh</i> assessors	As percent of total cases heard using <i>arbitrazh</i> assessors (n = 1115)
Moscow City	132	15.2	224	20
Moscow Oblast'	59	6.9	65	5.8
St. Petersburg/Leningrad Oblast'	18	2.1	18	1.6
Yekaterinburg	29	3.3	18	1.6
Saratov	3	0.3	1	0.09
Omsk	6	0.69	3	0.27

Sources: Otchet o rabote for each court for 2004 and 2005.

me of a case where she had rushed to complete an opinion at the request of an assessor only to have that assessor fail to come to her office to sign the opinion, thereby negating it. To a person, the judges' complaints centered on practical concerns; they reflect the obsession of these judges with getting cases handled within the statutory deadlines (as I discuss below). Adding assessors to the mix constitutes an unacceptable risk for them. The practice of using assessors has not yet caught on among litigants either, as Table 5 shows. It is most popular in Moscow, but even there, at its highest point in 2005, the number of cases in which assessors were involved represents only 0.3 percent of all cases heard.¹⁴ Looking at the *arbitrazh* system as a whole, the percent of cases involving assessors has yet to exceed 0.1.

Collegial decision-making is clearly associated with Soviet-era judicial practices. On a formal level, it has been largely abandoned, thereby signal-

¹⁴During the summer of 2004, I had the opportunity to observe a case in the Moscow City court in which the defendant had petitioned for assessors. When queried as to why, the defendant's representatives said that they hoped they'd have better luck with three decision-makers than with one. I asked whether they had any reason to suspect the objectivity of the judge. They said that they knew nothing of the judge before the case. Nor did they have any prior knowledge of the assessors that they brought into the case; they picked names off the list provided at random. This conversation confirms the worst fears of judges, namely that their schedules are being undermined on the random whims of litigants.

ing confidence in trial-level judges. The sideways step of introducing *arbitrazh* assessors was forced on the courts by legislators unfamiliar with the *arbitrazh* process. The reform has been stillborn. Neither judges nor litigants see assessors as adding value to the process.

The Move Away from Declarative Decisions

In a break from the *gosarbitrazh* practice, *arbitrazh* judges are required to justify their decisions. This duty was introduced in the 1992 code (art. 108) and was reconfirmed in the 1995 code (art. 127) and the 2002 code (art. 170). I first began reading *arbitrazh* decisions in 1994. It seemed to me that there was a correlation between the willingness to lay out the reasoning for the decision and the time on the bench. Those who had been part of the *gosarbitrazh* system were reluctant to change their writing style. As one Saratov judge told me in 1996, she had been doing the same job for 30 years and, during that time, had seen numerous procedural codes come and go. She had no intention of changing to suit the latest whim of the elite. To be fair, she was something of an outlier. Most judges paid lip service to the importance of providing litigants with reasoned opinions, even if their actions did not always live up to their rhetoric.

Coming to any sort of general conclusions about the extent to which *arbitrazh* judges have embraced the obligation to justify their decisions was complicated by the inability to get a random sample of opinions to read. Because my presence was always somewhat tenuous, I was reluctant to make too many demands. Moreover, the lack of consistency across courts in filing systems made getting any sort of representative sample almost impossible. The closest I got to this was in the course of a project I undertook in 2001, which was aimed at assessing the ability of victors in the *arbitrazh* system to enforce their decisions (Hendley, 2004). As part of this project, I gathered a set of 100 non-payments cases from the city court of Moscow and the regional courts of Yekaterinburg and Saratov. Among other things, I coded these cases for whether they were well-reasoned or pro forma. I found that only 25 percent were well-reasoned. This suggests that judges have yet to fully embrace the obligation to explain their decisions, *i.e.*, that they remain stuck in the Soviet-era tradition of merely revealing which side had prevailed.

The Move Toward Competence

The failure to justify their decisions might be seen as an indicator of lack of knowledge, but such an interpretation would miss the point. As I discuss in greater detail below, *arbitrazh* judges are under enormous time pressure and so may cut corners when writing up their opinions. This does not necessarily mean that they have reached an incorrect decision. My own survey of judicial opinions has been limited to contractual disputes, and I have rarely encountered opinions with glaring substantive legal errors.¹⁵ For the most part, my conversations with judges over the past 15 years

reveal a judicial corps struggling to keep up with its caseload, but one that works diligently to master the codes and accompanying regulations. This has not been an easy task, given the fits and starts by which the legal changes needed for the transition towards a market has proceeded. This concern with substantive knowledge represents a break with *gosarbitrazh*, when almost any outcome could be and was justified on the basis of the supervening need to fulfill plan targets.

