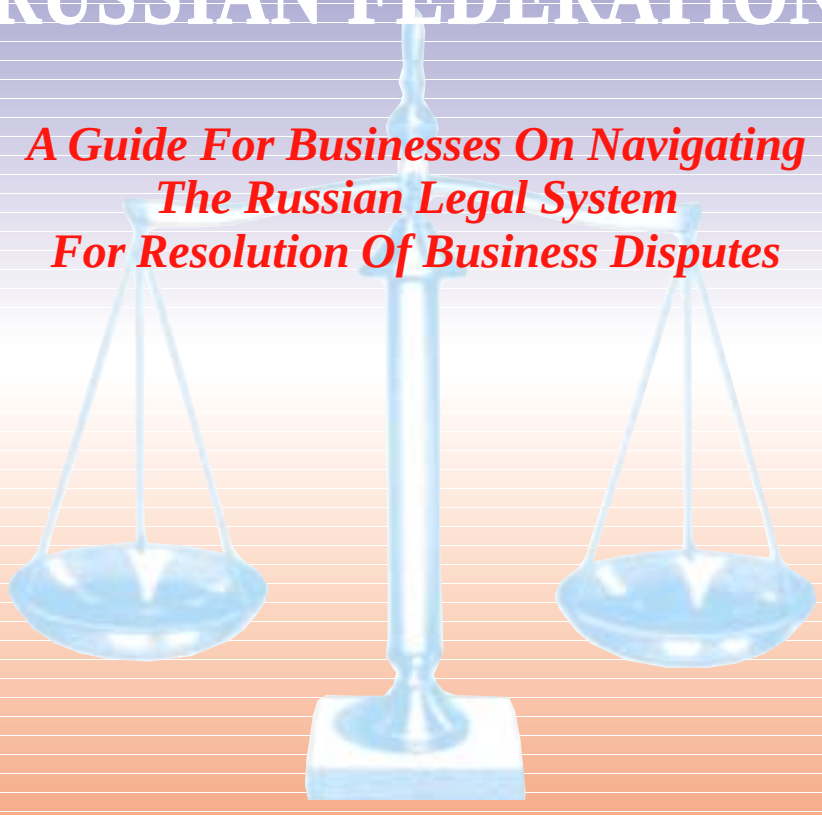
HANDBOOK ON COMMERCIAL DISPUTE RESOLUTION IN THE RUSSIAN FEDERATION

A Guide For Businesses On Navigating
The Russian Legal System
For Resolution Of Business Disputes



Prepared and Published Pursuant to Agreement

of the

U.S.-RUSSIA INTERGOVERNMENTAL
BUSINESS DEVELOPMENT COMMITTEE

U.S. Department of Commerce
International Trade Administration
Office of Eastern Europe, Russia and Independent States

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A Project of the

U.S.-Russia Intergovernmental Business Development Committee

Co-Chaired by

U.S. Department of Commerce
and
Ministry of Economic Development and Trade of the Russian Federation

With participation of the

U.S. DEPARTMENT OF COMMERCE

SUPREME ARBITRATION COURT OF THE RUSSIAN FEDERATION

THE INTERNATIONAL COMMERCIAL ARBITRATION COURT
AT THE CHAMBER OF COMMERCE AND INDUSTRY
OF THE RUSSIAN FEDERATION

AMERICAN CHAMBER OF COMMERCE IN RUSSIA

U.S. - RUSSIA BUSINESS COUNCIL

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

The United States of America places a high priority on developing economic and commercial cooperation with Russia. To achieve practical progress toward this goal, the United States and Russia formed the U.S.-Russia Joint Commission on Technological and Economic Cooperation in 1993 to bring the highest levels of our governments together and to focus their attention on issues of cooperation in the economy, business development, environment, space, and technology. The Commission's Business Development Committee has worked to advance market opportunities, helped increase trade between our nations, and encouraged investment.

The real engine of prosperity is the private sector. Knowledge of, and confidence in, the rules and regulations governing business relations, including a transparent and equitable business dispute resolution process, are of key importance to expanding trade, investment, and commercial cooperation. This Handbook provides a useful guide for both American and Russian businesses to better understand the business dispute resolution mechanisms in the Russian Federation as they exist today.

I am glad that the Department of Commerce has had this opportunity to cooperate with the Supreme Arbitration Court of the Russian Federation, under the auspices of the Business Development Committee, to enhance the environment for business. We are pleased to provide you the *Handbook on Commercial Dispute Resolution in the Russian Federation*, and hope you will support and participate in the expansion of business ties between the United States and Russia.

Norman Y. Mineta

Dear Readers,

The deep reforms based on market relations, which the Russian economy has undergone within an extremely short historical period of time, and the formation of the rapidly growing private sector in production and commerce, as well as the integration of Russia into the world economy - all these factors gave rise to the need of creation of an effective independent judicial system, especially designed to handle economic disputes arising in the area of business and other economic activities, including those with participation of foreign entrepreneurs and investors.

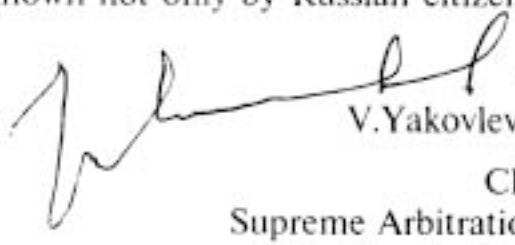
This problem was solved in 1992 by the re-establishment of commercial courts, which operated in Russia in the past and since their restoration have been named "arbitration courts". Under the Article 127 of the Constitution of the Russian Federation they represent an independent branch of the judicial power. The arbitration courts have jurisdiction in economic disputes, arising from civil, administrative and other legal relations between legal entities, individual entrepreneurs as well as between the latter and state authorities. Thus, the arbitration courts constitute the judiciary concerned with business and other economic activities of economic entities.

In a short period of time the arbitration courts, while continuously improving their activity and rules of procedure, have become the main state authorities protecting proprietary rights and free enterprise as well as providing uniform application of commercial law and other legislation in the sphere of economics - thus preventing arbitrary interpretation of laws by officers of any rank.

This Handbook being addressed to wide circles of American and Russian businessmen and citizens, shall inform the readers in detail of

the functions, structure and procedure to be followed by the Russian arbitration courts, as well as explain their distinction from the third-party tribunals (private arbitrators). Though the latter have often the same name -"arbitration courts"- they do not belong to judicial power and their decisions (arbitral awards) can be enforced only under condition that the competent state court issues a writ for their enforcement.

There is no doubt that the Russian-American business cooperation will get further development, when our judicial system and procedure for resolving economic disputes is known not only by Russian citizens but by American businessmen as well.



V.Yakovlev, L.L.D.

Chairman,
Supreme Arbitration Court
of the Russian Federation

ACKNOWLEDGMENTS

The drafting, preparation, and organization of the *Handbook on Commercial Dispute Resolution in the Russian Federation* has involved participation and efforts of a very large number of dedicated people from the American and Russian governments and the private sector.

The goal of this Handbook is to provide practical information and guidance to businesses on existing dispute resolution mechanisms in the Russian Federation. The comments and suggestions provided by American and Russian experts throughout the drafting and editing of the Handbook were critical in its development.

The Business Development Committee would like to express deep appreciation to the author of the Handbook, Sarah Reynolds; editor and project manager, Igor Abramov; Supreme Arbitration Court Vice Chairman Oleg Boykov, and International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry President Alexander Komarov for their extensive comments and suggestions; and the many Russian and American legal and business experts who contributed their time and expertise to the development of the Handbook.

We are grateful for the NIS assistance funds extended to the Business Development Committee Initiative by the Coordinator for U.S. Assistance to the NIS, which helped make this possible.

Susanne S. Lotarski, Director
Office of Eastern Europe, Russia
and Independent States, and
U.S. Executive Secretary of the
U.S.-Russia Business Development Committee

Table of Contents

This Handbook is intended to provide general guidance for businesses and practitioners in better understanding the existing business dispute resolution mechanisms in the Russian Federation. It is not intended to substitute for the advice of legal counsel. The Handbook was completed in June 2000. The author and editor have made their best effort to ensure the accuracy of all the information contained in this Handbook. Nevertheless, readers should be aware that all such information is subject to change without notice.

Introduction

A. How this Handbook Came About

The Russian Federation's shift from a centrally planned economy to a market-based economy has produced enormous challenges. New institutions and structures capable of supporting and regulating the new economic relationships have to be built to support Russia's nascent market-based economy. Among the key challenges is creating legal rules and building new legal institutions to protect new rights of private property and enterprise, as well as to protect the rights of both individuals and organizations in the process of economic exchange.

The changes in Russia's economy and Russia's vast economic potential have attracted many companies to business opportunities in the Russian Federation. The dramatic increase in business relations between foreign and Russian companies has been accompanied by a natural rise in the number of business-related disputes. Initially, the lack of familiarity with the dispute resolution fora available in the Russian Federation, concerns over differences in the legal systems, the evolutionary state of legal institutions, and fear of local bias all tended to lead foreign companies, including U.S. firms, to favor the use of arbitration tribunals in third countries for resolving business disputes with Russian parties.

As business relations have increased, however, the use of dispute resolution mechanisms within the Russian Federation has also increased. There are a number of reasons for this. The delays and inconveniences of using third country arbitration can be considerable. The substantial expense such processes entail may not be warranted for smaller contracts, smaller businesses, or limited disputes. Inability to meet such expenses has, in some cases, resulted in one party's failure to appear, complicating the consideration of the case and the enforcement of any resulting award. In addition, foreign businesses have become more involved in the Russian economy — not only contracting with Russian businesses but creating subsidiaries in the Russian Federation and investing in existing Russian companies. Exposure to an increased variety of potential disputes and legal concerns through the conduct of day-to-day business operations has resulted in significantly greater familiarity with domestic dispute resolution fora and the legal system as a whole.

One of the most important steps in the development of legal institutions supporting a market-based economy is the creation of effective dispute resolution mechanisms that can provide businesses, entering into contractual and commercial relations, with predictable enforcement of agreements. Also crucial is the existence of independent bodies that are able to interpret new laws authoritatively and apply them even-handedly, protecting the rights of organizations and individuals both in their dealings with one another, and with the bodies and agents of the state. In 1991, the state arbitrazh court system was created in the Russian Federation as a system of independent courts with jurisdiction over

commercial disputes involving organizations and registered individual entrepreneurs and over disputes between organizations or entrepreneurs and state bodies. These courts, functioning as of July 1, 1995, on the basis of the federal constitutional law "On Arbitrazh Courts in the Russian Federation," hear thousands of cases each year. The arbitrazh courts are of fundamental importance in interpreting and developing the law in the area of commercial relations and have jurisdiction over most of the common types of commercial disputes, including those involving foreign parties.

In addition to the arbitrazh courts, other legal institutions also exist which may play a role in commercial dispute resolution. On the basis of party agreement, such disputes may be submitted to one of a number of arbitration tribunals, including the long standing International Commercial Arbitration Court in Moscow. While these tribunals have no mandatory jurisdiction, as do courts, and are not state bodies, some have significant experience in the consideration of commercial disputes with foreign party participation and some parties prefer to use these services. Also, the courts of general jurisdiction may have jurisdiction over many disputes in which individuals who are not entrepreneurs participate. There are some categories of cases, however, such as bankruptcy, in which all disputes are subject to the arbitrazh courts, whether or not the participants are organizations and entrepreneurs. In some commercial matters, the procurator (public prosecutor) may play a role, or specialized state bodies responsible for the enforcement of particular laws may be involved.

Despite increased use of the Russian domestic legal system by foreign parties, significant confusion persists among American and other foreign businesses and legal counsel about the domestic Russian mechanisms for the resolution of business disputes and the roles played by different bodies. The U.S. Department of Commerce, the U.S. Embassy in Moscow, and other officials advising businesses operating abroad regularly receive questions and requests for assistance about the functions and jurisdictions of different court and arbitration bodies, the roles of other bodies involved in dispute resolution, the procedures for using them, and the special issues that may need to be addressed.

Lack of such knowledge may lead to costly delays as cases are rejected by bodies unable to resolve them, and in some instances may cause businesses to make irreparable errors or omissions in the process of trying to resolve a dispute. Confusion over the structure and function of the dispute resolution bodies may discourage some businesses from pursuing opportunities, cause them to withdraw from a business arrangement rather than defend their rights and interests, or make it difficult for them to understand, assist and/or supervise their legal counsel. Faulty understanding of the roles of the different bodies and the nature of the procedures used may also lead to inappropriate expectations about processes and outcomes and to false perceptions of bias or undue influence when these expectations are not met. Thus, confusion may adversely affect both individual businesses and entrepreneurs and also the business environment as a whole.

Recognizing this, the U.S.-Russia Business Development Committee of the U.S.-Russian Joint Commission for Technological and Economic Cooperation has agreed that additional information should be made available to businesses on commercial dispute resolution in the Russian Federation. This Handbook is a product of cooperation between the U.S. Department of Commerce, the Supreme Arbitration Court of the Russian Federation, and the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation.

B. What this Handbook Covers

This Handbook relates only to mechanisms available for the resolution of business disputes within the Russian Federation. While business disputes involving Russian and foreign parties are also resolved in a variety of arbitration tribunals outside the Russian Federation, as well as in the domestic courts of other countries, detailed information on those courts and tribunals is generally available in the English language.

Some notes and remarks in the text call the reader's attention to differences between Russian and American institutions or procedures that are of particular importance in understanding the system or in avoiding problems, but the Handbook makes no attempt at a general comparison of the Russian institutions and their procedures with those outside the Russian Federation.

The Handbook is intended for a general audience, without extensive knowledge of, or experience in, the Russian legal system, but with a good general grasp of the institutions involved in business dispute resolution in the United States and/or other jurisdictions with mature market economies. It was envisioned that the Handbook would serve as a basic guide for businesses and practitioners, assisting them in better understanding the existing business dispute resolution mechanisms in the Russian Federation. The Handbook is intended to clarify and explain, in general terms:

- what options for resolution of commercial and commercially related disputes exist within the Russian Federation;
- what bodies may be involved in the dispute resolution process, their roles and jurisdictions;
- where a claim can be filed and what information will need to be submitted;
- the process for consideration of disputes; and
- the process for the enforcement of judgments.

The Handbook discusses the resolution of disputes by the courts through formal judicial proceedings, as well as the roles of non-judicial bodies, including arbitration tribunals, some executive bodies, and others that may play a role in dispute resolution or

in execution of judgments, such as the procurator and the bailiffs service. While these bodies have more limited and specialized roles than the courts, it is important to be acquainted with them and to understand their functions.

The Handbook concentrates on the way the system operates now and the laws in force at the time of its writing. The Russian legal system is, however, still in the process of change. Some of the bodies (both old and new) have undergone several major changes in their structure and authorities within the past decade, as concepts of the proper directions for reform have changed. Work continues on implementing needed changes in the judicial system, enacting pieces of legislation to comply with the new Russian Constitution (adopted in 1993), elimination of gaps in the laws, and correction of problems observed in the use and application of recently created institutions and procedures. Significant change is expected in the near future related to the courts of general jurisdiction and to civil procedure legislation governing civil cases in those courts. The legislation on the arbitrazh courts, which are the focus of special attention in the Handbook, is not expected to undergo any fundamental change, although a new procedural code for those courts is currently in the early stages of the legislative process.

The continuing development of the law and the expectation of change in a number of areas means that the reader must remain aware of developments occurring after the date of publication. The Handbook notes the contents or trends in development of draft legislation where this information is available at the time of writing. If you are using this Handbook to help you make decisions and talk to your legal counsel, make sure that you ask counsel about the impending changes noted in sections that are relevant to your dispute and about any other changes that affect your options.

The recent date of some changes may mean that the precise details of new jurisdictional boundaries and newly redefined authorities are still being worked out in practice. Different bodies may disagree about their relative authorities, jurisdictions, and proper procedures, as practices and methods of operation under older rules and structures change or are modified. The remedy, and sometimes the prevention, for many of these "transitional" difficulties, as well as for other types of irregularities in the application of the laws, is for a participant in a commercial dispute to be well-informed about the authorities and procedures defined by legislation currently in effect. Care should be taken in assuming that the interpretation given to new rules and procedures by the bodies operating under and enforcing new legislation is authoritative or well-settled. The possibility of mistake or confusion should be considered, particularly if one is confronted with an action, a demand, or a result that appears to be clearly in conflict with new rules.

It must be emphasized that this Handbook is not intended as legal advice concerning any specific dispute. Moreover, the Handbook does not suggest or recommend that commercial claims be pursued without the assistance of qualified counsel who know and can explain the substantive law governing a particular dispute and the special procedural rules which may apply. It is hoped that the Handbook will enable the reader to better understand the advice and concerns of local counsel, to ask good questions, and to assist in the dispute resolution process, but it certainly is not a substitute for legal advice.

C. Organization of the Handbook

This Handbook is divided into five chapters. Chapter 1 provides general information on the bodies that play a role in dispute resolution in the Russian Federation, including courts, arbitration tribunals, the public prosecutor, and specialized law enforcement bodies. Chapter 2 provides more detailed information on courts and arbitration tribunals — the bodies to which disputes are generally submitted — and the current jurisdiction and authority of each.

Chapter 3 of the Handbook discusses procedures for the resolution of business disputes by the arbitrazh courts, and Chapter 4 the appeals process in the arbitrazh courts. The majority of commercial disputes, including those involving foreign parties, are within the jurisdiction of these courts. Although there are still some important exceptions to this rule (discussed in Chapter 2 of the Handbook), there is a clear legislative trend toward their elimination. Thus, the arbitrazh courts are increasingly likely to be the forum with jurisdiction over commercial disputes of interest to readers. Taking this into account, as well as the extremely limited availability of English language information on arbitrazh court procedures, these courts are the focus of the procedural sections of the Handbook.

This focus on the arbitrazh courts is not intended to indicate that arbitration tribunals and their procedures are not important, nor to suggest that the arbitrazh courts, and not arbitration tribunals, should be used to resolve particular business disputes. Use of arbitration tribunals in the Russian Federation, particularly the long-established international arbitration tribunal functioning under the Chamber of Commerce and Industry, has increased significantly with increased business activity. The multiplication of arbitration tribunals in recent years, however, makes a complete discussion of all of their rules and procedures beyond the scope of this Handbook.

The final chapter of the Handbook — Chapter 5 — covers the procedures for the enforcement of judgments. It should be noted that although the dispute resolution procedures for various specific arbitration tribunals are not discussed in the Handbook, Chapter 5's discussion of enforcement proceedings covers the enforcement of both court decisions and arbitral awards.

D. Language and Usage of Terms in the Handbook

A number of questions of language use and of translation may arise in relation to various parts of this Handbook. In part, this is due to the general subject matter rather than to differences in languages or structures of legal systems. The subject of law in any language uses a set of "terms of art" or common references that relate to the stages of legal process and fundamental legal principles. With respect to English language terms and expressions, an attempt has been made to avoid the use of extremely specialized terminology. Where less common terms are used, a definition or explanation is provided at the first usage, but is not repeated throughout the text.

In general, the Handbook avoids the use of English language terms which are not very near equivalents of the Russian. Thus, the Handbook refers to "arbitrazh courts" rather than "economic courts" and to the "procuracy" rather than the "prosecutor." ***The Handbook also avoids the use of the term "arbitration court" for the arbitrazh courts, since this erroneously suggests that these bodies are arbitral tribunals rather than courts. The reader should note, however, that the term "arbitration court" is used frequently in English, and by the arbitrazh courts themselves, to mean the arbitrazh courts.*** These institutions, and others discussed in the Handbook, are described in detail when introduced in Chapter 1.

Attempts have been made to preserve important distinctions in terms, even where this may make the language of the Handbook somewhat more complex. For example, the Handbook distinguishes between three types of appeal of court decisions — appeal of a first instance decision, "cassational" appeal, and petition for supervisory review. These differing types of appeal have no precise equivalents in Anglo-American legal systems, and the use of English language terminology would blunt or eliminate important distinctions. Each of the types of appeal and the corresponding review of the decision are discussed in detail in Chapter 4 of the Handbook.

Where the distinction is not important to the topic being discussed in the Handbook or the English term is sufficiently close, the Handbook uses the English term. In some instances, there are several English terms that are used by different authors or translators for a single Russian term. For example, the names of some of the constituent parts of the Russian Federation (krais and oblasts) are commonly translated in a number of ways (territories and regions, regions and districts, and other combinations). The Handbook uses the terms “territories” and “regions” for krais and oblasts. It does not, however, give the Russian equivalents for the English terms chosen, or discuss alternate terms except in the few cases in which a reader of both languages might be confused about the reference.

While the Handbook is designed as a basic, informational guide, suitable for use by a general audience of business and legal professionals, it does, however, assume a good degree of familiarity with basic legal terms and concepts related to the process of conducting a law suit. Like any resource guide, it is hoped that this Handbook will provide a better understanding of the existing business dispute resolutions mechanisms in the Russian Federation and the advice and concerns of the legal counsel.

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Chapter 1. Overview of Bodies Involved in Dispute Resolution

In most legal systems, there are a number of bodies and institutions that may play a role in dispute resolution. Courts usually play the anchoring role, but other bodies, including the prosecutor, state administrators, and facilities for arbitration and/or mediation may also be involved. Of course, every institution does not get involved in every dispute. In understanding your options, and anticipating possible developments, it is important to know what bodies and officials exist and what their roles are in the legal system and in the dispute resolution process. This chapter provides an overview of the different institutions and their functions. Chapter 2 will examine more closely the jurisdictions and limits of authority of the main bodies in the system - the courts and arbitration tribunals.

A. Arbitrazh Courts

1. What is an "Arbitrazh Court" and Does it Conduct Arbitration?

There is a common confusion among those not familiar with the Russian legal system about the nature and function of the system of arbitrazh courts and their relationship to other bodies which have the adjective "arbitrazhnyi" or even the term "arbitrazh court" in their titles. This confusion is quite understandable, since the adjective "arbitrazh" and the term "arbitrazh court" are used in Russian to refer to two different kinds of bodies, and English translation often fails to distinguish between them. The "arbitrazh courts" in the Russian Federation are a system of courts which have jurisdiction over most commercial disputes and many other cases involving business entities. These are not arbitration tribunals and they do not conduct arbitration - they are courts in the general sense of the word. They operate according to federal laws concerning their structure and procedures and they are staffed by full-time judges who are paid by the state and appointed through a formal procedure of nomination and approval by federal bodies.

As a general matter, classical arbitration is referred to by the Russian term "treteiskii sud" or "third-party court." However, the confusion of terms and functions is made more difficult by the fact that there are some instances in which the adjective "arbitrazh" is used to refer to arbitration rather than to the arbitrazh courts. In particular, the two oldest arbitration facilities in the Russian Federation — the Maritime Arbitration Commission and the International Commercial Arbitration Court — use the adjective "arbitrazhnyi" in their titles, with the second body using the term "arbitrazh court," although both of these bodies conduct a traditional form of arbitration. In addition, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is rendered in Russian using the term "arbitrazh decisions" rather than the term "treteiskii sud," and there are other instances of the use of the word "arbitrazh" alone, or the term "arbitrazh court," to refer to arbitration tribunals, especially foreign arbitration tribunals

or those resolving international commercial disputes. Because of this dual use of the term "arbitrazh," and the high probability that it will be translated into English as "arbitration" in all contexts, is important to clarify the institution that is actually meant, whether in negotiations and the formulation of contracts, in discussions with legal counsel or in legal literature.

2. State Arbitrazh and the Creation of the Arbitrazh Courts

Arbitrazh courts in their current form have existed in the Russian Federation for less than ten years. Prior to 1991, there existed a system known as "state arbitrazh." State arbitrazh had jurisdiction over the majority of disputes between and among enterprises and other legal entities, as well as disputes between those entities and state bodies. Disputes involving individuals and, in general, disputes not related to planned activities or state supervision of enterprises were handled by the courts. The state arbitrazh system, which grew out of a system of arbitrazh commissions created in the early 1920s, remained in place until 1991, undergoing gradual development from a somewhat dispersed system of dispute resolution bodies with limited formality in procedures toward a more unified system, with increasingly specific and formal rules of procedure and principles for its activities. However, although increasingly formal and "legalistic" in its rules and procedures, the state arbitrazh system remained an administrative body or a quasi-court rather than a court.

The primary function of state arbitrazh was to resolve disputes and difficulties in which a mandatory planning element or a relationship of subordination (as of an enterprise to a state body supervising its activities) was involved. It is important to note, however, that its jurisdiction was not defined in these terms, but rather by the characteristics or legal status of the parties. State arbitrazh had jurisdiction over disputes involving enterprises, institutions and other legal entities and over the disputes of legal entities with state bodies. Disputes involving individuals as even one of the parties were handled by the courts. However, because the spheres of activity of these groups were not permitted to overlap significantly, the division of cases by the characteristics of the parties had the effect of also dividing cases according to type of dispute and applicable law. Individuals were permitted to engage in economic activity for profit only in extremely limited circumstances and their disputes were generally governed by the Civil Code and legislation on consumer protection, labor and social protection. Nearly all activity of enterprises, on the other hand, was governed by legislation on planning and on mandatory forms for enterprise activity, as well as by specific planning orders and regulations. State arbitrazh bodies resolved all commercial and industrial matters on the basis of legal rules applicable to planning and state administration of the economy, while the courts handled cases related to individual matters, which were governed by a different set of legal rules.[1] Consistent with this division of subject matter, foreign trade cases and

[1] Exceptions were made in a few cases in which the division by party status didn't correspond to the broad division of subject matter and applicable law between the two bodies. For example, certain cases concerning very small amounts or unplanned transactions, which were governed by the rules of the Civil Code rather than planning legislation, were assigned to the courts for resolution, even though the parties involved (enterprises) met the status criteria for state arbitrazh.

others in which a foreign firm or entity was involved were within the jurisdiction of the courts despite the identify of the parties as legal entities, since foreign firms were not governed by planning legislation or subordinated to Soviet state bodies.

During the 1980s, a number of pieces of legislation were passed authorizing new, private types of economic activity by individuals, cooperatives and other entities and increasing possibilities for foreign trade and investment. Some of these laws gave jurisdiction over disputes concerning that activity to the courts. This was taken by some to indicate that the traditional division of competence between state arbitrazh (handling planning matters, administrative issues, and mandatory rules) and the courts (handling disputes between equal parties) would be maintained, and that the jurisdiction of state arbitrazh would simply shrink as market-oriented economic reforms moved the Soviet economy toward increasing amounts of unplanned economic activity. In the spring of 1991, however, a law was passed in the RSFSR[2] creating a system of "arbitrazh courts" — a new branch of the court system with a relatively broad jurisdiction.

The new courts were given jurisdiction over domestic disputes concerning "entrepreneurial activity," including those involving legal entities and also individual entrepreneurs.[3] Amendments to the law in 1992 refined the definition to give the arbitrazh courts jurisdiction over disputes "arising from civil-law relationships (economic disputes) or from relations in the sphere of administration," provided that the disputes involved enterprises and organizations that are legal persons or registered individual entrepreneurs. While the element of legal status of the parties, key to defining the jurisdiction of state arbitrazh, was maintained in these definitions, no additional element was added to the jurisdictional definition concerning a planned or mandatory element or relationship of administrative subordination. Thus, the new courts were effectively given jurisdiction over a broad field of disputes arising in the course of commercial activity. This was seen by some as an attempt to create "commercial courts" similar to those existing in some other jurisdictions, and the arbitrazh courts are referred to by some authors and translators as the "commercial courts." The use of party status to define the jurisdiction of the arbitrazh courts, however, and the retention of jurisdiction over disputes involving state bodies, produced a jurisdiction quite a bit broader than that of the commercial courts in many countries. Unlike many commercial courts, the arbitrazh courts do not apply a commercial code or a body of law separate from that which governs similar disputes heard by the courts of general jurisdiction.[4] The jurisdiction of the

[2] The Russian Soviet Federated Socialist Republic - the name of what is now the Russian Federation when a constituent part of the Soviet Union.

[3] Legislation passed in the mid-1980s allowed individuals to engage in economic activity for profit, provided they register as "individual entrepreneurs" with the state. Registration facilitates tax collection and other state supervision of entrepreneurial activity, and penalties are imposed on those who engage in individual entrepreneurial activity without registering as required by law. At present, individuals may also choose to form a legal entity and to pursue business activity through the entity, rather than directly as individuals.

[4] There are some special rules in the Civil Code of the Russian Federation which apply to firms and entrepreneurs and do not apply to citizens involved in the same types of transactions in their private capacity. The number of these is limited, however, and in general the arbitrazh courts and the courts of general jurisdiction are called upon to apply many of the same legislative provisions in resolving disputes.

Russian arbitrazh courts includes not only disputes concerning commercial dealings, but also other types of disputes between the parties and many types of administrative disputes involving the state.

The creation of the new system of arbitrazh courts, based in part on the existing state arbitrazh, made arbitrazh bodies and arbiters subject to the effects of a number of other laws which were designed to protect the independence of courts and to raise the status of judges. It also created some new questions in relation to the earlier pieces of legislation that had assigned dispute resolution concerning new types of economic activities to the "courts" or "through a court procedure." Prior to the creation of the arbitrazh courts in 1991, these were unambiguous references to the courts of general jurisdiction — the only court system then existing. With the creation of a new set of "courts" with jurisdiction over such disputes, the references were no longer so clear. The definition of the jurisdiction of the arbitrazh courts as disputes concerning "civil law relationships" raised questions about disputes and transactions not related to commercial conduct, while the restriction of jurisdiction to registered individual entrepreneurs left questions about investment disputes involving individuals who are not entrepreneurs and other issues related to commerce.

3. Current Structure and Jurisdiction of the Arbitrazh Courts[5]

a) Current Jurisdiction of the Arbitrazh Courts

In 1995, a federal constitutional law "On Arbitrazh Courts in the Russian Federation" was passed, together with a new procedural code for the arbitrazh courts. The new law eliminated the reference to civil-law relationships and illustrated the types of "economic disputes" subject to the jurisdiction of the arbitrazh courts by providing a list of the types of disputes involved. Like the previous law, the new law maintains the status requirements for arbitrazh court jurisdiction — requiring generally that parties be either legal entities or registered individual entrepreneurs. It eliminated, however, the artificial assignment of disputes with any "foreign element" to the courts of general jurisdiction. These disputes are now subject to the jurisdiction of the arbitrazh courts if they meet the general jurisdictional criteria concerning subject matter and status of the parties.

b) Current Structure of the Arbitrazh Courts

Under the 1991 law that created them, the arbitrazh courts were structured as a two tier system, consisting of many arbitrazh courts, each covering a defined territory, and a single superior court — the Higher Arbitrazh Court — for the entire country. ***The Handbook uses the term "Higher Arbitration Court" — a literal translation of the name of the court — to denote the highest court in the arbitration court system. The term "Supreme Arbitration Court" is also commonly used in English, and readers should be aware that the reference is to the same court.*** The various arbitrazh courts

[5] Readers may find some basic information on the arbitrazh court system in English, and a more extensive amount of information, including notes on case decisions, in Russian on the web site for the Russian arbitrazh court system, at www.arbitr.ru.

heard cases in the first instance (the first hearing and decision of the case) and also appeals of first instance decisions. Cassational review — that is, review for legal error only — and also a discretionary "supervisory" review were handled by the Higher Arbitrazh Court. The Higher Arbitrazh Court also had a substantial first instance jurisdiction over serious cases and administrative responsibility for the entire system, as well as the obligation to study the trends in lower court decisions and issue "guiding explanations" to ensure the correct and uniform application of the laws. This structure placed substantial burdens on the Higher Arbitrazh Court's resources.

The 1995 law, under which the arbitrazh court system currently operates, moved much of the Higher Arbitrazh Court's first instance jurisdiction into the lower courts and created an additional tier of arbitrazh courts. The new tier of courts consists of ten "circuit" arbitrazh courts, each of which is assigned a broad territory. The courts serve as a review instance between the lowest arbitrazh courts and the Higher Arbitrazh Court. They are responsible for the cassational review of cases — the review of a case to determine whether significant errors were made in the interpretation or application of the laws by the lower arbitrazh courts.

Under the current structure, the lowest arbitrazh courts hear most cases in the first instance and also consider appeals of first instance decisions. Appeals are directed to the same court that issued the first decision, but must be considered by different judges than those who heard the case originally. When considering an appeal, the lower courts may approach the case *de novo*. In other words, they may recall witnesses and reevaluate the evidence presented in the first hearing of the case, may take new evidence and may reconsider any aspect of the case. The circuit arbitrazh courts hear cassational appeals of the decisions of the lower arbitrazh courts. Because cassational appeals concern only the proper interpretation and application of the law, the circuit courts do not take new evidence.

This restructuring of the system under the 1995 law was intended to free the Higher Arbitrazh Court from a heavy burden of cassational appeals and allow it to accomplish its tasks in the areas of administration of the arbitrazh court system and in review of court practices. On the basis of such reviews, the Higher Arbitrazh Court issues decrees, letters and summaries of practice containing information and guidance for the courts on the proper interpretation and application of the laws. The interpretations and rules of application contained in these documents are binding upon the lower arbitrazh courts.

The Higher Arbitrazh Court also retains its function of hearing cases in "supervisory proceedings." "Supervisory" review of a case is a discretionary review, usually reserved for instances in which a significant error of law has occurred. These cases are heard on the basis of a "protest" concerning an error in the application or interpretation of procedural or substantive law. Protests can be submitted to the Higher Arbitrazh Court only by a very limited number of persons, including the Chair and Deputy Chairs of the Higher Arbitrazh Court and the Procurator General and his deputies. A party may request that a protest be submitted, but the submission of a protest is at the discretion of those who have the authority to do so.

CURRENT STRUCTURE OF THE ARBITRAZH COURT SYSTEM

Higher Arbitrazh Court

Reviews cases on the basis of protests, issues decrees and summaries of practice providing mandatory rules of interpretation and application as guidance for the lower courts, has administrative responsibilities for the system as a whole

Ten Circuit Arbitrazh Courts

Review cases for errors of law, may not accept new evidence or alter evidentiary findings of the lower courts

Arbitrazh Courts

Hear most cases in the first instance, appeals of first instance decisions heard *de novo* by a different bench

B. The Courts of General Jurisdiction

1. What are the Courts of General Jurisdiction?

The courts of general jurisdiction are just what their name implies. They are the general courts and have jurisdiction over all cases of any kind which may be heard by a court in the Russian Federation and which are not specifically assigned to the jurisdiction of another court. The "general jurisdiction" of the courts does not, however, imply a broad overlap with the jurisdiction of the other courts in the system — the arbitrazh courts and the Constitutional Court. As a rule, a particular dispute or legal matter will be considered to fall within the jurisdiction of only one of the courts in the system. For example, a law may state that cases or disputes that arise concerning it are to be resolved by a court or arbitrazh court. This might, at first glance, appear to suggest alternative jurisdiction in the two types of courts or the right of a plaintiff to choose where to file. Such a provision, however, is commonly interpreted to mean that those cases under the law which meet the required jurisdictional conditions of the arbitrazh courts will be subject to arbitrazh court jurisdiction, while all other cases will be submitted to the courts of general jurisdiction.

2. Courts and the Continuing Process of Court Reform

The organization, structure and jurisdiction of the courts, as well as the locus of control over their activities, shifted a number of times during the life of the Soviet Union.[6] In general, the courts had a broad jurisdiction, hearing civil and criminal cases as well as administrative and other matters assigned to the courts. Disputes between enterprises or concerning economic planning issues, however, were never heard by the Soviet courts and were assigned instead to state arbitrazh, as discussed above. Within a given court, the case load might be divided among groups of judges specializing in particular types of cases, or by a geographic division of the territory within the court's jurisdiction. Most cases were heard in the first instance in the local peoples courts, but the superior courts all had some form of first instance jurisdiction over more serious cases, including the USSR Supreme Court. All of the superior courts had presidiums, consisting of the chair and deputy chairs, along with some other members, which exercised supervisory functions and considered "protests" or appeals brought against the judgments of the court. The presidium, and in some cases the plenum, of higher courts also spent a considerable amount of energy in the study of court practice. On the basis of the study of practice, the highest courts could issue "guiding explanations," which discussed common mistakes or misinterpretations and gave general instructions concerning the proper interpretation and application of the laws.

The court system included "union level" courts (at the level of the Soviet Union as a whole) and also courts at the level of the union republics (Azerbaidzhan, Georgia, Ukraine, etc) and several levels of lower courts serving defined regions. Despite some elements of federalism in the structure of the state and in some legislative patterns, however, the court systems were not divided along horizontal lines nor between the union or "federal" courts and the lower courts. All of the courts were considered parts of a single, unitary system of courts. This conception of the court system as unitary has been retained by the Russian Federation to the present time.

It should be noted that theories of separation of powers were not accepted in Soviet political and legal theory until the late 1980s, and there was, accordingly, no attempt by Soviet authorities to create in the courts a "third branch" of government, with the corresponding authority and independence. The courts were acknowledged to be subordinate to the higher bodies of the state — specifically to the Supreme Soviet and to the Council of Ministers through the Ministry of Justice — and no court had the power to void or invalidate a legislative or regulatory act.[7] Judges were appointed for short terms by government bodies at the same territorial level as the relevant court, were subject to

[6] The reform of courts and legal procedures had been a subject of significant attention and debate during the later part of the pre-Revolutionary period as well. A recounting of the development of the Russian and Soviet courts and the numerous shifts in their structure and the theories of their operation is beyond the scope of this Handbook. The general description appearing in the text applies to the system put in place in the late 1950s, which retained its basic elements and developed in a relatively consistent pattern through the late 1980s.

[7] Courts did have the power to refuse to apply, in a concrete case, a regulatory act that violated or contradicted a legal act of a higher force.

recall by those bodies and dependent upon their re-nomination for continuation of their judicial careers, and also relied upon those bodies for some parts of both their professional and personal material support. The Ministry of Justice controlled judicial budgets and bonuses, and was responsible for dealing with complaints and evaluating judicial performance.

As a part of the reform efforts begun in the mid to late 1980s, the need for the creation of a "law-based state" was declared and significant attention was focused on the reform of legal institutions, including courts. In 1989, a new set of fundamental principles of legislation on the court system was passed, along with laws defining the status of judges and imposing penalties for disrespect to the court. Among other changes, these laws attempted to reduce interference in judicial decision making by having judges elected by state bodies at a higher level of state administration than that at which the court functioned and imposing fines, or even prison terms, for attempts to improperly influence specific decisions or refusals to carry out legitimate orders of the court.

Changes in this area created by the laws of the Soviet Union continued in force after its dissolution in the Russian Federation, and the process of court reform continued at the level of the Russian Federation. The RSFSR had passed a law in mid-1991 creating a Constitutional Court with broad powers of judicial review and 1992 saw the passage of another law on the status of judges, granting life tenure to most newly appointed judges and creating exclusively judicial bodies for discipline and for participation in judicial nominations. The passage of the 1993 Constitution heralded further changes, including confirmation of the direct effect of constitutional norms and the extension of additional procedural powers to judges. In addition, the text of the new Constitution required the passage of several "federal constitutional laws"[8] defining the organization of the court system as a whole and the competence and structure of the three highest courts and of all federal courts, offering an opportunity for implementation of various reform and restructuring proposals.

The required new law on the Constitutional Court was passed in 1994, but other legislation was slower, with the new law on the arbitrazh courts passing in 1995, and the new law on the court system in general in 1996. A number of steps remain to be taken, especially in relation to the courts of general jurisdiction. Dialogue continues concerning the proper distribution of judicial power between the federation and the regional and local governments and the means to ensure adequate financing and provision for the courts at all levels while preventing undue influence on them from the sources of support. In part due to continuing questions about these issues, the required federal constitutional law on the courts of general jurisdiction has not yet been passed at the time of this writing, leaving open significant questions about the structure of that court system and the possibility of additional, substantial change in the near future.

[8] A federal constitutional law is a law required by the text of the constitution. Passage of federal constitutional laws requires a super-majority in the two chambers of the parliament and a federal constitutional law stands a step higher in the hierarchy of legal acts than other federal laws passed through the standard legislative procedures.

3. Current Structure and Jurisdiction of the Courts

The courts of general jurisdiction have jurisdiction over all cases which may be heard by a court in the Russian Federation and which are not assigned to the jurisdiction of the arbitrazh courts or within the jurisdiction of the Constitutional Court. This includes jurisdiction over:

- all criminal cases;
- civil cases involving a citizen who is not an individual entrepreneur as at least one of the parties;
- appeals of administrative and other state actions which do not fall within the jurisdiction of the other courts;
- cases establishing facts having legal significance with respect to citizens (such as recognition of a person as dead or as legally incompetent);
- cases concerning family matters (custody of children, division of property);
- inheritance issues;
- cases concerning rights to housing, pensions and benefits, and other matters of social protection;
- other types of cases.

Most of the cases heard by these courts are not "commercial" in their nature. There are, however, a few types of cases of particular interest to businesses that do remain in their jurisdiction, either because of the status of one of the parties or because they are not specified in the jurisdictional provisions governing the arbitrazh courts. These cases are discussed in more detail in the next chapter.

As indicated above, the structure and organization of the courts of general jurisdiction is subject to some uncertainty at the time of this writing, as legislation defining the system in detail has not yet been passed. The Law "On the Court System of the Russian Federation," which passed in 1996, provides for the Supreme Court of the Russian Federation to be the directly superior court in relation to the supreme courts of the subjects (constituent parts) of the Federation[9] and in relation to military courts.[10] The law also envisions regional courts, which are to consider cases in the first and the second instance, and to exercise other authority as defined by a federal constitutional law. The specific organization, authority, and jurisdiction of military courts and of the supreme courts of the subjects of the Federation is also to be determined by a federal constitutional law, as are the internal organization and specific jurisdiction of the Supreme Court of the Russian Federation. The required federal constitutional laws, however, have not yet been

[9] The constituent parts of the Russian Federation are referred to as a group as the "subjects of the Federation." The different "subjects" are called by differing names, including "republics," "regions," "territories" and others. Which name attaches to a particular subject depends upon a number of factors, including the history of its inclusion into the territory of the Russian Empire or the Soviet Union and the basis for its definition as a separate subject (i.e. homeland of a national or ethnic group, purely geographic and administrative considerations, and so forth). They will be referred to in the Handbook using the current Russian terminology as the "subjects of the Federation."

[10] Because military courts do not play a role in the resolution of the types of disputes with which this Handbook is concerned, they will not be discussed here.

passed. One contentious issue at the time of this writing is the question of the possible role and authority of courts organized by the subjects of the Federation. Current legislation provides that all courts, except possibly the peace courts,[11] are federal courts, but there is strong feeling among many subjects of the Federation that more of a judicial branch is required by the subjects, for the enforcement of local and regional laws and regulations.[12]

Until the new laws are passed, the courts of general jurisdiction will operate in the structure in which they currently exist. This structure includes, at the lowest level, the peace courts, which may hear minor criminal, administrative or civil cases in accordance with the laws establishing them. In many areas, these courts have not yet been established, and the lowest level of the general court system in those areas is the district courts. These district courts hear the majority of civil, criminal and other cases in the first instance, and also consider appeals from decisions of the peace courts. The next level of the system consists of the courts of the subjects of the Federation. These courts hear appeals from the decisions of the district courts. They also hear a limited number of more serious cases in the first instance, and can review cases in supervisory procedure, on the basis of a protest of certain court officials and procurators.

Finally, there is the Supreme Court of the Russian Federation, which has a small first instance jurisdiction over the most serious cases. It also hears cases in cassational review (for errors of law only) and reviews cases in supervisory procedure on the basis of a protest of the Chair or Deputy Chair of the Court or of the Procurator General or his deputies. The Supreme Court also issues guiding explanations concerning the proper application of particular laws, and has the right to submit legislative proposals directly to the parliament.

[11] Peace courts are treated by Article 4 of the 1996 Law on Court Structure as courts of the subjects of the Federation. Their authorities are to be defined by both federal law and the laws of the subjects of the Federation. Their decisions, however, are subject to complete *de novo* review by the federal district courts, the decisions of which can be appealed up the hierarchy in the usual fashion

[12] The subjects of the Federation may organize separate courts to rule on issues concerning their charters or constitutions, and a number of them have done so.