My impressions of competence run counter to the position taken by much of the social science literature, which argues that *arbitrazh* judges were incapable of handling the market-based disputes that began to come before them in the 1990s (*e.g.*, Ledeneva, 2006; Volkov, 2002; Black and Kraakman, 1996). This literature tends to be dominated by anecdotal accounts of dissatisfied litigants, who blame their losses on the incompetence of *arbitrazh* judges.¹⁶ When carrying out field work in industrial firms in the late 1990s, I heard the same sorts of stories, but typically when I dug into the records, I saw that mistakes made by the firms themselves in the filings explained the losses. Blaming the judge for losing is easier than taking responsibility. No doubt there are *arbitrazh* judges who get it wrong, but my sense that concerns over competence are not central were confirmed by the results of a 1997 survey of the heads of legal departments of over 300 enterprises in six parts of Russia.¹⁷ When they were asked to assess the seriousness of various obstacles to *arbitrazh* cases, fears of incompetent judges emerged as a relatively unimportant factor, especially when compared to issues such as the cost of filing claims and the difficulty of enforcing judgments.¹⁸

The Move Toward Adversarialism

The procedural codes reflect an evolving commitment to shifting the responsibility for the case from the judge to the parties. As I noted above, both the 1995 and 2002 codes ostensibly require the parties themselves to

¹⁵Over the past decade, the percentage of trial decisions that have been appealed has ranged from 8.5 to 13.1. Elsewhere I have examined the appellate courts in more detail (Hendley, 1999).

¹⁶No doubt it is also influenced by public opinion polls. In a March 2006 poll of Russians conducted by the well-respected Levada Center in Moscow, only 15 percent of respondents found the courts completely trustworthy (compared to 56 percent who believed Putin is completely trustworthy). These low levels of trust have been reported throughout the post-Soviet period (www.levada.ru/press/2006041104.html, last visited on January 19, 2007). These data are highly problematic in that they fail to differentiate among the different types of Russian courts.

¹⁷For more information about this survey and an overview of the results, see Hendley, Murrell, and Ryterman (2000).

¹⁸Respondents were asked to assess these factors on a scale of 0 to 10. The mean response for judicial competence was 3.6, compared with 6.7 for the expense of filing claims and 7.3 for enforcing judgments. Among the possible obstacles listed, which also included procedural complexity, judicial bias, cost of outside counsel, delay, and confidentiality, only that last factor of confidentiality had a lower mean than judicial competence.

assemble the evidence necessary to prove their claims. This marks a definitive step away from civil law practice, which generally assigns responsibility for assembling the case to the judge. Assessing the extent to which judges have embraced this new referee-like role is not easy, but there are several objective indicators. The first is the way in which the first decree (*opredelenie*) sent by the judge to the parties is structured. This is a form document in which the judge sets the time and place for the first hearing. It also gives the judge the option to provide a list of evidence that the parties should bring to this hearing. Both the letter and spirit of the 1995 and 2002 codes militate against such an approach. Rather, the law would suggest that the sort of evidence to be presented should be left to the discretion of the parties. Yet this is not what is happening. Of the 100 non-payment cases I coded for my 2001 study, only 17 took this hands-off position. In the remaining 83, the judge provided a detailed list of the documents to be brought to court. During the summer of 2004, I read 62 files involving cases set for full hearings during my field work in the courts in Moscow, Yekaterinburg, and Omsk.¹⁹ Of these, 51 (81 percent) included *opredeleniye* with lists of documents to be presented. But some progress can be seen in the fact that about half were relatively generic lists, *i.e.*, reminding the parties to bring their organizational documents.

Another indicator of a shift toward adversarialism lies in how the parties behave once in court. Under *gosarbitrazh*, the parties were largely passive, mostly responding to questions raised by the arbiters. Their rights expanded with the reinvention of *gosarbitrazh* as a court. Beginning with the 1992 code (art. 28) and continuing with the 1995 code (art. 33) and the 2002 code (art. 41), parties gained the right to question one another during the hearing. When taken in concert with the shifting of the burden of proof, this can be seen as an effort to reshape the role of judge from ringmaster to referee and to enhance the power of litigants. But have litigants taken up the challenge? My research suggests that, outside of the city court for Moscow, relatively few litigants take advantage of this opportunity, instead relying on judges to elicit the key information.

Litigants are able to do this because judges routinely step in to fill in the gaps in their cases, rather than letting them flounder. A few examples may help illustrate what happens. In a case brought in the city court of Moscow during the summer of 2005 to recover interest on an unpaid debt (the petitioner had already prevailed in an earlier case to recover the debt itself), the lawyer for the plaintiff-creditor fumbled when trying to explain what she was seeking. She repeatedly conflated interest (*protsent*) with penalties (*peni*). Even when the judge intervened with specific questions, the confusion persisted. After responding in the affirmative to the judge's question as to whether she was seeking interest, the lawyer then started

¹⁹I read an additional 61 case files that used the "accelerated process" (*upreshchennoye proizvodstvo*), authorized for the first time by the 2002 code. For a fuller discussion of how this reform has played out, see Hendley (2005).

talking about penalties. Afterwards, the judge told me that she had concluded that the lawyer did not grasp the conceptual difference between the two,²⁰ but she went ahead and resolved the case as if the lawyer had made the appropriate argument, essentially stepping in for the lawyer. In a case brought in the regional court for Omsk during the summer of 2005, the petitioners advanced the wrong legal theory in a case seeking to recover for construction work. They grounded their claim in a written contract. Yet this contract came into effect only if and when the client (defendant) paid a deposit, which never happened, rendering the contract legally ineffective (despite being signed by both sides). The plaintiff was able to prove that the work had been completed, so the judge found in the plaintiff's favor. After rendering her decision, she explained to the plaintiff how the case had been mishandled. She later told me that she doubted it would have any effect on their future behavior. In fact, this sort of mistake happens so often that the judge has developed standard language for handling it in her opinions. As someone who teaches contract law, I thought it seemed like an elementary and embarrassing mistake, but the plaintiff exhibited no signs of being ashamed. In a simpler case before a different judge at the Omsk court, the judge had raised a question as to whether the person who had signed the complaint was authorized to do so in the decree setting out the time and place for the hearing (*opredeleniye*). Naturally she expected the plaintiff's representative to be prepared to address this issue. But when this representative got up to speak, she launched directly into her substantive argument. The judge cut her off, reminding her of the threshold question of the validity of the complaint. It quickly became clear that this representative had not read the *opredeleniye* carefully, even though she was a lawyer. She had not brought the relevant evidence. Rather than dismissing the case, as the procedural code would seem to require, the judge continued it in order to give the plaintiff a chance to redeem herself.

EXPLAINING THE RELUCTANCE OF ARBITRAZH JUDGES TO EMBRACE THE REFORMS

In my numerous visits to *arbitrazh* courts since the beginning of 1996, when the 1995 code went into effect, I have consistently queried judges as to why they have not taken advantage of the language of the code to reshape and limit their role. Such questions tended to arise in the context of a discussion of how overburdened these judges felt. Their responses have been remarkably consistent.

²⁰In legal terms, interest is viewed as a compensatory damage, meaning that its purpose is to compensate the non-breaching party for the lack of access to the funds during the period when payment was delayed. By contrast, penalties are viewed as a punitive damage, assessed with the sole purpose of punishing the breaching party and intended to discourage similar behavior in the future.

Low Levels of "Legal Literacy"

Judges routinely tell me that the low level of legal literacy (*pravovaya gramotnost'*) in Russia makes it impossible for them to enforce the new responsibilities placed on litigants. This argument was more convincing in 1996 than in 2006, but little has changed in the intervening years, in terms of the behavior of either litigants or judges. From the perspective of litigants, it is difficult to see why they would ever change their behavior. As the few anecdotes I laid out above indicate, they are not punished for sloppy lawyering. Rather, they are almost rewarded, in the sense that judges step in for them, possibly making a better argument than they could have made. If judges are unwilling to discipline parties by dismissing claims when the parties show up unprepared, then it is unrealistic to expect that litigants will stop leaning on them. Not only is this troubling in that it perpetuates the enabler function of *arbitrazh* judges, but it buttresses the impression that the law itself does not matter.

This explanation of low legal literacy is not terribly satisfying. That is not to say that it is not true. My time in the *arbitrazh* courts has left me with tremendous sympathy for the judges. They are right that parties frequently show up brazenly unprepared. As in most civil law countries, cases begin with the petitioner laying out the relevant statutory provisions that allow the claim. It is certainly shocking when they are unable to do this, even when guided through the process with softball questions from the judges. But what is even more shocking is the complete lack of shame on the part of the lawyers for such gaffes. Yet in cases where this happened, only I was surprised. Judges took it in stride. They did not always fill in the substantive gaps for the lawyers, but they never dismissed the case, which is what the code would seem to require. Nor did they impose fines for unpreparedness, as is allowed under the code. Instead, the worst outcome for those who came unprepared, whether representing the plaintiff or the defendant, was to have the case delayed. Needless to say, delays are hardly much of a sanctioning mechanism.²¹

This enabling attitude of judges caused me to dig deeper. Why do they refuse to dismiss cases when parties fail to sustain their burden of proof? Reading between the lines of what judges were saying (and not saying), a few additional explanations come into focus. They fall into three general categories: moral, practical, and doctrinal.