CURRENT STRUCTURE OF THE COURTS OF GENERAL JURISDICTION

Supreme Court of the Russian Federation

Cassational review and supervisory review of cases, very small first instance jurisdiction, issues explanations and guiding instructions, supervision of all lower courts

Courts of the Subjects of the Federation

Review of cases on appeal from district courts in cassation and in supervisory procedure, limited first instance jurisdiction over serious cases

District Courts

Hear the majority of cases in first instance, review *de novo* of decisions of peace courts

Peace Courts

First instance consideration of minor criminal, administrative and civil cases, not yet established in many regions

C. The Constitutional Court of the Russian Federation

1. Jurisdiction of the Court

The Constitutional Court of the Russian Federation currently operates on the basis of a federal constitutional law passed in July of 1994.[13] The Court has jurisdiction over only four types of cases:[14]

1. Cases concerning the constitutionality of federal laws and normative acts issued by the President, Government of the Russian Federation, Federation Council and State Duma; the constitutions and charters of the constituent units ("subjects") of the Russian Federation, and laws and normative acts of those units issued on matters in the joint control of the Federation and its subjects or in an area of jurisdiction belonging to the Federation; treaties and agreements between the

[13] Federal Constitutional Law of the Russian Federation "On the Constitutional Court of the Russian Federation," Sobranie Zakonodatel'stva RF, 1994, No. 13, Item 1447. A full English translation of the law can be found in the journal STATUTES & DECISIONS: THE LAWS OF THE USSR AND ITS SUCCESSOR STATES, Vol. 31, No.4 (July-August 1995) (S.J. Reynolds, ed.).

[14] See Article 3 of the Law "On the Constitutional Court." In addition to jurisdiction over the types of cases discussed in the text, the Court has the right of legislative initiative (i.e. to submit legislation directly) concerning questions within its jurisdiction, and is responsible for issuing a conclusion concerning whether established procedure has been complied with where a charge of state treason or another serious crime is made against the President (relating to the procedure for impeachment). The Court can also be delegated additional powers by the Constitution (presumably through amendment), the Federation Treaty, or federal constitutional laws.

Federation and its constituent parts and among the subjects of the Federation; and international treaties of the Russian Federation that have not entered into force;

2. Cases concerning a dispute about competences between federal bodies, between a federal body and a subject of the Federation, and between the highest bodies of state power of the subjects of the Federation;

3. Cases concerning a request for an interpretation of the Constitution of the Russian Federation; and

4. Cases concerning verification of the constitutionality of a law applied or subject to application in a specific case.

2. Standing to Submit a Complaint

Each of the types of cases, and in some cases sub-types, is governed by particular rules concerning standing and procedures. With respect to the first, second and third types of cases, standing to petition the Court is limited to a specified set of state bodies and officials only.[15] ***The only cases in which private parties have standing to petition the Constitutional Court are those concerning the violation of constitutional rights and freedoms by a law that has been applied or is subject to application in a specific case.*** Standing is limited to those whose rights have been or will be infringed, and the petitioners must submit documentary proof that the law being challenged has been applied or is subject to application with respect to them.[16] Legal entities, including those commonly formed for the purpose of business dealings such as stock companies, limited liability companies and partnerships, are considered to have constitutional rights[17] and to have standing to submit a petition of this type to the Constitutional Court.[18]

3. Relationship to Commercial Dispute Resolution

While the Constitutional Court is clearly not a forum for the general resolution of commercial disputes between parties, it does provide a forum for challenge of laws and other legal acts applicable to commercial matters which a petitioner believes are not

[15] These are defined by Articles 84, 88, 92, 101 and 105 of the Law on the Constitutional Court.
[16] Article 96 of the Law on the Constitutional Court. Such a document is to be issued by the court or other body applying the law at the request of those to whom it has been/will be applied.
[17] See the Decree of the Constitutional Court of the Russian Federation "In the Case Concerning the Verification of the Constitutionality of Points 2 and 3 of the First Part of Article 11 of the Law of the Russian Federation of June 24, 1993 "On Federal Bodies of the Tax Police," Sobranie Zakonodatel'stva RF, 1997, No. 1, Item 197 (the constitutional rights of the person and the citizen apply to legal persons to the extent that the rights, by their nature, may be applicable to them).
[18] See the Decree of the Constitutional Court of the Russian Federation, "Concerning the Case On the Verification of the Constitutionality of the first part of Article 2 of the Federal Law of March 7, 1996 "On the Introduction of Amendments into the Law of the Russian Federation "On Excise [Taxes],"" Sobranie Zakonodatel'stva RF, 1996, No. 45, Item 5202 (limited liability partnerships and limited liability society are associations of citizens within the meaning of the law on the constitutional court and can therefore properly submit a petition concerning the violation of their rights by the retroactive force of tax provisions).

constitutional. In recent years, the Constitutional Court has issued a number of important decisions on issues directly affecting commercial activity, including confiscation of property by customs authorities,[19] liability for late tax payments,[20] retroactivity of tax liabilities, [21] proper procedures for imposition of fines,[22] and other matters. The decisions of the Constitutional Court are binding upon the arbitrazh courts and courts of general jurisdiction, and on all other officials and bodies in the Russian Federation.

D. Arbitration Tribunals

1. History and Development

Arbitration tribunals existed in the pre-Revolutionary period, and for a part of the 19th century were an obligatory form of resolution of disputes among members of partnerships and those concerning stock companies, as well as a means that could be used on the basis of an agreement of the parties. The possibility of use of an arbitration tribunal continued after the revolution only for private disputes and for some disputes on commodities exchanges. State bodies and state enterprises could not use the arbitration tribunals, and they disappeared as an option for domestic disputes with the implementation of a fully planned economic system. The possibility for the use of an arbitration tribunal reappeared at a later period connected to state arbitrazh,[23] but there appears to be little evidence that they were used frequently for economic disputes.

The 1991 Law on Arbitrazh Courts in the Russian Federation contained an article specifically authorizing the transfer of a dispute to an arbitration tribunal or to a mediator for resolution, on the basis of agreement of the parties.[24] The right to transfer a domestic dispute to an arbitration tribunal was preserved by the 1995 Law, although reference to mediation was eliminated.[25] There has been a significant growth in the number of arbitration tribunals, and by 1997 a study done for the arbitrazh courts stated that as many as 250 permanent arbitration tribunals existed in the Russian Federation, with more than 1500 arbitrators included on their lists.[26] Many of these tribunals, however, have narrow fields of specialty or exist for the purpose of dispute resolution in relation to a particular exchange or other institution. Only a few have broad, general jurisdictions.

Two special arbitration tribunals for disputes involving foreign persons or companies were created in the 1930s and continue to operate to the present day. One tribunal was

[19] Decision reported in Sobranie Zakonodatel'stva RF, 1998, No. 12, Item 1458.
[20] Decision reported in Sobranie Zakonodatel'stva RF, 1998, No. 42, Item 5211.
[21] Decision reported in Sobranie Zakonodatel'stva RF, 1996, No. 45, Item 5202.
[22] Decision reported in Sobranie Zakonodatel'stva RF, 1997, No. 1, Item 197.
[23] See, e.g., the Statute on Arbitration Tribunals, confirmed by State Arbitrazh of the USSR, Bulleten' Normativnykh Aktov SSSR [Bulletin of Normative Acts of the USSR], 1967, No. 6.
[24] See Article 7 of the 1991 Law "On the Arbitrazh Court."
[25] For disputes subject to the courts of general jurisdiction, the right to transfer a dispute to an arbitration tribunal for resolution is expressed in Article 27 of the Code of Civil Procedure.
[26] Vestnik Vyshshego Arbitrazhnogo Suda RF [Bulletin of the Higher Arbitrazh Court of the RF], 1997, No. 8, page 93.

established for maritime disputes and related claims (the Maritime Arbitration Commission — still functioning under that name), and the other for disputes arising out of foreign trade activities (the Foreign Trade Arbitration Commission — predecessor to the current International Commercial Arbitration Court under the Chamber of Commerce). The Soviet Union was a participant in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Russian Federation became a participant upon the dissolution of the Soviet Union as its legal successor. In 1993, a general federal law "On International Commercial Arbitration" was passed, applying the requirements of the New York Convention to foreign arbitral decisions and establishing a similar regime for the treatment of decisions of arbitration tribunals in Russia concerning international commercial matters. The law also extended the ability of arbitration tribunals other than the long-established maritime and foreign trade tribunals mentioned above to undertake the resolution of international commercial disputes. It did not, however, equalize the treatment of domestic arbitration tribunals and those concerned with international commercial disputes and significant differences still exist concerning the two, especially with respect to enforcement proceedings.

2. Jurisdiction of Arbitration Tribunals

As a general rule, civil law disputes that are otherwise within the jurisdiction of either the arbitrazh courts or the courts of general jurisdiction may be transferred to an arbitration tribunal. There are several exceptions to this general rule. A dispute may not be submitted to an arbitration tribunal if it is assigned by law to the exclusive competence of a particular state body or a particular court. The substantive legislation concerning the particular type of dispute may prohibit transfer to an arbitration tribunal, as is the case, for example, with the bankruptcy legislation. The transfer of labor disputes and family-law disputes in general to arbitration tribunals is prohibited by the Civil Procedure Code.[27]

The jurisdiction of any arbitration tribunal is dependent upon the will of the parties and can only be established by an agreement between them. ***No type of dispute is generally assigned by law to an arbitration tribunal, and in the absence of an effective arbitration agreement, a dispute will be subject to the jurisdiction of the corresponding court, depending upon the nature of the dispute and the identity of the parties.*** The agreement between the parties to transfer the dispute can be either an arbitration clause in a contract or other agreement to which the dispute relates, or a separate, written agreement to transfer a specific dispute that has arisen.

With respect to international commercial disputes, the 1993 Law "On International Commercial Arbitration" defines the general limits of jurisdiction of arbitration bodies over such cases. That law defines the sphere of international arbitration as including two broad types of cases:

[27] Article 1 of Appendix 3 to the Civil Procedure Code.

1. Cases concerning contractual or other civil-law disputes arising out of foreign trade, where the place of business of one of the parties is located outside the Russian Federation; and

2. Cases in which an enterprise with foreign investments, international organization, or international association operating on the territory of the Russian Federation has a dispute with another such entity or with a domestic entity, and also cases concerning disputes among the founders of such enterprises, organizations or associations.

Many commercial disputes with which this Handbook is concerned will fall into one of these two categories, and the rules and procedures for international commercial arbitration are thus those that will be of most interest and concern. There remain, however, a number of points of confusion due to the existence of separate legislation concerning "domestic" and international arbitration, which are discussed in greater detail in Chapters 2 and 4.

E. The Procuracy

In addition to the courts and arbitration tribunals which may be involved in the direct resolution of disputes related to business activities, there are a number of other state bodies that may play an important role. One of these is the Procuracy — the general prosecutor's office. This body has broad powers and may become involved in the activities of businesses and in their disputes not only through its role as prosecutor in criminal cases and in actions to enforce civil fines and penalties, but also through its powers of "supervision" over observance of the laws and its capacity to intervene in court cases and to reopen a decision by "protesting" (appealing) it to a higher court.

1. What is the Procuracy?

The procuracy existed in various forms for several centuries before the revolution, serving at some times primarily as the public prosecutor for criminal cases, and at others as a supervisory institution designed to ensure that the various bodies and officials of the state observed the laws. Abolished along with the courts immediately following the revolution, it was recreated in 1922. It was an institution independent from other government bodies, with strict internal vertical subordination. Although its specific powers and duties shifted somewhat, the basic functions of the procuracy remained unchanged throughout most of the Soviet period, and consisted of the supervision of legality of actions of state bodies below the highest level and of the behavior of enterprises, institutions and citizens, and also supervision of legality in the conduct of trials and cases by courts and of the observance of legal rules in prisons. In addition to these extremely broad supervisory powers, the procurator also served the function of the "state accuser" or prosecutor in criminal cases for much of the Soviet period.

The primary tool of the procuracy in fulfilling its tasks was the bringing of "protests" — complaints or statements concerning a violation of the requirements of law — to a person, state body or enterprise, or to their superiors. The person or body to whom the protest was addressed was generally required to make some answer regarding measures taken to alleviate the problem or to explain their disagreement with the procurator's conclusion. If satisfaction was not received at one level, the procurator had the right to continue to protest up the chain of superior bodies all the way to the level of the highest state bodies of the USSR.

The procuracy's powers with respect to economic activity were broad. Through its powers of "general supervision," the procuracy had the authority to review activities and records of enterprises, to require oral and written explanations concerning possible violations, and to issue recommendations on the elimination of violations, or in some cases mandatory instructions.[28] If grounds for criminal, administrative or disciplinary proceedings existed, the procurator could issue a decree requiring their initiation, and in more recent years could also file a claim in state arbitrazh.

The procuracy's powers were not limited to major violations of the law and the procurators could and did exercise their powers of recommendation and protest to address such matters as labor discipline, managerial incompetence or errors, and waste or lack of efficiency. The law did not limit the procuracy's powers to state bodies, and specifically included citizens (individuals) in the procuracy's powers of supervision. Thus, as non-state forms of enterprise began to expand, the right to review all business records, demand information from entities and individuals, and to take action concerning any problems found extended to new private businesses and individual entrepreneurs as well as to state entities.

In addition to its "general supervision" powers over economic actors, the procuracy also had a significant role in economic disputes resolved through the courts or state arbitrazh. Through its powers of supervision over legality in the courts, the procuracy had the right and responsibility to supervise the behavior of judges and state arbiters and their proper conduct of cases. If problems or errors were detected, the procurator could notify the superiors of the judge or state arbiter involved. In addition, the procuracy conducted reviews of case decisions and frequently filed "protests" requesting the reconsideration of decisions believed wrongly decided. It was not required that the procurator have been a party to the case for a protest concerning the decision to be filed, nor that a particular public or social interest be at stake, but only that the procurator consider the decision incorrect as a matter of law.

[28] The authority to issue mandatory instructions concerned violations that were likely to cause immediate harm, and therefore could not wait for a protest to be considered and acted upon. This authority was given to the procuracy at a relatively late stage, by amendments enacted in 1987.

2. Current "Supervision" Powers of the Procuracy

In 1992, a new law on the Procuracy was passed,[29] which was extensively revised in 1995[30] after the passage of the 1993 Constitution. The nature and stated goals of the several types of procuracy supervision have been changed and the powers of "general supervision" substantially reduced. Nonetheless, the Procuracy remains an important and powerful part of the legal system and may play a number of possible roles in relation to commercial activities and commercial disputes.

Under the current version of the law, the procuracy's power of supervision over the execution of the laws (previously referred to as "general supervision") has been reduced to apply only to state bodies.[31] General supervision over the execution of the laws by commercial entities and individuals is no longer within the procurator's sphere of authority. With respect to state bodies, the procurator has the right to submit protests concerning acts or actions which violate the law. A protest must be considered within a 10 day period from the day of its receipt, and the results of the consideration immediately sent to the procurator in written form. The procurator also has the power to submit a "representation" concerning the elimination of violations of the law or of the conditions or reasons giving rise to them. A representation is subject to immediate consideration by the body or official receiving it and concrete measures must be taken within a month to eliminate the problem and its causes, about which the procurator must be informed in writing.

In addition to protests and representations, the procurator has the authority to issue a decree concerning violations of the law by individual officials and the need to impose administrative or criminal liability on them. The decree is submitted to the body which has the power to impose such liability and the procurator is informed of the results of the consideration of the decree in writing. The procurator does not have the right to exercise these powers with respect to the Government of the Russian Federation, but the Procurator General is obligated to inform the President of the Russian Federation concerning instances in which the acts of the Government are not in accord with the Constitution or laws of the Russian Federation.

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[29] Law of the Russian Federation "On the Procuracy of the Russian Federation," Vedomosti Verkhovnogo Soveta RF, 1992, No. 8, Item 366.

[30] Sobranie Zakonodatel'stva RF, 1995, No. 47, Item 4472. Some additional changes in the Law on the Procuracy were made very recently, most of which concerned the terms and conditions of service in the procuracy. See the Law of the Russian Federation "On the Introduction of Changes and Additions into the Federal Law "On the Procuracy of the Russian Federation," Sobranie Zakonodatel'stva RF, 1999, No. 7, Item 878.

[31] Supervision powers now apply only to federal ministries and departments, the representative and executive bodies of the subjects of the Federation, bodies of local self government, military administration bodies and bodies of state control (i.e. administrative bodies and those serving inspection and similar functions), and their officials.

A second type of supervision now exercised by the procuracy is supervision over the observance of the rights and freedoms of the person and the citizen.[32] This supervision extends to all of the state and local bodies to which general supervision applies, and also to the administrative bodies of commercial and non-commercial organizations. The rights and freedoms which are to be protected are primarily those included in the Constitution, such as the right to freely dispose of one's talents and labor capacity, freedom of movement, freedom of assembly and other rights. With respect to these issues, the procurator is to consider complaints and petitions, and may initiate a criminal case if a violation of rights involves criminally punishable actions. The procurator may also forward materials for the initiation of an administrative case, and may file suit in a court of general jurisdiction or in an arbitrazh court to protect the rights of those who cannot themselves file suit or of large groups of persons. The procurator also has the protest and representation powers described above. The law currently in effect specifically provides that the procurator is not to substitute for other state bodies nor to interfere in the economic activities of organizations.[33]

3. Current Authority of the Procuracy Respecting Court Cases

In addition to its supervision functions, the Procuracy retains a significant role in court consideration of particular cases. ***The procurator has the right to make petitions or bring suit in a wide variety of cases, where this is specifically envisioned by the relevant legislation and is necessary to protect the rights of citizens or the interests of the state or society.***[34] The procurator can intervene as an additional party in already existing cases for the same purposes. The specific rights of the procurator in each instance are defined by the general procedural legislation related to the court in which the actions occur, and may also be defined by the substantive legislation governing the case involved. In cases being heard in the courts of general jurisdiction, the procurator may submit a conclusion or representation concerning the case to the court, without otherwise participating in the case as a party or third party. The procedural legislation governing the arbitrazh courts does not permit the procurator to submit conclusions, but the procurator may still file cases where this is permitted by the substantive legislation and may enter existing cases as a third party for the purpose of protecting the interests listed above.

In addition to its rights to initiate or participate in court cases, the procurator continues to have significant authority with respect to appeals of court decisions. ***A procurator or deputy procurator may bring a cassational protest (concerning violations of substantive or procedural law) concerning any decision, sentence, determination or***

[32] Articles 26-28 of the Law on the Procuracy.
[33] Article 26, part 2. The Procuracy also retains, under the current legislation, its supervisory powers over bodies conducting search and investigation activities related to criminal cases and over prisons, camps and other places where people are kept under guard or serve sentence. (Chapters 3 and 4 of the Law on the Procuracy.) Since this power has little relationship to commercial disputes it will not be discussed further here.
[34] Article 35 of the law on the Procuracy.

decree of a court that he or she considers to be illegal or without sufficient basis.[35] Such a protest has the same effect as the filing of a cassational appeal by a party, and generally leads to the reconsideration of the case by the cassational court. It is not necessary that the procuracy have taken any part in the case in the lower court and the procurator may file such a protest independent of the wishes of the parties in the case. Procurators may also demand from the court the case materials of any case in which the decision has entered into legal force, or the files on an entire category of cases, for review. If the decisions are believed to be illegal or without sufficient basis, the procurator may bring a protest requesting their review in supervisory proceedings.[36] These powers give the procuracy a potentially significant role in almost any court case, including those concerning commercial matters.

F. Executive Enforcement Bodies

In addition to the procuracy's broad powers, there are a number of executive bodies which are empowered to directly enforce the law in a particular sphere. Examples of such bodies include the tax service, the customs authorities, and the Ministry for Antimonopoly Policy. The structure and general powers of bodies of this type are defined by the statute on the relevant body. Additional detail on the powers and authority of the relevant body are provided by the substantive legislation which the body enforces, which defines the range of penalties, types of orders issuable, amounts of fines, and the subjects against which they may be issued for each individual type of violation that is within the jurisdiction of the relevant body. In most cases, additional regulations or instructions are issued by the body itself which define the procedure for its enforcement activities and forms in which it issues official acts and decisions.

The various bodies may become involved in commercial activity and commercial disputes in several ways. Those bodies which enforce statutes on the basis of complaints may serve as a type of alternative dispute resolution forum for complaints under the relevant law. An example of this type of body is the Ministry for Antimonopoly Policy, which enforces the competition law, the advertising law, and some aspects of the consumer protection laws. Upon receipt of a complaint under these laws the Ministry makes an initial determination concerning whether there is basis to open a case investigation. If it finds that there is such basis, the Ministry continues through a process of investigation and consideration that includes a hearing at which all parties may be represented and present their evidence and arguments. A decision is issued on the basis of the investigation and hearing, which may include mandatory orders requiring specific action and also the compensation of damages. Thus, the Ministry may serve to resolve the dispute between the complaining and respondent entities.

Not all executive bodies which enforce particular statutes serve in the capacity of dispute resolution fora or employ the kind of quasi-judicial procedures just described.

[35] Procurators below the level of deputy may bring protests only concerning those cases in which they participated.

[36] See Chapter 4 for an explanation of review in supervisory proceedings in the arbitrazh courts.

Those bodies which do not rely on complaint and whose laws do not involve questions of balancing the interests of several entities or the conduct of complex analysis may have more simplified procedures through which they conduct investigations and notify subjects of the existence of a violation and the imposition of a penalty. Decisions of state bodies, whether imposed through a simplified or a quasi-judicial procedure, may be appealed on the grounds that the relevant body violated or misapplied the substantive or procedural legislation which is applicable to the action taken. Thus, all of the executive bodies empowered to act in relation to commercial conduct may become involved in disputes concerning appeals of their actions.

Finally, it should be noted that **some of the executive bodies concerned have the right to intervene as a third party in court cases which concern matters within their jurisdiction or sphere of expertise, even if the original case is between private parties and was not initiated by the state body.** This may occur, for example, where the substantive laws which are enforced by the relevant body allow both state enforcement action against a violation and private court action by those injured by the violation to recover damages from the violator. While the enforcement authority may not have a direct interest in the recovery of the private plaintiff in such actions, it may have concerns about court recognition of particular behavior as a violation, about evidentiary matters, and so forth. Unlike the procuracy, however, which has a general capacity to intervene in court cases to protect state and public interests, executive enforcement bodies have rights to intervene in court cases only where this is specifically envisioned in the legislation concerning the particular court body.

WHAT INSTITUTIONS MIGHT PLAY A ROLE IN YOUR DISPUTE?

Dispute Resolution Institutions

Arbitrazh Courts - cases that are (1) related to economic activity where (2) the parties are legal entities or individual entrepreneurs, including appeals of specific state actions; other cases if assigned by legislation, even if conditions (1) and (2) are not met (e.g. all bankruptcy cases)

Courts of General Jurisdiction - all matters that may be heard by a court and are not assigned to either the arbitrazh courts or the Constitutional Court

Constitutional Court - questions of constitutionality of statutes, regulations and other acts, as well as treaties and disputes among some state bodies. Strict standing requirements apply

Arbitration Tribunals - binding resolution of disputes submitted to them by agreement of the parties, with jurisdiction limited by each tribunal's charter and rules and by the general legislation on arbitration tribunals

Other Important Bodies to Know About

Procuracy - the public prosecutor, with authority to bring cases or intervene in cases to represent the interests of the public or the state, and to appeal some court judgments and arbitral awards whether or not a procurator participated in the case

Specialized Bodies - executive bodies responsible for the enforcement of the law in a particular area (e.g. tax, customs, competition policy) using specialized procedures; may have powers to issue mandatory orders, impose fines, and/or intervene in cases concerning their areas of responsibility

Chapter 2: Where Can Your Dispute Be Submitted for Resolution?

Once a dispute has arisen, how do you determine which of the bodies discussed in Chapter 1 is the right one to resolve it? In order to answer that question, you need to know the details of the rules concerning the jurisdiction of the different bodies and to answer some questions regarding the subject matter of and the parties to your dispute. This chapter discusses the rules on the jurisdictions of the different courts and of arbitration tribunals, and provides some examples to illustrate their application. It also provides some basic information on the process by which a dispute is submitted to each of the different tribunals.

A. The Arbitrazh Courts

The arbitrazh courts are presently governed by the Federal Constitutional Law of the Russian Federation "On Arbitrazh Courts in the Russian Federation" (hereinafter the Law "On Arbitrazh Courts") and by the Arbitrazh Procedure Code (also referred to below as the "APC") of the Russian Federation, both passed in April 1995.[1] The Law "On Arbitrazh Courts" has as its primary purpose the general establishment of the courts and the definition of their structure. It does not define the jurisdiction of the arbitrazh courts with specificity, stating only that the arbitrazh courts are to resolve economic disputes and consider other cases which are assigned to their competence by the Constitution, the Law "On Arbitrazh Courts," the Arbitrazh Procedure Code or other federal laws.[2] In considering such cases, the tasks of the arbitrazh courts are defined as:

"protection of the violated or disputed rights and legal interests of enterprises, institutions, organizations (hereinafter—organizations) and citizens in the sphere of entrepreneurial and other economic activities;

facilitation of the strengthening of legality and the prevention of violations of law in the sphere of entrepreneurial and other economic activities."[3]

A more detailed definition of the competence of the arbitrazh courts is provided by Article 22 of the Arbitrazh Procedure Code (APC):

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[1] Federal Constitutional Law of the Russian Federation No. 1-FKZ "On Arbitrazh Courts in the Russian Federation," Sobranie Zakonodatel'stva RF, 1995, No. 18, Item 1589; Arbitrazh Procedure Code of the Russian Federation, Sobranie Zakonodatel'stva RF, 1995, No. 19, Item 1709. A full English translation of both can be found in the journal STATUTES & DECISIONS: THE LAWS OF THE USSR AND ITS SUCCESSOR STATES, Volume 32, No.4 (July-August 1996) (S.J. Reynolds, ed.).

[2] The general statement appears in Article 4 of the Law "On Arbitrazh Courts in the Russian Federation."

[3] The quoted language appears in Article 5 of the law "On the Arbitrazh Courts."

Article 22. Jurisdiction

1. Cases concerning economic disputes arising from civil, administrative, or other legal relationships shall be subject to the jurisdiction of an arbitrazh court [if they are]:

(1) between legal persons (hereinafter-organizations) and citizens engaging in entrepreneurial activity without the formation of a legal persons and having the status of an individual entrepreneur acquired according to the procedure established by law (hereinafter - citizens);

(2) between the Russian Federation and subjects of the Russian Federation and among subjects of the Russian Federation.

2. Economic disputes resolved by an arbitrazh court shall, in particular, include disputes concerning:

- disagreements concerning a contract the conclusion of which is envisioned by law, or [concerning which] the transfer of disagreements to the arbitrazh court for resolution has been agreed upon by the parties;
- a change in the conditions of or the abrogation of contracts;
- the failure to execute or the improper execution of obligations;
- recognition of the right of ownership;
- a demand by an owner or other legal possessor [for the return of] property from the illegal possession of another;
- violation of the rights of an owner or other legal possessor not connected with the loss of possession;
- compensation for losses;
- recognition as void (in full or in part) of non-normative acts of state bodies, bodies of local self-government, and other bodies that are not in accord with laws and other normative legal acts, and that violate the rights and legal interests of organizations and citizens;
- the defense of honor, dignity and business reputation;
- recognition of an execution or other document, with respect to which recovery is being carried out in an uncontested (nonacceptance) procedure, as not being subject to execution;
- the appeal of a refusal of state registration or an evasion of state registration within the established period of an organization or a citizen, and in other instances when such registration is envisioned by law;
- the recovery from organizations and citizens of fines by state bodies, bodies of local self-government, and other bodies exercising oversight functions, if their recovery in an uncontested (nonacceptance) procedure is not envisioned by federal law;

- a refund from the budget of monies exacted by bodies exercising oversight functions in an uncontested procedure in violation of the requirements of the law or another normative legal act.

3. An arbitrazh court shall consider other cases, including:

- concerning the establishment of facts having significance for the emergence, change, or termination of the rights of organizations or citizens in the sphere of entrepreneurial and other economic activity (hereinafter - concerning the establishment of facts having legal significance);
- concerning the insolvency (bankruptcy) of organizations and citizens.

4. In the instances established by the present Code and other federal laws, cases concerning economic disputes and other cases with the participation of formations that are not legal persons (hereinafter-organizations), and citizens who do not have the status of an individual entrepreneur shall be subject to the jurisdiction of an arbitrazh court.

5. Other cases also may be referred to the jurisdiction of an arbitrazh court by federal law.

6. An arbitrazh court shall consider cases subject to its jurisdiction in which participate organizations and citizens of the Russian Federation, as well as foreign organizations, organizations with foreign investments, international organizations, foreign citizens, and persons without citizenship engaging in entrepreneurial activity, unless otherwise envisioned by an international treaty of the Russian Federation.

This definition is a bit complex, especially at first glance. It is helpful to separate several different aspects of the analysis.

1. Jurisdiction by Specific Assignment vs Jurisdiction Under General Principles

According to the definition contained in Article 22, cases may fall within the jurisdiction of the arbitrazh courts in one of two ways: (1) They may be within the court's jurisdiction because the characteristics of the case correspond to the general elements defining the types of cases assigned to the court. These are given in points 1-3 and point 6 of Article 22. (2) They may also be within the jurisdiction of the arbitrazh courts because they are specifically assigned to the arbitrazh courts by the APC or a federal law, in accordance with points 4 and 5.

For most types of commercial disputes— contract disputes, claims for damages, and so forth — the general jurisdictional rules will apply to determine whether the arbitrazh court has jurisdiction over the case. These rules, in turn, depend upon two general criteria concerning the status of the parties and the nature of the dispute (discussed further

below). In order for a case to come within the arbitrazh court's jurisdiction on these grounds, it must meet both criteria. If it does not, it will be rejected by the arbitrazh court and will, in the majority of cases, be subject to the jurisdiction of the general courts.

Cases that fall within the jurisdiction of the arbitrazh court due to direct assignment by legislation are a special category. If a case is assigned by legislation to the jurisdiction of the arbitrazh courts, the case does not also have to meet the general jurisdictional requirements. For example, the consideration of all bankruptcy cases is assigned by the Law "On Insolvency (Bankruptcy)" to the arbitrazh courts. Cases concerning the bankruptcy of individuals will be considered by the arbitrazh courts despite the fact that they do not meet the general criteria concerning the status of the parties. The APC does not place any limitations on the ability of federal legislation to assign additional cases to the arbitrazh courts.

2. Jurisdiction Under the General Principles

The general principles defining cases which are within the jurisdiction of the arbitrazh courts require that two criteria be met. The parties to the case must meet certain status requirements, and the dispute must be an "economic dispute."

a) Status of the Parties

With respect to the legal status of the parties, the arbitrazh courts have general jurisdiction over disputes between and among legal entities and citizens registered and doing business as individual entrepreneurs, and also disputes between and among the Russian Federation and subjects of the Russian Federation. Although the language of point 1 of Article 22 is not entirely clear on the issue, the arbitrazh courts also have jurisdiction over disputes between legal entities and entrepreneurs and state bodies of various kinds. Cases involving an individual citizen who is not registered as an entrepreneur do not fall within the general jurisdiction of the arbitrazh courts, even where the legal nature of the dispute is otherwise identical to those that would be considered by the arbitrazh court. For example, a business seeking a remedy for damage to its business reputation caused by distribution of false information about it by an individual may file suit in the arbitrazh court if the individual is registered as an individual entrepreneur, but must file suit in the courts of general jurisdiction if he is not so registered. Likewise, an individual entrepreneur wishing to obtain damages due to defects in the products sold to him by an enterprise for his use in his business must file suit in the arbitrazh court, while an individual citizen sold the same defective goods as a consumer must pursue such a claim in the courts of general jurisdiction.

The status requirement applies to all of the parties in the relevant case, including third parties, if their participation is required for the proper resolution of the case. It also applies to all parties in cases in which multiple claims are combined. If even one of the parties to the case is an individual not registered as an entrepreneur, the case may not be considered by the arbitrazh court. The court has no discretion in this matter. Unlike the courts of general jurisdiction, the arbitrazh courts are considered to be specialized courts

with a restricted jurisdiction, and as such their authority is strictly limited by the language of the law(s) which grants it. Consideration of a case that did not meet the legislated requirements by an arbitrazh court would be viewed as consideration by an improper or illegal court, and the decision would be subject to reversal.

b) Nature of the Dispute

An "economic dispute" for the purposes of arbitrazh court jurisdiction is not actually "defined" in the statute, in the sense of a set of criteria that may be applied to a specific dispute to determine whether it is "economic" in nature. Instead, point 2 of Article 22 provides a list of types of dispute that will fall within this category. The list is quite broad, and includes most of the types of disputes likely to arise between business entities — contracts and other obligations (including those arising in tort), property disputes of all types, protection of business reputation, and so forth. It also encompasses most of the types of disputes likely to arise between businesses and government bodies — such as the imposition and appeal of fines and penalties, appeals of registration and licensing refusals, and appeals of other state actions taken in regard to a specific business or entrepreneur.

The list of specific types of "economic disputes" in the law, although long, is not exhaustive. Other disputes between parties meeting the status requirements may also fit within the definition. However, because neither the Law "On Arbitrazh Courts" nor the APC specifies criteria for determining when a type of dispute not listed is an "economic dispute," such a determination will be a matter for the courts to decide. A dispute between entities which are subject to the general jurisdiction of the arbitrazh courts by their status but which is not an "economic dispute" would fall within the jurisdiction of the general courts.

3. Specific Exceptions to the General Principles

The general rules which define arbitrazh court jurisdiction are subject to a number of exceptions. Two of these exceptions are stated in point 3 of Article 22. By point 3, the arbitrazh court is specifically given additional jurisdiction over all cases of insolvency (bankruptcy) of both individuals and legal entities. This provision codifies the assignment of such cases that was made by the bankruptcy legislation. Point 3 also gives the arbitrazh courts jurisdiction over cases involving the establishment of legal facts having significance for economic activity, although some of such cases would not fall within the general rules.

The third exception is not as obvious from the text of the Article, but is quite important in practice. Within point 2's list of "economic disputes" subject to arbitrazh court jurisdiction are included disputes concerning the voidance by the court of a "non-normative" act of a state body which is not consistent with law or with other normative legal acts. "Non-normative" acts of state bodies include acts and actions which concern a single individual or entity — for example, the application of the tax laws to a single enterprise — and which do not establish a general rule or principle (a "norm") to be

followed by or applied to other individuals or entities. Although the subpoint is formulated to state positively what is within the arbitrazh courts' jurisdiction, the inclusion of only non-normative acts in the list means that the arbitrazh courts do not review cases concerning the legality of regulations, instructions or other general rules. Thus, the arbitrazh courts will take jurisdiction over claims requesting that an action of a state body be held void because it is in violation of the applicable legal rules, but will not take jurisdiction over a claim requesting that the general regulation or legal rule be held void because it is in violation of higher or controlling law.

In considering this exception, an important distinction must be made between cases in which the party filing the case is requesting that the normative act itself be held void — that is, be recognized as not having legal force in relation to anyone at all — and cases in which the party filing the case only requests that a particular normative act not be applied to it, due to its inconsistency with higher law. In the first case, the arbitrazh court will not take jurisdiction over the claim. In the second, the arbitrazh court may take jurisdiction over the dispute, and will apply to the individual case the rule which has the higher legal force. Thus, in a dispute in which a party claims that a normative act applied to it is not consistent with controlling law and requests that the court compel the body which applied the normative act to apply instead the rule contained in the law, the arbitrazh court has jurisdiction. It may consider the dispute and if it finds that the normative act is inconsistent with the controlling law, it will apply the rule contained in the law. If, in the same circumstances, the party requests that the normative act itself be held to be generally void, the arbitrazh court will not take jurisdiction. In practice, the distinction may come down to the way in which the party filing suit expresses its claim.

For the reasons discussed, complaints concerning the recognition of rules, regulations, instructions and other acts as generally void — even where the challenged acts are applicable only to business entities and are designed specifically to regulate their economic activities — must, in general, be made before the courts of general jurisdiction. Several recent pieces of legislation, however, have specifically assigned cases concerning normative acts in a particular sphere to the arbitrazh courts (a particularly important example is Part I of the recently enacted Tax Code). It is quite likely that this trend will continue as legislators find it more desirable to concentrate in a single court system the interpretation and enforcement of an interconnected body of laws and regulations designed to regulate a particular sphere of the economy. Any individual dispute concerning a normative act of a state body must be evaluated carefully at the time of filing to determine whether it falls within the jurisdiction of the arbitrazh courts or the courts of general jurisdiction.

4. Jurisdiction Over Foreign Parties

The general jurisdictional rules of the arbitrazh courts do not distinguish between parties on the basis of the foreign or domestic nature of legal entities or the citizenship of individual entrepreneurs. Point 6 of Article 22 of the APC provides that the arbitrazh court will have jurisdiction over foreign legal entities, international organizations, legal entities with foreign investment, and individuals carrying out entrepreneurial activities

who are not citizens of Russia, unless it is otherwise provided in an international agreement of the Russian Federation. This rule was established by the 1995 Arbitrazh Procedure Code, and those whose businesses were originally established prior to 1995 should take special note of this change. Prior to 1995, enterprises with foreign investment were subject to the jurisdiction of the arbitrazh court only if an international agreement specifically provided for such jurisdiction or if the parties agreed to submit the dispute to the arbitrazh court. Under current law, the arbitrazh court has jurisdiction over all cases falling within the general definition of its authority, without reference to the domestic or foreign status of the parties, and the parties may not move the case from one court system to the other by agreement.

Although point 6 of Article 22 provides that the general rules for arbitrazh jurisdiction apply to foreign entities and individuals equally with Russian entities and individuals, unless an international agreement of the Russian Federation provides otherwise, the general rules are supplemented by some additional specifics. These specific rules applicable to cases concerning foreign parties are contained in Article 212 of the APC. According to these rules, the arbitrazh courts have jurisdiction in cases in which:

- a foreign person is present or resides in the Russian Federation;
- a foreign entity has a representation or subsidiary in the Russian Federation;
- a respondent has property in the Russian Federation;
- the case concerns a contract, the execution of which did take place or was to have taken place on the territory of the Russian Federation;
- the case concerns actions or other circumstances which occurred in the Russian Federation and caused damage to property;
- the case concerns unjust enrichment which took place in the Russian Federation;
- the case concerns damage to honor, dignity or reputation and the plaintiff is in the Russian Federation;
- there is an agreement on such jurisdiction between a foreign person or entity and a citizen or organization of the Russian Federation.

Three exceptions limit these general rules. The first applies to cases concerning immovable property, which are to be heard at the place of location of the property. Thus, cases concerning rights in immovable property located outside the Russian Federation will not be heard, regardless of whether one of the other criteria for jurisdiction is present, while cases concerning immovable property located in the Russian Federation will be considered at the location of the property. The second provides that suits concerning a contract for transport are to be heard at the place of location of the transportation agency. The third is the general exception for international agreements. If an international agreement of the Russian Federation contains provisions altering the rules, the provisions of the international agreement will be applied.

5. Coordination of Jurisdictional Issues Between the Arbitrazh Courts and the Courts of General Jurisdiction

While there are certainly issues of jurisdiction on which the two court systems or individual courts may disagree, the courts do make a particular effort to coordinate their approaches to questions of jurisdiction. In some cases, courts of one system may be willing to hear a case that is "close to the line" on jurisdiction, even if they are not certain that it is properly theirs, when the courts of the other system have already rejected the case on jurisdictional grounds. This ensures that parties are not left without a forum for the resolution of disputes or protection of rights. For this reason, it is important for a party in this position to make clear to the courts of the second system that the courts in the first have refused the case on the grounds that it is not within their competence.

JURISDICTION OF THE GENERAL COURTS
(Provisions of the Civil Procedure Code)

Article 3. Right to make recourse to the court for judicial protection

All interested persons shall have the right to make recourse to the court, in the procedure established by law, for the protection of violated or disputed rights and legally protected interests.

Article 25. Jurisdiction of the courts over civil cases

[The following] are subject to the jurisdiction of the courts:

- cases concerning disputes arising from civil, family, labor and collective-farm legal relationships, if even one of the parties to the dispute is an individual citizen, with the exception of instances where the resolution of such disputes is assigned by law to the jurisdiction of administrative or other bodies;
- cases concerning disputes arising from contracts for the transport of freight in direct international rail transport and air freight transport between state enterprises,
- institutions, and organizations, cooperative organizations and their associations, or other social organizations, on the one hand, and bodies of rail transport or air transport on the other, arising out of the corresponding international contracts;
- cases arising from administrative-law relationships listed in Article 231 of the present Code;
- cases concerning special proceedings, listed in Article 245 of the present Code.

Other cases shall also be within the jurisdiction of the courts [when] assigned by law to their competence.

The courts shall also consider cases in which foreign citizens, persons without citizenship, foreign enterprises and organizations participate, if it is not otherwise envisioned by inter-state agreements, international treaties or the agreement of the parties.

B. Courts of General Jurisdiction

1. Jurisdiction

As discussed in Chapter 1, the courts of general jurisdiction are the "ordinary" or general courts. Unlike the arbitrazh courts and the Constitutional Courts, which have a limited jurisdiction defined by the laws governing their structure and procedure, the courts of general jurisdiction are the default forum for any matter that is capable of being heard by a court. Their jurisdiction is defined not by positive description, but rather as all cases and issues not specifically assigned to the jurisdiction of another body — such as the arbitrazh courts or the Constitutional Court.[4] Legal provisions governing the jurisdiction of the courts are extremely broad, reflecting this conception of the courts' function.

In understanding and interpreting these provisions, it is important to keep in mind that they were written in 1964, and although amended in later years, have not been updated to deal with many intervening changes. In particular, the reference in the second paragraph of Article 25 to assignment of cases "to the jurisdiction of administrative or other bodies" and its lack of reference to the possibility of assignment to "courts" does not indicate dual or alternative jurisdiction between the arbitrazh courts and the courts of general jurisdiction. At the time of the Code's passage, the general courts were the only courts in the country. State arbitrazh would have qualified as an "administrative or other body" under this paragraph of Article 25, and the currently existing arbitrazh courts qualify as "other bodies" under that same provision.

Similarly, the last paragraph of Article 25 states, the courts of general jurisdiction are to consider cases in which foreign parties of any type participate. The paragraph in which this statement appears is not qualified by a reference to the possible assignment of the cases to "other bodies." However, as was discussed in Section A of this Chapter, Article 22, point 6 of the Arbitrazh Procedure Code gives the arbitrazh courts jurisdiction over cases with foreign participants which are otherwise within their jurisdiction under the Code. Some authors have suggested that this language produces a conflict or overlap which would allow the general courts to serve as an alternative forum for any disputes in which a foreign business entity participates.

Although the language of the relevant portion of Article 25 is broad, the paragraph containing that language cannot be read in isolation from the remaining portions of the Article or its history. At the time of its passage, and through 1995, the bodies of state arbitrazh (and later the arbitrazh courts) were specifically denied jurisdiction over cases involving foreign parties. The passage of the new Arbitrazh Procedure Code in 1995 would either qualify as the assignment of these cases to "another body," exempting them from the courts' jurisdiction, or if that provision does not apply, as the later passage of a different legal rule, effectively amending the prior rule stated in the Civil Procedure Code. (The general principles of interpretation require that a later-passed law has priority over an earlier-passed law at the same level in the hierarchy of legal acts.) Such an

interpretation does not deprive the existing paragraph of application. The general courts, must, of course, retain the ability to consider cases in which foreign firms participate as parties in order to consider cases in which private individuals sue such companies or those cases which are specifically excluded from arbitrazh court jurisdiction (e.g. the challenge of a normative act by a foreign enterprise).

2. Commercial Cases Heard by the Courts of General Jurisdiction

The broad jurisdiction of the general courts includes all criminal cases, civil disputes concerning citizens who are not individual entrepreneurs, and appeals of administrative and other state action which do not fall within the jurisdiction of the other courts. Cases establishing facts having legal significance with respect to citizens (such as recognition of a person as dead or as legally incompetent), cases concerning family matters (custody of children, division of property), inheritance issues, and a variety of other concerns fall within the jurisdiction of the general courts.