Judges' Desire for Fair Outcomes

When I press the point about lax discipline, asking why more cases are not dismissed, *arbitrazh* judges often become defensive. They justify their behavior on the grounds that the ultimate goal is a fair outcome. They argue

²¹Indeed, some might argue that cluelessness has become a strategic tool in the hands of clever lawyers who need extra time. My own observations suggest that such an interpretation is misguided.

that if parties were shut out of the courts, then that would be unjust. They remind me that Russia is still undergoing a transition and that many litigants are unfamiliar with the *arbitrazh* courts and their procedural rules. They explain that part of their function is to help these litigants through the process. Some even concede that this function is a carryover from the Soviet era when judges were charged with educating litigants on how to become better Communists, though they concede that the curriculum has now changed. They see their assistance to uneducated litigants as fulfilling their charge of securing just and fair outcomes.

While the goal of achieving justice is laudable, the means is questionable. No doubt exceptional cases occur, in which the Russian equivalent of the country bumpkin finds himself in court without a clue as to how to proceed. Perhaps delaying the case and providing some substantive guidance to such litigants made sense during the first years of the transition, but Russia is now more than a decade into its identity as a market economy. Surely that is enough time for economic actors to familiarize themselves with the basic rules. The *arbitrazh* courts are sufficiently specialized to the business community that the ordinary person should not stumble in and be caught unawares. Moreover, the tendency to push every case to a decision on the merits, even if doing so requires multiple delays in order to allow one or both of the parties to get their act together, has itself created perverse incentives. Firms have not made much effort to improve their legal representation, reasoning that it does not much matter anyway. In essence, it has created a downward spiral. There is little point to striving for excellence if judges will overcompensate for the incompetent. This is not a phenomenon that escapes the *arbitrazh* judges they are, at least the thoughtful among their number. But they feel themselves barred from doing anything more activist—from dismissing cases or imposing fines on lawyers who are repeatedly unprepared—for various practical reasons.

The most commonly voiced reason why judges continue to micro-manage the process is that if they fail to do so, then the parties will show up empty-handed. This, then, is why they persist in providing lists of documents for parties to bring to hearings. But it is something of a vicious circle. If parties are not punished in any way for showing up empty-handed or unprepared, then why should they change their behavior? Once again, there are deeper motivations at work here.

Judges' Fear of Delays

Judges are responding to the incentives within the judicial corps itself. Like other civil law countries, Russia's judiciary (including the judges of the *arbitrazh* court) is set up as a civil service. Salary increases and promotions are driven by objective indicators, such as delay rates and reversal rates. As a result, judges work hard to keep delays and reversals to a minimum. What constitutes a delay is established by the procedural code, which does not provide much leeway for error. Under the 1995 code, cases at the trial level had to be decided within two months of being filed (art.

114). This deadline has been somewhat relaxed in the 2002 code. Judges now have a total of three months, including twomonths to complete the preliminary stage (art. 134) and an additional month to complete the hearing on the merits (art. 152). The slowness of the Russian postal service means that a minimum of several weeks needs to be allowed for any notice to the parties. This, in turn, means that any time the parties show up unprepared, requiring a postponement of the hearing, there is a risk that the statutory deadline will be violated, an outcome that judges are keen to avoid. Notwithstanding these obstacles, most judges succeed in meeting the deadlines established under both codes. As Table 2 documents, the delay rate has never exceeded 5 percent nationally, an astonishing statistic under the circumstances.

Getting cases processed quickly is important for all courts, but is especially important for a court geared to the business community. The dark side of this success in moving cases through the system expeditiously is a bizarre obsession with time on the part of the judges. Over the 15 years I have been going to these courts and among the scores of judges with whom I have spoken, I cannot recall a single conversation in which the judge did not raise the issue of the deadline (*srok*). It is like the sword of Damocles perpetually hanging over their heads, both individually and collectively. More than one judge has bemoaned the "conveyor belt" quality of the justice they are able to mete out under these conditions.