The majority of this jurisdictional list relates to individuals and their personal concerns and disputes. This is not surprising, as the jurisdiction of the arbitrazh courts, discussed above, covers most standard types of business activity. However, there are a few types of cases which are of particular relevance to commercial activity that currently fall within the jurisdiction of the courts of general jurisdiction, rather than the arbitrazh courts.

The first of these is the appeal of normative acts — that is, regulations or rules that have a general binding force — which the appealing party believes to be inconsistent with a law or with legal rules of superior force. Such rules may include regulations on the application of customs rules, rules concerning the conduct of production or sales activities, and any other rules of general application in the commercial context. As discussed in section A.3, above, the jurisdictional provisions of the Arbitrazh Procedure Code state that the arbitrazh courts consider only cases concerning non-normative acts of state bodies, unless the review of particular normative acts is specifically assigned to the arbitrazh courts by a legislative provision. This leaves most cases concerning normative acts, even if such acts regulate purely commercial issues and the complaint is being filed by a legal entity against a state body, within the “default” jurisdiction of the general courts.

The second category of cases having commercial significance but falling into the jurisdiction of the general courts is those cases in which an individual who is not a registered entrepreneur participates as a party. Disputes among the founders of a legal entity, where one of those founders is an individual, would fall into this category. Disputes arising from the conduct of a company or its officers may also fall into this category if the complaint is brought by an individual who is not a registered entrepreneur (for example, an individual share holder), although the same complaint would have to be filed in the arbitrazh courts by a legal entity holding shares in the same company. Cases in which the rights of individuals will be determined by the outcome, so that these

individuals may be necessary parties or have the right to participate as third parties, will also fall into the jurisdiction of the general courts, since the arbitrazh courts do not hear such cases.

3. Expectation of Legislative Change

Jurisdiction and procedure in the courts of general jurisdiction is currently defined by the Civil Procedure Code (also referred to hereinafter as the "CPC") of the RSFSR. The CPC was adopted in 1964 and has been extensively amended over the ensuing thirty-five years, including a significant set of amendments in 1995. Despite the extensive amendments, however, many portions of the CPC contain provisions which are clearly obsolete and refer to institutions or rules of law no longer in existence or effect.[5] Other rules are not obsolete "on their faces," but are presumably not subject to application due to their inconsistency with laws passed at a later time. The passage of a new Code of Civil Procedure has been expected for some time, and drafts of the new Code have been circulated. However, the difficulties discussed earlier concerning the nature and roles of courts of the subjects of the Federation have delayed any definition of the hierarchy and organization of the courts. Because the procedure code relies heavily on this hierarchy and organization in defining the powers of courts, grounds and hierarchies for appeal, and appeals procedures, the new procedural code is likely to be delayed until the matter is resolved.

4. Procedures for Submission and Consideration of a Complaint

Because the general courts have a limited jurisdiction over disputes related to commercial activity, and in consideration of the uncertainties associated with the state of the procedural legislation, this Handbook does not provide extensive detail concerning procedures in the general courts. It may be noted, however, that the types of commercially-related cases that are currently subject to the jurisdiction of the general courts are either not capable of transfer to an arbitration tribunal (those concerning the validity of regulation or other normative act) or are far less likely to be transferred than other commercial cases (cases concerning private individuals, with whom arbitration agreements are less likely to be concluded). For this reason, there may well be no alternative forum available, and a general overview of the procedures of the courts will be provided here.

Because of the wide variety of cases heard by the courts of general jurisdiction, the Civil Procedure Code contains many special provisions not related to types of disputes most likely to be of commercial interest. Both types of cases that are of interest — civil cases with individual participants and administrative cases challenging a legal act — are subject to the general rules of the CPC. These rules, although generally similar to those which apply in the arbitrazh court, do contain a number of important differences. Many of these are due to the difference in the dates of passage of the two codes. Some differences, however, may reflect a more solicitous attitude toward the individual citizens

[5] See, e.g., Article 26 of the CPC on the transfer of cases to "comrades courts."

who are the common users of the general courts in civil cases and who may not be legally sophisticated or well provided with legal counsel. In addition to the general rules, there are two special chapters of the CPC (Chapters 24 and 24[1]) providing some additional special rules for the consideration of administrative cases.

Civil cases are filed in a written form, which must contain a list of information contained in the CPC, and must be accompanied by payment of the filing fee. Filings are reviewed by a single judge for acceptance, who may reject them if they are fatally flawed. If a correctable error in the filing exists, the court keeps the filing and notifies the petitioner about the error, providing a period for cure. An accepted case will generally be considered by a three-judge panel of a district or city court, in the location of the respondent or that agreed by contract, in an open court session.

Procedures are relatively direct and simple, and the court is required to explain to the participants what their rights are in the process. As mentioned above, however, quite a number of provisions remain in the Code that appear to be outdated. For example, the Code provides that social organizations and labor collectives (not parties to the case) have the right, with permission of the court, to take part in the consideration of a case for the purpose of making their views on the case known to the court. Periods for the preparation and hearing of the case by the court are extremely limited. The court is given a general seven-day period for preparation of cases, which may be extended to twenty days for complex cases. For those types of civil cases which may have commercial interest, a decision is to be issued by the court within a month of completion of the preparation of the case. These periods may be somewhat lengthened, due to suspensions in the proceedings in the case according to the rules of the Code.

A number of special rules are applicable to the consideration of administrative cases concerning a challenge to normative acts. The relevant chapter of the CPC gives an aggrieved person the right either to make recourse directly to the court or to a body or official superior to the one which issued the challenged act. If a complaint is made to the superior body, the body or official is required to respond within a month. If the relevant body or official rejects the complaint, or if no answer is received, a complaint may be filed with the court. The rules provide for a very short time frame — 10 days of receipt of the complaint — for consideration of the case by the court. If the court finds the normative act, or a part of it, to be illegal or improper, that act or portion of the act is considered from the time of the issuance of the opinion to be without effect.

C. The Constitutional Court

The Constitutional Court operates on the basis of a federal constitutional law passed in 1994, which gives it jurisdiction over:

- cases concerning the constitutionality of federal laws and normative acts issued by the President, Government of the Russian Federation,

- Federation Council and State Duma; the constitutions and charters of the constituent units ("subjects") of the Russian Federation, and laws and normative acts of those units issued on matters in the joint control of the Federation and its subjects or in an area of jurisdiction belonging to the Federation; treaties and agreements between the Federation and its constituent parts and among the subjects of the Federation; and international treaties of the Russian Federation that have not entered into force;

- cases concerning a dispute about competences between federal bodies, **b**etween a federal body and a subject of the Federation, and between the highest bodies of state power of the subjects of the Federation;

- cases concerning a dispute about competences between federal bodies, between a federal body and a subject of the Federation, and between the highest bodies of state power of the subjects of the Federation;

- cases concerning a request for an interpretation of the Constitution of the Russian Federation; and

- cases concerning verification of the constitutionality of a law applied or subject to application in a specific case.

Individual citizens and legal entities have standing to submit complaints only concerning cases in the last category. It is under this provision that the Constitutional Court may provide a forum for challenge of laws or other legal acts that the petitioner believes are not consistent with the Constitution of the Russian Federation.

1. Standing

Standing to submit a petition to the Constitutional Court is strictly limited by the Law on the Constitutional Court, and for most of the types of cases over which it has jurisdiction, is defined by a specific list of state bodies and officials authorized to submit an inquiry or complaint. The review of cases concerning violation of constitutional rights and freedoms by a law applied or subject to application in a case is not, however, limited to cases submitted by a specific list of parties. (It is difficult to imagine how this might be done without arbitrary denial of review concerning some rights or some parties.) For this group of cases — the only one with which we are concerned — standing to submit a petition is limited to those individuals and/or entities whose rights have been violated (will be violated). In order to ensure that those submitting the petition do, in fact, meet this requirement, documentary confirmation must be provided that the legal act being challenged has been applied in a case or is subject to application in a case, and that the individuals or entities submitting the petition are those whose rights have been or will be violated. The petition is not, however, considered to be a direct appeal of the decision of another court or body. Indeed, the Constitutional Court has no power to review the decisions of other courts and can rule only on the constitutionality of the act in question.

A business entity is considered to possess constitutional rights and obligations, to the extent that such rights and obligations are consistent with the nature of the entity. Such entities have standing to submit a petition to the Constitutional Court concerning the violation of those rights which can be possessed. In addition, a petition may be submitted by individuals who are participants in the business entity (partners, founders, shareholders) on the basis of violations of their rights as individuals.

2. Scope of Review

The Constitutional Court's jurisdiction in such cases is limited to the review of the constitutionality of the law or legal act in question. This review, however, includes a number of aspects of the constitutionality of the legal act, including:

- constitutionality of the substantive content of the act (content of its norms);
- constitutionality of the form of the act (i.e. whether the legal rules contained in the challenged act may be established by a legal act of the corresponding type and level);
- constitutionality of the procedure of its passage, including the adoption, confirmation, signing, publication and entry into force;
- constitutionality from the point of view of consistency with the balance of powers and division of authority between federal bodies of power as established by the constitution;
- constitutionality from the point of view of consistency with the division of the subjects of jurisdiction and authority between federal bodies and the subjects of the Federation.

3. Procedure for Submission and Consideration of a Petition

A petition to the Constitutional Court must be filed in written form and must contain the information and appendices listed in the checklist below. In addition to the appendices listed, the petitioner may append other documents concerning the case to the petition, including proposals concerning witnesses or experts to be called, or other materials related to the petition. **Petitions submitted by individuals must be submitted in three copies, while those submitted by legal entities must be submitted in thirty copies.**

The Constitutional Court may reject a petition immediately if it is clearly not within the Court's jurisdiction, is in the wrong form, was filed by an improper party, or there is no evidence of payment of the state filing fee. If the petition is not returned on one of these formal grounds, it must next go through a process designed to determine whether the petition should be considered on its merits by the Court. The Chair of the Court assigns a preliminary review of the case to one or more of the judges, which must be

completed within two months. The conclusions of the preliminary review are presented to a plenary session of the Court, and a decision concerning acceptance of the case for consideration in its substance must be made within a month of that presentation.

CHECKLIST FOR A FILING WITH THE CONSTITUTIONAL COURT
Information Required in the Filing

- ❑ indication of the Constitutional Court as the court to which it is being submitted
- ❑ name of the petitioner, address and other information concerning the petitioner; any necessary information on the representative of the petitioner (if applicable) and his authority
- ❑ name and address of the state body which issued the act being challenged
- ❑ provisions of the Constitution of the Russian Federation and of the Law on the Constitutional Court which indicate the right to make recourse to the Constitutional Court in the given case
- ❑ the exact name, date of adoption, number, source of publication, and other information concerning the challenged act
- ❑ the specific grounds, under the Law on the Constitutional Court, for the consideration of the petition
- ❑ statement of the position of the petitioner and justification of that position, referring to the relevant provisions of the Constitution
- ❑ the demand made by the petitioner concerning the case, which in this type of case would be that the act be recognized as unconstitutional
- ❑ a list of the documents appended to the petition

In Addition, The Petitioner Must Submit as Appendices:

- ❑ the text of the act being challenged
- ❑ a copy of an official document confirming the application or possibility of application of the law or act that is the subject of the petition to the resolution of a specific case
- ❑ a power of attorney for a representative (if applicable)
- ❑ a document confirming payment of the state filing fee (15 times the minimum monthly wage for entities or one minimum wage for an individual citizen)
- ❑ a translation into Russian of any documents in other languages

If the Court accepts the case for decision on its merits, it is assigned for preparation to one or more reporting judges. The reporting judge(s) study the case and ensure that the necessary materials are collected and witnesses, parties and experts called to appear at the court session for its consideration. The reporting judge(s) also present the case to the rest of the members of the Court at the session in which it is heard.

The case will be heard in a session of one of the two chambers of the Court, which are made up of one half of the Court's members. Only one case is heard during any given session, and during the session the reporting judge(s), the parties, and other invited persons (experts, witnesses) will be heard and questions may be asked by the Court. Decisions are made by a majority vote of the chamber in a closed deliberation. The results of the vote are not to be revealed, although judges have the right (but not the obligation) to set forth a special opinion in the case if they are not in agreement with part or all of the decision of the Court. If the majority of the judges believe that the correct decision in the case is one which is not consistent with a legal position previously expressed by the Court, the case cannot be resolved by the chamber and must be transferred to the plenary session of the Court for consideration by all of its members. There are no time limits imposed upon the hearing of the case or the period within which the decision must be made.

4. Effect of Filing and Effects of Ruling

If a case giving rise to the petition to the Constitutional Court (that is, the case in which the challenged legal act is subject to being applied) is still in the process of consideration in another court, the acceptance of a petition in the Constitutional Court does not require the suspension of the case. The Constitutional Court must notify the court in which the case is being considered of the acceptance of the petition, and the court has the right, but no obligation, to suspend the case until the issuance of a decree by the Constitutional Court.

A legal act, or individual provisions thereof, found by the Constitutional Court to be unconstitutional loses its legal force and may not be applied in the specific case at issue nor in other pending cases nor by state bodies other than the courts. The Constitutional Court, as it is not a court of appeal, issues only its decree on the constitutionality of the relevant legal act(s), and does not issue a decision directly addressing the rights and obligations of the specific parties to the case in any other respect.

D. Arbitration Bodies

1. International vs Domestic Arbitration

Discussions of the jurisdiction and procedures for arbitration in the Russian Federation are somewhat complicated by the fact that the existing legislation on arbitration consists of several different, and not entirely consistent, legal acts relating to "international" arbitration and to arbitration generally. These acts include (1) the Statute on the Arbitration Court which appears as Appendix No. 3 to the Civil Procedure Code, providing very general rules concerning arbitration of civil disputes subject to the jurisdiction of the general courts, (2) the Temporary Statute on Arbitration Tribunals for the Resolution of Economic Disputes ("the Temporary Statute"), passed in 1992 to govern arbitration of disputes subject to the jurisdiction of the arbitrazh courts, and (3) the Law on International Commercial Arbitration, passed in 1993 to govern international

commercial arbitration, primarily at the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC).

At the time that the acts listed were adopted, there was little or no overlap in their coverage. Arbitration for international commercial disputes and for maritime disputes had been available for decades, but exclusively at the ICAC and MAC, each of which had its own statute and rules. The Temporary Statute on Arbitration Tribunals for the Resolution of Economic Disputes applies by its terms only to the arbitration of disputes subject to arbitrazh court jurisdiction, and at the time of passage of the Temporary Statute the arbitrazh courts had no general jurisdiction over international disputes. The Temporary Statute specifically exempts from its coverage the two international arbitration tribunals which were in existence at the time of its passage - the ICAC and the MAC — so there was no overlap in the application of the rules. Likewise, since the Temporary Statute applies only to disputes otherwise subject to the jurisdiction of the arbitrazh courts and Appendix 3 to the Civil Procedure Code can apply only to those which would otherwise be subject to the general courts, there was little or no overlap in the application of the two provisions to domestic disputes. In 1993, the Law "On International Commercial Arbitration" was passed. This law was intended to bring legislation on international arbitration into line with Russia's obligations as a signatory to the 1958 New York Convention (by way of legal successorship to the USSR). The terms of the law apply only to international commercial arbitration, and the statute on the ICAC is an appendix to the Law. The 1993 Law does not apply to "domestic" arbitration at all.

The rules envisioned in the three documents, although similar in some respects, are not identical. This is particularly true with respect to the rules concerning the execution of arbitral awards, including the limitations period for presentation of the award for execution and the jurisdiction of the courts in issuing the corresponding execution order. There are, however, other differences as well, including differences in the dispositive and imperative nature of the rules which must be observed by arbitration tribunals — a matter of significance as violation of the imperative rules may result in reversal of an award by the courts.

Between the passage of the listed acts and the present, the general jurisdictions of the different courts have changed and the number of existing arbitration tribunals has grown precipitously. As was mentioned in Chapter 1, one recent study found 250 arbitration tribunals of different types. While many of these tribunals, by their founding rules, accept only "domestic" disputes, some have statutes authorizing them to accept international commercial disputes for resolution as well. These include several tribunals accepting commercial disputes generally, such as those under the Union of Jurists and the Moscow [City] Chamber of Commerce and Industry, and also some that were formed to arbitrate particular types of disputes, such as the facilities established by the Moscow Interbank Currency Exchange and the national Association of Stock Exchanges. These developments have significantly complicated the application of the various laws and statutes.

The Temporary Statute, by its terms, applies to cases that would otherwise be subject to the jurisdiction of the arbitrazh courts. Since the passage of the 1995 Arbitrazh

Procedure Code, the simple presence of a foreign party or an enterprise with international investment does not remove disputes from the jurisdiction of the arbitrazh courts, if the disputes are otherwise subject to them. This would suggest that the Temporary Statute applies to arbitration of those disputes, unless they are being considered by the ICAC or MAC, which are specifically exempted by the Temporary Statute. However, the Temporary Statute itself also provides that it will apply to international disputes only by agreement of the parties. Thus, an international dispute otherwise subject to arbitrazh court jurisdiction, but in which the parties have not specifically agreed to the application of the Temporary Statute, might have to be governed by the 1993 Law. A dispute with a foreign element in which some individuals participate as parties would be subject to the jurisdiction of the general courts, not the arbitrazh courts, and so arbitration of such a dispute would seem to fall within the provisions of Appendix 3 to the Civil Procedure Code. But this Appendix is not entirely consistent with the 1993 Law or with Russia's treaty obligations under the New York Convention, and therefore the 1993 Law probably takes precedence on those issues when there are international parties participating. The differences in rules for execution of awards and general rules for procedure among the different laws will mean that an arbitration tribunal which accepts all kinds of commercial disputes must have several sets of rules, to be applied depending upon the nature of the parties.

The inconsistencies in the rules are likely to create increasing difficulties over time. As foreign investment in Russian companies expands through such means as stock ownership, the existence of "international investments" in a company may be increasingly difficult to determine by any simple means. Moreover, the term "international investments" itself may become less than clear. Does international financing qualify a company as one with "international investments"? What about stock holding through a domestic nominee? Since the presence of "international investments" is what determines which law applies regarding arbitration, the answers to these questions would be significant. One option in the interim would be for parties arbitrating before a general arbitration tribunal to be required to declare themselves as "international" at the outset or be subject to the "domestic" rules, or for tribunals to be required to make a finding in this regard in each case. A more desirable solution would eliminate the confusion surrounding the various statutes and bring the domestic and foreign rules closer together.

In February of 1998, a draft law "On Arbitration in the Russian Federation," passed its first reading in the lower house of the Russian Parliament. The draft law applies to the formation and activities of all arbitration tribunals located on the territory of the Russian Federation, eliminating the need to determine what rules apply on the basis of the court that the dispute would otherwise be heard in, and the confusing effects of changes in court jurisdictions. In providing a single set of rules for the formation of a panel of arbitrators and of imperative and default rules for procedures, the new law would eliminate problems presented by differences between Appendix 3 and the Temporary Statute. By its terms, however, the draft law does not apply to "international commercial arbitration," which would continue to be governed by the 1993 Law "On International Commercial Arbitration." Thus, arbitration facilities which accept both domestic and international disputes would continue to need to be attentive to differences between the

two pieces of legislation, and the problem of identification of the "international" status of a dispute would remain.

2. Jurisdiction of Arbitration Tribunals

The general rule concerning the competence of arbitration tribunals is that civil law disputes that are otherwise within the jurisdiction of either the arbitrazh courts or the courts of general jurisdiction may be transferred to an arbitration tribunal by agreement of the parties. Disputes which do not qualify as "civil-law" disputes are not subject to resolution by arbitration. This would include administrative disputes (e.g. those concerning the actions of a state body), disputes concerning the establishment of a fact having legal significance, and any other dispute or matter which is not subject to resolution by the will of the parties and requires that a competent body apply a legal rule or standard. Within the category of civil-law disputes, the general exceptions to arbitrability are (1) those disputes that are assigned by legislation to the exclusive competence of a court or other body; and (2) those disputes concerning which legislation specifically prohibits arbitration.

With respect to international commercial disputes, the 1993 Law "On International Commercial Arbitration" defines the general limits of jurisdiction of arbitration bodies over such cases. That law defines the sphere of international arbitration as including two broad types of cases:

(1) cases concerning contractual or other civil-law disputes arising out of foreign trade, where the place of business of one of the parties is located outside the Russian Federation; and

(2) cases in which an enterprise with foreign investments, international organization, or international association operating on the territory of the Russian Federation has a dispute with another such entity or with a domestic entity, and also cases concerning disputes among the founders of such enterprises, organizations or associations.

Further definition of the jurisdiction of individual arbitration tribunals is dependent upon the founding documents, charter or statute, and rules of each particular tribunal. Presentation of the specific rules of all of the arbitration tribunals which are authorized to resolve international disputes is beyond the scope of this Handbook.

By far the most commonly used arbitration tribunal for international commercial disputes is the International Commercial Arbitration Court under the Chamber of Commerce and Industry of the Russian Federation (the "ICAC"). The ICAC's Statute and rules were based on the UNCITRAL model rules and are consistent with those rules and with practices of international commercial arbitration tribunals in other countries. In defining its own jurisdiction, the ICAC's Statute repeats the two elements of the 1993 Law's definition of the sphere of international commercial arbitration which are given above. The ICAC's Rules,[6] in discussing its jurisdiction, expand upon this definition by

listing the following examples of civil law relationships which may give rise to disputes subject to ICAC arbitration:

- ➢ the purchase and sale (delivery) of goods;
- ➢ the performance of works or rendering of services;
- ➢ the exchange of goods and/or services;
- ➢ the carriage of goods and passengers;
- ➢ commercial representation and intermediary services;
- ➢ rental (lease);
- ➢ scientific and technical exchanges and the exchange of other results of creative activities;
- ➢ construction of industrial and other objects;
- ➢ licensing operations;
- ➢ credit and settlement operations;
- ➢ insurance;
- ➢ joint entrepreneurship;
- ➢ other forms of industrial and entrepreneurial cooperation.

The jurisdiction of the ICAC concerns all civil law relationships arising out of these activities and is not limited to disputes related to the contracts which establish them. Thus, the ICAC could have jurisdiction over a case concerning compensation for harm caused (tort) between parties subject to its jurisdiction, even if the events involved were not envisioned by a contract between the parties. For the ICAC to have such jurisdiction, however, the arbitration agreement between the parties would have to be sufficiently broad that it would cover all disputes between the parties, or the parties would need to agree to arbitrate the specific dispute before the ICAC.

3. Requirement of Agreement

***The submission of a dispute to an arbitration tribun*al always requires an agreement between the parties, and the relevant agreement must be in writing.** The agreement may cover a specific dispute, disputes concerning a specified subject matter, or all disputes between the parties which are subject to arbitration. Multi-party agreements concerning arbitration may be concluded. Whatever the scope of the agreement, however, it is important that it be clear. Russian courts have reversed/refused to execute arbitration awards where the language of the agreement could be construed not to require arbitration.

An agreement on arbitration may be in a contract or written separately. Arbitration provisions of contracts retain force regardless of the validity of the contract. Where the matter is governed by the Law "On International Commercial Arbitration," an agreement to arbitrate may also be concluded by means of the exchange of a filing of claim in which the petitioner states the existence of an agreement and a substantive answer to the claim

[6] A full English translation of the ICAC's Rules of Procedure can be found in 22 Review of Central and East European Law 33-53 (1996) (translation by William B. Simons and Curtis Vaughn-Kirov).

in which the existence of the agreement is not disputed. For matters governed by the 1993 Law, an agreement to arbitrate may also be concluded by reference in a contract to another document in which the arbitration agreement is stated. These means of concluding an agreement to arbitrate are not recognized by the Temporary Statute and so may not be applied in "domestic" cases.

The rules concerning recognition of an arbitration agreement vary between the arbitrazh courts and the courts of general jurisdiction. For those cases that would otherwise be subject to consideration by the arbitrazh courts (most commercial cases), a party wishing to enforce an arbitration agreement must petition the court concerning the matter by the time of its first submission on the substance of the case.[7] The existence of a valid arbitration agreement will not serve as grounds for reversal of an arbitrazh court decision unless the objection to the court's jurisdiction was made in the proper time. According to Articles 129 and 219 of the Civil Procedure Code, however, the courts of general jurisdiction may not consider a case where a valid arbitration agreement between the parties exists. This general statement deprives the court of jurisdiction, and will allow the reversal of an issued decision on the grounds that the dispute should have been resolved by the corresponding arbitration tribunal.

4. Procedure for Submission of a Dispute

The form and procedure for submission of a dispute to an arbitration tribunal is defined by the rules of the particular tribunal. A review of the rules of submission for all of the arbitration tribunals to which a commercial dispute could be submitted is beyond the scope of this Handbook. Referring to the ICAC, the most common forum for international commercial arbitration in the Russian Federation, the rules of procedure are quite consistent with international practice and were based on the UNCITRAL model rules. The newly formed St. Petersburg International Commercial Arbitration Court has adopted the UNCITRAL model rules as its rules for procedure. Tribunals that accept both domestic and international disputes, and particularly those designed for the resolution of only particular types of disputes, have differing procedural rules, depending upon their purposes and the legislative acts that served as the model for their drafters.

5. Execution and Appeals of Arbitral Awards

In general, arbitral awards are to be executed voluntarily by the parties within the time period specified in the award. ***If an award is not honored by the party required to do so, mandatory execution of the award may be sought through an execution order issued by a Russian court or arbitrazh court.*** This execution order is then submitted to the court enforcer (the bailiff service) for enforcement of the award through the same procedures used for any court judgment. Periods of limitation for the presentation of an execution order for enforcement vary depending upon whether the order concerns an international or a domestic arbitral award. These issues are discussed in detail in Chapter 5.

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[7] This rule is found in Article 87 of the Arbitrazh Procedure Code. See also Chapter 3 of this Handbook concerning procedures in the arbitrazh courts in the first instance.

Arbitral awards are final, and are not subject to appeal on grounds of error in the evaluation of the facts or the application of the law. In general, mandatory enforcement of an arbitral award may be refused by the court from which it is requested if:

(1) there was not a valid arbitration agreement or a party was without capacity;
(2) if the party objecting could not participate due to improper notice of the proceedings;
(3) if the composition or procedures of the arbitration tribunal were not those agreed by the parties;
(4) if the dispute was not subject to arbitration under Russian law; or
(5) if the award violates the public policy of the Russian Federation.

Although similar, the formulation of the rules applying to refusal of enforcement of arbitral awards varies somewhat between those issued in domestic and in international matters, and between international matters resolved by a Russian arbitration tribunal and those resolved by a tribunal outside Russia. They are discussed in more detail in Chapter 5.

E. Submission of a Complaint to the Procuracy or to an Executive Body

1. Complaint to the Procurator

Chapter 1's discussion of the Procuracy and of executive bodies responsible for enforcement of particular laws noted that the procuracy may be a source of legal assistance with some disputes, as may some executive bodies for disputes within their areas of responsibility.

The procuracy has no capacity to intervene in or resolve disputes between private parties. However, its supervision powers over state bodies of various kinds make it an alternative avenue for complaints concerning improper or illegal actions of those bodies. The submission of a protest by the procurator requires the body involved to make a specific answer to the procurator within a limited period, either stating the measures it has taken to rectify the problem or stating its reasons for disagreement with the procurator's conclusion about improper activities. The procurator also has the authority to conduct a "verification" of the observance of legality by bodies falling within its supervision powers, including demand for documents or explanations or physical inspection of its premises. This authority may give a procurator convinced by the complaint received the ability to obtain evidence of a violation that would be difficult for a party to obtain on its own

The procurator's authorities go to the observance of the laws by the bodies under its supervision. In practice, this means that the procurator will be more interested in complaints concerning clear and convincing violations of a plain rule than in complaints

which rest on a dispute with the relevant body about the proper interpretation of particular part of a law. The procurator has no authority to interpret the laws, and disputes concerning proper application and interpretation of the laws where no clear rule has been established belong in a court rather than the procurator's office.

There is no specified form for a complaint to the procurator's office. For reasons of efficiency and clarity, a written statement containing copies of necessary documents and evidence of the improper acts is desirable.

2. Complaint to Other State Bodies

Some state bodies enforcing the law in a particular sphere are also alternative sources for assistance in the resolution of disputes. One example of such a body is the Ministry for Antimonopoly Policy, which takes complaints from citizens and legal entities in the areas of competition law (abuse of a dominant position, restrictive agreements, and so forth), advertising law (false claims, commercial defamation) and consumer protection law. A number of types of common commercial disputes may fall within its jurisdiction. Another example is the Federal Commission on the Securities Market, which may address some complaints concerning shareholders rights or corporate governance. Other bodies will also take complaints from citizens or entities for investigation, where the complaint concerns their areas of responsibility.

The procedure for submission of a complaint to various state bodies is defined by each of the relevant bodies, but it is generally quite informal, and sometimes an investigation can be initiated on the basis of orally provided information. Because many of the bodies involved have a positive duty to enforce the law, rather than a function as a "neutral" body for dispute resolution, they often must respond to indications that the relevant law is being violated. Like the procuracy, they may have investigative authority in their areas of expertise that substantially exceeds that of a private party, which may be of assistance in proving a claim when necessary evidence is not in the control of the complaining entity. In some cases, the enforcement body has the authority to impose fines and to issue mandatory order concerning the behavior of a recipient (cease and desist orders, restoration of the status quo ante) or to suspend or withdraw licenses or permissions to carry out particular activies. Such bodies do not, however, have the power to award damages directly to a private party injured by the illegal behavior. In such cases, the private party may need to file suit in the relevant court to receive compensation. The pursuit of the complaint before the executive body may be of assistance as an evidentiary matter or to gain the support of the body (or its intervention as a third party, if it has the right) in the case.

JURISDICTION OF THE COURTS - EXAMPLES

1. A registered individual entrepreneur wishes to file suit against a state body supervising traffic on the automobile roads to contest penalties imposed on him for violation of traffic rules while he was delivering products to a customer with his truck.

The case is not subject to the jurisdiction of the arbitrazh courts, since the fine was imposed on the individual entrepreneur for a violation in personal conduct, not in relation to business activity. The parties meet the general requirement for status, but not the requirement for subject matter. The case is within the jurisdiction of the general courts.

2. An individual entrepreneur wishes to file suit against a state body supervising freight transport to contest its confiscation of cargo from his trucks due to irregularities in the shipping documents.

The case is subject to the jurisdiction of the arbitrazh court, as it meets both party status and subject matter requirements.

3. A legal entity wishes to file suit against a state licensing body to contest its decision refusing to issue a license, on the grounds that the licensing body incorrectly applied the law.

The case is subject to the jurisdiction of the arbitrazh courts, as it meets both party and subject matters requirements.

4. A legal entity wishes to file suit requesting that a licensing law be held to be generally without effect. The licensing body refused to issue the license on the basis of a general law issued by the relevant subject of the Federation which does not permit the issuance of such licenses to legal entities organized as partnerships. The legal entity is a partnership, and believes that the licensing body correctly interpreted and applied the general law as written. However, the legal entity believes that the law is itself invalid, because it violates federal legislation on licensing. The legal entity wants a court to find the law itself void.

The case is not subject to the jurisdiction of the arbitrazh courts. Although the parties and the subject matter meet the general requirements, the plaintiff in this case is challenging the validity of a law that is generally applicable to all partnerships — that is, a normative legal act. The arbitrazh courts consider such cases only in relation to non-normative acts, or where the review of such acts is directly assigned to them by statute. Proper jurisdiction for the case depends upon the plaintiffs reasons for challenging the act. If the plaintiff believes that the law is not consistent with federal law, the case is subject to the jurisdiction of the general courts. If the plaintiff believes that it is unconstitutional on its face, the case is subject to the jurisdiction of the Constitutional Court.

Chapter 3. Commercial Disputes in the Arbitrazh Courts - Proceedings in the First Instance

This chapter of the Handbook discusses the procedural steps to be taken in filing a suit in an arbitrazh court in the Russian Federation or responding to a suit filed against you, the roles of different parties in the process of consideration of the case, the rules concerning the hearing on the case and other practical matters. Before proceeding to the specifics, however, a few general observations are in order.

First, at the time of this writing, a new Arbitrazh Procedure Code is moving through the legislative drafting and passage process. Although some portions of the draft APC would introduce completely new rules,[1] many of the changes made in the draft are not fundamental reversals of the rules and principles of the currently effective APC, but rather provide additional detail and development of the existing rules and procedures. The draft of the new APC is far from final in the version available, and for this reason the discussion of procedures in this and the following chapter is based on the provisions of the 1995 APC currently in effect. However, readers should be aware of the possibility for changes in the near future.

Second, in interpreting and applying the procedural legislation, the arbitrazh courts, and particularly the Higher Arbitrazh Court, must be concerned not only with the application of the law as written and with the internal consistency of its interpretation, but also with the international obligations of the Russian Federation. In instances in which international treaties or agreements of the Russian Federation provide rules other than those contained in the legislation discussed here, the rules of the international agreement will apply.

Third, in addition to those international treaties which supply specific rules to be applied under specific circumstances, Russia is also bound by its general obligations as a member of the Council of Europe. As a member, Russia must provide effective judicial protection of a variety of rights, including a number of rights related to entrepreneurial activity, and must conform its legislation and practice to European standards for judicial activity and judicial protection. The Higher Arbitrazh Court has emphasized the importance of this source of procedural standards, and the effort to ensure compliance with the decisions of the European Court and with European standards may have a significant impact on both the continued development of the draft APC and the interpretation and application of existing procedural rules.

[1] One example is provision in the draft for a court to impose measures of security for a claim prior to the acceptance of a filing of suit. This proposal is discussed further in the section on security that appears below in this chapter.

A. Filing a Claim

1. Attempts to Settle the Claim Directly - Requirement for Preliminary Written Demand to the Respondent

Until recently, most claims could not be filed in the arbitrazh courts until the plaintiff had made an attempt to settle the matter directly with the respondent, by means of a formal, written demand, accompanied by documents supporting the demand. As a general rule, the respondent was given thirty days in which to respond to the demand, and in some cases several months or more.[2] The plaintiff could file suit in the arbitrazh court either upon receiving a full or partial refusal of the demand, or if no answer was received by the end of the legally required period, and evidence of the attempt to settle the matter directly was a required part of a proper filing of suit, without which the filing would be rejected by the court. The 1995 APC eliminated the general requirement that this procedure be observed for all disputes. It does, however, allow for the possibility of its continuation in cases where the procedure is required by federal law or by the terms of a contract, and in such cases the court will require that documents showing that the procedure has been followed be submitted as a part of the petition of suit. While it is not clear how many enterprises include such provisions in their contracts as a matter of course,[3] there are a number of areas in which the procedure continues to be required by virtue of the applicable law.

One broad area of application is disputes concerning the conclusion, amendment, or abrogation of contracts which fall within the definition of "public contracts" under the terms of Article 445 of the Civil Code of the Russian Federation. As contracts for the provision of utilities services, such as water, heat, electricity, and telephone services fall within this definition, the majority of commercial enterprises of any size will have some contractual relationships for which these legal requirements apply. Other areas in which such procedures are required by the terms of legislation include disputes concerning communications and delivery contracts (e.g. postal package delivery)[4], disputes concerning rail transport, and others. It is important to note that in some instances the required demand must be sent to the respondent organization within a limited period of time after the claim has arisen, and if the demand is not sent within that time period the claimant may lose the right to make the demand and also the right to file suit at all. In such instances it may be dangerous for claimants to be over-accommodating in allowing informal attempts to resolve the dispute to continue too long. ***Even if discussion is***

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[2] Transport cases, for example, were subject to a three month response period on the preliminary demand. The plaintiff could file suit in less than three months only if the transport organization sent a specific rejection of the demand prior to that time.

[3] The inclusion of the preliminary claims procedure in contracts as a matter of general practice is recommended by some current Russian literature as a means to maintain an orderly process of identification and resolution of disputes with business partners. See, e.g., Anokhin, V.S., The Entrepreneur and the Arbitrazh Court [Predprinimatel i Arbitrazhnyi Sood] (Moscow: Liga Razum 1998) 49-55.

[4] See Article 38 of the Federal Law of the Russian Federation "On Communications," Sobranie Zakonodatel'stva RF, 1995, No. 8, Item 600.

continuing in an attempt to resolve the difference of opinion, it is important to remain aware of the restrictions in the governing legislation and to ensure that the required written demand is made in order to preserve the right to sue.

2. Form of Filing

A petition of suit is filed in writing, must be signed by the plaintiff(s) or the representative of the plaintiff(s), and must state a number of mandatory elements and include a number of mandatory appendices. Unlike the general courts, the arbitrazh courts do not "hold" a filing for a period in which the petitioner is permitted to cure any technical defects, counting the filing as made on the date of the original submission. ***Failure to include the required information or to attach the required appendices will result in the return of the filing by the court to the plaintiff as improper.*** The petitioner has the right to file the petition of suit again after correcting the omission(s) or errors. For purposes of periods of limitation, however, the suit will be considered to have been filed only on the date on which it was properly filed with all required appendices.

Because technical errors or omissions in the filing may have significant effects, it is important to be certain the required elements are present, particularly when time periods are an issue. If a deadline is missed, the arbitrazh court does have the power to reestablish or extend the limitation period according to the general principles for extending time limitations. It will, however, require that the period have been missed for a good reason, such as that the information required to complete the filing could not have been obtained by the petitioner before the deadline. A plaintiff to whom a petition of suit has been returned on the grounds of omission of required information or documents also has the right to appeal this decision. If the appeals instance finds that the filing should have been accepted, the suit will be considered to have been properly filed on the date of the original submission. The checklist provides a list of the information that must appear in the petition, and the documents that must be appended to it.

The arbitrazh courts treat the filing requirements extremely seriously and are quite formal in evaluating whether the requirements have been met. As many as 20-30% of all filings submitted are returned due to their failure to contain all required information and attachments or to a failure to present the required information and attachments in the required forms. Requirements as to form include the linguistic formulation of the nature of the claim and the type of relief requested. For example, a claim concerning an illegal act by a state body should state a request that the illegal act be "recognized as void" rather than that it be "repealed." Statements of claim of this type that contain the wrong language in describing the legal nature of the case (and the basis for arbitrazh court jurisdiction) and in stating the type of relief requested may be returned to the submitting party, on the grounds that the arbitrazh courts do not have the authority to "repeal" legal acts, only to hold them void.

Parties should be aware that the need for inclusion of all required information in an exact manner, precise expression of the claim and its legal bases, and the collection and authentication/notarization of quite a number of documents will significantly increase the

time required to prepare a filing, especially in comparison to systems (such as those of most states and the federal courts in the United States) in which only a relatively general statement of the claim is required in order to file. Preparation must usually be begun with some lead time prior to any filing deadline, or there will be a substantial risk that the filing won't be completed by the required date or may be returned without sufficient time to correct errors or omissions. This is particular true where foreign documents must be translated and must be authenticated or "legalized" through a consular office or other means. The formality of the filing requirements and the time required to meet them also has an effect on the costs associated with preparing a filing.

In preparing a claim for filing, it is appropriate to keep in mind that the arbitrazh courts have a broad jurisdiction. Although some courts may divide cases among judges along broad categorizations, the judges have a general competence and cannot be specialists in the details of legal regulation in every area of law that may be the subject of a petition of suit, nor in the practices and economic issues involved in every type of entrepreneurial activity. In expressing the grounds for the claim, petitioners should not assume a detailed knowledge on the part of the judge, and should ensure that they provide all of the information and explanation needed to make the entire factual situation and all of the reasoning behind the legal arguments clear to the judge. Attachments for the filing should include copies of the laws and regulations upon which the claim is based, and others if they are relevant to the proper resolution of the claim. While this is particularly necessary in regard to provisions that may be difficult for the court to locate on its own (such as instructional letters or procedural rules issued by various state bodies), it is helpful to the court and prudent on the part of the petitioner to ensure that accurate copies of all of the relevant materials are immediately to hand at the time that the court reviews the petition.

CHECKLIST
Information that Must Appear in the Petition of Suit:

- ❑ the name of the arbitrazh court to which the petition of suit is being submitted;
- ❑ the names of the persons involved in the case and their mailing addresses;
- ❑ the value of the suit, if the suit is, by its nature, subject to valuation;
- ❑ a description of the circumstances on which the claims made in the suit are based;
- ❑ a description of the evidence confirming the bases for the claims;
- ❑ a statement of the amount subject to recovery or which is being contested;
- ❑ a statement of the demands of the plaintiff, including reference to the laws or regulatory acts which are applicable. If several respondents are named, the demands with respect to each of them must be stated;
- ❑ information concerning compliance with requirements for pretrial attempts to settle the dispute, if such requirements are imposed by law or by the relevant contract;
- ❑ a list of the documents appended to the petition.

Documents that Must be Appended to a Petition of Suit:

- ❑ evidence of the payment of the required filing fee (a receipt);
- ❑ evidence of the sending of copies of the petition of suit to the respondent(s), along with copies of documents appended to it which they do not have (a receipt for registered delivery or a document indicating hand delivery);
- ❑ evidence of compliance with the pretrial procedures for resolution, if such are required by law or by contract (copies of the demand and attachments sent, a receipt for delivery, and a copy of the refusal of the demand, if one was received);
- ❑ evidence that an attempt was made to obtain payment by presenting the proper documents to the bank where the defendant maintains its accounts, if this procedure is envisioned by the applicable law;
- ❑ evidence of the circumstances and bases for the claim that are described in the petition (contracts, correspondence, etc.);
- ❑ power of attorney of the representative of the plaintiff, if the petition is signed by the representative rather than the plaintiff.

Other documents in addition to those specifically required by the procedural code (those included in the checklist) may also be needed, and can be appended to the filing. For example, in order to confirm that a petitioner is a duly registered legal entity, and to determine who has the power to represent the entity in court or authorize another person as representative, excerpts from the register of legal entities and copies of the founding documents, both duly authenticated, may be required. Other documents may be required in relation to particular claims or types of evidence.

An example of a petition of suit appears as Appendix A to the Handbook.

3. Combination of Several Claims in a Single Filing

Several related claims against the same respondent(s) may be joined into a single petition of suit. If unrelated claims are joined in a petition, however, this may serve as grounds for the return of the petition to the plaintiff for correction, as described above. The court also has the right on its own initiative to join a number of related claims into a single suit or to separate claims that are not sufficiently related into several independent proceedings.

4. Process for Review and Acceptance of a Petition

When a petition has been submitted, it is reviewed by a judge, who decides whether the petition is to be accepted for proceedings. If the petition complies with the requirements stated in the APC, the judge has no discretion, and must accept it for proceedings. If the petition or its appendices are incomplete or unrelated claims are joined, the judge will return the petition to the plaintiff, as discussed above. The petition will also be returned if it has been filed in the incorrect court (with respect to jurisdiction and venue), if an unauthorized person has signed the petition, or if the plaintiff has requested to withdraw the petition. In all of these cases of return, the plaintiff may refile the petition after correcting the relevant problem. The judge may also refuse to accept the petition on the grounds that the dispute is not subject to the jurisdiction of the arbitrazh courts or that a suit on the same grounds between the same parties is currently in progress or has previously been resolved by a decision of a court or arbitration tribunal or by a confirmed settlement agreement. A determination on the refusal of a case must be issued no more than five days after its receipt and may be appealed. An example of a determination accepting a case for proceedings and appointing a date for its consideration in court appears as Appendix B to the Handbook.

Additions or amendments may be made to the claims of the suit after its acceptance by means of the submission of a motion to that effect. The motion must be in written form and have as attachments any documents necessary to support the addition or amendment to the claim. If the change in creases the value of the suit, an additional payment of the filing fee may be required. An example of a motion to amend the claims of a suit appears as Appendix C to the Handbook.

5. Where to File - Jurisdiction and Venue

a) At What Court Level to File - Jurisdiction Within the Arbitrazh Courts

Cases filed in the arbitrazh courts must be within the jurisdiction of the arbitrazh courts, as discussed in Chapter 2. The petition will be filed in the first instance arbitrazh court for the appropriate subject of the Russian Federation — the arbitrazh court of the

republic, oblast (region), krai (territory), and so forth. The circuit arbitrazh courts have no first instance jurisdiction and cannot accept initial petitions of suit. The Higher Arbitrazh Court does have a limited first instance jurisdiction, but most of the disputes that fall within it are those occurring between high level bodies of state power. There is one category of dispute within the first instance jurisdiction of the Higher Arbitrazh Court that could possibly involve a private commercial party — disputes concerning the recognition of non-normative acts of the President of the Russian Federation, the State Duma or Council of the Federation, or the Government of the Russian Federation as void, on the grounds that they are inconsistent with higher law. Most of the acts issued by these bodies that affect any particular business are of a normative (rule creating) nature, and are therefore not subject to the jurisdiction of the arbitrazh courts except by direct legislative assignment. However, acts of the listed bodies are sometimes issued solely in relation to particular enterprises or business issues, such as and act concerning the privatization of a particular enterprise or the extension of credit to a particular company. A petition concerning recognition of such an act as void would have to be filed with the Higher Arbitrazh Court in the first instance.

b) In which Location to File - General Rules of Venue

As a general rule, petitions of suit should be filed in the arbitrazh court in the subject of the Federation where the respondent is located. If the respondent is a legal entity, the place of location is either the place of its state registration (the default rule) or another location specified in the founding documents for the legal entity.[5]

If the suit concerns the actions of a separate subdivision of a legal entity, the proper venue is the location of the separate subdivision. In this usage, a separate subdivision does not refer to functional, internal departments of a larger legal entity (e.g. an accounting department, or a “production subdivision” within a large factory), but rather to a subdivision that conducts separate economic and financial activities, often having its own identified property and accounts and being physically separate from the other activities of the legal entity. Examples of this type of subdivision are often factories or other facilities located some distance from the head offices or other operations of the company (e.g. an Ekaterinburg factory which is a subdivision of a legal entity whose main offices and operations are located in Moscow). Because the separate subdivision is not a legal entity in its own right, the place of its location is not determined by its place of registration or founding documents, but rather by its place of activity or physical location. The entity named in the suit, however, is the legal entity, since the separate subdivision has no legal personality. If it does have legal personality — i.e. if it is a subsidiary or an affiliated company that is legally organized as a separate entity — then it can sue and be sued in its own right and the rules for separate subdivisions do not apply.

[5] Article 54 of the Civil Code defines the place of location of a legal entity as the place of its state registration, but allows an entity to define another place of location in its founding documents if it so chooses.

c) Choice of Venue by the Petitioner or by Agreement

In a number of circumstances, the plaintiff may have a choice of several locations in which to file. If the suit concerns several respondents located in several subjects of the Russian Federation, the plaintiff may choose the location of any one of the respondents in which to file the suit against all. If the suit concerns a respondent whose place of location is unknown, the suit may be brought in the last known location of the respondent or in the location of the property of the respondent. If the suit concerns a respondent that is a citizen or organization of the Russian Federation who/which is located on the territory of another country, the plaintiff may file the suit at the location of the property of the respondent, or at the place of location of the plaintiff. Finally, if the suit derives from a contract in which a place of execution is stated, the plaintiff may choose to file suit at the location of execution of the contract, rather than in the location of the respondent. A different venue for consideration of suits may also be determined by contract between the parties.

d) Special Rules for Particular Cases

For some types of cases a specific venue other than that of the respondent has been established by law.[6] Cases concerning rights in immovables (buildings, land, improvements) must be filed in the arbitrazh court at the location of the property. Cases concerning contracts for transport must be filed at the location of the transportation organization. Cases concerning the validity of acts of state bodies of subjects of the Federation or bodies of local self-government must be filed in the arbitrazh court in the relevant subject of the Federation, regardless of where the body itself is located. Cases concerning the establishment of facts having legal significance may be filed at the place of the location of the petitioner, unless they concern immovables, in which case they must be filed in the location of the immovable property. Cases concerning bankruptcy are to be heard in the location of the debtor (which is consistent with the general rule, if the debtor is equated with the respondent). Certain cases concerning damages arising as a result of procedural actions in a court case must be heard by the arbitrazh court which considered the original case.[7]

e) Result of Filing in Improper Venue; Changes of Circumstance

The result of failure to file in the proper venue, if discovered at the time of filing, is the return of the petition to the plaintiff. If the improper venue becomes clear at a later stage in the consideration of the case, the arbitrazh court is obligated to transfer the case for the consideration of the proper court.[8] If, however, the case was accepted in accord with the rules for venue at the time the petition was filed, and a change in circumstances

[6] See Articles 27 and 29 of the APC.

[7] This category includes damages resulting from the imposition of arrest on property or funds as security for a suit, and damages resulting from the failure of a respondent or other persons to abide by prohibitions on their actions imposed by an arbitrazh court as a measure of security for the suit. See Articles 76 and 80 of the APC, and the discussion of measures of security for the suit later in this Chapter.

[8] See Article 31 of the APC.

occurs during its consideration (e.g. a change in the legal location of the respondent) which would result in a differing venue, the arbitrazh court is obligated to continue the consideration of the case on its merits. An arbitrazh court may transfer a case outside the venue determined by the general rules if, as a result of the recusal[9] of one or more judges or due to other factors, it is not possible for the case to be considered in the court in which it was filed. In these instances, the case is to be transferred to another court of the same level for consideration. In instances in which an arbitrazh court transfers a case for the consideration of another court, the receiving court cannot refuse to accept the case.

f) Rules Concerning Foreign Parties

It should be noted that specific venue rules are not provided in the law for cases including foreign persons and entities. Some of the rules which determine a case is subject to the jurisdiction of the arbitrazh courts (discussed above in Section A.4 of Chapter 2) also effect venue for a specific case. For example, the rule that cases concerning contracts for transport are heard at the place of location of the transportation agency defines both jurisdiction within the Russian arbitrazh courts (depending upon whether the agency is located in the Russian Federation) and venue within the arbitrazh courts (at the place of the agency's location). The same applies to the rule requiring consideration of a case concerning immovable property at the place of location of the property.

6. Periods of Limitation

There is no period of limitation established by the APC for the filing of claims in the arbitrazh courts***. Periods of limitation concerning particular claims are established by the substantive law applicable to the claim, rather than by the courts' procedural rules, and they may vary widely for different types of claims.*** A general period of three years limitation on civil-law claims is established by Article 196 of the Civil Code of the Russian Federation, but both longer and shorter periods may be established by law, and the Civil Code itself contains a number of differing periods for particular types of claims.[10] Article 371 of the Customs Code, for example, establishes a ten day period for the appeal of actions of the customs authorities. A period of limitation is not required to be established, and there are some claims for which no period of limitation at all applies, including those of a depositor against a bank for the return of a deposit and tort claims for damage to the life or health of individuals.[11] The general rules for calculation of

[9] Judge are "recused" when they cannot hear a particular case because they have a reason for bias or interest in the outcome of the case or because they have been involved in the case previously or for other reasons defined in the procedural legislation. Section C.7. of this chapter discusses the legal grounds for recusal of judges.

[10] An example of special periods of limitation is Article 181 of the Civil Code of the Russian Federation, which establishes a ten year period for suits demanding that the court recognize as void a transaction that is by its nature void ab initio, and a one year period after the cessation of threat or other grounds for voidability or after the plaintiff knew or should have known of grounds for voidability for suits concerning recognition of a voidable transaction as void.

[11] See Article 208 of the Civil Code. An unlimited right to sue may also be established for other claims by law.

limitations periods and for their suspension and renewal are contained in Articles 199-207 of the Civil Code, and apply equally to the general period and to special periods established by law. A period of limitations that has expired can be renewed by the court, if it considers the reasons for missing the required deadline to be adequate to justify this.

The expiration of a period of limitation is an affirmative defense, which must be raised by the respondent in order to be applied. The court will not independently determine whether the limitations period has expired when deciding whether to accept a claim for proceedings, and it will not raise the issue on its own initiative during the consideration of the case. The respondent may raise the issue by reference to the period of limitations in its initial refusal of the demands of the plaintiff, in its written response to the petition, or in its oral presentation to the court during the hearing of the case. If the limitation period has, in fact, expired, this will serve as grounds for the court to issue a decision rejecting the plaintiff's claim. However, if the respondent does not raise the limitations period prior to the issuance of the final decision in the court of first instance, it may not be raised on appeal as grounds for reversal of the decision.

B. Responses to a Petition of Suit

1. Response Concerning the Substance of the Suit

A respondent has the right to make a written response to a claim filed against it, although is not required by law to do so. A written response must be signed by the respondent or respondent's representative, and must state:

- ❑ the name of the arbitrazh court to which the response is sent;
- ❑ the name of the plaintiff and the number of the case;
- ❑ reasons for the rejection of the demands and arguments of the plaintiff, containing reference to the laws or regulatory acts and the evidence supporting the response; and
- ❑ a list of the documents appended to the response, which should include those giving evidence of the circumstances relied on in the response, evidence that the response was sent to the other parties in the case, and a power of attorney for the representative, if a representative has signed the response.

The law does not specify a rigid period of time within which the response must be made, but rather states that it should be sent so as to be received prior to the day of consideration of the case in court, and copies sent to the other parties in the case together with copies of appended documents that they do not already have. An example of a response to a petition of suit appears as Appendix D to the Handbook.

Because the respondent is under no obligation to make a response, it is quite possible that the plaintiff will not learn of the arguments that the respondent wants to make until they are presented at the hearing of the case in court. The plaintiff may also make

additional arguments and present additional evidence during the court hearing that was not mentioned in its original petition. Unlike some other systems with which readers may be familiar, the rules for pre-trial proceedings are not designed to ensure that the parties state all of their claims and provide all of their evidence to one another prior to the hearing of the case, in an attempt to foster settlement. The requirement of a written demand, which was previously a part of the general procedures, was in part designed to serve this purpose, but no longer applies except as discussed above in Section A.1. There are no procedures by which an opposing party may be forced to reveal evidence or theories prior to their presentation in court. The absence of extensive pretrial procedures of this type may be of great value in limiting the amount of procedural delay prior to the first hearing of the case by the court. Such absence, however, may also have the effect of reducing incentives and capacity for settlement at the earliest stages of a dispute and increasing later delays as parties request time to respond to unexpected arguments and evidence.

2. Counter-Claims

A respondent may also respond to the filing by making a counter-claim against the plaintiff. The counter-claim may be filed immediately, in response to the initial filing, or at any time prior to the court's decision in the case. Procedure for filing a counter-claim is the same as that for filing any petition of suit. The counter-claim is to be accepted as such if it is: (1) of a type that is to be credited against the original claim, (2) if the satisfaction of the counter-claim will preclude the satisfaction of the original claim in whole or in part, or (3) if there is sufficient connection between them that joint consideration will lead to a swifter or more correct resolution of the matter. If not sufficiently connected to the original petition, the counter-claim may be heard separately by the arbitrazh court.

3. Challenges to the Jurisdiction of the Court

a) Existence of an Arbitration Agreement

According to Article 23 of the APC, a dispute that is subject to arbitrazh court jurisdiction under general principles may be transferred for the consideration of an arbitration tribunal if there is an agreement of the parties. The agreement may concern the specific dispute that has arisen, or may be a general agreement to transfer future disputes that arise between the parties (often an arbitration clause in a contract). Article 23 states that a case may be transferred pursuant to such an agreement at any time prior to the adoption of decisions by an arbitrazh court concerning the case. This does not, however, indicate that one party wishing to challenge jurisdiction on the grounds that an arbitration agreement exists may do so at any time prior to the issuance of a decision in the case.

If one of the parties has filed a case in the arbitrazh courts, and that case is otherwise subject to the court's jurisdiction, the court may leave the case without consideration and transfer it to an arbitration tribunal only under certain conditions.[12] The conditions required are:

1. the existence of a valid arbitration agreement (clause);

2. confirmation that the ability to make recourse to the arbitration tribunal has not been lost; and

3. the respondent objecting on this ground to the court's jurisdiction makes this objection ***no later*** than the first response concerning the substance of the case.

Thus, although Article 23 permits a transfer of a case to an arbitration tribunal by ***mutual agreement*** of the parties at any time prior to the first decision in the case, the much more common situation of objection by one party (the respondent) to a court process on the grounds of an existing arbitration agreement requires ***immediate objection***. If the objection is not made prior to or concurrent with the respondent's first substantive response to the suit, the right is lost. This rule is consistent with the rules applicable to cases concerning international arbitration under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[13] If a respondent makes the objection in a timely manner, but the court rejects the respondent's arguments concerning the arbitration tribunal and proceeds to hear the case, the court's decision on this issue may be appealed in the usual manner.

b) Outside Arbitrazh Court Jurisdiction

A challenge may also be made to the jurisdiction of the arbitrazh court on the grounds that the case is not within arbitrazh court jurisdiction. In theory, a determination will have been made by an arbitrazh court judge that the case does fall within the court's jurisdiction at the time that petition of suit was reviewed and accepted by the court. This initial determination, however, is by definition made on the basis of the information contained in the initial petition of the plaintiff, and the respondent may object to arbitrazh court jurisdiction in its response, providing new information, evidence and arguments on the issue. Should the court determine, contrary to the respondent's arguments, that it does have jurisdiction, this determination may be appealed in the general fashion (see below). Unlike the issue of an arbitration agreement, however, an objection to the fundamental jurisdiction of the arbitrazh court is not lost if not made immediately at the opening of the case, and can be raised on appeal even if not raised at earlier stages of the proceedings.

[12] See generally Article 87 of the APC.

[13] Russia is a party to the New York Convention, as the successor-state to the Soviet Union. The Convention and the rules concerning the enforcement of the awards of arbitration tribunals are discussed in Chapter 5

C. Participants and their Rights, Preliminary Proceedings

1. Persons Participating in the Case and their Rights

In defining the rights and obligations of those appearing before the court during the consideration of a case, the legislation applicable to the arbitrazh courts divides participants into two groups — "participants in the case" and other "participants in the proceedings." Participants in the case are the parties who are directly interested in its outcome and who have substantive positions on the legal and factual issues in the case. They include the parties (plaintiff(s) and respondent(s)), any third parties, and may also include the procurator and a federal, regional, or local body if the procurator or body files a petition for the protection of state or public interests. The rights of all of these "participants in the case" are defined generally by Article 33 of the APC and include the right:


to acquaint themselves with the materials of the case and to take notes on them and make photocopies of them;


to petition for the recusal of judges or other participants (experts, interpreters);

? to pose questions during the consideration of the case, and to make motions and petitions, and also to object to the motions and petitions of other participants;


to give explanations to the arbitrazh court, and to present opinions and arguments on all questions arising during the consideration of the case, and to object to the arguments of other participants; and


to appeal acts of the court and to exercise other procedural rights.

The plaintiff and respondent in the case, of course, have particular rights in the case which follow from their roles. The plaintiff has the right, prior to the issuance of a decision, to withdraw the suit, or to make changes in the subject of the suit or change the demands made of the respondent. The respondent has the right to admit the plaintiffs claims, in part or in full. The direct parties to the suit have the right to conclude a settlement agreement at any stage of the proceedings.[14] The arbitrazh court, however, may not accept a withdrawal of the suit, change in the bases or demands of the suit, admission of claims or a settlement agreement if the action violates a law or regulatory act or infringes upon the rights and legal interests of other persons.

Third parties may be participants in a case if they have an independent claim directly concerning the subject of the dispute, or if the outcome of consideration of the dispute affects their rights or obligations in relation to one of the parties. Where a third party has an independent claim, the third party enters the case through the filing of a petition, which must correspond to the general requirements for any petition of suit. A petition concerning entry into a case that has already begun may be rejected or returned to the third party on the same grounds that an original petition of suit may be return to the

[14] Article 121 of the APC. See the section on settlement agreements later in this Chapter.

plaintiff, except that such third parties are not required to abide by the rules concerning direct attempts to settle certain kinds of disputes. A third party with an independent claim has the general rights of a participant in the case, and has all of the rights of a plaintiff concerning its own claim (e.g. amendment, withdrawal, and settlement).

A third party that does not have an independent claim, but whose rights and obligations will be affected by the outcome of the case, may enter the case on the side of the plaintiff or of the respondent at any time prior to the issuance of a decision in the case. Third parties of this kind may also be summoned to participate in the case on the basis of a motion of one of the parties or on the initiative of the court itself. Such third parties may be related to a participant in the suit (e.g. the founder of a legal person), or may be unrelated parties whose own rights and liabilities are affected by the outcome (e.g. an insurance company or other party that may be liable to compensate the respondent if it must pay the plaintiff). It is quite important to note, however, that while a third party may participate in a case due to its possible liability to the respondent in the event of a judgment against the respondent, the arbitrazh court does not have the right to combine the claim of the respondent against the third party for compensation with the original claim against the respondent and consider them together. If the respondent wishes to receive compensation from the third party for a judgment paid to the plaintiff, a separate claim must be filed in the arbitrazh court on this subject. Third parties without an independent claim have the general procedural rights of a participant in the case, except those which concern changes in the sum demanded or the legal basis of the underlying suit. A third party also lacks the right to compel execution of the judgment on the original suit.

2. Additions and Changes of Parties to a Case

Changes and additions to the parties in the case may be made by the court in several instances. Additional respondents may be added by the arbitrazh court, at the request of or with the consent of the plaintiff, at any time prior to the issuance of a decision on the case. Where it is established that the suit was filed by an improper party (not possessing the right of claim in the case), or addressed to an improper respondent (e.g. to a subdivision having no legal personality), the court may, with the consent of the plaintiff, permit the replacement of the plaintiff or respondent with the proper party. If the plaintiff does not agree to replacement by the proper plaintiff, that party may enter the case with the status of a third party with independent claims, and the court must inform that party of this possibility. If the plaintiff does not consent to the replacement of a respondent with another party, the court may summon the proper respondent as an additional respondent. Such addition of a respondent, however, also requires the consent of the plaintiff. The law provides that the consideration of the case must be begun again from the very beginning after the replacement of an improper party with the proper party.[15] This requirement is not stated in the law for cases in which an additional respondent is added, so long as the original respondent remains in the case and was a proper party.

[15] Article 36 of the APC, part 4.

3. Participation of the Procurator and of State Bodies

The procurator and also federal, regional and local bodies have rights both to file suit in the arbitrazh courts independently, and to participate in an already existing suit for the purpose of protecting state or public interests. Current legislation on the participation of these bodies, however, does not clearly distinguish the two forms of participation and the rights of the relevant bodies in each case. One commentary to the APC, published shortly after its passage, suggested that both an independent filing of suit and participation in an existing case would require a specific basis in law, such as a provision that the relevant body has the right to file suits in arbitrazh courts concerning particular types of legal violations, or a provision giving the body a general right to participate in cases concerning its area of responsibility.[16] On the other hand, a recent ruling of the Higher Arbitrazh Court held that the list of grounds on which the procurator may file suit to protect state or social interests that is contained in the law is not exhaustive, and the procurator may appear also in other types of cases to represent the interests of the state.

According to the APC, the procurator and state bodies, when participating in a case, have all of the rights and obligations of a plaintiff, except the right to conclude a settlement agreement. A withdrawal of the suit or claim of the procurator or state body, however, does not deprive an original plaintiff in the case or a plaintiff in whose interests the case was filed by the procurator or state body, of the right to demand that the case be considered on its merits. If the procurator or state body has filed suit on behalf of a particular plaintiff, however, and that plaintiff withdraws the claim, the case is to be left without consideration. Although previous legislation provided state bodies with the ability to participate in a case by means of the submission to the court of a conclusion on the case, currently effective legislation no longer provides for this general right.

4. Witnesses, Experts and Interpreters

Witnesses, experts and interpreters are not considered persons participating in the case, but rather other "participants in the arbitrazh process." Their rights and duties are defined separately in the articles of the APC devoted to each of these categories of participants. Witnesses are obligated to appear when called, to give true testimony, and to answer the questions asked by the judge(s) and persons participating in the case.

Experts in a case before an arbitrazh court are appointed to give an opinion in the case by the court, at its own initiative or at the request of participants. The participants may propose questions that are to be asked of the expert, but it is the court's responsibility to determine the final formulation of the questions on which the expert will give an opinion or conclusion. If the court rejects the proposals of the participants in the case, it must set forth the reasons for doing so in its determination on the appointment of the expert. Experts appearing in the case are obligated to appear when called and to

[16] For example, Article 12 of the Law of the Russian Federation "On Competition and the Limitation of Monopolistic Activity on Goods Markets" gives the antimonopoly body the right to participate in cases concerning the violation of antimonopoly legislation.

present their conclusions, but may refuse to give conclusions if they have not been provided with adequate information or the conclusion requested is beyond their expertise. An expert has the right to acquaint himself with the materials of the case, and to participate in the sessions of he court, ask questions and request additional materials if these things are necessary for the issuance of a conclusion.

Interpreters are required for the conduct of cases in arbitrazh courts to assist those who do not have a command of the Russian language (see below regarding language issues). The interpreter is appointed by the court, and may be chosen from among persons proposed by the participants. A participant in the case may not, however, serve as an interpreter. An interpreter is required to appear when called, and to completely, correctly, and timely interpret/translate. The interpreter may ask those present questions during the proceedings, if necessary for an accurate translation.

Both interpreters and experts are subject to recusal on the grounds of relationship to participants or their representatives, direct or indirect interest in the case, or other grounds casting doubt on their objectivity. An expert may also be recused on the grounds of current or prior subordinate relationship to a participant in the case or their representative, or the production by the expert of materials or opinions which served as the basis for the suit or which are being used in the consideration of the case. Unlike a judge, however, prior participation in the case is not grounds for recusal of an expert or interpreter. Experts and interpreters are expected to recuse themselves if grounds exist, but participants may also petition for their recusal. Witnesses are not subject to recusal, and there are no rules in the general procedural law applicable to the arbitrazh courts which disqualify witnesses under certain circumstances (e.g. a legal representative asked to testify to facts known due to service in that capacity), although the rules of other legislation protecting certain knowledge may be applied to limit witness testimony or appearance in those cases.

Witnesses, experts and interpreters are subject to fines and, in some circumstances, criminal penalties for the knowing presentation of false information, conclusions or translations.[17] Each of these participants is warned concerning the possibility of criminal liability when appointed and/or before giving testimony. With respect to witnesses, there are no provisions for the submission of written statements of witnesses who cannot be present in a court session.

[17] Articles 307, 308 and 309 of the Criminal Code of the Russian Federation apply to these issues. Article 307 concerns the giving of a knowingly false expert conclusion, testimony or incorrect translation and provides for penalties ranging from a fine of from 100 to 200 times the minimum monthly wage to arrest for up to 3 months if committed in a case not concerning a grave crime. Article 308 concerns refusal of a witness or victim to provide evidence, and envisions penalties ranging from a fine of 50 to 100 times the minimum wage to arrest for a period of up to three months. Although the language of Article 308 does not specify that it is to apply only to criminal cases, the reference to victims suggests that this may be the intent. Article 309 concerns the use of payment or threat to induce a witness, interpreter or expert to give false testimony, conclusions or translations, with penalties ranging from a fine of 100 to 200 times the minimum wage to arrest of up to three months where payment is involved, and from a fine of 200 to 500 times the minimum wage to imprisonment of up to seven years where varying degrees of force and organization are involved.

5. Representatives

Organizations or other legal entities participating in a case before an arbitrazh court may be represented in the court by their heads or by other persons authorized by the founding documents of the organization to represent it. In appearing in the court, these persons must present to the court documents confirming their position in the organization and their authority to represent it. Both organizations and individuals may also choose to have a representative (not part of the organization's staff or not the individual himself) conduct their case in the court. A person who is considered the legal representative of another individual — parents, guardians of persons without legal capacity — may represent that person or may choose to appoint another representative. The presence of a representative does not deprive an individual of the right to take part in the case.

A representative may be any person who has been given the authority to conduct the case, and who has a properly formalized proof of that authority. Exceptions to this rule are judges, investigators, procurators and those who work for the court, who may only appear as representatives of the corresponding court or procuracy or as legal representatives (such as a parent for a child). It is important to note that a representative may only be a physical person. A legal entity may not be empowered as a representative, and an authorization that purports to give a firm (such as a law firm) or other legal entity the powers of a representative has been rejected by some courts. With respect to a legal firm, the authorization may be given to one or more of the specific attorneys, with specific authorization for those representatives to authorize another member of the firm, if that is desired.

The authority of a representative must be formalized by a written authorization, verified in accordance with legal requirements. For an authorization to represent an organization, the written authorization requires the signature of the head of the organization or another person authorized by the founding documents of the organization, and must have the seal of the organization. For representation of an individual, the authorization must be certified by a notary or by another authorized official. There is no legally established form for the authorization given to an advocate (lawyer), but these are usually simple written statements authorizing the relevant person to conduct the case.

A general authorization to conduct the case gives the representative the right to take many, although not all, of the procedural actions which the represented party could take themselves. Without a proper authorization, representatives will not be permitted to participate in the proceedings at all, nor to acquaint themselves with the materials of the case. Rejection of authorizations for representatives due to inappropriate signatures or other defects in form are reported to be relatively common, and it is advisable to take some care that the formalities are observed and that the representative is provided with evidence of the authority of the signatory. This evidence (such as an excerpt from the company charter or other statement of authority) may itself need to be authenticated by a notary or other authorized official.

There are a number of key procedural actions which may be taken by a representative only if the authorization given specifically expresses the intent to allow that action. Without the proper written authorization to take these specific actions, the representative can conduct the other aspects of the client's case, but will have to obtain the client's signature, presence, or participation (or an amended power of attorney) to complete each of the actions.[18]

If you want to authorize your representative to:

- sign a petition of suit on your behalf;
- transfer the dispute to an arbitration tribunal;
- fully or partially withdraw the suit or admit any of the claims in a suit;
- change the subject or grounds for a suit;
- conclude a settlement agreement;
- appeal a court determination or decision;
- sign a petition for a supervisory protest;
- make a demand for mandatory enforcement of the decision;
- authorize another person to conduct the case on your behalf;
- receive property or money from the judgment for you;

you *must* specifically write the task into the authorization to represent you (power of attorney)

6. Language Issues and Interpretation

The language of all arbitrazh court proceedings in the Russian Federation is Russian. Persons participating in a case who do not have command of the Russian language have the right to use an interpreter to acquaint themselves with the materials of the case and to participate in the court's proceedings and the court session. An interpreter is provided by the arbitrazh court to such persons and is paid by the arbitrazh court for his/her services. The interpreter may be appointed from among persons proposed by the participants, but may not be a participant in the case. Violation of the rights of persons participating in the case to have interpretation is grounds for an unconditional reversal of decisions of arbitrazh courts of the first instance or decrees of the appellate instance.

[18] The rules concerning special authorization for procedural actions are one of the areas in which the procedural rules for the arbitrazh courts and for the courts of general jurisdiction diverge significantly. A representative in the court of general jurisdiction may perform many procedural actions on the basis of a general authorization which cannot be performed in the arbitrazh courts without specific authorization.

7. Challenge to the Composition of the Court (Recusal of Judges)

Cases in the arbitrazh courts are, as a rule, considered by a single judge in the first instance, with the exception of cases concerning validity of acts of state bodies and cases concerning insolvency, which must be heard collegially (by a panel or three or another odd number of judges). There are a number of grounds which may prevent a particular judge from participating in a given case:

Circumstances that Prevent an Arbitrazh Court Judge From Participating in a Case

- S/he is related to any of the persons participating in the case (including the primary parties and also other participants, such as the procurator and third parties) or to their representatives.
- S/he will or has previously participated in the same case as expert, witness, interpreter, procurator or representative.
- S/he participated in considering the case while serving on a court of another instance.
- S/he participated in the consideration of the case previously, and the case has now been returned to the court for reconsideration in accordance with the ruling of a higher court. (This does not apply to a case being reopened and reconsidered on the grounds of newly discovered circumstances.)
- S/he has a direct or indirect personal interest.
- There are other grounds cast doubt on the judge's impartiality.
- S/he and another judge on the panel are related.

Where any of these grounds exist, a judge is required by law to recuse himself/herself from consideration of the case. A participant in the case may also make a petition to have one or more of the judges assigned to consider the case recused on any of the grounds listed. Such a petition must contain the full justification for the request and must be submitted immediately, prior to the beginning of consideration of the case on its merits. After the case has begun to be considered, petitions for recusal (and also self-recusal) will be permitted only where the circumstances serving as the basis for the recusal became known after the consideration of the case commenced.

When a recusal petition is made, the arbitrazh court is required to hear the opinions of the petitioner and the other participants in the case, as well as of the judge whose recusal was requested. The decision on recusal will be made either by the chair of the arbitrazh court, the chair of the judicial collegium to which the judge belongs, or by the entire composition of the court, depending upon the stage of proceedings and number of judges challenged. A successful petition for recusal results in the consideration of the

case in the same arbitrazh court, but by a different judge or panel. If the recusal of a number of judges leaves the arbitrazh court unable to consider the case, the case must be transferred to an arbitrazh court of the same level for consideration. A sample of a petition for the recusal of a judge, as well as the determination issued in response to that petition, appear as Appendix E to the Handbook.

8. Measures for Securing the Suit

A number of measures for securing the suit — that is, for ensuring that funds or property are available to meet a possible judgment — are available in the arbitrazh courts, including:

- arrest of property or funds belonging to the respondent;
- prohibition on particular actions by the respondent (e.g. sale of property);
- prohibition on actions of other persons concerning the subject of the dispute;
- suspension of execution on an execution order or other document authorizing the direct receipt of the sum from the plaintiff (plaintiff's accounts); and/or
- suspension of the sale of property if the suit concerns a petition to release property from arrest.

The listed measures, or a combination of such measures if necessary, can be taken only upon a petition by a person participating in the case. (A sample of such a petition, requesting arrest of property, and of a determination issued on the petition, appear in Appendix F to the Handbook.) The list of measures is exhaustive, and the court may not impose other measures of its own devising. ***The arbitrazh court does not have authority to take measures to secure the suit on its own initiative.*** Once a petition has been made, the court is obligated to consider it no later than the following day after it is received, and to issue a determination on the matter. The determination of the court may be appealed, but the appeal does not suspend execution of the measures imposed by the court in its determination. ***The execution of the measures imposed by the court is not immediate or automatic, but rather takes place on the basis of an execution order issued by the court in the same procedure as that for execution orders concerning final decisions.***[19]

The respondent in a case has the right to petition for measures to be imposed to secure counter-claims. A respondent (either to the original claim or to the counter-claim) may also request that the court, having imposed measures to secure the suit, require the plaintiff to provide security that any damages to the respondent resulting from the measures of security will be compensated. Failure of the respondent or other persons to observe prohibitions imposed as measures of security may result in substantial fines,[20]

[19] See Chapter 5 for a discussion of execution proceedings.

[20] The fine may be up to 50 percent of the value of the suit. For suits not subject to valuation, the fine is less significant — up to 200 times the minimum monthly wage. It should be noted, however, that many of the types of suit not subject to valuation concern such matters as challenge to the validity of the act of a state body, where security for the suit is not at issue.

and the plaintiff has the right to seek damages caused by failure to abide by measures of security.[21]

The arbitrazh court is not obligated to impose any measure of security, and the party seeking these measures must provide evidence and argument to the court which confirm that in the absence of these measures, the execution of a decision may be hindered or become impossible. Participants arguing for such measures, however, must take into account the possibility that they will become liable for damages caused to the other party by the measures of security if the case is not decided in favor of those who sought the measures. A respondent (on the original claim or to a counter-claim) has a general right to seek from the plaintiff the reimbursement of damages caused by the imposition of security measures for any portion of the suit in which the plaintiff was not successful. This right applies also in cases when the proceedings in the case are terminated or the case is left without consideration.[22]

If the court chooses to impose security measures, the funds or property involved are not reserved by this action only for the satisfaction of the plaintiff's claims. For example, if a judgment in the plaintiff's favor is issued, that judgment might not be the first claim to be paid from the respondent's accounts in terms of legally determined creditor priority. If there are creditors with a higher priority and there are not sufficient funds, the judgment for the plaintiff might not be paid or might not be paid in full, even if arrest was imposed on funds in the respondent's account as a measure of security for the plaintiff's suit. During the consideration of the case, if there exist creditors whose claims have a legal priority higher than that of the plaintiff, and if there are no funds in the respondent's account other than those which have been arrested to secure the plaintiff's suit, the creditors may petition the arbitrazh court to permit the sum due to them to be deducted from the account. It should also be noted with respect to bank accounts that arrest may be imposed only on sums of money that are in the accounts at the time of imposition of the measures to secure the suit. The court may not impose arrest on the accounts themselves nor on funds which are received into the accounts in the future.

Measures of security may be changed through the same petition procedure as that for imposition of the measures. In a case concerning the exaction of money, a respondent may, rather than executing the measures established for securing the suit, choose to place the sum in dispute in the deposit account of the arbitrazh court.

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[21] Damages must be sought through the filing of another suit in the same arbitrazh court. Since the fact that the plaintiff was damaged by the failure may not be completely clear until the original case has been decided (since the plaintiff must win the case, at least in part, for it to need access to the security), such a suit could not be filed until after a decision has been entered in the original case. The plaintiff can, however, seek mandatory execution of the security determination through the issuance by the court of an execution order.

[22] In order for damages to be recovered, the respondent must file suit in the same arbitrazh court in which the original case was decided. This is an exception from the general rules on venue, since that court is not necessarily in the location of the respondent in the case concerning the damages (the original plaintiff).

9. Preparation of the Case

The transformation of the state arbitrazh system from an administrative dispute resolution system into a system of courts, and the general movement of the Russian legal system toward a greater use of adversarial models, have both involved reductions in the amount of investigative and preparatory work expected of judges in resolving economic disputes. Nonetheless, the arbitrazh court may still take an active role in the preparation of the case for consideration in court. The judge is responsible for taking a long list of actions (if necessary) prior to the hearing.

The list of actions to be taken by the court is not considered exhaustive, and other measures may also be taken if necessary. Each of the listed actions, and also any other actions taken by the judge in preparing for the hearing of the case, must be taken in accordance with the APC and other legal rules governing those actions. Some of the issues listed as within the judge's responsibility in preparing the case are not matters that the court can resolve on its own initiative. This does not prevent the judge from addressing these matters, however, as the judge may propose to the participants in the case that the relevant action be taken, or offer them the opportunity to take it. For example, the court does not have the power to include third parties in the case in those instances when the third parties have independent claims. However, if the materials submitted in the case suggest that such third parties exist, and that their presence would contribute to the more efficient and correct resolution of the case, the judge may inform them of the proceedings and of their right to participate in them.

Preparation of the Case

Judge's "To Do" List

- ☑ consider questions of summoning additional/different respondents and/or third parties to participate in the case
- ☑ inform interested persons concerning the proceedings in the case
- ☑ propose that the participants in the case or other persons and entities that documents and information significant in the case be provided
- ☑ verify the relevance and admissibility of evidence already submitted
- ☑ summon witnesses
- ☑ consider the possibility of appointment of an expert
- ☑ send mandates to other arbitrazh courts (to undertake procedural actions relevant to the case)
- ☑ summon the persons participating in the case
- ☑ take measures toward the conciliation of the parties
- ☑ resolve questions of the necessity of summoning the heads of the organizations participating in the case to give explanations
- ☑ take measures for securing the suit

In addition to such formal actions as summoning third parties, the court may suggest that participants take other actions it considers necessary, such as clarification of unclear demands or objections, submission of additional information concerning the circumstances of the case or the governing law, provision of copies of additional documents necessary in the case, and others. These suggestions may be included in the determination accepting the suit for consideration and setting the date for its consideration in court. The sample of such a determination which appears in Appendix B is a form document, containing sections in which the judge accepting the case may fill in the necessary proposals in regard to documents and evidence.

The judge must also, according to Article 112, point 9 of the APC, facilitate the conciliation of the parties. Recent commentary on the application of this provision, however, suggests that the judge's responsibility is limited to explaining to the parties at the preparatory stage, and again when the court hearing of the case begins, their right to conclude a settlement agreement, and perhaps to inquiring at the preparatory stage concerning whether the dispute might be settled in this manner. The judge must issue a determination on the preparation of the case for hearing, which contains a statement of the actions that must be performed prior to the hearing and the time and place that the hearing will be conducted, and this determination must be sent to all of the persons participating in the case.

D. Consideration of the Case in the Court Hearing: Rules for Proceedings

1. General Principles

In understanding the procedural rules of the arbitrazh courts, there are some general principles which should be kept in mind — in particular, the requirements of directness and continuousness of the court examination of the case, and the prohibition on the replacement of a judge during the consideration of the case.[23] The first of these principles — directness — means that the court must base its decisions only on evidence which has been examined during the hearing of the case. The second — continuousness — means that the judge or panel of judges considering a particular case is required to continue through the consideration of that case until it is completed before the consideration of a different case is begun by that judge (panel). The third of these principles — prohibition on a change of judge during the consideration of the case — means that any event that requires that a new judge consider a case already in progress, even if that judge is a member of a panel of judges, will automatically require that the case be heard again from the very beginning.

These principles are intended to ensure that decisions are made on the basis of the best evidence available and that the evidence has been tested in court, and also that the

[23] These requirements appear in Articles 10 and 117 of the APC, but as discussed in the text have a significant effect on many of the procedural rules.

judge(s) making the decision in a case has personally heard and examined all of the witnesses and evidence and has not been distracted in this task by moving between many cases at once.[24] The specific procedural rules are intended to facilitate the observance of the general principles and to allow the direct, continuous consideration of cases by a single judge or panel. Thus, for example, the rules are designed to ensure that all of the relevant materials and evidence in the case have been gathered and are ready to be presented prior to the beginning of the hearing on the case.

2. General Conduct of the Hearing; Appearances of Participants

The hearing of a case is conducted by the single judge hearing the case, or if the case is being heard by a panel of judges, by the presiding judge among them. The judge (presiding judge) conducts the session and also keeps order and makes the required announcements for the record, sometimes performing duties in the court session that are performed in some other systems by bailiffs, court clerks or other functionaries. The judge opens the court session, announcing the case to be considered and verifying the presence of the participants in the case and others summoned to take part in the hearing. If any of the participants[25] fails to appear in the hearing, the judge must determine whether they were informed of the place and time of the hearing in the proper manner. In the absence of evidence that a participant in the case who is absent was informed in the proper manner, the judge must delay the consideration of the case until there is certainty that all participants have been duly notified of a hearing.[26]

If a properly notified plaintiff fails to appear in the hearing, and has not requested that the court consider the case in its absence, the court will issue a determination leaving the case without consideration on these grounds. If a properly notified respondent fails to appear, the court may consider the case in the absence of the respondent. Where a properly notified expert or witness(es) fails to appear, the court must hear the opinions of the participants in the case concerning the possibility for the court to hear the case in their absence, and then issue a decision on the matter.

If a response to the petition was not received, or other evidence requested by the court from one or more participants, the court may put off the consideration of the case if the absent information is necessary to the resolution of the matter. If it has become clear that additional information not yet requested will be required to resolve the case, the court may request it at this initial session, putting off the consideration of the case to a later

[24] There are additional factors that may have influenced the original adoption of these principles, such as the limited availability of qualified legal representatives and the practical difficulties and costs that would be involved if the parties and participants in a case were required to appear in court (often a significant distance from their places of work and residence) many times for the resolution of the case.

[25] The distinction made in the procedural rules between participants in the case and other participants in the proceedings becomes quite important in connection with the rules concerning participation in the hearing. See the discussion of those rules above.

[26] The consideration of a case in the absence of any of the participants who was not informed in the proper manner of the time and place of the hearing is an unconditional ground for the reversal of the decision of the arbitrazh court.

date. The requirement that the court put off the consideration of the case if the information is necessary, rather than hear those witnesses and examine that evidence which is available, is related to the general requirement of continuousness discussed above. Where the court finds that the case cannot be considered due to absence of a participant or of necessary evidence or information, it must issue a determination to that effect and name a new place and time for the consideration of the case. A sample of a determination, issued in connection with the need to call particular witnesses, appears as Appendix G to the Handbook.

In some instances, the discovery that the case cannot be considered without the person/information may be made after some of the opening proceedings in the case have occurred, or even after the evidence has begun to be examined. The court has the right in such cases to make a determination putting off the consideration of the case, but the consideration of the case must begin again at the beginning.

If it is found that the consideration of the case may go forward, the (presiding) judge announces the composition of the court and the identity of persons serving as experts, interpreters and other participants. The judge must explain to the participants their right to petition for recusals of those subject to recusal as well as their procedural rights and obligations during the hearing. He may at this time warn experts, witnesses and interpreters concerning their legal liability for providing knowingly false/incorrect information during the hearing.[27] The judge then determines the procedure for the conduct of the hearing, and ensures that witnesses leave the courtroom until the time for their testimony.

The law requires that all those present in the courtroom (including spectators and others not participating in the process) stand for the entry of the judge, and also while the decision of the court is being read out in the courtroom. During the hearing, those addressing the court must stand, including witnesses and experts while giving their testimony. The presiding judge may, however, make an exception to this rule. The persons present in the courtroom have the right to take notes, make a stenogram of the proceedings, and also to make sound recordings. Visual recordings, including still photos and videotaping, and also the direct sound or video translation of the proceedings to another location or over radio or television broadcast require the specific permission of the court. During the hearing of the case, participants in the case and in the proceedings have the general procedural rights discussed above. With respect to the motions and petitions made by participants in the case, the court is required to hear the opinions of all of the other participants in the case prior to issuing a determination on the issue.

[27] While the relevant provision of the APC requires that the judge give this warning, it does not require that it be done prior to the general taking of evidence in the case. In some cases the judge will prefer to warn the relevant participants about their liability at the time that they present information or begin to interpret.

3. Evidentiary Rules

a) Evidentiary Burdens

As a general rule, the participants in the case are each required to prove those facts and circumstances on which they rely as the basis for their claims, petitions, arguments and objections. Thus, the plaintiff must provide evidence of the bases for the claims in the petition, while the respondent may choose simply to deny the plaintiff's allegations and rely on insufficiency of the plaintiff's evidence, or to provide additional evidence refuting the plaintiff's claims. If the respondent wishes to rely on an affirmative defense, such as the effect of *force majeur*, the respondent will have the burden of producing evidence of this circumstance. Special rules apply to some types of cases, such as the rule that requires state bodies appearing as respondents in cases where a plaintiff is challenging the validity of an act to provide evidence of the circumstances that gave rise to the passage of the challenged act. Particular burdens may also be imposed by presumptions directly stated in the legislation applicable to the specific subject of the dispute, or by the settled interpretation of particular legal rules.[28]

b) Relevance and Admissibility

Evidence must be both relevant and admissible. Relevance is determined by the specific facts and arguments in the case, and is a matter for the judge to decide. If only part of a document is relevant, a notarized excerpt from it is to be presented to the court rather than the entire document. Admissibility of evidence in cases before the arbitrazh courts may be determined by specific legal rules requiring certain types of evidence and not others of particular facts or relationships. Examples of such rules include the general civil law rules concerning required forms for some kinds of transactions, and specific rules contained in legislation or regulatory acts concerning the means for recording particular facts (e.g. damage to freight received). In some circumstances, notarization or registration of documents or contracts may be required for their validity or enforcement, and absence of these elements may make a document otherwise giving evidence of the transaction inadmissible as evidence that a valid transaction took place. Evidence obtained in violation of federal law is not admissible.

c) Facts and Circumstances Not Requiring Proof

The court may recognize some circumstances or facts as matters of public knowledge, which do not require proof. In addition, facts established by a prior arbitrazh court decision concerning the same parties do not require proof, nor do those established by a prior decision of a court of general jurisdiction in a civil case, where circumstances having significance in the case were established by the decision in that case in relation to

[28] For example, the imposition of liability for harm caused (tort liability) on a respondent under the general provisions requires that four elements be shown: 1) harm, 2) causation, 3) illegality of the acts causing the harm, and 4) fault on the part of the respondent in the form of intent or negligence. The long-settled interpretation of this rule provides that the plaintiff, in order to successfully make a case, must prove the first three elements. After those are shown, the burden to prove absence of fault is placed on the respondent.

persons participating in the new case before the arbitrazh court. A verdict in a criminal case has legal force for an arbitrazh court on the questions of whether certain actions took place and who committed them.

d) Form of Evidence

Evidence may be presented in the form of testimony, and also of documents and other physical objects. Documents must be originals or properly verified copies or excerpts. Original documents are returned to their owner at the conclusion of the case, or upon a petition for their return if the return of the original will not affect consideration of the case and copies properly notarized or verified by the court are left in their place. Physical evidence is stored at the arbitrazh court as a general rule, although in necessary cases may be examined at another location and stored there. If a participant fears that evidence may be lost or become unavailable, a petition to the court may be made to secure the evidence, describing the specific evidence sought, the issue of significance to the case to which it relates, and the reasons for fearing its loss. The court may also issue a mandate to an arbitrazh court for another subject of the Russian Federation in which the collection of evidence, taking of testimony, or other actions which will produce evidence in a case under consideration are requested.

e) Presentation of Evidence; Demand for Evidence

Evidence is presented in the case by the participants. If a participant in the case is not able to obtain necessary evidence from another participant, or from other persons, the arbitrazh court may issue a demand for the evidence on the basis of a detailed motion from the participant identifying the evidence, the persons possessing it, and other relevant information. (A sample of such a motion requesting that documents be obtained from the tax authorities, and of the demand issued by the court on its basis, appear in Appendix H to the Handbook.) If the person to whom the court demand is addressed cannot provide the evidence, or is unable to provide it within the period established by the court, they are obligated to notify the court within five days of receipt of the demand. A fine may be imposed on those who fail to provide evidence for insufficient reasons, but the fine does not release the person from the obligation to provide the evidence.