It should, therefore, come as no surprise that judges do whatever they can to minimize the risk of violating the deadline. Viewed in this light, telling the parties ahead of time what documents to bring to the hearings is a practical accommodation. The judges' fixation on meeting the deadline blinds them to the fact that they are babying the litigants and undermining the goal of shifting the burden of proof onto litigants. For judges, this is a small price to pay to ensure a low delay rate. Until the deadline is loosened to the degree that it is workable or eliminated entirely, this judicial behavior is unlikely to change.²² The 2002 code attempted to take a step in this direction by introducing a preparatory stage, during which litigants would share their evidence with one another, an idea clearly modeled on the discovery phase of civil litigation in Anglo-American systems. It is a transplant that has yet to take root within the *arbitrazh* system. As I have detailed elsewhere, the code gave litigants the right, but not the obligation, to participate in these preliminary hearings (Hendley, 2007). Many have opted out. As a result, the hard work of working through the evidence still remains to be done during the hearing on the merits, now with less time. As with all reforms, the devil lies in the details, and here they provided a loophole that has hamstrung judges. It also helps explain why judges may

²²Eliminating or further loosening the deadline seems unlikely. As outsiders, it may seem to us that the *arbitrazh* courts process cases quickly, but Russian litigants are less sanguine. In our 1997 survey, the slowness of these courts was viewed as a serious obstacle (ranked third behind the cost of filing claims and the difficulty of enforcing judgments).

Table 6. Per-Month Caseload for *Arbitrazh* Judges

Court	1998	1999	2000	2001	2002	2003	2004	2005
All <i>arbitrazh</i> courts	23.9	28.1	39.6	34.2	38.1	44.5	61.6	71.1
Moscow City	30	34.4	32.1	33	33.2	43.8	55.4	64.3
Moscow Oblast'	18.8	25.9	29.3	37.5	34.4	41	53.5	54.7
St. Petersburg/ Leningrad Oblast'	33.7	42.8	42.2	46.7	47.2	55.4	94.1	87.3
Yekaterinburg	24.1	33.4	36.6	49.6	52.4	58.3	65.5	61.2
Saratov	27.8	35.4	38	49.5	47.3	45.9	77	81.6
Omsk	35.4	45.9	44.8	49.4	53.5	48.2	72	65.6

Sources: Spravka o nagruzke (1998–1999; 2000–2001; 2002–2003; 2004–2005).

be willing to inch over the line of objectivity to offer substantive assistance to hapless litigants in an effort to move the case along.

The increased use of the *arbitrazh* courts (Table 3) has led to a rise in the per-judge caseload, which has only made it more difficult to meet the statutorily-imposed deadlines. As Table 6 documents, judges had their hands full in the late 1990s, when they resolved between 20 and 30 cases per month. But more recently, the situation has reached crisis proportions, as judges are deciding more than 50 cases each month. Unlike American judges, who may be juggling just as many cases, Russian *arbitrazh* judges do not have the luxury of taking extended recesses. Nor can they wait weeks or months before issuing opinions in a case. As a general rule, they are required to resolve one case before beginning another. This helps explain why they frequently do the parties' work, because if they mistakenly rely on the parties to live up to their obligations, they will fall further and further behind. Likewise it helps explain why they sometimes cut corners in their opinion writing and do not provide well-reasoned explanations for their decisions.

The *arbitrazh* judges themselves may not be fully aware of the statistics reported in Table 6, but the sense of being beleaguered and overworked is clearly part of their identity. The steady increase in per-judge caseload has not escaped the attention of policy makers. It is a topic that the chairman of the Higher *Arbitrazh* Court consistently raises with Putin in their periodic meetings. But to little avail. Though Putin pays lip service to the need to reduce the burden on *arbitrazh* judges, he has been unwilling to commit additional resources to hiring judges or to constructing bigger facilities to house these additional judges. Perhaps he views it as premature, given that most courts have been unable to hire their full complement of budgeted

Table 7. Number of *Arbitrazh* Judges Budgeted and Actually On the Bench

	2000		2003		2005	
	Budgeted	Actual	Budgeted	Actual	Budgeted	Actual
Moscow City	170	147	180	163	180	146
Moscow Oblast'	70	60	74	61	74	55
St. Petersburg / Leningrad Oblast'	90	81	120	93	120	65
Yekaterinburg	63	54	88	64	93	77
Saratov	37	34	50	37	50	45
Omsk	29	23	32	31	38	32

Sources: Spravka o nagruzke (1998–1999; 2000–2001; 2002–2003; 2004–2005).

judges, as Table 7 shows. The reasons why this shortfall persists are beyond the scope of this paper, but are surely related to the length and complexity of the selection process as well as to the increasing availability of other opportunities for experienced legal professionals. Another way of resolving the overload would be to reduce the number of cases taken by the *arbitrazh* courts, either by narrowing the jurisdiction of the courts or by increasing the procedural complexity associated with bringing a case so as to discourage casual litigation. The 2002 code definitively rejected both options. By its terms, it expanded the court's jurisdiction²³ and retained the non-legalistic approach to filing cases in an effort to enhance accessibility. Indeed, the new code makes it more difficult for judges to dismiss a case for procedural irregularities. In contrast to the 1995 code, judges are now usually required to hold a hearing to inquire into whether the problems can be fixed. On a more positive note, the tax code was recently amended to remove the requirement that all fines imposed by the tax inspectorate go through the *arbitrazh* courts. This requirement had flooded the courts with thousands of petty fines, some amounting to only a few dollars. Now only substantial fines have to go through the courts.