The court itself does not have the capacity to independently order participants or other persons to provide evidence, to enter evidence into the case on its own initiative, or to conduct an independent investigation.[29] The court does, however, have broad powers to propose to participants that additional evidence or information be provided, and to delay consideration of the case if the information is not available at the time appointed for the hearing. Where the court has requested that such information be provided, but the party interested in the presentation of the information has neither done so nor provided sufficient reason for its failure, the court will take a decision based on the information

[29] There are some exceptions to this rule, such as the powers of the arbitrazh court to require the submission of information about the debtor and its accounts in a bankruptcy proceeding.

available.[30] A court that has not requested necessary information, however, and which makes a decision in the case based on its absence (e.g. that a particular circumstance was not proved), may well be reversed on appeal on the grounds that it failed to take into account all of the circumstances of the case, as is required by law.

f) Weighing and Evaluation of Evidence

The arbitrazh court is required to evaluate all of the evidence in the case on the basis of its "internal conviction," which must in turn be based on a full and objective examination of all of the evidence in the case. The APC states that no evidence has a prior established force for the arbitrazh court. This is not a contradiction of the provisions concerning facts and circumstances established by other court decisions or concerning evidentiary requirements for certain transactions. Rather, it indicates that the court must consider all evidence in the case and may not rely only on part of the evidence on the grounds that it comes from a "reliable" source, nor accept the conclusion of a government body or other authoritative source as a substitute for evaluation of evidence. If there is other evidence in the case concerning the relevant issues, the court must itself weigh all the evidence and it is required to indicate in its decision why it rejected or accepted particular evidence.

g) Falsification of Evidence

Falsification of evidence may result in criminal penalties. Article 303 of the Criminal Code of the Russian Federation provides that the falsification of evidence in a civil case by a participant or his representative may result in punishment ranging from a fine of from 500 to 800 times the minimum wage to arrest of from 2 to 4 months. Commentaries to the Criminal Code suggest that the definition of the crime of falsification under Article 303 includes not only the falsification of documents or other similar evidence, but also the giving of false testimony. It is interesting to note that the range of fines envisioned in Article 303 is significantly higher than those envisioned by the articles of the Criminal Code concerning the giving of false evidence, conclusions or translations by witnesses, experts and interpreters.

4. Records of Case Proceedings

A record of the proceedings during the hearing of the case, and also of procedural actions which occur separately from the hearing, known as a "protocol," is kept by the court.[31] During the hearing, the protocol is kept by the judge (one of the judges) hearing

[30] This is not problematic where the absence of the information injures the party responsible for providing it. Failure to provide information which is of benefit to the other parties in the case is a more difficult circumstance.

[31] General rules concerning the keeping of protocols are contained in Article 123 of the APC. Specific articles of the APC concerning various procedural actions or decisions that may occur outside a court hearing (e.g. examination of evidence at its place of location) may contain a requirement that a protocol be created concerning the action.

the case. The protocol contains information identifying the case, the judge(s) hearing it, the participants in the case and in the process and whether they appeared, and whether their rights and obligations were explained to them. It also contains information on the evidence given in court by witnesses and the conclusions presented by experts, and states the oral motions and petitions made by participants during the hearing of the case and any determinations (e.g. on a petition to submit additional evidence) made by the court immediately during the court session, without a break for consideration. The protocol must be signed by the presiding judge not later than a day following the completion of the court session. The signature of the judge indicates certification that the protocol is correct, and its absence can result in the reversal of a decision on appeal.[32]

Protocols are also made concerning procedural actions that take place outside the court session (e.g. examination of evidence at its place of location). Such protocols are similar in content to that for the court session, containing information on the case concerned, the persons present, the actions taken, and, if relevant, any information or evidence received. They must be completed and signed immediately after the relevant action is taken. Each of these protocols is entered into the case record.

The participants have a three-day period following the signature of the protocol in which to examine it and to make comments concerning its completeness and accuracy. The comments are made in writing, and the judge must examine them and make a formal determination concerning whether the comments, additions, or clarifications are accepted or rejected. Both the comments and the determination on them must be appended to the protocol in the case record. Comments on the protocol which are not submitted within the period are returned by the judge without consideration.[33]

The protocol is an extremely important document, as it serves as the record of the court session that will be reviewed by a superior court in the event of an appeal. In some cases, the protocol may be only a form document, containing limited spaces in which the judge is to insert the required information, which may be in a terse, abbreviated form. (A sample of such a protocol appears in Appendix I to the Handbook.) Verbatim transcripts of court proceedings are not kept by the arbitrazh courts, and although participants are permitted to keep detailed notes and to make sound recordings, these are not a part of the official record.[34] For these reasons, ***parties must take special care in reviewing the protocol and make sure that any information or evidence discussed in the court session that is important to their case is properly noted***. Likewise, it is vital that oral petitions or motions, the rejection of which may be relevant on appeal, are correctly recorded in the protocol, giving clear evidence of their content, their timely submission and the determination made by the judge.

[32] The absence of any protocol of the court session in the record will also serve as grounds for reversal.
[33] The period for submission of comments can be renewed or extended by the judge according to the general rules concerning procedural time periods, discussed below.
[34] They may, however, serve as the source for information to be used by the participants in making comments and corrections to the protocol, and may be useful in convincing the judge that a correction or addition proposed by a participant is warranted.

A record of the case as a whole is kept by arbitrazh court, and includes the original petition of suit and documents reflecting all of the actions taken in the case (review and acceptance of the petition, notifications to participants, and so forth), and copies of documents submitted as evidence in the case. This written record of the case is referred to as "the case," using the same word that indicates the case itself as a cause of action or legal dispute.[35] From the point of view of higher courts, the case record serves as evidence concerning whether the case was conducted in conformity with procedural law and of the facts and arguments that served as the basis for the decision of the judge(s) on the substantive law. Since violation of a number of procedural requirements can result in drastic consequences,[36] as can a record that does not reflect all of the evidence submitted or all of the arguments considered in reaching a decision, ***it is advisable for the participants in the case to take careful notice of the case record as a whole and to make timely petitions to the court to correct omissions or to append important documents to the record***.

5. Suspension or Termination of the Case Prior to Decision; Settlement Agreements

a) Suspension of Proceedings

Although the procedural law in theory strives toward the uninterrupted consideration of a case within a relatively limited time period, there are some circumstances in which the law requires or allows the arbitrazh court to suspend the consideration of the case.

The court is obligated under the APC to suspend proceedings in the case in four circumstances:

[35] This terminology is sometimes the cause of confusion for those unfamiliar with the system, as it can be difficult to immediately determine whether a reference is being made to the dispute, or to the written record of the case.

[36] As was noted above, the court does not have discretion in applying the rules concerning grounds for returning an incomplete petition or in applying a number of other rules, and such problems with a case record as the absence of evidence that required notifications were made to interested persons or an inconsistency between the notation concerning the judge hearing the case and the judge signing a procedural document may lead to reversal of the decision overall. In this environment, clerical error or the accidental misfiling of a key document in another case record can have serious consequences. In order to avoid confusion at a later date, participants in cases before the arbitrazh court should be particularly careful not only to review the case record but also to keep scrupulous records of the documents filed, the identity of those signing them, fees paid and other matters having procedural significance.

- the need to await a decision on another case, where that decision will have a mandatory force for the arbitrazh court concerning facts, circumstances or legal interpretation which are significant for the case being considered;[37]

- the entry of a person who is a respondent into the active armed forces, or a motion of a person who is a plaintiff and is entering into the active armed forces requesting suspension;[38]

- the death of a person participating in the case, if the rights and obligations in the legal relationship involved in the case may pass to a successor;[39] and

- the loss by a person participating in the case of legal capacity.[40]

Additional mandatory suspension requirements may be imposed by the legislation relating to a particular type of case.

In addition to mandatory suspensions, the arbitrazh court has discretion to suspend proceedings in a case in three other circumstances:

- where the arbitrazh court has appointed an expert to conduct an expert review or analysis and time is required for this process;

- where an organization which is a participant in a case is undergoing reorganization; and

- where a person participating in the case has been summoned to perform any kind of state duties.

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[37] Such cases may be in other arbitrazh courts, or in the courts of general jurisdiction, or before the Constitutional Court. It should be noted that the law on the Constitutional Court envisions the possibility for an arbitrazh court hearing a case in which a doubt about the constitutionality of the law to be applied has arisen to suspend proceedings in the case and refer the question of the constitutionality of the law to the Constitutional Court. In such cases, rather than reacting to information about the existence of another court proceeding requiring suspension, the arbitrazh court itself initiates the other proceeding through its reference to the Constitutional Court. An example of an inquiry to the Constitutional Court made by an arbitrazh court during the consideration of a case appears in Appendix J.

[38] A plaintiff who has entered the active armed forces also has the right to petition the arbitrazh court to hear the case in his absence.

[39] It should be noted that since the arbitrazh court does not have jurisdiction over cases involving individuals nor does it hear inheritance matters, the question is not whether a judgment will affect a personal heir through its effect on the estate of the deceased participant. Rather, the question is whether there is a legal successor to the business interests of the deceased participant, such as a person who enters a partnership on the basis of their status as the decedent's heir.

[40] The general rules concerning the civil law capacity of citizens appear in Articles 29 and 30 of the Civil Code of the Russian Federation. If a person's legal capacity is recognized under these rules as limited, rather than absent, the case will be suspended only if the limitation of capacity applies to the matter in dispute. If a guardian is appointed to conduct the affairs of the person whose capacity has been limited, the proceedings in the case may be continued with the guardian representing the person who has lost legal capacity.

Proceedings may be suspended on the grounds listed at any stage of consideration of a case, including all of the stages of appeal and review. The court must issue a determination on the suspension, stating the grounds for the suspension and the circumstances that will give rise to a continuation of case proceedings. A determination suspending the case may be appealed, although a determination refusing a petition to suspend a case is not subject to immediate appeal and may serve only as a grounds for appeal of the decision in the case. During the period of the suspension, all limitations periods applying to procedures in the case are also suspended, and begin to run again only upon the re-initiation of the proceedings.

b) Termination of Proceedings

There are also circumstances under which the arbitrazh court is legally obligated to terminate the proceedings in a case. Those circumstances include cases in which:

- ⊗ the dispute is not subject to the jurisdiction of the arbitrazh court;
- ⊗ a decision of a court or arbitration tribunal exists which has entered into legal force and which concerns the same subject matter between the same parties;
- ⊗ an organization participating in the case is liquidated;
- ⊗ there is no legal successor to a person participating in the case who has died;
- ⊗ the plaintiff withdraws the suit and this withdrawal is accepted by the arbitrazh court;
- ⊗ a settlement agreement is concluded between the parties and the settlement agreement is confirmed by the court.

The list of grounds for termination of a case is exhaustive and the court has no discretion to terminate a case on other grounds. Some of the grounds for termination of the case are also grounds for refusal of an original petition by the arbitrazh court. If these grounds become known only after proceedings in the case have begun, or arise during the consideration of the case, the court must terminate the case. Termination of proceedings in a case implies a permanent bar to the further consideration of the case. After termination, proceedings in the case may not be reinitiated nor may the petition be re-filed. Proceedings in a case may be terminated with respect to the entire case or only with respect to particular claims or disputes.

c) Settlement Agreements

A settlement agreement between the parties may be concluded at any stage of arbitrazh court proceedings. The agreement must be in written form, signed by the parties, and must resolve all of the disputed questions between them. The agreement is

then submitted to the court, which must review the agreement and confirm it. The court may not confirm a settlement agreement which is not consistent with law or the terms of which violate the rights of other persons. These are the only grounds on which the court may refuse to confirm the agreement, however. If the court confirms the agreement, it must issue a determination, in which the terms of the settlement agreement are set forth in detail, and in which the proceedings in the case are terminated. Upon the issuance of the determination, the terms of the settlement agreement become binding upon the parties in the same way that the terms of a court decision on the case are binding. An execution order is generally issued at the time of confirmation of the settlement agreement, and forcible execution can be carried out if the parties fail to abide by its terms. Settlement agreements may not be concluded concerning cases on the recognition of acts of state bodies as void, on the establishment of facts having legal significance, or on other cases where the matter in dispute is not subject to disposition by the parties.

6. Decision of the Court in the Case

a) Closure of Proceedings and Deliberation

After all of the evidence in a case has been examined during the court session, the judge is required to give the participants in the case the opportunity to offer additional material for examination. If no petition for the examination of additional material is made, the judge must announce the completion of the examination of the case, and the judge or panel of judges leaves the courtroom to consider the case and make a decision. The law requires that only the judge(s) considering the case be present in the room while a decision is being made. If the case is considered by a panel of judges, a decision is made by a majority vote.

b) Form and Elements of the Decision

A decision must be set forth in writing and signed by all of the judges participating in the case. The decision is divided into four parts: an introductory part, a descriptive part, a part containing the reasoning and justification for the decision, and a part containing the resolution. The content of each of these parts is regulated by the APC. The introductory part contains identifying information about the case and its consideration, including the name of the arbitrazh court and the judge(s), the number of the case and the names of the participants in it, the date and place of the court hearing and the names and roles of those present. The descriptive part contains a short description of the petition of suit, the answer of the respondent, any counter-claims, the responses of various participants, and the other petitions and motions made in the suit.

The “motivation” part of the decision contains statements of the facts and circumstances considered established by the court, and what facts and circumstances relied on by the participants the court considers to have been established, the evidence upon which the court bases its decision and an explanation of the reason for rejecting evidence or arguments of the participants, and a statement of the laws and normative acts

upon which the court bases its decision and reasons for rejecting any arguments of the parties concerning which laws and normative acts should apply to the case. Failure of the court to state the laws and normative acts upon which it based its decision are grounds for the reversal of the decision in cassational appeal, regardless of whether the decision of the court is correct according to law. The court may make reference in this part of the decision also to decrees of the Higher Arbitrazh Court which contain explanations of the proper application of the legal provisions involved.

The "resolution" part of the decision states the consequences of the court's reasoning for each of the participants in the case. It must state whether the petition of suit is to be satisfied, in full or in part, with respect to each of the claims made in the petition. If there are several plaintiffs and/or respondents, the resolution part of the decision must state clearly the decision with respect to each of them and their obligations as a result of the decision. If a set-off of claim and counter-claim is made, or if the petition of suit is satisfied only in part, the court must state specifically what sum is due as a result of the decision.[41] The court must also state in this part of the decision how court costs are to be divided among the participants. If special procedures for the execution of the decision are established, these must be stated in this part of the decision as well. Specific requirements for decisions in particular types of suits are established by the procedural code.

A sample decision issued by an arbitrazh court of the first instance appears as Appendix K to the Handbook.

c) Issuance and Announcement of the Decision

The decision in the case must be made and announced during the same session of the court in which the case was considered by the court.[42] For exceptionally complicated cases, a delay of no more than three days may be announced for the court to complete the part of the decision which states the court's reasoning, but even in these cases the resolution part of the decision must be announced during the same session of the court in which the case was heard. At the time of announcement of the decision in the case, the judge must explain to the participants their rights to appeal the decision and the procedure for appeal, and must also notify them of when they may receive the motivation part of the decision, if it is not announced at same time. Copies of the court's decision must be sent to the participants in the case, by registered mail or delivered against a signature, within five days after its issuance. If the decision is not clear, a participant may petition the court for an explanation. Mistakes in the decision — such as clerical or mathematical errors not affecting its substance — may be corrected by the court on its own initiative or upon the petition of a participant.

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[41] If the court fails to resolve a claim made in the case or to state the sum or property to be transferred or other actions to be taken, or fails to deal with the court costs, an "additional decision" may be made in the case. The participants are notified of the time and place at which the question of the need for an additional decision will resolved, but their appearance is not required for the decision to be taken. A participant may petition for an additional decision prior to the entry of the decision into force, and refusal of such a petition may be appealed.

[42] Rules concerning the procedure for announcement of the decision are contained in Article 134 of the APC.

d) Entry Into Legal Force

The decision of the arbitrazh court enters into legal force one month after its issuance.[43] If an appeal is made against the decision of the court of first instance within that period, the original decision does not enter into force until the time of issuance of an appellate decision leaving it without change. The decision of the court is put into execution only after it has entered in to legal force, except for decisions holding an act of a state body void or confirming a settlement agreement, which are executable immediately upon issuance. If a participant in the case makes an appropriate petition, the court may impose means for securing the execution of the decision, following the same general rules which apply to securing the suit during its consideration.

7. Determinations and "Private Determinations"

a) Determinations

Decisions of the arbitrazh court which are issued on procedural and other matters during the course of consideration of a case are generally known as "determinations.[44]" A determination issued during the consideration of the case in a court session may be recorded in the protocol of the court session. All other determinations are recorded in a document which states the identifying data on the case (number, subject of dispute, judge, participants, etc.), the question upon which the determination is being issued, the court's decision and the reasoning for the court's decision, with references to the laws or acts involved. Where the procedural action is subject to immediate appeal, it is this determination, as a separate act of the court, that is appealed. Determinations made in the course of the case hearing and recorded only in the protocol may not be appealed separately, but may form grounds for appeal of the decision of the court. A determination must be sent to the participants or issued against their signature within five days of its issuance. If the determination is subject to appeal, it must be sent by registered post with notification to the court of the delivery.

b) Private Determinations

The procedural laws also permit arbitrazh courts to issue acts which are know as "private" or "separate" determinations.[45] These are not determinations on matters directly related to the dispute before the court. Such a determination is issued by the arbitrazh court if it observes during its conduct of the case that there is a violation of the law in the actions of an organization, citizen, official, or state or local body. The "private determination" contains a statement of the violation directed to the body, organization or citizen, which/ who must respond to the court within a month stating what measures have been taken to eliminate the violation. Such determinations may be issued by the court at any stage of arbitrazh court proceedings, including in appellate instances, and may be appealed.

[43] In the few instances in which the Higher Arbitrazh Court serves as a court of first instance, its decision enters into force immediately from the time of its issuance.
[44] The Russian term is *opredelenie*.
[45] The Russian term is *chastnoe opredelenie*.

8. A Note on Procedural Time Periods

Many of the procedural actions involved in the filing and consideration of a case in the arbitrazh courts are subject to time limitations stated in the relevant portion of the procedure code. With respect to those procedural matters for which the law does not establish a specific period, the arbitrazh court is generally authorized to do so itself. Periods of limitation may be expressed by the statement of a specific date by which the action must occur, by a period of time in which it must occur, or by reference to an event which must occur. According to the general rules,[46] limitations periods expressed as a period of days, months or years (the most common form of expression), begin to run on the day following the calendar date upon which they begin. If the last day of the period falls on a holiday or a non-working day, the next work day will be considered the last day of the period. Actions to which the limitation applies may be taken up to midnight on the last day of the limitations period, and the submission of documents to the post or other acceptable communications facility by midnight on that day is acceptable performance of the action (filing of an appeal, etc).[47]

Failure by participants to take actions within the required time period may result in the loss of the right. This applies to appeals and petitions for reconsideration of decisions, as well as to procedural actions taken during the consideration of the case by a particular court, and the presentation of execution orders of the court for execution. Some of the relevant periods of limitation are quite short in comparison with those which operate in other legal systems, and foreign participants in cases before the arbitrazh court should take particular care in remaining aware of the limitations periods.

Procedural legislation also imposes a significant number of limitations periods on the arbitrazh courts themselves. These periods concern the time frame within which the case must be considered and decided, (two months in the first instance, one month for appeals and cassational appeals), and also the time frames in which the court must consider various petitions and in which it must complete other tasks. (For example, signature of the protocol of the court session is to be done no later than a day after its completion.) The violation by the court of the procedural periods imposed upon it by the APC or other legislation does not give rise to any specific remedy on the part of the participants in the case nor to any means for them to force the court to take the required action. It does, however, provide grounds for the participants to seek extension or renewal of procedural periods applying to their own actions, if the court's violation of the procedural period causes difficulty in meeting them.

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[46] The general rules for the calculation of time periods related to civil matters are contained in Articles 199-207 of the Civil Code of the Russian Federation.

[47] This is true both for participants located within the immediate vicinity of the arbitrazh court hearing the case and for those located some distance away. It is not possible to submit documents in person to the arbitrazh courts after the end of the regular working day (usually 6:00 PM). A stamp, receipt, or notarized excerpt from the registration book of the post office or other communications facility to which the documents were submitted should be obtained as evidence of the time at which they were submitted.

The arbitrazh courts have the right to renew periods of limitation if the reason for missing the relevant deadline is sufficient. The courts may also extend periods of limitation that are established by them on the same grounds. The courts may not "extend" periods specified by law, but must rather renew them. A renewal may be for a part of the period, or for the entire period. A petition for the extension or renewal of a period is made to the arbitrazh court in which the procedural action should take place. A determination on the refusal to renew a period of limitations may be appealed.

9. Filing Fees and Court Costs

a) Filing Fees

Filing fees must be paid upon the submission of an original petition of suit, and also upon the submission of a third party claim, a bankruptcy petition, a petition concerning establishment of legally significant facts, and upon the filing of a petition for mandatory execution of the decision of an arbitration tribunal. Filing fees are also due upon the filing of first appeals and cassational appeals of decisions of the arbitrazh courts, and on the appeals of determinations of the courts concerning termination of proceedings, leaving the suit without consideration, and imposition of court fines. The amount of the filing fee is calculated based upon the value of the suit. The value of the suit is based on the sum in dispute or the value of the property in dispute in the case, including the fines or penalties that may be sought in the petition. For cases in which there is no specific sum or piece of property in dispute, such as a petition requesting that the act of a state body be held void or on the establishment of a legally significant fact, or for case in which the value of the suit is difficult to determine, such as bankruptcy petitions, specific filing fees have generally been established by law. A petition may be made to the arbitrazh court concerning permission for a delay in the payment of the fee or for the payment of the fee in installments, and also for the reduction of the amount of the fee, by a party unable to pay the fee. Government bodies submitting petitions to the court for the protection of state or public interests are generally not obligated to pay filing fees.

The payment of the filing fee is a significant issue, and a lack of evidence that the fee was paid is grounds for the court to return a petition to the plaintiff. If during the course of consideration of the case the plaintiff increases the sum demanded or otherwise increases the value of the suit, the additional amount of the filing fee must be paid or exacted at the time of the decision. No return of the fee is due if the value of the suit is reduced during the consideration of the case.

Filing fees must be paid in rubles; the court will not accept foreign currency or bank transfers denominated in foreign currency. In addition, bank transfers from foreign accounts into accounts in Russian banks often entail substantial and unpredictable delays. If a party does not have a local bank account, the representative (or his/her firm) may pay the filing fee for the client and be reimbursed for this cost.

b) Court Costs

In addition to filing fees, participants in a case before the arbitrazh court may be required to pay court costs, which consist of the sums paid to experts, and witnesses for their services and to cover their expenses during the hearing of the case. In practice, the party calling a witness, or making a petition for expert review, is required to place the sum required to cover the relevant expenses into the deposit account of the court, out of which such expenses are paid. As a general rule, the court costs are assigned, at the end of the case, to the participants in the case in proportion to the satisfaction of the claims made in the case. Unpaid filing fees of a plaintiff unable or not required to pay may be charged to a respondent found liable on the plaintiff's claims, in proportion to the amount of the claims that were satisfied. The parties may make an agreement concerning the division of court costs, and the court will issue a decision in accord with this agreement.

Chapter 4. Appeals in the Arbitrazh Court System

A. Appeals of Procedural Decisions During the Consideration of Case (Interlocutory Appeals)

Many of the procedural decisions of the arbitrazh courts of the first instance are subject to appeal when the determination on the question is issued, allowing the matter to be appealed relatively quickly instead of waiting for the issuance of the final decision in the case as a whole. The determination on a procedural question is subject to appeal if an appeal is specifically provided for in the APC or in other legislation. Determinations subject to appeal include:

- refusal to accept a petition or return of a petition to the plaintiff;
- refusal of a petition for securing the suit, a petition on exchange of one type of security for another, or refusal to release security measures for the suit, and refusal of the analogous petitions related to security for the execution of the judgment;
- suspension or termination of proceedings in a case, or a determination leaving a case without consideration;
- refusal to issue an additional decision, to explain the decision, or to correct clerical or mathematical errors;
- imposition of a fine for failure to provide information or evidence;
- a private or separate determination concerning violations of the law observed and requiring measures be taken to eliminate them;
- refusal to reconsider a case due to newly discovered circumstances;
- issuance of, or refusal to issue, a duplicate execution order and renewal of, or refusal to renew, the period for presentation of an execution order for execution; and
- permission for or refusal of permission for delay of execution or execution in installments, or change in the means and procedure for execution.

Appeals of determinations do not suspend the consideration of the underlying case. They are filed and considered in the general procedure for appeals of decisions, described in the following section. The appeal may be filed within a month of the issuance of the determination, unless it is otherwise provided by the provision in the legislation authorizing the appeal.

B. Appeals of Decisions of Arbitrazh Courts of the First Instance

1. Period for Appeal, Place and Manner of Consideration

Appeals of final decisions of arbitrazh courts of the first instance must be filed within a month of the issuance of the decision. The time limitation for appeal is considered a standard procedural limitation, and is subject to renewal by the court if it finds sufficient reasons for the failure to file within the period. Appeals are filed with, and considered by, the same arbitrazh court that issued the original decision, by a panel of three judges.[1] The appeal may not be considered by a judge who participated in the consideration of the case in the first instance, however, and if it is not possible for the appeal to be considered by the court which issued the original decision, the case may be transferred to another arbitrazh court of the same level.

2. Who May File

The appeal may be filed by a participant in the case, or in instances in which the court of first instance made a decision concerning the rights and obligations of persons who were not summoned to participate in the case, by those persons as well.

3. Form of Appeal, Required Content

The appeal complaint must be signed by the appellant or his representative. The appeal complaint will be returned to the appellant if:

- it is not signed or was signed by someone whose position is not stated;
- evidence of the sending of copies to other participants is not appended; or
- evidence of the payment of the filing fee is not appended (or in the alternative a petition for delay, reduction or payment in installments).

If the appeal is submitted after the one month period for appeal, the appeal complaint will be returned if it is filed without the attachment of a petition for the renewal of the appeal period.

[1] An appeal may be considered by a panel of another odd number of judges, but this very rarely occurs.

CHECKLIST FOR AN APPEAL FILING

Information Required in an Appeal Filing

- ❑ name of the court to which the appeal is addressed
- ❑ name of the person appealing, and of other persons participating in the case
- ❑ name of the court which took the decision being appealed, the number of the case, date of he issuance of the decision and the subject of the dispute
- ❑ the bases upon which the appealing party considers the decision in the first instance incorrect, including reference to legal and regulatory acts that are relevant
- ❑ the demand of the appealing party (reversal in full or in part, etc)
- ❑ a list of the documents appended to the complaint

Documents Required as Appendices to an Appeal Filing

- ❑ evidence of payment of the filing fee (receipt)
- ❑ evidence that the filing and attachments were sent to the other parties in the case
- ❑ authorization of a representative to sign the appeal (if applicable)

If the appeal is accepted for proceedings, the court issues a determination stating the acceptance and the date and time for consideration of the appeal, and sends this to the participants in the case. Upon receiving the appeal complaint, the participants in the case may make a response, which must be received by the court before the day set for the consideration of the appeal. Evidence of the sending of the response the other participants, such as a signature acknowledging delivery or the receipt for registered post, must be appended.

A sample appeal complaint, determination accepting the appeal for proceedings, and response to the appeal complaint appear in Appendix L to the Handbook.

4. Consideration of the Appeal by the Arbitrazh Court

The court considers the appeal according to the procedural rules established for consideration of cases in the first instance, with the exceptions established by Chapter 20 of the APC. The court may consider new evidence if the participant presenting the evidence shows that it could not have been presented during the previous consideration of the case. The court is not bound by the appeal complaint or the arguments of the participants, and must verify the legality and basis for the original decision in all respects. It will not, however, consider new claims or demands not made during the consideration of the case in the first instance. The court must consider the appeal within a one month period of receipt of the complaint. The appeals court has the right:

- to leave the decision of the court of first instance in place;
- to reverse the decision in full or in part and make a new decision on the parts reversed;
- to make changes in the decision;
- to reverse the decision and terminate proceedings in the case; or
- to reverse the decision and leave the case without consideration in whole or in part.

5. Grounds for Appeal

The grounds for appeal, and for the appeals court to reverse or change the decision of the court of first instance, are:

- incomplete clarification of the circumstances of the case having significance for the case. This usually refers to failure of the court to examine all of the evidence in the case, refusal to call witnesses or demand evidence of significance to the case, mistaken exclusion of relevant evidence from the case, and similar problems;

- inadequate proof of circumstances that the first arbitrazh court found to have been established by the evidence, and which have significance in the case. This may include reliance by the court on evidence improperly obtained, on unreliable evidence, on evidence that does not meet requirements of relevance and admissibility, or on mutually contradictory evidence. It may also refer to case in which the court made presumptions on the basis of the evidence, but the presumed facts or circumstances themselves were not proved;

- failure of the conclusions set forth in the decision to correspond to the circumstances and materials of the case. This may include cases in which the conclusion of the court is presented without justification, is self-contradictory, or is unsupported by the evidence in the case. It may also relate to cases in which the court failed to consider some of the evidence or circumstances in the case which were significant; or

- violation or improper application of the norms of substantive or procedural law, if the violation resulted or might have resulted in the issuance of an incorrect decision. This may include cases in which the court applied the wrong law, failed to apply an applicable law, or interpreted the law incorrectly in its application. It may also include cases in which the court applied a law which was no longer or not yet in force, or a regulatory act which was not consistent with governing law.

Some violations of procedural law by the courts of the first instance are always grounds for the reversal of the decision. If one or more of these violations is shown, the

decision will be reversed "unconditionally" — that is, without reference to the legal correctness of the decision. In most cases, a decision reversed due to this type of violation will be sent for a new consideration by the lower court.

GROUNDS FOR UNCONDITIONAL (AUTOMATIC) REVERSAL OF A COURT DECISION

- consideration of the case by an illegal composition of the court
- consideration of the case in the absence of any of the participants, who was not properly informed of the place and time of the court session
- if the rules concerning language and interpretation were violated
- if the court issued a decision concerning the rights and obligations of persons who were not summoned to participate in the case
- failure to sign the decision or signature by someone other than the judge(s) named in the decision as having heard the case
- issuance of the decision by judges who did not consider the case
- absence of a protocol of the court hearing or absence of the required signatures on the protocol

A sample decree of an arbitrazh court of the appellate instance appears as Appendix M to the Handbook.

6. Issuance and Content of Decree; Entry into Force

The appellate court issues a "decree" rather than a "decision" concerning the results of its consideration of the case, which must be signed by all of the judges participating in the case.

A decree of the appeals court enters into force from the time of its issuance and is sent to the persons participating in the case by registered mail with notice of delivery. The decree may be appealed to the cassational instance — the federal arbitrazh court for the "circuit" in which the appeals court is located.

REQUIRED CONTENTS OF A DECREE OF THE APPEALS COURT

- the name of the court, number of the case, date of issuance of the decree, composition of the court, names of those present in the session and their authorities
- date of the issuance of the first instance decision, and the name(s) of the judge(s) who issued it
- names of the participants in the case and of the person who filed the appeal
- a short description of the substance of the decision made in the first instance
- the bases on which the appeal was made
- arguments in the responses to the appeal (if any)
- the circumstances established by the court, evidence on which its conclusions about the circumstances are based, arguments why the court accepts or rejects particular evidence and applies or refuses to apply laws and regulatory acts cited by the participants and relied upon by the first instance court
- if the decision of the first court is reversed or amended, the reasons for the appellate court's disagreement with the first court's conclusion
- the final conclusion of the appellate court

C. Cassational Appeals

Participants in a case have the right to make an appeal to the cassational court — that is, an appeal concerning the proper application of the law by the lower court(s). A cassational appeal may be filed with respect to a decree of an appeals court, and may also be filed with respect to the decision of the court of first instance that has entered into force.[2] In other words, it is possible to file a cassational appeal — complaining of improper application of the law by the court of first instance — even if the decision of the first court was not appealed through the procedure described in Section B, above. The arbitrazh courts which hear cassational appeals are the federal arbitrazh courts for the various "circuits" or areas. The areas served by the ten different circuit courts are defined by the constitutional law on the arbitrazh courts.

1. Form, Period and Place of Submission

A cassational appeal is not submitted directly to the circuit court, but rather to the arbitrazh court that issued the decision being appealed. That court must send the appeal to the corresponding circuit court, together with the record of the case, within five days of

[2] Decisions issued in the first instance by the Higher Arbitrazh Court are not subject to consideration by the circuit courts that generally hear cassational complaints. An appeal of such a decision must be directed to the Higher Arbitrazh Court itself.

CHECKLIST FOR A CASSATIONAL APPEAL FILING

Information Required in a Cassational Appeal Filing

- ❑ the name of the court to which the appeal is addressed
- ❑ the name of the person submitting the appeal and the names of the other participants in the case
- ❑ the name of the arbitrazh court which issued the decision or decree being appealed, number of the case, date of issuance of the decision or decree, and subject of the dispute
- ❑ a statement of the violation of the substantive or procedural law or improper application of the law which is the basis for the appeal, and the demands of the appellant
- ❑ a list of documents appended to the complaint

Documents Required as Appendices to the Filing

- ❑ evidence of payment of the filing fee
- ❑ evidence of the sending of the complaint to the other parties in the case
- ❑ authorization for a representative to sign and file the cassational appeal (if applicable)

its receipt. The cassational appeal must be submitted within one month of the entry of the decision or decree into force, and must be signed by the person submitting the appeal or by his representative.

The complaint may be returned to the appellant for reasons analogous to those applicable to petitions of suit and first appeals, specifically:

- failure to sign or improper signature;
- submission directly to the cassational court instead of through the original court as required;
- absence of evidence of payment of the filing fee (or a petition on reduction, delay or installment payments);
- absence of evidence that copies were sent to the other participants in the case; and
- submission of the cassational appeal after the period for appeal (without a petition for renewal).

In addition, a cassational complaint may be returned to the appellant if the complaint does not describe the violation or improper application of the law by the lower court that gives rise to the cassational complaint. As a rule, it is the court of the first instance that

received the cassational complaint that returns the complaint on the grounds listed. The cassational court may also return the complaint on the same grounds, if the flaw or omission in the filing was not discovered by the court of first instance. A sample cassational complaint appears as Appendix N to the Handbook.

2. Procedure and Period for Consideration

If the case is accepted for consideration, the circuit (cassational) court issues a determination on its acceptance, stating a date and time for its consideration. The person submitting the cassational appeal has the right to withdraw it at any time prior to the issuance of the decision. The appeal must be considered within a one month period of its receipt together with the materials of the case by the circuit court. The consideration of the case by the court takes place according to the general rules established for cases in the courts of first instance, with the exceptions noted in Chapter 21 of the APC (such as the one month time frame for consideration, rather than the two month time frame for cases heard in the first instance) and with the omission of rules not relevant to the cassational process (such as those concerning the taking of evidence). The cassational court has the right to suspend the execution of the court decision or decree being appealed during its consideration of the cassational appeal, but only on the basis of a petition from one of the participants in the case requesting such suspension.

3. Grounds for Cassational Appeal

Violation or improper application of the substantive or procedural law are the only grounds for a cassational appeal. No arguments may be made at the cassational stage concerning lack of proof of the circumstances of the case, failure of the conclusions of the court to correspond to the materials and circumstances of the case, or other matters based solely on disputes about the facts and evidence in the case. The application by the lower courts of procedural law concerning evidence and the application of the law to the facts of the case can, however, be the subject of consideration in the cassational instance. Thus, evidentiary matters may still arise at the cassational stage. Cassational courts do not, however, take new evidence in a case.

A violation or improper application of procedural law may serve as the grounds for amendment or reversal of a lower court decision only in the case that it led or might have led to the issuance of an incorrect decision/decree. The same procedural law violations which lead to an unconditional reversal of the decision of a court of first instance by the appellate instance, however, will also serve as grounds for the reversal by the cassational instance of the decision of the court in the first instance or of the decree of the appellate instance, without inquiry into their capacity to lead to a legally incorrect result.

4. Authority of the Cassational Instance

The cassational instance issues its decision in the form of a “decree” and has the power to:

- ➢ leaves the lower court decision without change, or leaves one of two different lower court decisions/decrees in force, reversing the other;
- ➢ reverses the decision of the lower court in part or in full and makes a new decision;
- ➢ reverses the decision of the lower courts and returns the case for a new consideration in the same court in which the reversed decision/decree was issued. This may be done if the decision or decree was without sufficient basis;
- ➢ amends the decision of the lower court;or
- ➢ reverses the decision of the lower court in part or in full and terminates proceedings in the case or leaves the case without consideration.

5. Content of the Decree of the Cassational Court

The decree of the cassational court enters into force from the time of its issuance. The instructions in the decree concerning actions to be taken by the arbitrazh court (e.g. consider the application of a particular legal rule, admit evidence improperly excluded) in

REQUIRED CONTENT OF A DECREE OF THE CASSATIONAL COURT

- the name of the court issuing the decree, number of the case, date of issuance of the decree, composition of the court, and names of those present with indications of their positions and authorities
- the name of the person who filed the cassational appeal and the other participants in the case
- the name of the arbitrazh court that considered the case in the first and appellate instances, number of the case, date of issuance of the appealed decision or decree, and the names of the judges issuing it
- a short description of the substance of the decision or decree appealed
- the basis on which the cassational appeal was filed
- arguments in the response to the appeal
- explanations of those present during the consideration of the case
- reasons for the court not to apply laws or legal acts referred to by the parties or on which the lower courts relied in their decisions
- if the lower court decision is reversed or amended, reasons for the disagreement of the cassational court with the conclusions of the lower court
- the final conclusions of the cassational court in the case
- a statement of the actions that must be performed by persons participating in the case and by the arbitrazh court, if the case is returned for a new consideration by a lower court
- division of court costs among participants

a new consideration are binding upon the court. However, the cassational court cannot pre-decide the case for the lower court, indicating what its decision must be, nor can it give instructions to the lower court concerning the probative value of specific evidence or whether specific circumstances were or were not proven in the given case. A sample decree of a circuit arbitrazh court (the cassational instance) appears as Appendix O to the Handbook.

Determinations of the arbitrazh courts concerning procedural matters that are subject to appeal are also subject to cassational appeal. Cassational appeal of a determination is governed by the same rules as those for cassational appeal of decisions and decrees.

D. Reconsideration of a Case in Supervisory Proceedings

1. Nature of Supervisory Proceedings

Any decision of an arbitrazh court of the Russian Federation may be reconsidered in "supervisory proceedings." This term refers to the review and reconsideration of a decision or decree by the Higher Arbitrazh Court on the basis of a "protest" against the decision or decree which is made by one of a limited number of authorized persons. There is no right to a review in the supervisory instance, and a decision or decree will be reviewed only if the relevant authorized persons are convinced that the lower court decision or decree is legally incorrect or without basis. The participants in the case, however, may petition the appropriate persons concerning the submission of a protest in the case, setting forth the reasons that they believe the lower court decision to be incorrect. (A sample of such a petition appears as Appendix P to the Handbook.) Determinations of the lower courts on procedural matters may also be reviewed in supervisory proceedings if they are of a type that is generally subject to separate appeal, or if the determination has the effect of preventing the consideration of the corresponding case from continuing.

2. Standing to Submit a Protest

A protest concerning a lower court decree or decision may be submitted by the Chairman of the Higher Arbitrazh Court of the Russian Federation or the Procurator General of the Russian Federation concerning any decision of any arbitrazh court, with the exception of decrees of the Presidium of the Higher Arbitrazh Court. The deputy chairs of the Higher Arbitrazh Court and deputies of the Procurator General of the Russian Federation may submit protests concerning the decisions and decrees of any arbitrazh court, with the exception of decrees of the Presidium of the Higher Arbitrazh Court and decisions of a three-judge panel of the Higher Arbitrazh Court considering a case in the first instance. The Chair of the Higher Arbitrazh Court or one of the deputy chairs may suspend the execution of the corresponding decision during the period in which the protest is being considered. All protests are considered by the Presidium of the Higher Arbitrazh Court of the Russian Federation.

3. Procedure for Consideration; Authority of the Presidium

If one of the persons authorized to bring a protest considers that grounds exist for the protest, that person submits the protest, along with the case record, to the Presidium. In considering the protest, the Presidium hears the report of a judge of the Higher Arbitrazh Court concerning the circumstances of the case and the arguments in the protest, and discusses these issues. The Presidium may also summon participants in the case if clarifications or explanations are required,[3] but their failure to appear does not hinder the consideration of the case by the Presidium. The Presidium considers the case in all of its aspects, and may make decisions both on legal issues and on the evidentiary basis for the court's decision in the specific case.

The Presidium issues its decision in the form of a "decree." It has the authority to:

- ➢ leave the decision or decree unchanged;
- ➢ reverse the decision or decree in full or in part and send the case for a new consideration;
- ➢ amend or reverse the decision or decree and make a new decision without sending the case back for a new consideration;
- ➢ reverse the decision or decree and terminate the proceedings in the case or leave the case without consideration, in full or in part; or
- ➢ leave one of several earlier issued decisions or decrees in force.

The Presidium is empowered to act if a majority of the members are present, and a decision on a protest is taken by a majority vote of those members who are present when it is considered. The decree on the protest is signed by the Chair of the Higher Arbitrazh Court and enters into force from the time of its issuance. Instructions of the Presidium which are set forth in the decree are binding upon lower courts if the case is sent back for a new consideration. The decree may not, however, establish facts or circumstances that were not considered established by the lower court decisions, nor may it decide questions of the probative value of particular pieces of evidence or state what decision must be made in the new consideration of the case.

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[3] The language of part 2 of Article 186 of the APC suggests that the Presidium may summon those participants in the case that it considers necessary to its consideration of the case, without notification of the other parties and participants and that it may choose not to involve participants in its consideration of the case. A determination issued by the Constitutional Court of the Russian Federation, however, has stated that the Article may not be applied in this fashion. The Presidium must give the participants in the case the opportunity to be heard in all instances in which its decision effects a change in their rights and obligations. And, without regard to whether the decision changes the rights and obligations of the parties, if any participants in the case are provided such an opportunity, then all participants must be provided an equal right to be heard. See the Determination of the Constitutional Court of the Russian Federation "Concerning the Complaint of the Open Joint Stock Society "NTV Television Company" About the Violation of Constitutional Rights and Freedoms by Part 2 of Article 186 of the Arbitrazh Procedure Code of the Russian Federation," *reported in* Sobranie Zakonodatel'stva RF [Collected Legislation of the Russian Federation], 1999, No. 44, Item 5382.

E. Reconsideration of a Case on the Basis of Newly Discovered Circumstances

1. Grounds for Reconsideration of the Case

A decision of the arbitrazh court of any level may be reconsidered on the basis of newly discovered circumstances. Newly discovered circumstances are not simply new evidence that was not presented at the original consideration of the case. In order to justify the reconsideration of a case, the party petitioning for such reconsideration must show:

- circumstances having significance for the resolution of the case that were not and could not have been known to the petitioner at the time of its consideration;

- the deliberately false character of evidence or information provided to the court which resulted in the adoption of an illegal or unsubstantiated decision. This may include false witness testimony or expert conclusions, incorrect interpretation or translation of evidence or testimony provided in a language other than Russian, and/or falsified documents or physical evidence. The deliberate falsity of the evidence or information must be established by a judgment of a court that has entered into legal force;

- criminal actions of the parties to the case or their representatives, or of the judges in consideration of the case, as established by the judgment of a court that has entered into legal force; or

- the reversal of an act of the arbitrazh court or of another court or of the decree of another state body that served as the basis for the original decision.

In order to serve as grounds for the reconsideration of a case, the reversal of an act or decree of a court or of another state body that served as the basis for the original decision must be a direct reversal of the specific act or court decision, and the decision or act reversed must have been the basis of the arbitrazh court's ruling in the case to be reconsidered. A later change in the interpretation of a legal provision or the adoption of a new legal rule in the area is not sufficient.

2. Procedure for Submission of a Petition

A petition to reconsider a case on the basis of newly discovered circumstances must be made by a person participating in the case within one month of the time that the circumstances serving as grounds become known to that person. The petition must be forwarded to the other persons who participated in the case, along with appended documents that they do not have, and the evidence of this must be filed together with the petition and its attachments in the arbitrazh court.

3. Consideration of the Petition and Effects of its Satisfaction

A petition for the reconsideration of a case on the basis of newly discovered circumstances must be considered by the arbitrazh court in a session within one month of its acceptance. Petitions for the reconsideration of a decision of the arbitrazh courts of the first instance are considered by the same court that issued the decision. Petitions for the reconsideration of a decision at the appeals level, at the cassational level, or in supervisory proceedings that changed a court decision previously issued or that adopted a new decision are to be considered by the court that made the change or adopted the new decision. The court considering the case may either reject the petition for reconsideration of the case or may satisfy the petition by reversing the court decision in the case. If the court decision is reversed, the case must be considered (again) by an arbitrazh court under the general procedural rules applicable to the level at which it is being considered. There is no provision in the APC at the present time that would provide for the separation of a portion of a case to be reconsidered, if the grounds for reconsideration affect only a portion of a complex decision.

Chapter 5. Execution of Court Judgments and Arbitral Awards

The execution[1] process for decisions of courts and awards of arbitration tribunals, whether foreign or domestic, is similar in its general outlines. An execution order is issued and the process of enforcement of that order follows the general rules and patterns set forth in Section A of this Chapter. An execution order, however, can only be issued by a Russian court or arbitrazh court — thus, all arbitral awards and the decisions of foreign courts must be recognized by a Russian court and an execution order issued by the court on the basis of the foreign decision or the arbitral award. The circumstances under which a court may refuse such recognition are discussed in Sections B and C, as well as the special limitations period applied to foreign court judgments and international arbitral awards. Section D of this Chapter discusses some practical questions and concerns relating to the enforcement of judgments and the ability of those entrusted with execution to effectively carry out their duties.

A. Enforcement of Court Decisions

1. Governing Legislation

The enforcement of court decisions has at least two stages. A first, or preliminary, stage consists of the formalization of the decision itself and the expression of the amounts to be paid, property to be transferred or actions to be performed by the court in a form that can be used in execution of the judgment. The second or main stage consists of the proceedings by which enforcement measures are undertaken on the basis of the issued documents, including procedures for the mandatory or forcible execution of judgment in those cases in which the person or entity against whom/which the judgment is issued fails to observe it by voluntary action. The first stage of enforcement proceedings is governed by the rules in the Civil and Arbitrazh Procedure Codes concerning when execution documents are to be issued with respect to judgments and decrees.

The second stage of proceedings — the conduct of enforcement proceedings on the basis of the documents issued by the court — is governed by a combination of several pieces of legislation. Both the Civil Procedure Code (CPC) and the Arbitrazh Procedure Code (APC) contain provisions on execution proceedings. In addition, two new laws came into force at the end of 1997: the Law of the Russian Federation "On Execution Proceedings,[2] "which regulates the enforcement process in detail, and the Law of the

[1] The terms "execution" and "enforcement" are both used in this Chapter to mean the process by which a sum of money or piece of property awarded to one party as a result of a court or arbitral decision is transferred to that party. The terms are essentially identical, although in English legal usage "enforcement" is more commonly used to indicate that outside parties are called upon to take action to force the terms of the decision to be met, while "execution" of a judgment may occur through voluntary action.

[2] Law of the Russian Federation "On Execution Proceedings," Sobranie Zakonodatel'stva RF, 1997, No. 30, Item 3591.

Russian Federation "On Court Bailiffs,[3]" which creates the service responsible for conducting those proceedings. The provisions of the currently effective CPC concerning enforcement proceedings are in many respects not consistent with the laws "On Execution Proceedings" and "On Court Bailiffs" and it is anticipated that the new Civil Procedure Code, when it is passed, will contain a limited section on execution that refers the details of the process to the specialized legislation.[4] The APC, although adopted two years prior to the specialized legislation on execution, makes reference to the specialized legislation and contains only a few inconsistencies with the newer laws. Until the passage of the new CPC and APC, the later-passed Law "On Execution Proceedings" (hereinafter — the Law on Execution) governs concerning any matters on which there is conflict. Because the new law covers the matter in a relatively comprehensive form, discussion in the sections of this Chapter concerning the second stage of the enforcement process will focus on the provisions of the Law on Execution.

2. Issuance of Execution Documents on the Basis of a Court Decision

a) Requirement of an Execution Order

One of the most basic principles which must be understood concerning the enforcement of Russian court decisions is that a plaintiff who has been granted a sum of money, a performance, or the transfer of property, by a court decision in a case, or in whose favor certain procedural actions have been required by the court in a determination, must usually take additional positive action to ensure that the decision or determination is executed. The receipt by the respondent of the court's decision or decree containing the judgment is not usually, in and of itself, sufficient. The document authorizing the plaintiff, who has now become a creditor of the respondent by virtue of the debt acknowledged in the court's decision, to take the actions necessary for collection of the debt is an execution order.[5]

[3] Law of the Russian Federation "On Court Bailiffs," Sobranie Zakonodatel'stva RF, 1997, No. 30, Item 3590.

[4] The currently effective CPC was intended to govern the execution process directly, without reference to additional legislation, and therefore contains 94 articles on execution issues, plus additional provisions concerning the execution of foreign judgments. The provisions were designed to operate in very different economic circumstances from those currently existing, and are quite out of date in many respects. The 1995 APC was adopted in anticipation of the passage of specialized legislation on the topic, and for this reason contains only 13 articles on enforcement, making direct reference to the specialized legislation for the details of the proceedings.

[5] The Russian term — ispolnitel'nii list — translates literally as an "execution sheet." Until the passage of the current APC in 1995, arbitrazh courts issued "orders" [prikaz], and only the courts of general jurisdiction issued "execution sheets." The new APC unified terminology for this type of court document, but references are sometimes still made in discussion or publications to "orders."

REQUIRED CONTENT OF AN EXECUTION ORDER

(Orders Not Containing Required Information May Have To Be Reissued)

- ❑ the name of the court issuing the order
- ❑ the case in which the execution order is being issued and its number
- ❑ the date of issuance of the decision or other act of the court which is subject to execution
- ❑ the name of the creditor (plaintiff or holder of judgment) and of the debtor (respondent or other party found liable) and their addresses
- ❑ for an individual debtor, the date and place of birth of the individual and his place of work
- ❑ a statement of the resolution part of the judgment of the court (or the part relevant if several orders are issued)
- ❑ the date of entry of the court decision into force
- ❑ the date of issuance of the execution order and the period within which it is effective

b) Required Content of an Execution Order

Failure of the court to state any of these required elements in the execution order may result in the need to have the order reissued before it can be enforced through the services of the court enforcer. The court has the right to grant a delay in the execution of the judgment or to allow for the payment of the judgment in installments, on the basis of a petition filed by the creditor, the debtor or by a court enforcer. The court issues a determination on such petitions through the usual procedures. If this is done prior to the issuance of an execution order concerning the judgment, the delay or payment in installments must be reflected in the terms of the execution order.

c) Issuance of an Execution Order

An execution order is issued by the court that issued the decision, decree or determination in which the action or payment is required. The execution order is issued to the person/entity entitled to seek the performance or sum after the corresponding decision or other court act enters into legal force. ***Exceptions to this rule are decisions which void an act of a state body (and may require elimination of its consequences), determinations confirming a settlement agreement, and also determinations concerning security for a suit or security for execution, all of which are subject to immediate execution,*** although they enter into force in accordance with the general

rules.[6] Separate execution orders are issued with respect to several plaintiffs or respondents, or where the execution must be carried out in several locations, with each of the separate orders containing only the relevant part of the judgment.

3. Limitation of the Period of Effect of an Execution Order

Execution orders are subject to a limitations period during which they must be presented to the proper person or institution for execution. The limitations period on an execution order varies depending upon the body that issued it and in some cases on the type of execution document concerned. ***For all acts of the arbitrazh courts, and for execution orders based on the decisions of domestic Russian arbitration tribunals, the limitations period on presentation of an execution order is six months. For execution documents issued by the courts of general jurisdiction, including those issued on the basis of foreign court judgment or an arbitral award issued by a foreign arbitral tribunal, the limitation period is three years.*** This difference in limitations has sometimes caused confusion among those unfamiliar with the system and its rules, and it is important for those seeking to enforce a court decision or arbitral award to be certain which period applies to their case. (See Section B and C, below, for further discussion of this issue.) In addition to these general periods, other limitations periods are established by legislation for other types of documents which may be subject to execution through mandatory procedures.[7]

The limitations period on the presentation of the execution order is effectively a limitation on the right to execution of the judgment. If the execution order is not presented for execution within the required period, the holder of the order loses the right to execute the judgment through mandatory execution procedures.[8] For execution orders related to court decisions, however, the period for presentation of the execution order is a standard procedural period, and may be renewed by the court upon a petition showing acceptable reasons for failure to present the order. The period applies to presentation of the order for execution, not to the fulfillment of the demands of the execution order by the debtor. The period ceases to run upon the presentation of the order for execution, or upon

[6] Decisions of courts of the first instance enter into force one month after their issuance unless appealed, and if appealed and not reversed enter into force immediately upon the decision of the appeals court. Determinations enter into force a month after their issuance, unless it is specified otherwise in the portions of the procedural code related to the particular type of determination. Decisions of appellate and cassational courts, as well as decisions issued by the Plenum of the Higher Arbitrazh Court in supervisory proceedings, all enter into force immediately and an execution order may be issued at the time of issuance of these decisions.

[7] For example, a period of three months is established for execution documents related to certain labor disputes and to decisions concerning administrative violations of law (minor infractions of the law, giving rise to fines and similar penalties). The effect of the Code of Administrative Violations, previously limited to individuals, may soon extend to legal entities as well and an expected new Code may contain provisions relating to violations by those entities in the sphere of economic activity. If this occurs, those conducting business activities will need to take note of the short periods traditionally provided in that Code both for the appeal of administrative actions of state bodies and for the execution of decisions imposing administrative sanctions.

[8] The debtor/respondent can, of course, voluntarily honor the obligation after this period has expired.

a partial payment. If the execution order is thereafter returned to the creditor because it cannot be executed (e.g. by a bank in which the debtor no longer has funds), a new limitations period begins to run for the presentation of the execution order through other means (e.g. the opening of execution proceedings against property by the court enforcers division of the bailiff service). The limitations period may also apply to petitions for the issuance of a duplicate of an execution order.[9]

4. Presentation of the Order to a Bank for Execution

If the execution order concerns the payment of a sum of money, the order may be presented by the person seeking payment directly to a bank or credit institution in which the debtor has accounts for payment. The bank is obligated within a three day period of receipt of the execution order to pay the sum stated in the order to the creditor, if there are sufficient funds in the debtor's account. No agreement or order by the debtor to the bank for payment is required. If the account does not contain funds to satisfy the debt, or if the debt can only be satisfied in part, the bank must return the execution order to the creditor (within the same three-day period), with a statement that the order cannot be executed or cannot be executed in full. Failure by a bank to execute an order properly presented (i.e. to pay out existing funds in the account or to respond to the creditor) may result in a fine of 50% of the sum involved in the order, and a repeated failure by a bank to honor execution orders is grounds for withdrawal of the bank's license to conduct banking operations.[10]

If the creditor does not have information on the bank accounts of the debtor or is unsure what funds may be available, the creditor may choose not to present the execution order directly to a bank, but rather to present the execution order to the "court enforcer" — the part of the court bailiffs service responsible for carrying out execution proceedings — for the conduct of formal enforcement proceedings. In this case, the court enforcer may present the execution order at banks in which the debtor has accounts, and the rules concerning bank payment of the sum will be the same as those described for presentation by the creditor directly. A creditor that has received notice that the bank(s) in which the debtor has accounts that the creditor is aware of cannot execute the order, may present the same order to the court executor for the conduct of the execution proceedings described below in order to satisfy that part of the order not paid by the bank(s). If the execution order concerns other matters instead of or in addition to the payment of money, the order must be presented to the court enforcer. This presentation of the order to the court enforcer begins the formal process of execution.

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[9] See Article 204 of the APC, providing that a petition concerning the issuance of a duplicate execution order may be satisfied by the court upon a showing that the original has been lost or not returned, but only within the six month period for presentation of the original order.

[10] While the APC provides that the fine is up to 50%, suggesting that the court has some discretion in the setting of the fine in specific cases, Article 86 of the Law on Execution (which governs) omits the words "up to" from its equivalent provision, apparently indicating that the amount of the fine is no longer discretionary and is set at 50% of the amount in question.

5. The Court Enforcer

The Law of the Russian Federation "On Court Bailiffs" created for the first time a Court Bailiffs Service, which has two core functions — the maintenance of order in the courts and the execution of judgments. The law suggests a division of the two functions of the service, and refers to those whose task it is to ensure the execution of judgments as court bailiff-enforcers (hereinafter "court enforcers"). The court bailiffs service is an executive body, attached to the Ministry of Justice of the Russian Federation, and the Chief Court Bailiff of the Russian Federation, who is the head of the Service and who directs the department of court bailiffs in the Ministry, is *ex officio* a Deputy Minister of Justice of the Russian Federation. According to the Law, a separate court bailiffs service is to exist in the military courts department of the Ministry of Justice of the Russian Federation, and in each of the subjects of the Russian Federation a court bailiffs service is to be headed by the chief court bailiff for that subject, who is *ex officio* a deputy chief of the state body for justice of that subject of the Federation. The bailiffs at the local level, and the senior court bailiffs directing each local subdivision, are appointed to their posts by the chief court bailiff of the relevant subject of the Federation.[11]

Court enforcers have the right to use physical force and to use weapons in the pursuit of their duties, if other means have not been sufficient. They must, however, warn the possible object of the use of force and must provide adequate time for the relevant party to take necessary actions voluntarily, unless exigent circumstances exist.[12] This is a substantial change, since prior to the passage of the current legislation, court enforcers did not have these powers and the execution of a judgment against an unwilling respondent was difficult and complicated.

The bailiffs service as a whole, including the court enforcers, is to be financed out of the federal budget, although regional authorities may choose to contribute to the support of the service in their regions. The court enforcer service, however, also receives some of its funding from the execution fees which are imposed upon a judgment debtor who fails to voluntarily execute the judgment. Seventy-percent of such fees are placed into the "fund for the development of execution proceedings." This fund is a non-budgetary fund from which expenses for execution proceedings are paid during the course of execution and from which individual court enforcers receive incentive payments.

In addition to salaries and benefits, individual enforcers receive additional payments when they provide for the timely execution of a judgment. The payment is in the amount

[11] Chief court bailiffs for the subjects of the Federation are appointed by the Chief Court Bailiff of the Russian Federation, on the basis of nominations from the minister of justice or other head of the relevant executive body for matters of justice in the corresponding subject of the Federation. (Not all of the subjects of the Federation choose to mirror the titles of federal officials in their own executive bodies. Thus, some subjects (in particular the republics) refer to some of their executive bodies as ministries, and to the heads of those bodies as ministers, while others used other terms, such as department or administration, and refer to the heads of those bodies with corresponding terms.) The Chief Court Bailiff for the Russian Federation is appointed by the Government of the Russian Federation upon nomination by the Minister of Justice of the Russian Federation.

[12] Articles 15-18 of the Law on Court Bailiffs.

of five percent of the sum or value of property recovered, up to a maximum of ten times the minimum monthly wage, for each judgment executed. Judgments not involving the recovery of property entail a payment of five times the minimum monthly wage. If only part of an order has been executed, the court enforcer receives a payment proportional to the amount of the judgment that was recovered.

6. Presentation of an Execution Order to the Court Enforcer and its Acceptance

Execution proceedings conducted through the court enforcer proceed according to a number of formal stages. The first of these stages is the presentation and acceptance of the execution order by the court enforcer. The person seeking execution presents the execution order to the court enforcer, who is required to accept the execution order and open execution proceedings if the order is presented within the limitations period and it is properly formulated. The court enforcer must, within a three day period of receipt of the order, either issue a decree on the initiation of execution proceedings or return the execution order. (A sample of a decree initiating execution proceedings appears as Appendix Q to the Handbook.) If the reason for the return of the order is the expiration of the period of limitations, the order is returned to the creditor who submitted it. If the reason for return is the absence of required information, the order is returned directly to the court that issued it. If the order is returned, the court enforcer must within a day of returning it notify the issuing court and the submitter of the order. If the reason for the return of the order was failure to meet documentary requirements, the court enforcer's decree on its return must state specifically which requirements were not met. If the flaws in the document are corrected, the order (or a new order issued by the court) may be submitted again.[13]

If the court enforcer accepts the execution order, a decree is issued on the initiation of proceedings in which a period is established by the court enforcer for the voluntary execution of the order by the debtor, which period may not be more than five days from the day of initiation of the execution proceedings. The court enforcer must also include in the decree provisions informing the debtor of the requirement that an "execution fee" and the costs of the execution proceedings be paid in the case of failure to voluntarily execute the requirements of the order. Upon a petition by the creditor, the court enforcer may, at the same time as the issuance of the decree on initiation of the proceedings, conduct a listing and description of the debtors property and "arrest" it — that is, take measures to prevent its sale, transfer or disappearance. Copies of the decree concerning the initiation of the case must be sent within a day of its issuance to the creditor, debtor and to the court that issued the execution order. A decree on the initiation of execution proceedings, and also a decree returning the execution order, may be appealed within a 10-day period.

[13] The court enforcer, in returning the order on the grounds of a flaw in the document will establish a period for the correction of the problem. If the flaw is corrected within that period, the order will be considered to have been submitted at the time of the first submission. If the flaw is not corrected within that period, the order may still be resubmitted after its correction, but will be considered to have been submitted at the time of the second submission, and the limitations period applied accordingly.

7. Security for Execution of the Judgment

Imposition of measures of security for the execution of a judgment may be done by the court issuing the original decision and execution order. Arbitrazh courts will accept petitions from participants in the case for measures of security for execution both before and after a decision has been issued, although they may not impose such measures on their own initiative. The rules for the consideration of such petitions and the types of measures that may be imposed for securing the judgment are the same as those which apply to petitions for security measures during the consideration of the suit.[14] According to those general rules, the arbitrazh court must consider the petition for security within a day of its receipt, and issue a determination imposing or denying the security measures. The determination may be appealed in the usual procedure, but is subject to immediate execution. Execution of the determination takes place on the basis of an execution order issued by the court at the same time as its determination. The execution order is to be executed through the same procedure as that for a final decision. This means, in effect, that such an order is to be taken to the court enforcer, who will impose the stipulated measure of security on the debtor's accounts and property, since the execution of final decisions is carried out in that manner.[15] The application of the standard procedures for execution of judgments — which involve various delays — to requests for the imposition of security measures concerning the same judgment is circular and may defeat the primary purpose of such measures, which is an immediate prevention of improper actions until the normal execution process can take place.[16]

A second possibility for securing execution is raised by the provisions of the Law on Execution related to initiation of the execution proceedings. According to those provisions, the court executor may inventory and impose distraint on the property of the debtor at the time of issuance of the decree initiating the execution proceedings. This may be done only on the petition of the judgment creditor, for the purpose of securing a property judgment, and the measures must be listed in the decree. There is no requirement that the measures be ordered or approved by a court. Thus, the court

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[14] See Chapter 3 of the Handbook concerning the available measures of security.

[15] Current law does not clearly state whether a execution order for security of judgment (or of suit) which is directed solely toward a bank in which the debtor (respondent) holds assets (e.g. a freezing of the account) can be submitted directly to the bank by the judgment creditor in the same fashion that an execution order concerning the payment of funds from such accounts. This is more likely to be an issue in relation to security during the consideration of a claim, since at the stage of execution available funds may simply be withdrawn to meet the relevant judgment.

[16] The provisions concerning initiation of execution proceedings do not specifically provide for the case of an immediately enforceable determination. Thus, the general statement in the APC that orders concerning security for a judgment are to be executed in the usual procedure would seem to subject them to all of the requirements of the initiation process under Article 9 of the Law on Enforcement, including the three-day period for the issuance of the court enforcer's decree and the mandatory stipulation of a period for voluntary compliance. The use of the court enforcer's authority to immediately impose distraint on property under part 5 of Article 9, discussed below, might allow some delay to be avoided, although this would not clearly eliminate the possible three-day delay in the issuance of the decree. If the arbitrazh court can be called upon to respond to a petition on security within one day of its submission, there seems little reason that the court executor should not be subjected to a similar time frame within which to act on the court's determination.

executor may independently impose these measures of security for property judgments. His decree concerning the initiation of execution proceedings, including any provisions on immediate distraint of property, can be appealed within a 10-day period of its issuance to the corresponding court.

8. Conduct of a Search for the Debtor or Debtor's Assets

As a general rule, the court enforcer is not obligated to undertake a search for a debtor or for the debtor's assets in commercial dispute cases.[17] The court enforcer may, however, conduct a search in cases concerning commercial disputes if the creditor agrees to cover the costs of the search and makes a corresponding deposit in advance through the standard procedure.[18] The court enforcer is not obligated to conduct such a search, even if the required cost coverage is promised. If the debtor or debtor's assets are found, the creditor may seek coverage of the costs of the search from the debtor. The court enforcer may not directly impose the search costs on the debtor in these cases, however, and the creditor must seek an award in court. In conducting a search for the debtor assets, both the court enforcer and the creditor's may, after execution is formally initiated, make use of the records of the tax service concerning the debtor's accounts.

9. Participants in the Execution Process; Recusals

a) The Parties and Their Rights

Like the legislation governing procedure in the arbitrazh courts, the Law on Execution contains general provisions defining the participants in the execution process and their rights and obligations. The creditor(s) and debtor(s) on the judgment are defined as the "parties" and have the right:

- to acquaint themselves with all of the materials of the case and to take excerpts and make copies of those materials;
- to participate in the actions taken in execution of the judgment;
- to make petitions, and to submit explanations, conclusions and arguments on all questions which arise, as well as objections to the petitions and arguments of other parties; and
- to petition for the recusal of those participants subject to recusal and to appeal the actions of the court enforcer.

If there are multiple creditors or debtors, participation in the execution proceedings on behalf of all or several of the creditors or debtors may be entrusted to one of the co-

[17] The only circumstances in which a search is obligatory concern execution of judgments concerning alimony, tort damages for death or harm to health or for the death of the supporter of the creditor, and those concerning removal of a child from custody of the respondent.
[18] See Section A.16. of this Chapter on execution fees and costs.

parties. A legal successor may be brought into the case upon the death or other removal of a party, and all of the actions taken by the party being replaced prior to its removal will be binding upon the successor.

Parties may have representatives participate in the execution process in their interests.[19] Organizations may be represented by their heads or officials, with their capacities as defined by law or by the founding documents of the organization, or by a representative given authority in the usual manner. Officials of organizations must present documents evidencing their positions and authorities, and representatives must have properly formalized proof of their authority to represent the relevant party. The representative's power to submit or withdraw the execution document, to appeal actions of the court executor, to entrust the representation to another person, or to receive money or other property on behalf of the represented party must be specifically stated in the document which gives authority to the representative. In other respects, a duly authorized representative may take all actions that could be taken by the parties.[20]

b) Interpreters/Translators, Witnesses and Specialists

A party in need of a translator to understand and participate in the execution proceedings may invite a translator to take part in the proceedings, and will be given time to do so. If a translator is not found by the party within the period allowed by the court enforcer, a translator may be appointed by the court enforcer. Payment to a translator is included among the execution costs which are covered by the parties through the general procedure (see below).

Witnesses [ponyatie] are required to be present during some acts related to the execution proceedings, including those that involve the opening and search of premises and storage facilities used or occupied by the debtor or other persons, and the inspection, "arrest", confiscation or transfer of property belonging to the debtor. The court enforcer may call witnesses to other actions at his discretion. Witnesses must be at least 18 years of age, may not have an interest in the execution actions being taken, and may not be related to other participants in the proceedings or in a subordinate position to them. Where witnesses are used, there must be at least two witnesses.

Witnesses are obligated to confirm by their signatures the fact of occurrence, the content and the results of actions taken in their presence. The signature is placed on the document reflecting the actions. Witnesses have the right to know what actions they are to witness and on the basis of what documents they are being taken, and to make notations concerning those actions in the document personally or to have them included. The court enforcer must explain the rights and duties to the witnesses prior to the taking of any actions. Witnesses have the right to be compensated if they bear expenses in connection with their service, which compensation is included in the execution costs.

[19] Persons under 18, under guardianship or supervision, and judges, procurators, court staff, and staff of the bailiff service may not be representatives. An exception is made for judges, procurators and staff members who are representing the corresponding court, procuracy office, or bailiff service division directly.

Specialists may be called to participate in the execution proceedings at the initiative of the court enforcer or by request of the parties. Such specialists give conclusions in written form, and are obligated to appear when called and to give an objective conclusion on the relevant issues. They have the right to be paid for their work, and the expenses for their payment are included in the execution costs.

c) Recusal of Enforcer and Other Participants

The court enforcer, and also interpreters and experts, are subject to recusal if:

- they are related to the parties, their representatives, or other persons participating in the process;
- they have an interest in the outcome of the execution proceedings; or
- there are other grounds to doubt their objectivity.

If such circumstances exist, the person affected by them is obligated to self-recuse, but a petition may also be made by the parties on these grounds. Petitions for the recusal of a court enforcer are decided by the senior court enforcer to whom he is subordinate, while petitions on recusal of an interpreter or expert are decided by the court enforcer.[21]

10. Delay, Suspension or Termination of Execution Proceedings

a) Delay of Execution Proceedings

Upon a petition by the creditor or a determination by the court, the court enforcer may delay execution proceedings for the period requested or indicated in the determination. In circumstances in which there is an obstacle to the performance of execution proceedings, the court enforcer may delay them for a period of not more than 10 days, either on his own initiative or on the basis of a petition from the debtor. A decree must be issued on the delay and the parties and court notified.

b) Suspension of Execution Proceedings

Under a number of circumstances, execution proceedings must be suspended or terminated, or may be suspended. In these instances, the decision to suspend or to terminate the execution proceedings is made by a court on the basis of a petition of either the court-enforcer or a participant in the case. With respect to execution orders issued by the arbitrazh court, the suspension or termination may be considered by the court which

[21] The law does not contain a provision concerning the recusal of witnesses, but rather states that persons with the same impediments that lead to the recusal of the enforcer, expert or interpreter may not be appointed as witnesses in the first place. However, since the parties have a general right to make petitions and express their concerns, conclusions and arguments on all matters arising during the execution proceedings, they could presumably use these methods to demand that a biased witness not be used, if they were present at the time the actions were occurring.

originally issued the execution order, or by the arbitrazh court in the place of location of the court enforcer. For all other types of execution orders and documents, including decisions of the courts of general jurisdiction, the suspension or termination is considered by a court of general jurisdiction in the place of location of the court enforcer.[22]

Proceedings for execution ***must*** be suspended upon:

- death of the debtor, announcement by a court that the debtor is legally dead or is recognized as missing, if there is a possibility for successorship;
- initiation of bankruptcy proceedings concerning the debtor in the arbitrazh court;
- loss by the debtor of legal capacity to act in his own behalf;
- participation of the debtor in hostilities as a member in active service in the armed forces or a request of a creditor in the same circumstances;
- appeal of the execution order in court, where permitted by law;
- appeal of actions of the official or body considering a case on an administrative violation;
- issuance by a person authorized by law to suspend the execution of a court act of a decree doing so;
- filing of a suit concerning the exclusion from the listing of the debtor's property (or release from "arrest") of particular property which is being subjected to execution in accordance with the execution order.

Execution proceedings may also be suspended, although this is not obligatory, in several other circumstances. Suspension is discretionary when:

- the court enforcer has made recourse to a court for an explanation of the execution order;
- a request was made by a debtor during his mandatory military service;
- the debtor is on a long-term work-related trip;
- the debtor is being treated in a medical facility;
- an appeal has been filed concerning the actions of the court enforcer or concerning a refusal to recuse himself;
- a search is being conducted for the debtor or his property;
- the debtor or creditor are on vacation beyond the area in which the execution actions are to be carried out.

[22] Article 24 of the Law on Enforcement states the rules for consideration of suspension or termination of execution proceedings.

In instances of such suspensions, the execution is to be suspended until the conditions leading to the suspension have ceased to exist, and may be reinitiated by a court on the basis of a petition by the creditor or the initiative of the court enforcer.[23]

c) Termination of Execution Proceedings

Execution proceedings ***must*** be terminated when:

- ∅ the court has accepted a creditor's rejection of the right to exact the relevant money, property or performance;
- ∅ a settlement agreement has been confirmed by the court between the creditor and the debtor;
- ∅ the creditor or the debtor has died or been declared dead or missing, if the relevant claim or obligation does not pass to a successor or cannot be enforced against the administrator of the property of a missing person;
- ∅ there is insufficient property from a liquidated organization to satisfy the claims;
- ∅ the legally established period for a particular type of execution has expired;
- ∅ the court decision or other document on which the execution order was based is reversed;
- ∅ the creditor has refused to accept objects confiscated from the debtor according to an execution order providing for the confiscation of those specific objects and their transfer to the creditor.

Upon the termination of execution proceedings, the court executor must reverse all of the actions that may have been taken in the execution of the order. The execution order, upon which a notation is made concerning the termination, is returned to the issuing body.

11. Forcible Execution Against Assets of the Debtor

a) Measures Authorized

If a judgment debtor has not satisfied the requirements contained in an execution order by the end of the period established by the court enforcer for voluntary compliance,

[23] Article 22 of the Law on Enforcement defines the periods for suspension in various instances by stating the circumstance (e.g. release from military service or from a medical treatment facility) that will allow reinitiation of enforcement proceedings. In effect, the named events define the point at which the obstacle ceases to exist. The court may establish shorter periods for suspension if it sees fit.

the court enforcer may undertake measures for the forcible execution of the order. The measures authorized by law include:

- confiscation and (if necessary) sale of the debtors funds or property;
- attachment of salary or other income of a debtor;
- confiscation and (if necessary) sale of assets or property of the debtor held in the possession of others;
- transfer of specific property to a judgment creditor in accordance with an execution order;
- other measures in accordance with law which ensure the execution of the order.[24]

b) Priority of Asset Attachment

In conducting a forcible execution, the first assets against which the execution is made are the debtor's monetary assets, including funds located in banks and other credit institutions and cash resources. Where the debtor is an organization or firm, the first priority for asset attachment also includes the attachment of debts which are owed to the debtor by third parties and which are due and payable.[25] Safes and other storage facilities will be opened and their contents inventoried and confiscated, while bank and other accounts may be frozen upon the order of the court enforcer. If payable debts are to be arrested, the debtor on the judgment being executed is forbidden to take any actions changing or extinguishing its rights of demand in the debt and the third party obligated to the debtor is informed that it may not pay the debt except by the transfer of the corresponding amount into the deposit account of the person (court enforcer) conducting the execution. Rights of claim on debts owed to the judgment debtor may also be sold to other parties during the process of execution and the amounts received used to meet the judgment being executed.

Funds in rubles are to be used to meet the judgment first, and only thereafter funds in foreign currency, if funds in rubles are not sufficient. If the court enforcer does not have information on the location of the debtor's accounts, he may obtain it from the tax service, which is obligated to provide the information within a three-day period of an inquiry by the court enforcer.[26]

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[24] These may include measures authorized by the Law on Enforcement concerning execution of judgments which require the judgment debtor to take particular actions, or judgments concerning such matters as restoration of an illegally fired employee to a previous work position or concerning the eviction of the respondent in the suit from premises.

[25] This rule was established by Decree No. 516 of the Government of the Russian Federation of May 27, 1998 "On Additional Measures for the Improvement of the Procedures for Execution Against the Property of Organizations."

[26] A judgment creditor has the same right to receive information from the tax service, after the presentation of a proper execution order that has not yet expired.

If the debtor's monetary assets are not sufficient, the court enforcer begins to execute the judgment against the debtor's other property.[27] For debtor organizations, a three-tier priority order is established for execution against property:

first priority — property not involved in productive activities (in addition to money and rights of claim on debts, this includes such items as cars, office furnishings, stocks, etc.);

second priority — completed products, and other valuables not directly involved in production;

third priority — immovable property, raw materials, equipment and other basic assets which are directly involved in productive activity.

A debtor has the right to indicate which property should be executed against first, although the final determination regarding the order and process for execution against the property is made by the court enforcer. In instances in which a court enforcer puts assets of an organization debtor in the third priority category under distraint, notification must be made to the Federal Bankruptcy Administration within three days. The Federal Bankruptcy Administration may require that a notice be published in the press concerning the execution against the organization's property. If the Federal Bankruptcy Administration notifies the court enforcer that it will seek initiation of bankruptcy proceedings against the debtor organization, the court enforcer must petition the relevant court (which issued the execution order) for a delay in the execution proceedings. If a bankruptcy case is initiated by the arbitrazh court, the execution proceedings are suspended until the consideration of the case by the court.

c) Listing, Storage of Debtor's Property

The court enforcer, not later than within a month of the delivery to the debtor of the decree on initiation of execution proceedings, must carry out a listing of the debtor's property and announce prohibition on its sale, and may also remove property from the debtor's possession for storage and later sale. The choice of whether to remove specific items of property immediately from the debtor's possession is made by the court executor, taking into account the purpose and use of the property and other factors in each specific case, and in the case of organization debtors taking account also of the priority order discussed above. Money, precious metals and jewels found in the possession of the debtor must be removed and placed either into the specialized accounts of the court enforcer for later use in satisfying the judgment or into a special storage facility.[28]

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[27] With respect to individuals, some property is not subject to execution proceedings. This generally includes the basic necessities of life, and is not usually an important source of assets for execution in a commercial matter. The list of such property currently in force is contained in an appendix to the Civil Procedure Code.

[28] The Statute on the Procedure and Conditions for the Storage of Distrained and Confiscated Property, confirmed by Decree of the Government of the Russian Federation, No. 723, of July 7, 1998, provides some additional detail on the requirements for the treatment of various types of property.

Perishable goods are to be transferred for immediate sale. Expenses for the storage of property by someone other than the debtor or its employees will be compensated, and the amount included in the costs of execution.

It should be noted that the Law on Execution treats the conditions of storage and the rights and obligations of the person/organization performing storage functions in a unified fashion, making few distinctions between instances in which distrained property remains in the possession of the debtor (and is thus "stored" by the debtor) and those in which the property is confiscated and stored by someone else. There is a general provision allowing the person storing the property to use the property while it is being stored. This provision appears to extend not only to the debtor but also to outside storage facilities, although it is not clear why a paid storage facility would need to have use rights in stored property. Similarly, the general requirement that the expenses of maintenance of the property be compensated, with set off of benefit from its use, appears to apply not only to outside storage facilities, but also to the debtor, leaving it unclear whether the debtor is to receive compensation for maintenance of its own property and whether the compensation received remains among the assets available to the creditor.[29]

Distrained or confiscated property of the debtor is to be sold within a period of two months from the time of imposition of distraint or confiscation. The law requires that the sale of the property be conducted by a specialized organization on the basis of a contract, with the exception of immovable property, which is to be sold at auction by a special organization which is licensed to deal in immovables.[30] If the property is not sold within the legally imposed two month period, the objects themselves are to be offered to the creditor. If the creditor refuses the objects, they are returned to the debtor.

12. Execution Against Income Streams

The provisions of the Law on Execution do not envision any form of execution against regular income which would apply to commercial matters. While the provisions

[29] These general rules would seem to permit the odd situation in which an outside storage facility uses the debtor's property, thus incurring maintenance expenses which are also charged to the debtor or included in the execution expenses, and also being paid a fee for storage services. It is not clear why a storage facility or person entrusted with confiscated property awaiting sale should have such rights if the property can be safely and properly stored without use. If the use of the property causes any additional costs to be included in the execution expenses in situations where the debtor's property is insufficient to meet the judgment, the use of the property by the storage facility is effectively being conducted at the expense of the creditor. If this type of situation arises with any regularity, there may be a need for a later amendment to the law to distinguish more clearly between the rights of a debtor who is continuing to use distrained property and of a person or organization not the debtor which is performing storage functions for a fee.

[30] In practice, this may mean that a commercial company organized for the purpose would be authorized to conduct sales and storage of seized property in a particular area. Conflicts of interest may arise in relation to these processes. One form of conflicting interest might be an interest on the part of the sales and storage companies and/or their individual employees in purchasing or using the property at a low cost to themselves. Effective means will need to be developed to ensure that the goal of the process is the receipt of the maximum value for the property involved and to prevent any abuses that may occur. It may also be necessary to ensure that the process of distraint and sale of assets of a judgment debtor is not used as a means to eliminate competition.

of the relevant chapter of the Law on Execution[31] refer generally to "the debtor," without restricting this to physical persons, and to "income," not restricting this to salaries and other personal income of an individual, execution against income may be used only with respect to periodic payments (such as alimony) and to sums not exceeding twice the minimum monthly wage. In all other circumstances, the execution is to be made immediately upon monetary assets and property as described above. In some cases, execution against debts due to the judgment debtor may, in practice, include much of the regular income of the business. However, the provisions concerning the use of debts and rights of claim to meet a judgment appear to relate only to debts currently due rather than to envision ongoing process. There may be some cases in which it will be more efficient and less damaging to the debtor's business to pay a large judgment in several installments out of its business income, rather than to sell rights to a debt at a significant discount or to sell physical property needed for the conduct of the business. This type of arrangement would require that the debtor and creditor agree to this procedure specifically,[32] or that the debtor petition the court issuing the execution order for an order granting payment in installments.[33]

13. Priority Order for Payments

Fees and expenses associated with the process of execution are paid out of the sum of the debtor's assets (including sale proceeds) before all other claims against the funds. The remaining sum is used to satisfy the judgment, and if additional funds are left, they are returned to the debtor. If the sums available to the court enforcer are not sufficient to cover the claims of all of all judgment creditors, the claims are to be satisfied in the following priority order:

first priority for payment — alimony and tort damages for harm to life or health, or for the death of a family supporter;

second priority for payment — claims of employees arising from labor relations, of members of cooperatives connected with their work in the cooperative, of a lawyer for the provision of legal services, and of authors and inventors for use of their works;

third priority for payment — claims of the Pension Fund of the Russian Federation, of the Social Insurance Fund of the Russian Federation, and of the State Employment Fund of the Russian Federation;

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[31] Execution against salaries and other income of a debtor is covered by Chapter 6 of the Law on Execution, which is clearly written with an individual, rather than a company or organization, in view. There are no provisions for execution against the income of an organization in Chapter 5 of the Law on Execution, which covers particular features of execution against an organization debtor.

[32] The debtor and creditor would need to conclude a settlement agreement to this effect, to be confirmed by the court.

[33] The court may consider such a petition either before or after the issuance of the original execution order. The restrictions discussed in the text do not apply to plans for the restructuring of a business enterprise and/or the repayment of its debts which are confirmed through the legal procedures applicable to bankruptcies, which are governed by specialized legislation.

fourth priority for payment — payments owned to the budgets of any level of the state (e.g. taxes) and also payments to non-budgetary funds not listed in the third priority;

fifth priority for payment — all other claims in the order of receipt of the execution documents related to those claims.

If there are not enough funds to cover all of the claims in a given priority category, the claims in that category are covered proportionally to the size of the claim.

14. Return of an Execution Order Without Completed Execution

In a number of circumstances, the court enforcer may return the execution order to the creditor without a suspension or termination and without its complete execution. As noted above, this may occur when the order is presented for execution after expiration of the time limit or the execution order does not meet documentary requirements. In addition, the order may be returned to the creditor without a completed execution when:

- the debtor has no property or income which may be used to satisfy the judgment and the court enforcer has not been able to locate any such assets;
- if the creditor refuses to accept unsold property remaining after all of the execution actions have been taken as payment for unmet portions of the debt;
- if the creditor, by action or inaction, hinders the execution; or
- if the debtor cannot be located, nor its property or other assets, in instances where the law does not provide for a search.

When the execution order is returned to the person submitting it without completion of the execution, the submitter may receive back all or a part of the advance deposit for costs which is required under the Law on Execution to be submitted with the execution order, except where the reason for the return is the creditor's hindrance of the execution proceedings.[34]

[34] Where the execution order is returned on the grounds that the limitations period has expired or the document is not properly formulated, and where the creditor refuses property which was not sold, the deposit is returned in full. Where the reason for the return is that the debtor cannot be found or has no assets with which to satisfy a judgment, the deposit is returned in that part which is not needed to cover expenses of the execution actions taken. The reason for different rules with regard to cases in which the executor attempted to sell property but was unable, and those in which the executor could not locate the debtor and/or its assets is not clear. See Section A.16 in this Chapter concerning execution costs and fees.

15.Conclusion of Execution Proceedings

Execution proceedings are concluded by any of the following:

- complete execution of the execution order;
- return of the execution order without execution upon the demand of the court that issued it or of the creditor;
- return of the execution order on the grounds listed in Section A. 13 of this Chapter;
- sending of the execution order to another division of the court enforcer's service for execution;
- sending of the execution order to an organization or place of work for the one-time or regular deduction of payments from the salary or income of the debtor;
- termination of the execution process on the grounds listed in Section A.9(c), of this Chapter.

The court enforcer issues a decree on the conclusion of execution proceedings, which may be appealed within 10 days.

16.Execution of Judgments Not Concerning Property

Judgments which do not concern property, such as those obligating a respondent to take particular actions, also give rise to the issuance of an execution order and the initiation of execution proceedings as described above. As in the case of other types of judgments, the court enforcer appoints a period for the voluntary execution of the order by the debtor.[35] If the respondent fails, without sufficient reason, to take the required actions within the period established, a fine may be imposed of up to 200 times the minimum monthly wage and a new period established for execution. If the actions are not performed within the subsequently established periods, the fine is doubled each time. Repeated failure to take the required actions will give rise to a submission by the court enforcer of a representation to the authorities empowered to impose administrative or criminal liability on the individuals who should have executed the actions.

17.Fees and Costs Associated with Execution

In any instance in which a debtor fails to execute the requirements of the execution order within the period established for voluntary execution, an execution fee is imposed upon the debtor. For judgments concerning money or property, the execution fee is 7% of the sum or of the value of the property, and for non-property judgments the execution fee

[35] There is a slight inconsistency in the language of Article 73 of the Law on Execution, concerning execution of non-property judgments, and the language of Article 9 of the same law concerning the initiation of execution proceedings by the court enforcer. Article 9 requires the court enforcer to name the period for voluntary execution in the decree on initiation of the proceedings. Article 73 states that this is to be done "after the initiation of execution proceedings," but "in accordance with Article 9."

is five times the minimum wage for a physical person and fifty times the minimum wage for an organization. 30% of the execution fee is paid into the federal budget, while the remaining 70% goes into the fund for the development of execution proceedings, from which court executors are paid success fees and from which the expenses of execution are covered during the process of execution.