Judges' Fear of Reversals

The fear of being reversed on appeal is another practical reason why judges refuse to dismiss cases even when doing so would be allowed by

²³The 2002 code requires all cases brought by shareholders to be brought to the *arbitrazh* court, irrespective of whether the shareholder is a physical person or a legal entity (art. 33). See Hendley (2003) for deeper analysis of the reasons for, and consequences of, this change.

the code. The first-level review is *de novo*, but is statutorily limited to the evidence submitted at trial. Additional evidence is supposed to be admitted only under extraordinary circumstances, such as when it was literally unavailable for trial (art. 155, 1995 APK; art. 268, 2002 APK). But this rule has been bent beyond recognition by well-intentioned appellate judges. I spent the summer of 1997 observing and talking with appellate judges in the city court of Moscow and the regional courts in Yekaterinburg and Saratov. At that time, the appeals process was in its infancy, as was the entire system. Their rationalization for their liberal policy on admitting new evidence on appeal—namely, that economic actors were still learning the rules and should not be penalized for getting it wrong—was somewhat persuasive. But when I heard the same justification from Omsk appellate judges in 2004, it rang hollow. They are still regularly remanding cases to the trial court in which defendants rise from the dead only at the appellate level after having been non-communicative during the trial. Nor is this a practice unique to Omsk. Every trial-level judge I spoke with in 2004 and 2005 raised the risk of reversal when I asked why they did not dismiss cases when parties failed to meet their burden of proof. They said that they would rather cajole the parties into participating at trial than see the same case back on remand. Here again, we confront a situation where good intentions have perverse results. The appellate judges are concerned with seeing justice done, but fail to appreciate the impact their behavior is having on trial judges. Perhaps more devastating for the system is the message it sends to litigants that a second bite at the apple is always available.

Judges' Fear of Ethical Complaints

A final practical reason why judges have adopted a conciliatory attitude toward parties is their fear of the disciplinary process within the courts. Litigants who believe that a judge has behaved unethically are entitled to file a complaint with the judicial qualification council. Until recently, such complaints were filtered by the chairmen of the courts, allowing them to siphon off those that were baseless or that were really appellate complaints. Because some felt that chairmen were using this power inappropriately, all complaints about judges now go directly to the judicial qualification council, where they are investigated. If they are frivolous, then they will be dismissed, but the process will require the judge to explain himself, taking up time that the judge needs to get his work completed. Word of the complaint inevitably spreads among colleagues, potentially affecting the judge's reputation, even when he is fully exonerated. This has caused many judges to censor themselves. In comparing the courtroom demeanor of judges in Saratov and Yekaterinburg whom I observed in 2001 and 2004, the change was striking. The sort of good-natured but sometimes tough scolding of unprepared parties that had been routine in my earlier visits had almost disappeared by 2004. When I asked why, I was told that they did not want to risk being reported to the judicial qualification commission. To a person, these judges emphasized that they

did not believe their prior practices had been inappropriate, but that they had seen how parties had played the victim, taking advantage of this new avenue for complaints. As with so many reforms, this one was well-intentioned, but one of its unintended consequences has been to discourage judges from challenging litigants, thereby perpetuating existing practices.

Doctrinal Uncertainty

As in other countries with civil law heritages, Russian judges are guided primarily by the text of the codes. On the desk of every judge I have ever interviewed was a dog-eared copy of the procedural code. Often the judge would consult it during our conversation. So it only makes sense to look within the code for explanations of judicial behavior.