If expenses are incurred for actions taken to enforce the judgment, any such expenses, in addition to the execution fee, are also payable by the debtor and are to be refunded into the fund for the development of execution proceedings at the conclusion of the execution process. Costs of execution have the first priority in payments from the debtor's assets, and will be refunded into the fund whether or not there are sufficient assets to cover the judgment in full. The following may be considered execution costs:

- **$** expense for the transport, storage and sale of the debtor's property;
- **$** payments due to interpreters, specialists, witnesses or other persons in connection with execution activities;
- **$** fees for the delivery of the sums due to the creditor through postal money transfers or other means involving a fee;
- **$** costs of other actions taken for the execution of the order in accordance with law.[36]

The creditor has the right to make an advance on the execution costs to help ensure the availability of funds to cover the necessary activities. The advance is returned to the creditor at the end of the execution proceedings, except where the creditor has hindered the execution or has refused to accept property specifically subject to transfer by the terms of the execution order. In the latter cases, the creditor will receive only the amount of the advance not used in the execution process.

18. Rights of Appeal of Execution Actions; Liability for Failure to Comply; Time Limitations on Actions of the Court Enforcer

a) Failure to Comply With the Demands of the Court Enforcer

A fine of up to 100 times the minimum monthly wage may be imposed by the court enforcer on any person or official who fails to comply with the lawful demands of court enforcers, and also on those who provide inaccurate information on the income or property of a debtor, destroy an execution document or fail to send it properly, or fail to inform the court executor of a change in the place of work or address of a debtor.

[36] As noted above, searches for the debtor and debtor's property in commercial cases are to be carried out at the expense of the creditor. The creditor may seek reimbursement of such costs, but must do so separately.

b) Appeal of Execution Actions

Decrees of the court enforcer may be appealed. Decrees issued by the enforcer concerning execution documents issued by the arbitrazh courts may be appealed to the arbitrazh court within a ten day period of the action (refusal to act). In all other cases the actions (refusals to act) of a court enforcer may be appealed to a court of general jurisdiction within a 10 day period. The court enforcer is obligated to issue a written decree concerning all actions and decisions in the execution process which concern the interests of the parties or other persons. The decree must state:

- ❒ the date and place of issuance of the decree;
- ❒ the position and name of the court enforcer issuing it;
- ❒ the execution proceeding concerning which it is issued;
- ❒ the question considered;
- ❒ the basis for the decision taken, including reference to the laws or other legal acts by which the court enforcer was guided;
- ❒ the conclusion concerning the question considered; and
- ❒ the procedure and limitations period for appeal of the decree.

In addition to the right to appeal the actions of the court enforcer to a court, interested persons have the right to make complaints concerning those actions to the court enforcer's superior — which will generally be the senior court enforcer in charge of the subdivision in which the court enforcer works. The making of such a complaint does not constitute any bar to a court appeal, and may be pursued simultaneously. A third avenue of complaint is the procurator, who is responsible under the Law on Court Bailiffs for the supervision of the legality of the activities of the service. The procurator, in turn, will have the right to make protests to the court enforcer taking the action and/or to his superior in the bailiffs service, and also to file a suit or appeal in court to protect state or social interests or the interests of third parties.[37]

c) Time Limits for Actions of the Court Enforcer

The legislation concerning the execution of judgments places time limitations on many of the actions required of the court enforcer during the execution process. It does not, however, provide for any penalty to the court enforcer for failure to meet the deadlines contained in the law, nor does the Law "On Court Bailiffs" provide for any

[37] A recent note on the powers of the Procuracy in the supervision of the court enforcers service, including recommendations on the issues with which procurators should be concerned, appeared in the Procuracy's journal Zakonnost' [Legality]. Attention was directed to the possible self-interest of the court enforcers with respect to fees and success payments, to the protection of the interests of minors and others who may be less able to enforce their own rights, and also to the issue of self-interest of parties in the non-execution of judgments (due to bribery or other motives) and the difficulty of determining why a creditor may not press for the execution of a judgment.

such penalties. No law provides specific alternatives to a creditor in the case of a failure by the court enforcer to take timely action, except for the right to appeal a failure to act as discussed above. Nor are there remedies which would apply if delay in execution actions or failure to take particular actions results in the disappearance of assets that would otherwise have been available to meet a judgment.

B. Execution of Decisions of Foreign Courts

1. Recognition of Decisions of Foreign Courts

In order to secure the execution in the Russian Federation of a judgment rendered by a foreign court, the decision and judgment of the foreign court must be formally recognized by a Russian court and an execution order issued.[38] The only exception to this rule concerns decisions issued by the courts of the member countries of the Commonwealth of Independent states. An agreement "On the Procedure for Resolution of Disputes Connected with Conduct of Economic Activity" was signed by the CIS member states (except Georgia) in Kiev in 1992, which provides for the treatment of court decisions of member countries in the same manner as the decisions of national courts in the country in which execution is sought.

The procedure for the execution of the decisions of foreign courts is to be determined by the international agreements of the Russian Federation, if such agreement exists between the Russian Federation and the relevant country. There is no single applicable convention governing the execution of the decisions of foreign courts, and in each case the parties must determine whether a corresponding agreement exists between Russia and the foreign country concerning the reciprocal recognition of civil judgments, and the terms of any such agreement. Russia is signatory to a number of agreements concerning mutual legal assistance which include provisions concerning the mutual recognition and enforcement of court judgments. All of these agreements, however, provide for the formal recognition by a Russian court of the foreign decisions and its execution on the basis of an order of such court. ***At the time of this writing, no such agreement exists between the Russian Federation and the United States.***

As an example of the types of issues that may be raised concerning the recognition and execution of foreign judgments, the Convention on Legal Assistance which applies as between the countries of the Commonwealth of Independent States (signed in Minsk in 1993) lists the following bases for refusal to recognize or execute a court decision of another state:

- ✘ the decision has not entered into legal force or is not subject to execution in the state in which it was issued, with the exception of cases in which the decision is subject to immediate execution prior to its entry into legal force;

[38] Such recognition is, of course, required only for the execution of the foreign judgment on assets located in the Russian Federation. Enforcement of a foreign court judgment against property of the debtor located in the country where the judgment was issued will be governed by the laws of that jurisdiction.

- ✘ the respondent or his representative did not participate in the consideration of the case because of a failure to inform them properly about the proceedings;

- ✘ a decision of a court on the same matter between the same persons already exists in the country in which execution is sought or from a third country or proceedings in such a case were initiated in the country in which recognition has been sought prior to those which gave rise to the decision;

- ✘ the case is within the exclusive competence of the institutions in the country in which recognition is sought;

- ✘ there is no document supporting the agreement of the parties in the case, if the decision is based on contractually agreed venue;

- ✘ the limitations period for execution of the decision in the country in which recognition and execution are sought has expired.[39]

In general, the relevant international agreements provide that a decision of a foreign court is to be recognized and enforced by the competent court in the state in which execution is sought. There has been some confusion regarding which courts in the Russian Federation should be considered the "competent court" with respect to the enforcement of foreign judgments. The term "competent court" might be considered to refer to the court that would be competent to consider the case if it were filed in the Russian Federation, or in the alternative could be any court defined as competent by Russian legislation. This question is not clearly resolved by the procedural legislation currently in effect.

There is no legislation in the Russian Federation which directly defines the courts that are to be considered "competent" for purposes of execution of foreign judgments. The Civil Procedure Code, which applies to the courts of general jurisdiction, does make reference in Article 437 to the enforcement of foreign court decisions by those courts, stating that the procedures are to be determined by international agreements. An Edict of the Presidium of the Supreme Soviet of the USSR "On the Recognition and Enforcement in the USSR of the Decisions of Foreign Courts and Arbitral Tribunals," issued in 1988,[40] provides some limited guidance on procedures for enforcement of such decisions, but as the arbitrazh courts did not exist at the time of passage of that Edict, there was no need to distinguish between the two court systems regarding competence in such questions. The currently effective Arbitrazh Procedure Code contains no direct reference to the enforcement of foreign judgments, but does state in Article 215 that the arbitrazh courts are competent to undertake particular court actions or fulfill mandates by way of legal

[39] Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases.
[40] Edict of the Presidium of the Supreme Soviet of the USSR "On the Recognition and Enforcement in the USSR of the Decisions of Foreign Courts and Arbitral Tribunals," Vestnik Verkhovnogo Soveta SSSR [Bulletin of the Supreme Soviet of the USSR], 1988, No. 29, Item 427. Legislation and other legal acts of the USSR apply in the Russian Federation unless they are superceded by Russian legislation or conflict with the constitution or laws of the RF.

assistance. If the recognition and enforcement of foreign court judgments is considered such legal assistance, then the arbitrazh courts on this basis have jurisdiction to consider requests for the recognition and enforcement of foreign court judgments. This interpretation is currently accepted by the arbitrazh courts, and on this basis those courts do accept petitions concerning the recognition and enforcement of foreign judgments when the judgment concerns a case that would be within the jurisdiction of the arbitrazh courts if considered in the Russian Federation. Unlike most parts of the competence of the arbitrazh courts, however, this type of case is not considered by the arbitrazh courts to be within the exclusive jurisdiction of the arbitrazh courts, but rather to be a matter of alternative jurisdiction, in which the party seeking the enforcement of the foreign judgment may choose which court to approach with the corresponding petition.

Confusion does continue, however, and some in the Russian legal community, including some courts, believe that foreign court decisions may only be recognized and enforced by the courts of general jurisdiction. This opinion is based on the concept of the arbitrazh courts as specialized courts, with a competence strictly limited to those cases directly placed within their jurisdiction by legislation, and a view of the language of Article 215 of the APC as insufficient to clearly assign such cases to the arbitrazh courts. In practice, there are instances in which courts of general jurisdiction accept petitions concerning the recognition of foreign judgments related to commercial disputes and others in which such courts reject such petitions, stating that the case is within the jurisdiction of the arbitrazh courts. This confusion, like the confusion regarding the enforcement of arbitral awards (discussed below), is a product of the change in the competence of the arbitrazh courts in 1995, when they received jurisdiction over cases in which foreign parties or interests are involved. The preparation of a new Arbitrazh Procedure Code which is currently underway includes amendments which will clarify the issue of competence and provide clarity with respect to procedures. The passage of the amended APC, and of a new CPC, should substantially reduce confusion in this area.

With respect to the arbitrazh courts, it should be noted that the APC requires arbitrazh courts to leave a suit without consideration when a competent court of a foreign state is considering a case concerning the same persons and the same subject and grounds, or has issued a decision on the case. The foreign court must have accepted the case for consideration prior to the filing of the case in the arbitrazh court in the Russian Federation. This rule is not applied, however, if the decision of the court is not (will not be) subject to recognition or execution on the territory of the Russian Federation, or is within the exclusive competence of the arbitrazh court in the Russian Federation. Such cases would include, for example, cases concerning rights in immovable property located in the Russian Federation.

2. Limitations Period for Execution of Foreign Court Judgments

According to the CPC, recognition and enforcement of the decision of a foreign court may be sought within three years of the entry of the decision into force. The Law on Execution recognizes execution orders based on a foreign court decision (Article 7), but does not state a specific period for the presentation of an execution order based on a

foreign court decision. Instead, Article 14 of that law states generally that an execution order issued by a court of general jurisdiction of the Russian Federation may be presented for execution within three years of the time of entry of the court act into force. The language of the relevant provision refers to execution orders issued "on the basis of" court acts of the courts of general jurisdiction. An execution order issued on the basis of a foreign court decision is not dealt with separately in the Article, leaving it somewhat uncertain whether the time period is to be calculated from the time of entry of the foreign court judgment into force or from the time of the entry of the court act issuing the execution order (the first act by the Russian court of general jurisdiction) into force. By analogy with a domestic court decision, however, the period would be calculated from the time of entry of the underlying foreign decision into force.

The interpretation of the provision is important, in that it may define the period for the presentation of the execution order by the time of entry into force of the underlying foreign court decision and not on the basis of the time of issuance of the execution order itself by the Russian court. In fact, the period in which an execution order may be sought from a Russian court and the period in which the execution order issued by a Russian court may be presented for execution appear to be identical under these provisions. In practice, time will be required to obtain the execution order from a court, and it is possible that a proceeding seeking recognition and enforcement filed late in the three year period could result in the issuance of an execution order after the same three year period permitted for its presentation. For this reason, the recognition of the foreign court judgment and issuance of the corresponding execution order should be sought well before the expiration of the three year period currently established for that step in the process.

There is no provision in the APC concerning the limitation period for a petition for an execution order based on a foreign court decision, nor concerning the period for presentation of such an order for execution. As stated above, the Law on Execution also fails to state a period for the presentation of execution orders based on a foreign court judgment. The general period applicable to execution orders based on acts of the arbitrazh courts is six months. Since an execution order issued by an arbitrazh court on the basis of a foreign court judgment is not based on an act of an arbitrazh court, this limitation would seem not to apply. As there is no other period stated, however, there remains a question concerning whether the six month period envisioned for court acts of the arbitrazh courts or the three year period for acts of the courts of general jurisdiction is to apply.

3. Security for Execution of the Judgment

The currently effective Civil Procedure Code does not contain specific provisions on security for a judgment. The Code does contain general provisions concerning security for a claim during the consideration of a case,[41] but these are written with the apparent presumption that a court within the system will be considering the case in its substance,

[41] See Chapter 13 of the CPC, Articles 133-140.

and require that the court "considering the case" also consider the request for security. It is not clear whether a court considering a petition for the recognition and enforcement of a foreign court decision would consider this petition to be a "suit" within the meaning of the term used in the provisions concerning security measures, or would consider its consideration of a petition for enforcement to be "considering the case" on the enforcement. If so, then the general provisions of those articles would apply to allow the court to impose measures of security at the time of issuance of the execution order. The APC treats measures of security for execution of the judgment separately from those for security of the suit during its consideration, and it is those provisions of the APC which would apply to security for the execution of a foreign court decision recognized by an arbitrazh court. The separate treatment in the APC of security for the suit during its initial consideration in substance and security for the execution of the judgment suggests that the general provisions of the CPC do not encompass measures imposed solely to secure the execution. If the CPC is interpreted in this way, there are no such measures available to a judgment creditor seeking security for execution from a court of general jurisdiction.

It should be noted, however, that the provisions generally allowing the court enforcer to impose distraint on property at the time of the initiation of the execution proceedings would seem to apply equally to the court enforcer's execution of an order enforcing a foreign court decision. Thus, although security measures might not be directly available from a court of general jurisdiction, they could be imposed by the court enforcer when initiating the execution. This would require a petition from the judgment creditor requesting the immediate distraint of property to be submitted at the time of presentation of the execution order to the court enforcer for execution proceedings.

C. Recognition and Enforcement of Arbitral Awards

The earlier discussion of the jurisdiction of arbitration tribunals over commercial disputes noted that inconsistencies in the several legal acts which regulate this matter make a clear definition of the rules difficult.[42] This is equally true with respect to the legal rules concerning the enforcement of the decisions of arbitration bodies. Differing rules apply to arbitral awards issued by foreign tribunals and by Russian domestic tribunals in "domestic" matters, and there is a particular lack of legislative clarity concerning arbitral awards issued by Russian arbitration tribunals in cases in which an "international element" — a foreign party or enterprise with foreign investments — is present.

[42] The three legal provisions governing arbitration and the process by which confusion among them has arisen are discussed in Chapter 2, Section D.1. of this Handbook.

1. Arbitral Awards of Russian Arbitration Tribunals Concerning Domestic Disputes

a) Applicable Law

The activity of Russian arbitration tribunals in resolving domestic disputes (i.e., those not involving foreign parties or interests) is governed generally by the provisions of the Temporary Statute on Arbitration Tribunals for the Resolution of Economic Disputes (hereinafter the Temporary Statute)[43] and the Statute on the Arbitration Court which appears as Appendix No. 3 to the Civil Procedure Code. The Temporary Statute governs arbitration of disputes subject to the jurisdiction of the arbitrazh courts, while Appendix No. 3 applies to arbitration of disputes subject to the courts of general jurisdiction.

b) Enforcement Under the Temporary Statute

The provisions of the Temporary Statute concerning the execution of the awards of arbitration tribunals state that the decisions of arbitration tribunals are to be executed voluntarily within the period and through the procedures established in the decision. If no period for execution is stated in the decision, it is to be executed immediately. If the decision is not executed voluntarily within the period stated in the decision, the party in whose favor the decision was issued may submit a petition for an order on the execution of the decision to the permanent arbitration tribunal where the case materials are stored or to the arbitrazh court in the place where the arbitration tribunal is located. Such a petition must be made within a month of the expiration of the period for voluntary execution. If the petition is filed with the permanent arbitration tribunal, that tribunal must within five days of its receipt send it to the arbitrazh court which is competent to issue an execution order.

The petition must have as appendices documents confirming the failure to execute the decision and evidence of the payment of the filing fee for the arbitrazh court. If the petition is submitted after the expiration of the one month period or without proper documentation, it will be returned by the arbitrazh court without consideration. The arbitrazh court may, however, renew the period for the submission of the petition if the filing was missed for a sufficient reason.

A petition is to be considered by one judge within a one month period of its receipt by the arbitrazh court. The arbitrazh court may refuse the issuance of an execution order if the arbitration tribunal violated procedural rules, such as:

- ✘ the parties did not agree to consideration of the dispute by an arbitration tribunal;
- ✘ the composition of the tribunal or the procedure for consideration was not in accord with the agreement of the parties;

[43] Temporary Statute on Arbitration Tribunals for the Resolution of Economic Disputes, confirmed by Decree of the Supreme Soviet of the Russian Federation, Vedomosti S'ezda Narodnykh Deputatov i Verkhovnogo Soveta RF [News of the Congress of People's Deputies and the Supreme Soviet of the Russian Federation], 1992, No. 30, Item 1790.

- ✘ the party against which the decision was issued was not properly informed of the day of consideration of the case in the arbitration tribunal or for another reason was not able to present its explanations; or

- ✘ the dispute arose in the sphere of administrative relations with a state body or was otherwise not legally subject to consideration in an arbitration tribunal.

In addition to the procedural grounds for refusal of execution, the Temporary Statute allows the arbitrazh court to review the decision of the arbitration tribunal in its substance. According to its Article 26, if the arbitrazh court finds during its consideration of the petition that the decision of the arbitration tribunal is not in accord with the substantive law or was taken without proper consideration of the materials of the case, the arbitrazh court must return the case to the arbitration tribunal which issued the decision for a new consideration. These provisions effectively permit the substantive review of the case by the arbitrazh court. If it is not possible for the same arbitration tribunal to consider the case, the claim may be submitted to an arbitrazh court in accordance with the general rules concerning jurisdiction and venue.

The arbitrazh court issues a determination on its consideration of the petition, either granting or refusing an execution order. The determination may be appealed through the general procedures for appeal established by the APC, including those applying to cassational appeal and supervisory review. A sample petition for the enforcement of an arbitration award issued in a "domestic" commercial dispute, and the arbitrazh court's determination on that petition, appear as Appendix R to the Handbook.

c) Enforcement Under Appendix No. 3 to the CPC

Appendix No. 3 to the CPC states that a decision of an arbitration tribunal which is not executed voluntarily may be enforced through the issuance of an execution order by a court. In issuing the execution order, the court is to verify that the decision of the arbitration tribunal does not violate the law and that the rules contained in Appendix No. 3 concerning procedures in the arbitration tribunal were not violated in the issuance of the decision. A refusal by the court to issue an execution order may be appealed within a 10 day period after its issuance. After a court's refusal to order the execution of an arbitral award has entered into legal force, the dispute may be submitted to a court for resolution.

2. International Commercial Arbitration Outside Russia

With respect to awards issued by arbitration tribunals outside the Russian Federation, **recognition and enforcement are governed by the terms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,**[44] to which Russia is a party.[45] The grounds envisioned in the New York Convention for the refusal to recognize an award or to enforce it are:

[44] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517, TIAS 6997, 330 UNTS.

[45] Russia became a party to the Convention upon the dissolution of the Soviet Union in 1991.

- ✘ one of the parties to the arbitration agreement did not have legal capacity or the agreement itself was void by the applicable law, or if the applicable law is not stated by the law of the place of the arbitration;

- ✘ the party challenging the award was not properly notified of the appointment of an arbitrator or of the consideration by the tribunal or for another reason was not able to present its case;

- ✘ the award was issued concerning a dispute not subject to the arbitration agreement (but if this affects only a part of the award and the terms are separable, then only the part outside the agreement will not be recognized);

- ✘ the composition of the arbitration tribunal or the arbitration procedure was not in accord with the agreement of the parties, or was not in accordance with the law of the place of the arbitration;

- ✘ the award has not yet become binding on the parties or has been reversed or suspended by a competent court.

In addition, a court may refuse to enforce an arbitral award if the matter in dispute is not subject to arbitration under the law of the country in which enforcement is sought, or its enforcement would violate the public policy of that country.[46] The New York Convention is implemented by the 1993 Law "On International Commercial Arbitration" and Articles 35 and 36 of that law define the conditions for enforcement of foreign arbitral awards, repeating the provisions of the Convention listed here.

3. International Commercial Arbitration Awards Issued in the Russian Federation

a) Applicable Law

It is this category of arbitration proceedings and arbitral awards that gives rise to confusion concerning the applicable law and the procedures for securing enforcement of an arbitral award. The confusion is caused by the fact that two different pieces of legislation sometimes appear to apply to the same dispute. The Temporary Statute, by its terms, applies to arbitration of disputes which would otherwise be subject to the jurisdiction of the arbitrazh courts. The jurisdiction of the arbitrazh courts includes disputes involving foreign parties which meet the other criteria for arbitrazh court jurisdiction. Thus, the arbitration of international commercial disputes which would otherwise be subject to the jurisdiction of the arbitrazh courts would seem to be governed by the Temporary Statute. The clear exception to this is disputes which are arbitrated at the long-established International Commercial Arbitration Court (ICAC) or the Maritime Arbitration Commission (MAC), which are specifically exempted from the effect of the Temporary Statute.

[46] Grounds for reversal of an arbitral award or the refusal of execution appear in Article V of the New York Convention.

At the same time, there is a Law of the Russian Federation "On International Commercial Arbitration,[47] "which applies generally to arbitration of international commercial disputes in the Russian Federation, without distinguishing among them on the basis of the court in which they would be heard if they were not arbitrated. The rules contained in the 1993 Law and in the Temporary Statute differ significantly, however, and most international commercial disputes which are subject to arbitration would fall into the jurisdiction of the arbitrazh courts if they were not arbitrated. The determination concerning which of these legal acts applies will define which court has the authority to enforce an award and what the powers of the court and procedures for enforcement will be.[48]

One of the means to resolve this apparent overlap in jurisdiction is a strict reading of the first article of the Temporary Statute, which provides that the Temporary Statute will not apply to disputes where a party is located abroad or where a party is an organization with foreign investment unless the parties to the dispute agree otherwise. If strictly applied, this article would eliminate the application of the Temporary Statute to any international commercial dispute except those in which the parties had specifically agreed upon its use.[49] This interpretation is not, however, universally accepted and there may be disagreements among courts concerning jurisdiction over the enforcement of arbitral awards issued by Russian arbitration bodies in cases concerning international commercial matters and the rules governing the enforcement of those awards.

b) Standards for Enforcement Under the 1993 Law "On International Commercial Arbitration"

The 1993 Law was in large part intended to implement the New York Convention. Articles 35 and 36 of the Law state the grounds for refusal of recognition or enforcement of a foreign arbitral award that are listed above in Section C.2. of this chapter. Article 34 of the Law states the grounds on which reversal of an arbitral award concerning international commercial matters ***issued in the Russian Federation*** may be sought in court, specifically:

- ✘ one of the parties to the arbitration agreement did not have legal capacity or the agreement itself was void by the applicable law, or if the applicable law is not stated by the law of the Russian Federation;

[47] Law of the Russian Federation "On International Commercial Arbitration," Vedomosti S'ezda Narodnykh Deputatov Rossiskoi Federatsii i Verkhovnogo Soveta Rossiskoi Federatsii, 1993, No. 32, Item 1240.

[48] The confusion over the scope of application of these provisions is a result of changes that have occurred since the time of their passage. When the two acts discussed were adopted, the arbitrazh courts had no jurisdiction over cases concerning international commercial matters, and the only arbitration tribunals hearing such matters were those specifically excluded from the scope of application of the Temporary Statute. In the intervening period, the arbitrazh courts have been given general jurisdiction over most international commercial disputes and many new arbitration tribunals have been formed and are hearing disputes concerning such matters.

[49] Even in instances of agreement, however, the application of the rules of the Temporary Statute concerning enforcement of arbitral awards by courts to cases concerning international commercial arbitration may still raise difficult issues, as the grounds provided by the statute for refusal of enforcement of an award are not entirely consistent with those envisioned in the New York Convention

- ✘ the party challenging the award was not properly notified of the appointment of an arbiter or of the consideration by the tribunal or for another reason was not able to present its explanations;

- ✘ the award was issued concerning a dispute not subject to the arbitration agreement; or

- ✘ the composition of the arbitration tribunal or the arbitration procedure was not in accord with the agreement of the parties, if they could have legally agreed on those issues under the 1993 Law, or was not in accordance with the law.

In addition, the award may also be reversed by a court on the grounds that the object of the dispute may not be the subject of arbitration according to the law of the Russian Federation or that the award violates the public policy of the Russian Federation.

These grounds are identical to those provided by the New York Convention as grounds for refusal to enforce a foreign award, with the exclusion of the ground that the award is not yet binding or has been suspended or reversed. Thus, the primary difference between the enforcement of arbitral awards concerning international commercial arbitration issued outside the Russian Federation and those issued inside the Russian Federation is that those issued inside the Russian Federation may be ***reversed*** by a Russian court under certain circumstances, while the same circumstances with respect to a foreign arbitral award may lead only to a ***refusal to recognize and enforce*** the award. This leaves open the possibility, in relation to arbitral awards issued inside the Russian Federation, for reconsideration by a Russian arbitration tribunal where the defect which led to the reversal is one that can be cured in a new arbitration proceeding (e.g. failure to properly notify a party or procedural problems).

c) Standards for Enforcement Under the Temporary Statute

Where enforcement of an arbitral award concerning an international commercial matter takes place under the Temporary Statute, the rules and procedures discussed above in Section C.1(a) of this chapter will apply.

4. Where and How to File

a) Requests for Enforcement Under Appendix No. 3

A request for enforcement of an arbitral award in a case that would otherwise have been subject to resolution in the courts of general jurisdiction must be sought from the first-level court (the regional or city court) in the area where the arbitration procedure took place. The records of arbitration proceedings in such cases are to be forwarded to this court for storage after the arbitration has been completed. A decision refusing to issue an execution order may be appealed within ten days of issuance. After a decision refusing an execution order has entered into force (which occurs either when no appeal was filed within the available period or after the appeal decision is issued), a party in the

case may file a petition for the resolution of the same dispute in the appropriate court of general jurisdiction.

b) Request for Enforcement Under the Temporary Statute

The Temporary Statute provides that execution orders are to be issued by the arbitrazh court of the first instance in which the arbitration tribunal issuing the award is located. A petition must be submitted within a month of the expiration of the period stated in the award for voluntary execution, or within a month of the day after the issuance of the award. The arbitrazh court has the authority to reestablish the period for filing if a good reason is shown for having missed the deadline. If the arbitral award in question was issued by a permanent arbitration tribunal, the request is made by submission of the petition to the tribunal, which must forward it within five days, together with the record of the proceedings, to the appropriate arbitrazh court. If the arbitral award was issued by an ad hoc tribunal, the petition is submitted directly to the arbitration court. The petition is to be considered by a single judge within a one month period of its receipt, and a determination issued on issuance or refusal of the execution order.

c) Request for Enforcement of Decisions Issued in International Commercial Arbitration Processes

The question concerning which court is appropriate for the filing of a petition for enforcement in a case involving international commercial arbitration is not resolved by the 1993 Law, which only states that the petition should be filed in the "competent" court. With respect to the decisions of arbitration tribunals located outside the Russian Federation, the 1988 Edict on enforcement of foreign judgments and arbitral awards, discussed in Section B of this Chapter with respect to the enforcement of foreign court decisions, states that the petition should be filed in the highest (supreme) court in the subject of the Federation (republic, oblast, krai) in which the execution is being sought. As discussed above, the 1988 Edict was passed before the creation of the arbitrazh courts and so does not distinguish between the arbitrazh courts and the courts of general jurisdiction. The same confusion discussed in Section B with respect to the "competent court" for the enforcement of foreign judgments exists also with respect to the competent court for the enforcement of foreign arbitral awards. If foreign arbitral awards are equated with foreign court decisions and their enforcement is considered to be within the definition of "legal assistance" under Article 215 of the APC, then the analysis currently accepted by the arbitrazh courts and discussed in Section B, under which the arbitrazh courts have "alternative jurisdiction," together with the courts of general jurisdiction, over enforcement of foreign court judgments, applies equally to the enforcement of foreign arbitral awards.

A special question exists with respect to the enforcement of arbitral awards, however, that does not arise with respect to enforcement of court decisions. Court decisions are either issued by foreign courts or by domestic courts. Arbitral awards, however, may be issued in "international" cases by arbitration tribunals located within the Russian Federation. This raises the question of the definition of the "competent" court

with respect to enforcement of an award issued in international commercial arbitration proceeding that takes place in the Russian Federation.

Traditionally, the courts of general jurisdiction enforced the decisions of the ICAC and MAC during the many decades in which these were the only existing international arbitration tribunals within the USSR. This practice continues in the present, and the decisions of those bodies are usually submitted to a court of general jurisdiction for the issuance of an execution order. Article 339 of the Civil Procedure Code, applied by the courts of general jurisdiction, includes decisions of the ICAC and the MAC in its list of documents on the basis of which an execution order may be issued. The specific court to which a petition is submitted has changed a number of times over the years, including the local court of the first level located at the place of the arbitration tribunal, the second-instance court (the Moscow city court of general jurisdiction), and the first instance court at the place of location of the respondent. At the present time, petitions are being accepted by the Moscow city court of general jurisdiction. However, the practice of submission of such petitions to this court is not an exclusive one, and there have been instances in which a petition for the issuance of an execution order based on a decision of the ICAC has been submitted to the Moscow arbitrazh court (the first instance arbitrazh court) and an execution order has been issued by that court.

With respect to the decisions of other arbitration tribunals in the Russian Federation which hear both “domestic” and international matters, there is some confusion concerning jurisdiction to issue execution orders. A conclusion that the courts of general jurisdiction are the proper courts for such cases can be based upon the provisions of the CPC generally authorizing issuance of execution orders on the basis of arbitral decisions. A conclusion that the arbitrazh courts have jurisdiction over such cases may be based on one of several possible legal analysis. One analysis relies on the language of the Temporary Statute concerning its application to all cases within arbitrazh jurisdiction (including, since 1995, cases involving foreign parties). Another would interpret the 1993 Law’s reference to the “competent” court to mean the court otherwise competent to hear the underlying dispute if it were brought in a domestic court. In the alternative, the arbitrazh courts could be considered to be competent to issue enforcement orders in such cases on the basis of the same analysis presented in Section B of this Chapter concerning foreign court decisions, treating “international” awards issued by domestic arbitral tribunals as “foreign” for the purposes of the analysis. Practice in the submission and consideration of such cases is not completely consistent. The arbitrazh courts acknowledge jurisdiction over such cases, provided they would be within the jurisdiction of the courts if heard initially. Courts of general jurisdiction have in some instances transferred cases to the arbitrazh court or refused the case and advised the party seeking enforcement to do so. In other instances, however, the courts of general jurisdiction have accepted the relevant petitions and considered the case.

The lack of clarity in the legislation creates some serious questions about differing treatment of petitions for execution orders. If the arbitrazh courts apply the Temporary Statute in considering a petition for an execution order, they may conclude that they are to review the decision of the arbitral tribunal in substance, to determine whether the decision

is legal and was based on due consideration of all of the factual circumstances. The courts of general jurisdiction, however, if applying the 1993 Law, would conclude that they may not review the substance of the arbitral decision and may only reverse or refuse execution on the grounds stated in the Law. A different question of differential treatment may arise between international cases decided by a foreign arbitration tribunal and those decided by an arbitration tribunal within the Russian Federation, due to the differing time limitation on the execution of a resulting order. (See below.) These questions may be resolved by the new APC and CPC and/or by legislation on arbitration, but until this occurs it is important for parties to a dispute to be aware of the issues. There have been some cases in which foreign parties relied on needs to be resolved through legislative clarification or conclusive interpretation by the highest courts in the two court systems.

5. Limitations Periods for Enforcement

The 1993 Law does not specify any time limitation on the submission of a petition for the enforcement of an award from an international commercial arbitration tribunal. With respect to execution of an order enforcing the award once it is received, the limitation stated in the Civil Procedure Code and repeated in the 1988 Edict is three years.

The 1997 Law on Execution does not appear to contain a limitation period applicable to execution orders based on a decision of a foreign arbitration tribunal. In defining execution documents, that law (Article 7) lists as two separate categories execution orders issued (a) on the basis of decisions of foreign courts and arbitration tribunals, and (b) on the basis of decisions of the International Commercial Arbitration or other arbitration tribunals. Although the reference to "International Commercial Arbitration" uses the term "arbitrazh" for arbitration tribunal rather than "arbitrazhnyi sud" or "arbitrazh court" — the reference is singular and capitalized and appears to refer to the International Commercial Arbitration Court (ICAQ) discussed above. In defining the periods for presentation of execution orders, the same law (Article 14) provides a six month period for orders issued on the basis of decisions of the ICAC or of other arbitration tribunals, which appears to be applicable to orders enforcing awards issued by these tribunals, whether issued by the courts of general jurisdiction or by an arbitrazh court.

The 1997 Law on Execution, however, provides no period for the presentation of execution orders based on the decisions of foreign courts or arbitration tribunals. In the absence of such a period, the periods defined by the CPC and the 1988 Edict of three years would seem to apply to these orders. This differentiation in time periods, however, would seem to subject awards in international commercial arbitration to very different execution periods, depending upon whether they were issued within the Russian Federation or by a tribunal outside the Russian Federation. In the alternative, the general periods for presentation of orders based on acts of the arbitrazh courts (six months) and of the courts of general jurisdiction (three years) could be applied, but this would result in very different periods for the enforcement of foreign arbitral awards depending upon which court issued the execution order. Confusion about the applicable limitation has in some instances caused foreign parties to fail to present execution orders within the required periods and thereby to lose their opportunity to enforce an arbitral award. Until

this matter is more clearly resolved by legislation, parties to disputes should be extremely careful about limitations periods on execution orders and would be well advised to obtain and present such orders for execution as early as possible.

6. Security for the Execution of the Judgment

Provisional measures for security of the claim during arbitration are provided for by the rules of a number of the arbitration tribunals that are competent to issue awards in cases concerning foreign economic matters, and the ICAC, for example, reports an increasing number of requests for provisional security in recent years. Such measures will usually be ordered by an arbitration tribunal only if the respondent, against whom the security measures are sought, can be shown to be acting in a manner that is likely to damage its ability to meet an award (e.g. selling principle assets). The party seeking the security may be required to give a return security for damages caused by measures of restraint, should the seeking party lose the case before the arbitration tribunal. All measures of restraint which are ordered by the arbitration tribunal hearing the case (or by the official of the tribunal authorized to do so) are to be implemented voluntarily by the parties. If a party does not voluntarily implement the security measures, the party seeking the measures must seek their enforcement through the courts, using the same procedures discussed above for security of a suit and the enforcement of court decisions generally.

There is a lack of detailed legal regulation in this area, and the kinds of questions discussed above concerning the competent court for enforcement of an arbitral award exist also in relation to orders for interim security measures. The language of Article 9 of the 1993 Law on International Commercial Arbitration states that "recourse of the parties to a court prior to or during the consideration by the arbitration tribunal with a request that measures be taken to secure the suit and the issuance by the court of a determination on the taking of such measures shall be compatible with the arbitration agreement." The language of this provision clearly suggests that parties may be able to make recourse to a court for security of the claim during the arbitration process. Neither the CPC, passed prior to the issuance of the 1993 Law, nor the APC, passed two years thereafter, however, contains language specifically relating to security for an arbitral award. The general provisions of both codes concerning security for a suit during its consideration state that the petition is to be considered by the same court considering the dispute itself, leaving it at a minimum uncertain where a petition for security during consideration by an arbitration tribunal should be heard. Nor does the draft of the new Law "On Arbitration Tribunals in the Russian Federation" available at the time of writing provide any clarity in this respect. It states only that an arbitration tribunal shall have the right to instruct parties to take measures securing the claim, and does not address in any provision the means for enforcement of such measures, if they are not implemented voluntarily.[50]

[50] The provisions of the draft relating to enforcement of arbitral awards would not appear to apply at all to the enforcement of measures for security, as the provisions concern only the court enforcement of the "decision" of an arbitration tribunal. The article concerning interim security measures refers to the arbitration tribunal's ability to "order" such measures. There are no provisions in the law concerning the mandatory enforcement of the "orders" of an arbitration tribunal, and without such the provisions would normally be interpreted not to apply to such orders.

D. Practical Issues Related to Enforcement[51]

The practical problems associated with establishing an effective enforcement and execution system in the Russian Federation are considerable and the effort required should not be underestimated. This issue is not simply one of the need to create the court enforcer's service and to establish the legal procedures which will be implemented in order to carry out execution activities — although these are certainly necessary and important elements. This issue is also one of the state of development of markets and of the institutions that support them, and of the cost of some of the tools which may be taken for granted in other systems. Some of the underlying institutions and infrastructure which make reasonably certain and efficient execution possible in other systems have not yet had time to develop in the Russian Federation, while others are costly and may not develop on a broad scale until there is sufficient demand and ability to pay. While this certainly does not mean that judgments cannot be executed until they do develop, it does mean that the task may be difficult and creative strategies may need to be employed.

Under planning there was a very limited need for the services now to be provided by the court enforcer. Most of the property and funds of enterprises were used and transferred according to the requirements of economic plans and much of the accounting between entities was conducted without cash transfers. When an inter-enterprise dispute was resolved, the property or funds could be transferred by direct order of the controlling ministry, or direct accounting adjustment between the two enterprises, not requiring any acts of will of the enterprise or its managers. Failure of individuals to carry out transfers or other actions in accordance with properly issued instructions was punishable by significant administrative or even criminal liability. The property ownership of individuals was quite limited by law, as was their capacity to have domestic or foreign bank accounts. Under these circumstances, the ability of an enterprise or an individual to refuse to comply with a judgment, or to hide assets, or to transfer funds or assets to use for personal gain, was extremely limited. The kinds of mechanisms used to trace assets, to freeze accounts, and to allow for the enforcement of obligations in an otherwise unrestricted atmosphere were simply not required, and so did not exist.

It should be noted that many of the mechanisms used by those charged with enforcing a judgment in complex market environments were not created solely, or even primarily, for this purpose. Registry systems for various kinds of property, systems that track use of credit and certain kinds of bank transfers, the credit and financial history records that make it difficult for a person or company owing a judgment to continue to receive financing or to operate in another location, and other institutions of modern market life were put into place over time for the purpose of facilitating business activities. For example, the certainty about the ownership of property provided by registry systems ensures that transactions are final and provides security to the parties, while credit and

[51] The number and type of practical issues that must be addressed in enforcing a court judgment will, of course, vary with the type of judgment or dispute and the parties involved. A full discussion of all of the possible issues is well beyond the scope of this Handbook. This section addresses only a small number of structural problems that are likely to affect most enforcement proceedings.

financial tracking and reporting allows businesses to make informed decisions about potential customers and partners with whom they are unacquainted. As it happens, these mechanisms also have substantial roles to play in allowing enforcement authorities to track assets and ensure that judgments are paid. These types of services and infrastructure will, presumably, develop as Russia's economy develops and the need for them increases. In the interim, priority may need to be given to rules which allow the most serious forms of asset hiding and improper transfers to be discouraged and, in appropriate circumstances, to be reversed. The creation of more detailed systems of credit reporting and monitoring primarily for enforcement purposes, however, is unlikely to be successful, since it will be avoided by commercial actors rather than viewed as a useful source of information and assistance, and probably cannot be funded without commercial application.

Another way in which the level of development of markets and the health of the economy affect the execution process is in their impact on markets for productive assets that may be sold to meet a judgment. In conditions of economic downturn, or in areas in which there is little in the way of available investment capital, the auction of the equipment and other productive assets of a commercial entity against whom a judgment has been issued may bring results disappointing to the judgment creditor. In recent years, however, monetary assets — bank accounts and cash — have been quite easy to transfer and to hide, and it is the physical assets that are less likely to disappear. Land and buildings enjoy a brisk demand in many locations, and may be the most valuable physical asset against which execution may be made. There are, however, still significant complications concerning the transfer of land in ownership and the prevalence of complex use agreements in office and industrial buildings may make them less useful as an asset to satisfy a judgment in some cases.[52] These are not issues that changes in the execution process per se can address, but rather problems that will be alleviated with time, growth and continuing development of legislation in other areas. They are, however, issues that those involved in commercial disputes should remain aware of, and should take into account both before disputes arise — in considering the advisability of structuring security measures into business transactions — and after they have arisen — in considering the possibility of a request for imposition of security for the claim during consideration or security for the execution.

At the time of this writing, there is another significant issue that must be addressed in discussing the execution of judgments in commercial cases — the issue of the competing creditors of the judgment debtor, its possible bankruptcy, and the effect of these on the process and outcome of execution. As discussed above, the court enforcer is obligated to inform the Federal Bankruptcy Agency about execution proceedings which involve the basic productive assets of an enterprise, and the Federal Bankruptcy Agency may take steps to ensure that other creditors of that enterprise are informed of the situation or may itself take steps to initiate bankruptcy proceedings. The initiation of a

[52] It is possible to transfer rights in a long-term lease and to auction such rights as a part of the property of the debtor. Article 62 of the Law on Execution specifically provides for such auctions. The transfer of the leased premises, however, may require the approval of the lessor, which may complicate the transaction should the lessor be unwilling to give a blanket approval.

bankruptcy process requires the suspension of the execution proceedings, and if the debtor is liquidated in bankruptcy the judgment creditor will be included among the creditors making claims against the bankruptcy estate. Priority order for the payment of claims from the assets of a bankruptcy estate places debts to employees and to the state (including taxes and contributions to the Pension and other funds) above debts contracted in the normal course of business. The level of indebtedness of many enterprises to employees and to the state at the current time is extremely high, which reduces the likelihood of payment to ordinary creditors during a bankruptcy proceeding. While this is not a matter that is within the control of a party to a commercial dispute, its practical significance may weigh on decisions concerning such matters as settlement agreements or whether to object to a proposed installment scheme for execution. A similar issue may arise with respect to a judgment debtor against which the higher-priority claimants have already obtained execution orders, since the priority order for the payment of competing judgment creditors also places creditors in the normal course of business in a lower priority than debts to employees, to state Pension, Employment and Insurance Funds, and to the budgets of any level of the state.

APPENDICES

Appendix A: Petition of Suit

Arbitrazh Court of Samara Oblast
443045 Samara, ul. Avrora, 148

Plaintiff: OAO Stockholders Commercial Bank "TOKOBANK" in the person of its Samara Branch
[address]

Respondent: ZAO "Ekvator"
[address]

Sum of the suit: 3570000 rubles
State [filing] fee: 29450 rubles

PETITION OF SUIT
Concerning the Return of Indebtedness

Between the Plaintiff and the Respondent on 11 April 1997 there was concluded Credit Contract No. 32/97 (hereinafter — the credit contract), in accordance with which the Respondent was provided credit in the amount of 1000000 (one million) new rubles for the period until 15/07/97. By the additional agreement No. 4 of 15/07/97, the period for the payment of the credit was established as 15/12/97.

In accordance with point 3.3. of the credit contract, the Respondent was obligated pay to the Plaintiff for the use of the credit 45% per year from the date of the creation of the debt until 14/07/97, providing for the deposit of the sum of the payment due to the account of the Plaintiff not later than the 25th of each month. Later the percentage rate on the credit contract was changed by additional agreements in the following manner:

Date of add. Agreement	% yearly	Date of change in rate
No. 1 of 15/05/97	39	15/05/97
No. 2 of 23/06/97	27	16/06/97
No. 9 of 16/10/97	24	06/10/97
No. 11 of 21/11/97	31	22/11/97

By an additional agreement of 26/12/97, the sum of the credit was increased to 3000000 (three million) rubles and the date for payment established as 25/12/98, and the procedure for the provision of the credit was changed as well: The provision of the credit was to be carried out at any time and n any amount by means of an additional agreement or the payment of a payment order.