Building on the language of the 1993 Constitution, both the 1995 and 2002 procedural codes embrace the principle of competitiveness between the parties (*sostyazatel'nost'*). This concept was entirely absent from Soviet-era theory, meaning that *arbitrazh* judges had nothing to draw on in implementing it. The commentary to the code provides guidance to how judges understand the code. The then-chairman of the Higher *Arbitrazh* Court, V. F. Yakovlev, co-edited a commentary to the 1995 code that was viewed as authoritative. In the interpretation of the provision establishing *sostyazatel'nost'* as a guiding principle for the *arbitrazh* court, the difficulties in operationalizing it are immediately apparent: On the one hand, the commentary begins by linking it to shifting of the burden of proof to the parties, indicating a fairly traditional image of adversarialism. But then the commentators back away, saying that this "should not be taken to mean that, when gathering evidence, the court is assigned a role as a passive observer or that the court has given up the possibility to obtain evidence on its own initiative" (Yakovlev and Yukov, 1996, p. 18). The same sort of ambivalence is evident in the commentary to article 53 of the 1995 code, which placed the burden of proof firmly on litigants. Yakovlev and Yukov vigorously advocate the need for parties to assume this burden and link it back to *sostyazatel'nost'*. Indeed, they push it further, arguing that parties should not be solely concerned with their own case, but should be prepared to share all information relevant to the dispute, even if it inures to the benefit of the other side (*ibid.*, pp. 112–113). But then, as before, they note that "the principle of *sostyazatel'nost'* does not assume complete passivity of the court in the sphere of elucidating the factual aspects of civil cases" (*ibid.*, p. 113). This debate on the meaning of *sostyazatel'nost'* was not echoed in the scholarly literature, where the principle has been mostly ignored.

The 2002 code also embraced *sostyazatel'nost'*. As I noted earlier, the statutory treatment was expanded to include an obligation to share evidence between parties before trial, an obligation that harkens back to the position taken by Yakovlev and Yukov earlier.²⁴ But the commentaries to the 2002 code diverge from their predecessor; they are more single-minded in their explanations of *sostyazatel'nost'*. Gone is the language about judicial activism (Yakovlev and Yukov, 2003, pp. 44–47). None of the commentaries

say anything about what this principle means for judicial behavior. Rather, they focus on what it means for the parties, stressing the link between *sostyazatel'nost'* and the imposition of a burden of proof on the parties (*ibid.*; Yarkov, 2004, p. 19).

But there are still a number of articles in the post-Soviet codes that seem to send a mixed message about the role of judges. For example, the language placing the burden of proof on the parties is followed by a section that provides: "the *arbitrazh* court has the right to propose to the parties participating in the case that they present additional evidence if the court considers it impossible to resolve the case without this evidence" (art. 53). The language was not changed in the 2002 code, though the portion dealing with the rights of the judge was shifted to a different article (arts. 65–66). The choice of verb is fascinating. Rather than employing a strong verb such as "order" (*prikazat'*), the drafters use "propose" (*predlozhit'*), which leaves the decision in the hands of the litigants. Elsewhere in these codes, the drafters are not shy about using strong verbs and/or grammatical constructions that leave no doubt about who is obligated to do what.

Things become even murkier when this language is taken together with other parts of the code in which judges' duties are discussed. Dating back to *gosarbitrazh*, decision-makers have had a duty to investigate (*issledovat'*).²⁵ The 1992 code said little about judges' duties, but their central role in ferreting out evidence was assumed. The 1995 code was more expansive and explicit on the role of all those involved in the judicial process. The 2002 code pushed further in this direction. Both codes contain general language at the outset that imposes a duty on judges to "directly investigate" all evidence.²⁶ Moreover, this obligation is reiterated at two other places in both codes.²⁷ The commentaries, however, suggest that these sections are not geared toward encouraging judges to solicit additional evidence, but that their goal is to ensure that judges personally review all evidence and limit themselves to the evidence actually presented. But any doubt about whether *arbitrazh* judges have the right to demand additional evidence on their own initiative was dispelled by the 2002 code. It provides

²⁴This obligation is further fleshed out in a series of articles detailing how the newly-created preliminary hearings were to operate.

²⁵The verb choice is intriguing here as well. There are numerous versions of the verb "to investigate" in Russian. The APK drafters shied away from the version used in criminal investigations (*rassledovat'*) in favor of the more neutral version that would be used by a social science researcher (*issledovat'*), perhaps signaling that *arbitrazh* judges should use restraint in their efforts at investigation.

²⁶Both codes include an identically worded section stating that "the *arbitrazh* court is obligated to directly investigate all evidence in the case during the judicial process" (art. 10 in both codes).

²⁷See arts. 58 and 117, 1995 APK; arts. 71 and 162, 2002 APK. Interestingly, the wording of article 162 was shifted slightly from its 1995 version. In 1995, the code stated that "when resolving a case, the *arbitrazh* court investigates the evidence in the case ..." (art. 117(1)). In 2002, the judge's obligation was sharpened: "when resolving a case, the *arbitrazh* court must directly investigate the evidence in the case ..." (art. 162(1)).

that if, either during or after the closing statements of the parties, the judge “recognizes the need to elucidate additional circumstances or investigate new evidence, s/he resumes hearing evidence” (art. 162). In other words, the judge can order the parties to present additional evidence if it is deemed necessary to resolve the case.²⁸ The code would seem to limit judges’ discretion by specifying that this can happen only in connection with the parties’ closing statements. But this assumes a level of formality in the process that I have rarely seen. Perhaps because the vast majority of cases are heard in the confined spaces of judges’ offices (which is a result of the lack of courtroom facilities), the process tends to be rather informal. Typically judges ask the parties if they have any final arguments to make, but I have never heard them use the technical term (*preniya*) from the code. More often than not, parties decline the invitation to speak. As I noted earlier, the *arbitrazh* process is document driven; flowery rhetoric is largely superfluous.

Prospects for Independence

Stepping back from the doctrinal and behavioral analysis and returning to the original question—what conclusions can be drawn about whether Russian judges remain Soviet. The foregoing has shown that Russian judges have been reluctant to embrace the reforms aimed at freeing them from many of their Soviet-era responsibilities. From that, we might fairly conclude that they remain Soviet in their core. But the explanation for their reluctance suggests a different set of conclusions. Though some of their behavior may look familiar and may seem to represent a continuation of Soviet-era habits, the rationale is quite different. When present-day *arbitrazh* judges stage-manage cases and lecture the parties about what they should have done, their goal is not to make them better citizens (as it would have been in the Soviet era), but rather to educate them about the substance of the law with an eye to making their court operate more efficiently. In doing so, they are responding to the incentives embedded into the post-Soviet reforms. Getting cases resolved quickly with a minimal number of reversals and ethical complaints has a concrete reward for judges in the form of respect within the judicial corps, which, in turn, is translated into salary increases and promotions. Though the principle of adversarialism is loftier, in the sense that it derives from the constitution, its practical payoff is more elusive and, in the short run, may actually damage the material interests of judges. So the fact that it has become a second-order concern for judges is not surprising.

Many of us who studied Soviet courts argued that judges were embedded within a culture of dependency (Foglesong, 1997; Hendley, 1996). They were “elected” for five-year terms on single-candidate ballots controlled

²⁸The commentaries agree that this can occur on the initiative of either the judge or one of the parties (Yakovlev and Yukov, 2003, pp. 467–471; Yarkov, 2004, p. 411).

by the Communist Party. Any ideological misstep was grounds for being left off the ballot. The chilling effect produced by that institutional environment was palpable. Judges did not need to be told how to rule; they learned how to read the signals. To what extent does this culture of dependency live on? Many of the institutional levers that allowed it to endure have been removed. Judges no longer serve at the discretion of any single political party; efforts have been made to depoliticize the selection process. But some vestiges of the old system remain. Judges’ housing is still provided by the state. This proved to be a powerful “carrot” in the Soviet era. Arguably it still is. Though a housing market exists in present-day Russia, the relatively meager salaries of judges severely limit their options and so the state steps in.²⁹ The sorts of apartments (location, size) provided would certainly be out of reach for judges without state assistance. The structure of courts remains rigidly hierarchical. Chairmen hold sway over their judges³⁰; seniority matters. But whether this means that they use this influence to impose their own views on judges is unclear. Rumors of “telephone law” persist (Ledeneva, 2006) and are buttressed by high-profile cases for which the Kremlin seems to dictate the results. The efforts of the Kremlin to overturn jury verdicts that dissatisfy them and to retry the cases before more compliant juries likewise fuel the fire (Solomon, 2007).

Where does that leave Russia in its quest for an independent judiciary? If we conceptualize independence as existing along a spectrum, with complete independence as an elusive (and perhaps undesirable) goal, then Russia certainly would seem to have made substantial forward progress in the post-Soviet era. But there are real limits on the extent of this progress. Russia can fairly be regarded as a dualistic legal state. Many cases are resolved by judges in accord with the law and without any outside interference. But the political and economic elite can and do interfere when their core interests are in play.

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²⁹Interestingly, Russian commentators present the provision of housing to judges by the state as a mechanism of ensuring judicial independence. It is seen as part of a package of social guarantees, including health insurance (e.g., Goloshumov, 2005). Presumably it lessens the need of judges to seek bribes, thereby enhancing independence. Many judges see housing as a standard perk, though others have voiced a preference to be paid enough to allow them to make their own decisions about housing.

³⁰Chazan (2004) tells of a Russian judge from the courts of general jurisdiction who claims that her chairman conspired to have her removed as a judge when she refused to toe the line. More specifically, she refused to go along with the prosecutor’s version of what happened in a case she was hearing. The judicial qualification commission removed her on the grounds that she had defamed the Russian judiciary in her public statements.

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