In accordance with this, on the basis of an additional agreement No. 14 of 26/12/97, the Respondent was provided with a veksel credit in the sum of 3000000 rubles with a time for payment of 15/10/98. The percentage for the use of the credit was defined as 10% yearly until the payment by the bank of the veksels, and thereafter 31% yearly. The percentage for use of the credit was established by agreement of 01/02/98 in the amount of 34% yearly, by additional agreement No. 16 of 23/03/98 as 36% yearly from 01/03/98. By additional agreement No. 17 of 23/03/98 the percentage rate for the credit was reduced to 30%, beginning with 16/03/98.

By additional agreement No. 18 of 25/05/98 the time for the payment of the interest for the period of 01/05/98 through 25/12/98 was established as being simultaneously with the payment of the credit.

In security for the execution of its obligations under the credit contract, on 11/04/97 the Respondent provided a mortgage on immovable property belonging to it: a part of the non-residential premises being built at ul. Aerodromnaya, d. 13, in the city of Samara, with an overall space of 1046 square meters.

In accordance with Article 339 of the Civil Code of the RF, the contract of mortgage was certified on 15/04/97 by a notary, G.V. Vantenkova (register No. 776) in the city of Samara, and on 18/04/97 was registered in the bodies of state registration of the municipal enterprise “Bureau of Technical Inventory” (register No. 4).

In violation of the conditions of the credit contract (with all of the additional agreements to it), the Respondent has not fulfilled its obligations to this time and did not provide for the receipt of assets in payment for its underlying debt and the interests for its use.

As a result of the violation by the Respondent of its obligations, there has been formed an indebtedness of the Respondent to the Plaintiff, which on 25 December 1998 consisted of 3570000 rubles, of which:

3000000 (three million) rubles is the amount of the basic debt
570000 (five hundred and seventy thousand) rubles is the amount of the interest debt

In accordance with point 4.1 of the credit contract, the Plaintiff has the right to withdraw in an uncontested procedure [automatically] from the account of the Respondent monetary sums for the payment of the basic debt and interest on it. Payment instructions Nos 1 and 2 of 29/12/98 for the withdrawal of the sums of the debts from the settlement account of the Respondent were not executed due to the lack of funds in the settlement account.

On the basis of that set forth above, in accordance with Articles 334, 349 and 810 of the Civil Code of the RF, and being guided by Articles 4 and 22 of the APC RF,

I REQUEST:

That 3570000 (three million five hundred seventy thousand) rubles be exacted from the Respondent to the benefit of the Plaintiff, of which

3000000 (three million) rubles is the sum of the underlying debt and
570000 (five hundred seventy thousand) rubles is the sum of the indebtedness for interest.

That execution be levied on the mortgaged immovable property belonging to the Respondent.

That the court costs for the payment of the state [filing] fee be imposed upon the Respondent.

Attachments:

1 Evidence of the sending of a copy of the petition of suit to the Respondent.
2 Motions (for delay in the payment of the state fee and for security for the claims of the suit)
3 An account of the sums of indebtedness of ZAO “Ekvator”
4 A copy of Credit contract No. 32/97
5 “ “ “ Additional agreement No. 1 of 15/05/97
6 “ “ “ Additional agreement No. 2 of 23/06/97
7 “ “ “ Additional agreement No. 4 of 15/07/97
8 “ “ “ Additional agreement No. 9 of 16/10/97
9 “ “ “ Additional agreement No. 11 of 21/11/97
10 “ “ “ Additional agreement without number of 26/12/97
11 “ “ “ Additional agreement No. 14 of 26/12/97
12 “ “ “ Additional agreement No. 15 of 02/02/98
13 “ “ “ Additional agreement No. 16 of 23/03/98
14 “ “ “ Additional agreement No. 17 of 23/03/98
15 “ “ “ Additional agreement No. 18 of 25/05/98
16 “ “ “ Mortgage contract of 11/04/97
17 “ “ “ Conclusion of the Bureau of Technical Inventory on the market value of the immovable property on 19/02/97
18 “ “ “ Additional agreement of 26/12/97 to the mortgage contract
19 “ “ “ Payment instruction No. 1 of 29/12/98
20 “ “ “ Payment instruction No. 2 of 29/12/98
21 “ “ “ Power of attorney No. 44 of 14/01/99

For AKB “TOKOBANK”
Acting Director of the Samara Branch Office T.N. Rezanova
By Power of Attorney of 14/01/99, No. 44

[signature]

Appendix B: Determination on Acceptance of a Case and Preparation

Determination on the Acceptance of a Case for Proceedings and its Preparation for Court Consideration

City of Chelyabinsk

__26 April 1999__ **Case No.** __A76-3051/99-39-102___

Judge of the Arbitrazh Court of Chelyabinsk Oblast __Alginova, S.I._____,
having considered the materials of the case concerning the suit of _OAO Kombinat Magnezit" of the city of Satka_____

against ___the State Tax Inspectorate for the city of Satka_____
_____

concerning ____the recognition as void of decision No. 75 of the State Tax Inspectorate of 23 March 1999_____
_____

HAS ESTABLISHED:

The petition was submitted taking account of the proper venue and with observance of the requirements of Articles 102-104 of the Arbitrazh Procedure Code of the Russian Federation.

Bearing in mind the sufficiency of the basis for the acceptance of the petition of suit and the consideration of the dispute in a court session, as well as the necessity to take actions directed toward provision for the correct and timely consideration of the dispute, and being guided by Articles 106, 112, 113 and 140 of the Arbitrazh Procedure Code of the Russian Federation [the judge]

HAS DETERMINED:

1. To accept the petition of suit for proceedings and to appoint the case for consideration in a session, which will take place on __26 May 1999_ at 10:00_ in the premises of the arbitrazh court of the city of Chelyabinsk, ul. Voroskogo 2, in room number _617_, telephone __65-33-70__.
2. To call to the session the parties and also _____.
3. In the process of preliminary preparation of the case for hearing to propose to the persons participating in the case that they complete the following actions:

3.1. To the plaintiff (petitioner) [it is proposed] to present the documents stated in points _____ of the "list" given on the other side of this determination, and also ____the decree on the registration of the enterprise_____
_____
_____

3.2. To the respondent [it is proposed] to present the documents stated in points _____ of the "list" given on the other side of this determination, and also:
_____ a justified response [to the petition of suit], with the normative and documentary bases for the challenged decision_____
_____
_____

Judge: [signature]

Note: In correspondence you must refer to the number of the case. In accordance with point 3 of Article 119 of the APC RF, in the case of failure of a plaintiff who has been properly notified of the time and place for the consideration of the case to appear in the court session, **the dispute may be resolved only in the presence of a petition of the plaintiff for the consideration of the case in his absence, and otherwise the case will be left without consideration in accordance with point 6 of Article 87 of the APC RF.**

[Translator's Note: The determination shown here is a form document containing blanks which are to be filled in as appropriate by the judge deciding whether the case is to be accepted for consideration. Points not relevant to the particular case are simply left blank, as point 2 in the example shown. The reverse side of the determination contains a standard list of documents that may be necessary in cases of particular types. For example, under the first category heading "Legal Position (Authority) of a Person" there are listed eight types of documents (charter of an enterprise, founding contract, power of attorney, evidence of registration of an individual entrepreneur, and so forth), each numbered 1.1 through 1.8, so that the judge may simply inset their numbers into the form for the determination under points 3.1 and 3.2.]

Appendix C: Amendment to Claims of Suit

Arbitrazh Court for Samara Oblast
[address of the court]

Plaintiff: OAO AKB "TOKOBANK"
[address]

Respondent: ZAO "Ekvator"
[address]

(Motion on change in the sum of the claims of the suit)
[above title written by hand above that below]

Addition to Petition of Suit on the Exaction of Indebtedness

The arbitrazh court of Samara Oblast has accepted for proceedings a petition of suit by AKB "TOKOBANK" in the person of its Samara branch office concerning the exaction of indebtedness for credit against ZAO "Ekvator."

In accordance with the account for the claims of the suit, the indebtedness on 25/12/98 consisted of

3,570,000 rubles.

However, the Respondent has not to the present time fulfilled its obligations under the credit contract in full, in connection with which the Plaintiff has conducted a recalculation of the interest due for use of the credit through 09/04/99 inclusive and the penalty for violation of payment obligations. The indebtedness on 09/04/99 consisted of **4,086,250 rubles**, of which:

3,000,000 rubles is the underlying debt
1,086,250 rubles is the debt for interest due, including at a higher rate [due to failure to pay on time], of which

826,250 rubles is the debt for interest due for use of the credit
260,000 rubles is a penalty

On the basis of that set forth and in accordance with Article 37 of the APC RF

I REQUEST

That **4,086,250** (four million eighty-six thousand two hundred and fifty) rubles be exacted from the Respondent in favor of the Plaintiff.

Attachments:

1. Accounting of the indebtedness of the Respondent to the Plaintiff
2. Copy of Power of Attorney No. 227 for T.P. Kalinkina

For AKB “TOKOBANK” T.P. Kalinkina
By Power of Attorney No. 227 of 29/03/99

[signature]

Appendix D: Response to a Petition of Suit

ZAO "Ekvator"
443070 Samara
ul. Aerodromnaya 13
[telephone & fax numbers]

Arbitrazh Court
Samara Oblast

Copy to: Samara Branch
OAO Stock Commercial Bank
"TOKOBANK"
443083, Samara
ul. Zaporozhskaya 19

RESPONSE
To Petition of Suit in Case No. A55-329/99-23

OAO AKB "TOKOBANK," in the person of its Samara branch office on 29/12/1998 presented a suit against ZAO "Ekvator" concerning the exaction from ZAO "Ekvator" of indebtedness in the sum of 3570000 rubles, according to credit contract No. 32/97 of 11/04/97.

ZAO "Ekvator" does not accept the claims made by the bank for the following reasons:

On 11 April 1997, credit contract No. 32/97 was concluded between ZAO "Ekvator" and OAO "TOKOBANK".

In accordance with the stated contract, credit in the sum of 1000000000 old rubles was provided by the bank to ZAO "Ekvator.".

ZAO "Ekvator" has fulfilled its obligations concerning the return of monies under credit contract No. 32/97 of 11/04/97.

The credit was paid off on 25/12/97, which is confirmed by the notation of the bank showing the movement of monies through the debt account No. 10477354 of ZAO "Ekvator" and the memorandum order No. 10 of 25/12/97, confirming the deduction of monies by the bank from the settlement account of ZAO "Ekvator" in payment of the indebtedness for 25/12/97.

In accordance with point 5.1 of the credit contract No. 32/97 of 11/04/97, that contract loses force after the complete payment by the borrower of the credit and the payment of the interest.

Thus, the effect of credit contract No. 32/97 of 11/04/97 was terminated on 25/12/97. The given contract between the parties was not prolonged. Additional agreements to the credit contract No. 32/97 of 11/04/97, signed by the parties after the termination of the effect of the disputed contract are void.

As follows, the claims of suit of the bank, based on the credit contract No. 32/97 of 11/04/97, are not proper.

On the basis of that set forth, the court is requested to reject the suit of AKB "TOKOBANK" against ZAO "Ekvator."

Attachments:

1. Notation of the bank on the movement of monies in the loan account No. 10477354 of ZAO "Ekvator."
2. Memorandum order No. 10 of 25/12/97.

For ZAO "Ekvator" I. P. Pavlova
Representative by Power of Attorney of 01/03/99

Appendix E: Petition for Recusal of Judge; Determination on Recusal Petition

To: Arbitrazh Court for Moscow Oblast

Plaintiff: ZAO "Social Initiative"
[address]

Respondent: OAO "Scientific-Production Association "Energomash" in the name of V. I. Glushko
[address]

PETITION

On the Recusal by Request of the Plaintiff of Judge G.G. Kuskov

I.

Exercising the right envisioned in Article 33 of the APC RF, I hereby petition for the recusal of Judge Kuskov, G.G. on the basis envisioned in point 3 of Article 16 of the APC RF.

In accordance with point 3 of Article 16 of the APC RF, "A judge may not participate in the consideration of a case and is subject to recusal:

. . . . 3) if he personally, directly or indirectly, is interested in the outcome of the case or there are other circumstances which give rise to doubt about his impartiality."

I believe that the following actually occurring facts are "other circumstances giving rise to doubt about the impartiality " of the judge.

II.

In a determination of 26/10/99, Judge Kuskov proposes to the parties, among other things, to present "copies of all court acts adopted in cases connected with the construction of buildings No. 5 and 5"a" (properly certified)."

In connection with this the following question cannot fail to arise:

How could facts of court cases between the parties be known to Judge Kuskov if:

1) there is no mention of them in the suit;
2) a response to the suit by the respondent was not presented to the court, and at the time of the issuance of the determination concerning the appointment of the case for hearing could not yet have been presented.

Moreover, the judge demands neither more nor less than properly certified copies of court acts, presupposing a controlling force of these acts!

The circumstances set forth above completely clearly demonstrate that Judge Kuskov, already before the issuance of his determination on the appoint of the case for hearing, exhibited direct interest in the outcome of the case by conducting an inquiry and collection of information on circumstances having no relationship to the subject of the dispute, and about which he could not and should not have known until the beginning of the court consideration.

Taking account of all set forth above, I believe that the fact of the existence of circumstances giving rise to doubt about the impartiality of Judge Kuskov and his personal interest in the outcome of the case has been shown, and the present petition on the recusal of Judge Kuskov is well founded and is subject to satisfaction.

III.

The case filed by the plaintiff in the court on 22/10/99 was appointed for hearing on 22/12/99, that is, in violation of Article 114 of the APC RF on the day following the expiration of the time period envisioned in the given Article for the consideration of the case and the adoption of a decision.

I believe that there are two possible reasons for the failure of Judge Kuskov to observe the period, envisioned by Article 114 of the APC RF, for the consideration of the case filed by myself, the representative of ZAO “Social Initiative” V. I. Kharchenko.

The first possible reason — is the desire of Judge Kuskov, on the basis of the above-stated interest, not to allow the fastest legal issuance of a decision, by using the usual delays.

The second possible reason for the violation of the period for the consideration of the case by the Judge — is the settling of personal scores with me.

On 07/08/99 I submitted a complaint about the actions of Judge Kuskov in connection with the delays he caused in the case of the Individual Private Enterprise (later a limited liability society) “Atlantic” against the Associated Central Base of the Ministry of Internal Affairs.

It is possible that this could be forgotten, if it were not for one important circumstance that became know to me much later after the submission and consideration of my complaint against Judge Kuskov.

In the normal consideration of the dispute between ICP (OOO) "Atlantic" and the Ministry of Internal Affairs, Judge Makovskaya was recognized by the plaintiff as a former employee of the respondent, which was the basis for the recusal of Judge Makovskaya, and for the submission in relation to her of a complaint to the qualifications collegium. And only during the process of the submission and consideration of the petition and complaint did I learn that Judge Makovskaya was the person with whom Judge Kuskov discussed the desirability of acceptance of the suit of ICP "Atlantic" for proceedings. The point is, that the initial petition of suit of ICP "Atlantic" was based on more than 50 contracts, settlements for which had been conducted together by means of mutual set-off and completed with the signature of an "act of consolidation" which revealed the existence of a dispute. Judge Kuskov, to whom the case came, demanded the submission of a separate suit for each contract, which destroyed the scheme of mutual set-offs existing between the parties and complicated the possibility of proof. It is possible that this could be considered [simply] the legal position of Judge Kuskov, but he came to this position during a discussion with me, with the participation of Judge Makovskaya, whose interest became known only much later, during the consideration of the cases on each contract separately.

In the current case Judge Kuskov exhibited an interest in the outcome of the case. And then the situation with the suit of ZAO "Social Initiative" became not a single instance but part of a tendency. The tendency of Judge Kuskov toward an "original" approach to the consideration of cases received by him for proceedings. The "originality" of this is expressed in the coordination of his position and his procedural actions with third parties, not having any procedural relationship to the case, but having their own real interest in it — or, as was stated above, the actions of Judge Kuskov are a desire to settle accounts personally with me for the complaint I made against him.

On the basis of that set forth above, I request that the court recognize the petition as well founded, and the request for recusal — as subject to satisfaction.

Attachments:

1. Remarks of the qualifications collegium of 02/10/97
2. Determination of the Moscow Oblast Arbitrazh Court of 26/05/99 [case no.]
3. Determination of the Moscow Oblast Arbitrazh Court of 26/10/99 [case no.]

Representative of
ZAO "Social Initiative" [signature] V.I. Kharchenko

22 December 1999

Arbitrazh Court of Moscow Oblast
[address]

D E T E R M I N A T I O N

"_22_" __December_ 199_9 Case No. __A41-K1-14303/99_

The Arbitrazh Court for Moscow Oblast, in the composition of:

Presiding Judge __PanchenkoV.S. _____

Judges:_____

Considered in a court session the ~~suit of~~ __petition_____
(name of the plaintiff)

___ZAO "Social Initiative"_____

against _____
(name of the respondent)

_____

concerning ____recusal of Judge Kuskov, G.G._____

_____

with the participation in the session of

_____

__the representatives of the parties (see the record)_____

_____

_____

has established: The petition of ZAO "Social Initiative" concerning the recusal of Judge G.G. Kuskov was considered.

The petition is grounded in the existence of circumstances of an interest of the judge, expressed in the receipt of additional information, not from the parties to the case, during the appointment of the case for hearing. In addition, the petitioner refers to the violation by the judge of the procedural periods during the appointment of the case for hearing, and also to the possibility of the settlement of a personal account with the representative of the plaintiff.

The representative of the respondent considers that there is no basis for the satisfaction of the present petition in accordance with the norms of procedural legislation.

Judge Kuskov did not provide an explanation on the petition made, being guided in this by part 1 of Article 20 of the APC RF.

Having considered the present petition, I consider that it is not subject to satisfaction for the following reasons: see other side

[on the other side of the determination form]

In accordance with point 3 of part 1 of Article 16 of the APC RF, a judge may not participate in the consideration of a case and is subject to recusal if he personally, directly or indirectly, is interested in the outcome of the case or there are other circumstances giving rise to doubt about his impartiality.

No documentary evidence was presented by the petitioner confirming the existence of a basis for the recusal of the judge as envisioned in the stated norm of the law.

The existence, in the opinion of the plaintiff, of specific violations of the norms of procedural law, is not a subject for discussion in the consideration of the question of the recusal of a judge. In case of failure to agree with a court act that is adopted, the petition has the right to appeal it in the established manner, referring in this to the violations, in his opinion, of the requirements of the procedural legislation.

No evidence was likewise presented to the court of the existence of circumstances giving rise to doubt about the impartiality of the judge, that is, influence on his professional activities on the part of anyone.

It is necessary to note that the effective Arbitrazh Procedure Code of the RF does not envision the possibility of satisfaction of a petition on the recusal of a judge due to the submission by persons participating in the case of any kind of complaint about the actions of the judge in a case earlier considered by him.

Taking into account that set forth and being guided by Articles 16 and 20 of the APC RF

D E T E R M I N A T I O N:

The petition of ZAO “Social Initiative” for the recusal of Judge Kuskov G.G. is to be left without satisfaction.

Deputy Chair V.S. Panchenko

Appendix F: Petition for Security of Suit (Arrest of Property) and Determination

To the Higher Arbitrazh Court of
The Republic of Buryatia
[address]
Judge S. L. Kazantsev

PETITION
(on the imposition of arrest on property)

A case concerning the suit of OOO NPKF "F-Gima" against AOOT "Chelutailes" concerning the exaction of 375,838,776 rubles is currently in proceedings before You, and is appointed for hearing on 1 December 1997.

Making recourse with this petition and exercising its procedural right, the plaintiff considers that there is a real threat of impossibility in the future of execution of the court act. The plaintiff associates this concern with the fact that the respondent is insolvent and openly announces its financial position. However, the plaintiff has information that the respondent has property that may be used to pay the amount of the suit. The actions of the plaintiff wholly arise from the Decree of the Plenum of the Higher Arbitrazh Court of the RF of 31 October 1996 "On the Application of the Arbitrazh [Procedure] Code of the RF in the consideration of cases in the court of the first instance:"

The plaintiff has the following property:

- a railway path of 10 kilometers
- spur lines on the railway lines
- working forest
- auto and tractor parks
- equipment for cutting sleepers

Taking into account the arguments set forth concerning the financial and property position of the respondent and being guided by Article 76 of the APC of the RF,

I REQUEST:

That the court accept this petition for proceedings and issue a determination on the imposition of arrest on the property of the respondent, specifically:

1. a railway path of 10 kilometers
2. spur lines on the railway lines
3. working forest
4. auto and tractor parks
5. equipment for cutting sleepers

Director	[signature]	G.I. Fedik
Counsel	[signature]	S.D. Karpenko

Arbitrazh Court of the Republic of Buryatia
[address]

D E T E R M I N A T I O N

On Security for a Suit

City of Ulan Ude Case No. _A10-186/12_

22 June 1998
___Judge Kovalev N.A.___
Family name, initial [of judge]

Having considered the petition of __OOO NPKF "F-Gima"_____
Name of the petitioner

Concerning adoption of measures of security for the suit of __OOO NPKF "F-Gima"__
Name of the plaintiff

Against ___AOOT "Chelutailes"_____
Name of the respondent

Concerning ___exaction of 375838796 rubles__

Has established: The plaintiff requests that measures for the security of the suit be applied to the respondent in the form of the arrest of its property.

Taking into account the fact that the respondent is not executing voluntarily its obligations according to a settlement agreement which was confirmed by the determination of arbitrazh court of the Republic of Buryatia of 03/03/98, the court considers that the motion of the plaintiff is subject to satisfaction since the failure to take such measures may make difficult or impossible the execution of the determination of the court.

Being guided by Articles 75 and 76 of the Arbitrazh Procedure Code of the Russian Federation

HAS DETERMINED:

1. ___To satisfy the motion of OOO NPKF "F-Gima" and to impose arrest on the property of the respondent AOOT "Chelutailes" on the sum of 375,838 rubles and 80 kopecks until the execution of the determination of the court, and to issue an execution order._____
2. This determination may be appealed to the Arbitrazh Court for the Republic of Buryatia.

Judge [signature] N.A. Kovaleva

Appendix G: Determination on Hearing Delay and Calling of Witnesses

Arbitrazh Court for Moscow Oblast
[address of the court]

D E T E R M I N A T I O N

"_16__" _September__ 199_9 Case No. __A41-K1-11146/98__

The Arbitrazh Court for Moscow Oblast, in the composition of:

Presiding judge ____Vinogradova, N. N._____

Judges: _____

Has considered in a court session the case concerning the suit of_____
(name of the plaintiff)

_____G.P. [State Enterprise]Yegorovski ForestryUndertaking_____

against _____OAO Yegorovski LPX"_____
(name of the respondent)

_____

concerning ____exaction of 11,087 rubles_____

_____

with the participation in the session of

_____

_____Plaintiff: Shevchuk, E. V. - Dir._____

_____Respondent: Marshev, T. F. - forest master, Premichkov, R. A. - representative

by _____power of attorney_____

has established:

G.P. Yegorovski Forest Undertaking made recourse with a suit concerning the exaction of 11,087 rubles as the sum of a penalty for unsatisfactory clearing of forest, by act witnessing [this unsatisfactory state] of 21/05/99, in connection with the timber cutting permit No. 19 of 09/02/98.

The respondent did not accept the claims of the suit, because it has a completely different act dated 21/05/99; I. A. Chekina was not present at that location although the act which was presented in court bears her signature; and the act itself is improper evidence. [Respondent] requests that I. A. Chekina be called as a witness.

Taking into account that it is necessary for the parties to present additional evidence, the hearing of the case is delayed.

On the basis of that set forth, and being guided by Article 120 of the APC of the RF, the court

HAS DETERMINED:

To delay the hearing of the case to 14/10/99 at 12:40.

Plaintiff: Is to appear, [and bring] its founding documents (copy for the case materials), and give additional explanation concerning the act.

Respondent: Is to give grounds for its objection to the suit, providing documents, its accounting, and its founding documents (copy for the case materials), and to appear.

Chekina, I. A., and Zhmyakina, I. N. are to be called in the capacity of witnesses in the case.

Judge [signature] **N. N. Vinogradova**

Appendix H: Motion for Demand of Evidence in Control of Others; Court Demand

8 October 1999

Arbitrazh Court for Moscow Oblast
[address of the court]

Plaintiff: OAO "Electronpribor"
[address]

Respondent: ZAO "Feltis"
[address]

Case No. A 41-K1-10920/99

MOTION

(under Articles 33, 54, 118 and 120 of the APC of the RF)

The Arbitrazh Court for Moscow Oblast initiated case No. A41-K1-10920/99 on the petition of OAO "Electronpribor" (hereinafter referred to as "Plaintiff"), concerning the exaction from ZAO "Feltis" (hereinafter referred to as "Respondent") of indebtedness and a penalty fine in the sum of 39,105 rubles, and issued a Determination requiring the Respondent to present evidence disproving the claims of the suit and showing a full or partial payment of the debt, as well as to conduct a summary of accounts. In the given determination, the arbitrazh court appointed the date of 21/10/99 for the session in which the consideration of the case would take place.

The Respondent is unable to fulfill the requirements of the Arbitrazh Court in the stated period due to the fact that since 21/04/99 a tax verification has been underway at the enterprise for the years 1997 through 1999, inclusive. In connection with this, all of the documentation concerning the financial-economic activities of ZAO "Feltis" were taken, including the letter of guarantee of the Plaintiff.

The given fact was reflected by the Respondent in its Motion of 03/09/99.

In addition to that stated above, the Respondent informs the court that on 05/10/99, on the basis of an Instruction of the head of the Federal Tax Police for Moscow Oblast, a search of the premises of the Respondent was conducted and documents were taken. (Attachment No. 1).

ZAO “Feltis” in connection with the impossibility of conduct of a summary accounting of mutual obligations and of proof of its position, which is set forth in its response of 04/10/99, sent an inquiry to the bodies of the tax police on 08/10/99 (Attachment No. 2).

However, documents stated in the inquiry were not provided by the tax bodies.

In connection with this, ZAO “Feltis” considers that for the conduct of a summary of accounting for mutual obligations it is necessary to demand the following documents: petition of ZAO “Feltis” of 06/10/98 sent to OAO “Electronpribor” on 06/10/98, and the letter of OAO “Electronpribor” of 10/11/98.

Thus, the Respondent considers that for the consideration of the case in its substance, the above-listed evidence must be demanded of the Shchelkovski division of the Federal Tax Police for Moscow Oblast.

We simultaneously inform [the court] that no mutual set-off between the Plaintiff and the Respondent for the guarantee letter and the payment instruction has been conducted.

On the basis of that set forth above, ZAO “Feltis,” being guided by Articles 33, 54, 118 and 120 of the APC of the RF

REQUESTS:

1. That an inquiry be sent to the Shchelkovski region tax police for Moscow Oblast [address of the division of the tax police] a demand for the petition of ZAO “Feltis” of 06/10/98 and the letter of OAO “Electronpribor” of 10/11/98.

2. That the tax police for the Shchelkovski region of Moscow Oblast be obligated to provide the above-stated documents be provided to the Arbitrazh Court of Moscow Oblast.

3. In connection with the absence of the necessary documents in the possession of ZAO “Feltis”, that the consideration of the case be delayed for a period defined at the discretion of the court.

Attachments: 1. Copy of the inquiry to the Federal Tax Police of the RF for the Shchelkovski region of Moscow Oblast of 08/10/99, 1 copy on two pages.

2. Records of the search of 05/10/99 Nos. 1/3, 1/4, 1/23 in three copies on six pages.

Representative according to power
of attorney of 04/09/99 [signature] A. V. Kostyunin

ARBITRAZH COURT FOR MOSCOW OBLAST
[address of the court]

To the Federal Tax Police for Shchelkovski region of Moscow Oblast

_21.10.99_ No._A41-K1-10920/99_
Responding to No. _____ of _____

Demand Under Article 54 of the APC RF

Proceedings are being conducted in the Arbitrazh Court for Moscow Oblast concerning a suit of OAO "Electronpribor" against ZAO "Feltis" concerning the exaction of 39,105 rubles.

According to the statement of ZAO "Feltis," a tax verification is being conducted since 21/04/99 at the enterprise for the period of 1997 through 1999 inclusive, in connection with which all documentation concerning the financial-economic activities of the enterprise were taken. On 05/10/99, on the basis of the instruction of the head of the Federal Tax Police of the RF for Moscow Oblast, a search of the premises was conducted and the following documents were taken: petition of ZAO "Feltis" of 06/10/98, sent to OAO "Electronpribor" on 06/10/98, and the letter of OAO "Electronpribor" of 10/11/98.

The given documents are necessary for the consideration of the dispute in its substance.

It is requested that the given documents — the petition of ZAO "Feltis" of 06/10/98, sent to OAO "Electronpribor" on 06/10/98, and the letter of OAO "Electronpribor" of 01/11/98 — be issued directly to the authorized representative of ZAO "Feltis" in connection with the restricted time periods for the consideration of the dispute.

Judge [signature] N. N. Vinogradova

Appendix I: Record (Protocol) of a Court Session

Note: The original of this document is a form document, filled in with hand written notations. The parts of the document appearing in script typeface are those which appear in handwriting on the original. A copy of the Russian language original follows the translation.

Record
of the Court Session

City of *Moscow* Case No. *K 1-11146/99*

"16" September 199 *9*

The arbitrazh court in the composition of:

Presiding Judge *N. N. Vinogradova*

Judges

considers in the court session the case concerning the suit (appeals/cassational complaint

concerning the case) of *State institution Yegorovski*

Forest Undertaking
(name of the plaintiff)

against *OAO "Yegorovski LPKh*
(name of the respondent)

concerning *exac. of 11,087 rubles*

At the court session appeared: (to be stated: the surname, patronymic and name of the representatives of persons participating in the case, their positions, the basis for their authority, other participants in the arbitrazh process) *plaintiff - Shevchuk, E. B.*

by p. of att. N12-3/6 of 14/05/99

respondent - Marshev, T. F. - for. mast. by p. of att. N OP-6 of 14/05/99 (in case file) Premichkov, R. A. - representative by p. of att. N OP-6 of 14/05/99

Of those called to the court session the following did not appear: (state the persons participating in the case, other participants in the arbitrazh process, the reason for their failure to appear)

The presiding judge explained to persons participating in the case and other participants in the arbitrazh process their procedural rights and obligations, envisioned by Articles 33, 44, 45, 46 and 50 of the Arbitrazh Procedure Code of the Russian Federation. *Rights and duties explained. Procedure for appeal explained.*

The following were warned concerning criminal liability:

Witness (witnesses) - for the giving of knowingly false testimony, refusal or avoidance of the giving of testimony:

1. _____ _____
(signature of witness)

2._____ _____

3._____ _____

4._____ _____

[in the original document, these areas are crossed out, indicating no warnings issued]

expert (experts) - for the giving of knowingly false conclusions or refusal to give a conclusion without adequate reason:

1._____ _____
(signature of the expert)

2._____ _____

3._____ _____

4._____ _____

translator - for knowingly incorrect translation _____

(signature of translator)

Petitions and motions of persons participating in the case. Determinations issued by the court without withdrawal from the courtroom. *Court session was opened. No recusals to the court or motions made Plaintiff objects to the consideration of the case, considers that ac*t [document] n*ot in accord with require. No signature in act, requests that [names of three persons] be called in the capacity of witnesses. Request satisfied. Parties withdrew from courtroom. Motivated determination issued, determination read out. Distributed to parties against signature. Court session closed. Judge N.N. Vinogradova* [signature]

ПРОТОКОЛ
СУДЕБНОГО ЗАСЕДАНИЯ

город Москва № дела А41 11146/99
"16" сентября 199 9 г.

Арбитражный суд в составе:

председательствующего Виноградова И.К.

судей _____

рассматривает в судебном заседании дело по иску (апелляционную, кассационную жалобу по делу) Государственное учреждение Чеховский ЦСКО
(наименование истца)
к ОАО "Ефремовский АПК"
(наименование ответчика)

о б/ 11087 руб

В судебное заседание явились: (указываются: фамилия, и.о. представителей лиц, участвующих в деле, их должности, основания полномочий, иные участники арбитражного процесса) истец - Мельник Б. Та юр. дел N12-3/6 от 14.09.99 (с иском)
ответчик - Карпиев Г. Ф. - зам. нач. фил. N ОП-6 от 14.09.99 (с отз. треб. иск. + ...)
N 0 - нет, - нет.

Из вызванных в судебное заседание не явились: (указываются лица, участвующие в деле, иные участники арбитражного процесса, причина их неявки) _____

Председательствующим разъяснены лицам, участвующим в деле, и иным участникам арбитражного процесса их процессуальные права и обязанности, предусмотренные статьями 33, 44, 45, 46, 50 Арбитражного процессуального кодекса Российской Федерации.

Предупреждены об уголовной ответственности:

свидетель (свидетели) - за дачу заведомо ложных показаний, отказ или уклонение от дачи показаний;

1.
2.
3.
4.
5.

(подпись свидетеля)

эксперт (эксперты) - за дачу заведомо ложного заключения или отказ от дачи заключения без уважительных причин

1.
2.
3.
4.
5.

(подпись эксперта)

переводчик - за заведомо неправильный перевод.

(подпись переводчика)

Заявления и ходатайства лиц, участвующих в деле. Определения, вынесенные судом без удаления из зала заседания.

Appendix J: Inquiry by Arbitrazh Court to Constitutional Court

ARBITRAZH COURT OF BRYANSK OBLAST

[court address]

To the Constitutional Court of the Russian Federation

__4__ ___07___ 1996

No. __391__

From the Arbitrazh Court of Bryansk Oblast in the composition of Judge Nina Sergeevna Gomanyuk, considering Case No. 263/20 on the suit of the limited liability partnership "Idos" of the city of Bryansk against the Bryansk Customs authority concerning the recognition of collection instruction No. 30 of 03/04/96 as void.

INQUIRY

On the Verification of the Constitutionality of the First Paragraph of Article 2 of the Federal Law No. 23-FZ "On Excises," Adopted by the State Duma 14 February 1996 and Published in [the newspaper of record] Rossiskaya Gazeta No. 48 (1408) of 13/03/96

The Arbitrazh Court of Bryansk Oblast in the composition of Judge N.S. Gomanyuk is considering a case concerning the suit of the limited liability partnership (LLP) "Idos" of the city of Bryansk against the Bryansk customs authority concerning the recognition as void of collection instruction No. 30 of 03/04/96, which was presented to the LLP "Idos" by the Bryansk customs authorities concerning the automatic deduction from its account of 30,193,049 rubles in excise fees.

During the court consideration, the court established that in the exaction from the plaintiff of the stated sum, the customs authorities were guided by the Federal Law No. 23-FZ of 07/03/96 "On the Introduction of Amendments in the Law of the Russian Federation "On Excises"" [citations to original publication and amendments of the law omitted]. The named Federal Law, as stated in the court session by the respondent, allows the imposition of tax on goods originating in the countries of the Commonwealth of Independent States and brought onto the territory of the Russian Federation beginning with 1 February 1996, which follows from the first paragraph of Article 2 of the Federal law "On the Introduction of Amendments in the Law of the Russian Federation "On Excises"", in accordance with which the named act enters into force from 1 February 1996.

The plaintiff objects to the augments of the respondent referring to Article 57 of the Constitution of the Russian Federation, in accordance with which laws can not have retroactive force where they make the position of the taxpayer worse. Moreover, the plaintiff made a request that the [arbitrazh] court would make recourse to the Constitutional Court of the Russian Federation with an inquiry on the verification of the constitutionality of Article 2 of the Federal Law "On the Introduction of Amendments to the Law of the Russian Federation "On Excises"".

The court, having heard the arguments of the parties and having considered the request made, satisfied it, since it came to the conclusion that in the given instance there is a lack of correspondence between the provisions contained in the first paragraph of Article 2 of the Federal Law "On the Introduction of Amendments in the Law of the Russian Federation "On Excises"" and Article 57 of the Constitution of the Russian Federation. The proceedings in the case were suspended in connection with this.

The position of the court consists of the following:

As a result of the adoption by the legislator of the Federal Law "On the Introduction of Amendments in the Law of the Russian Federation "On Excises"" there occurred a worsening in the position of a particular group of taxpayers. In particular, the subjects of entrepreneurial activity, among whom is included the plaintiff in the case under consideration, did not in accordance with the Law of the Russian Federation "On Excises" pay excises on goods originating on the territory of the member states of the Commonwealth of Independent States and brought onto the territory of the Russian Federation until 1 February 1996. In addition, the effect of the Federal Law "On Excises" was extended by the legislator to relations [events] which existed prior to the time of its passage by the State Duma (14 February 1996), approval by the Council of the Federation (22 February 1996), signature by the President of the Russian Federation (7 March 1996) and official publication (13 March 1996).

Thus, the court considers that the Federal Law "On the Introduction of Amendments in the Law of the Russian Federation "On Excises"" which is subject to application in the case under consideration possesses all of the elements that would allow the statement that it is not in accord with the provision of Article 57 of the Constitution of the Russian Federation, in accordance with which laws making the position of a taxpayer worse may not have retroactive force. In this the court proceeds from the fact that the concept of "taxpayers" used in Article 57 of the Constitution of the Russian Federation encompasses all of the subjects of the law upon which the law imposes the obligation to pay taxes. In the opinion of the court, the fact of the location of the named constitutional norm in Chapter 2 "Rights and Freedoms of the Person and the Citizen" does not restrict in the given instance the content of the concept of "taxpayers" only to individual citizens.

Moreover, in the court's view, the failure of the law to conform to the Constitution of the Russian Federation occurred in the given instance as a result of violation by the legislator of the procedure for the entry of the law into effect. This type of failure of a

normative act to correspond to the Constitution of the Russian Federation is mentioned, in particular, in point 3 of part 1 of Article 86 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation.”

In connection with that set forth and proceeding from the fact that the Federal Law “On the Introduction of Amendments in the Law of the Russian Federation “On Excises”” is subject to application in the case under consideration and being guided by part 4 of Article 125 of the Constitution of the Russian Federation, point 3 of part 1 of Article, point 3 of part 1 of Article 86, and Articles 101-104 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation,”

I REQUEST:

The verification of whether the first paragraph of Article 2 of the Federal Law “On the Introduction of Amendments in the Law of the Russian Federation “On Excises”” is consistent with Article 57 of the Constitution of the Russian Federation.

Attachments:
1. Text of the inquiry in 30 copies.
2. Official texts of the Federal Law “On the Introduction of Amendments in the Law of the Russian Federation “On Excises”” in 30 copies.
3. Determination on the acceptance of the petition of suit for proceedings and the appointment of the case for court consideration (30 copies).
4. Record of the court session (30 copies)
5. Determination on the suspension of proceedings in the case and recourse to the Constitutional Court of the Russian Federation with an inquiry (30 copies).

Appendix K: Decision of an Arbitrazh Court in theFirst Instance

In the Name of the Russian Federation

DECISION

City of Samara Case No. A55-329/99-23_

_12 April 1999

The Arbitrazh Court for Samara Oblast

In the composition of:

Presiding judge __Evstifeeva, V.V._____
And judges _____
Having considered in a court session the case concerning the suit of _____OAO _____
"Tokobank" in the person of its Samara branch in the city of Samara_____
_____
against: _ZAO "Ekvator" of the city of Samara_____
_____
concerning _____the exaction of 3570000 rubles due_____
_____

With the participation in from the plaintiff - head of the legal department the session of: T.P. Kalinkina (power of attorney dated 29/03/99), from the respondent - I.P. Pavlov (power of attorney dates 01/03/99) and A.A. Samoilov (power of attorney dated 01/03/99)

The plaintiff, taking account of the petitions of01/03/99 and of 09/04/99, requests the exaction from the respondent of 4086250 rubles, including 3000000 rubles in debt for credit received and 1086250 rubles in debt for interest (including at an increased rate [due to late payment]) according to contract No. 32/97 of 11/04/97, with account for the additional agreement of 26/12/97.

The respondent did not admit the suit, considering that in accordance with credit contract No. 32/97 it received credit in the sum of 1000000 rubles, which was timely returned to the plaintiff, and that no credit was issued to it on the basis of the additional agreement of 26/12/97.

During the session, a break in the hearings was announced of three days.

Taking into consideration that in accordance with the credit contract of the parties No. 32/97 of 11/04/97 the plaintiff on 14/04/97 issued to the respondent 1000000000 rubles (in 1998 denomination 1000000 rubles) for a period (taking into account the additional agreement No. 4 of 15/07/97) through 15/12/97 with a 45% yearly interest rate. The rate of interest for use of the credit was changed several times by additional agreements to the contract. According to memorandum order of 25/12/97, the indebtedness for the credit in the sum of 1000000000 rubles was extinguished by the respondent.

In accordance with the corrected account of the plaintiff, on 25/12/97 the respondent remained indebted for the interest for the use of the credit in the sum of 20666 rubles, 67 kopecks. During the court session no support was found for the statement of the respondent that on 25/12/97 it was not indebted to the plaintiff for interest, since the plaintiff failed to take account of the payment orders No. 237 of 24/07/97, No. 338 of 29/09/97, No. 314 of 16/09/97, No. 377 of 28/10/97 and No. 434 of 27/11/97, for the overall sum of 37833334 rubles (in 1998 prices). In all of the listed payment orders, the purpose of the payment is listed by the respondent as payment on a loan account, and not interest for the use of a credit.

During the period of effect of the credit contract No. 32/97 of 11/04/97, two additional agreements to it were concluded by the parties, in accordance with which the plaintiff opened for the respondent a credit line in the amount of up to 3000000000 rubles with a period for payment of 25/12/98, and in additional agreement No. 14 of 26/12/97 the plaintiff obligated itself within three days of its conclusion to transfer according to the information stated by the respondent 3000000000 rubles for a period until 15/10/98 (points 2 and 3 of the agreement). At the same time, in point 1 of the additional agreement it is envisioned that the plaintiff will issue a so-called “bill of exchange credit,” that is, the issuance of four simple bills of exchange [veksels] of the bank, series DB Nos. 0004764, 0004765, 0004766 and 0004767, for an overall sum of 3000000000 rubles. For the use of the credit in the additional agreement No. 14 there is envisioned a payment in the amount of 10% yearly from the date of the creation of the indebtedness until the date of payment by the bank of the bills of exchange and 31% per year from the date of the payment of the bills of exchange until 15/10/98.

In fact, monetary assets in the sum of 3000000000 rubles as a credit to the respondent were not issued by the plaintiff, in connection with which it does not have the right to claim their return from the respondent and the payment of interest for their use by the respondent on the basis of the credit contract.

In the materials of the case there is an act confirming the transfer by the plaintiff of the stated bills of exchange to the respondent, however the obligation of the respondent to the plaintiff in connection with this may not be based upon the credit contract of the parties.

Taking account of that set forth, the suit should be refused.

In connection with the expiration of the delay in payment of the state fee granted to the plaintiff, the fee is subject to exaction from [the plaintiff] into the federal budget in the amount of 32031 rubles, 25 kopecks.

Being guided by Articles 124 and 125 of the APC RF,

THE COURT HAS DECIDED:

The suit is refused.

There shall be exacted from OAO Stock Commercial Bank “Tokobank” of the city of Moscow into the federal budget the sum of 32031 rubles, 25 kopecks as the state [filing] fee.

An execution order shall be issued after the entry of the decision into legal force.

Judge V.V. Evstifeev [signature]

Appendix L: Appeal Complaint; Acceptance of Complaint; Response to Appeal Complaint

Arbitrazh Court for Samara Oblast
[address of the court]

Plaintiff: OAO Stock Commercial Bank "TOKOBANK" in the person of its representative
[address of the Samara branch]

Respondent: ZAO "Ekvator"
[address]

Value of the suit: 4,086,250 rubles
State fee: 16,015 rubles, 62 kop.

APPEAL COMPLAINT
On the Decision of the Arbitrazh Court of Samara Oblast of 12 April 1999 in Case No. A55-329/99-23

The arbitrazh court for Samara Oblast on 12 April 1999 adopted a decision on the refusal to satisfy the claims of the Plaintiff concerning the exaction from the Respondent of indebtedness due in the amount of 4,086,250 rubles, taking account of the amended claim through the procedure of Article 37 of the APC RF.

The given decision of the court was issued in crude violation of the norms of substantive and procedural law, and is illegal and without basis. The court avoided the consideration of the dispute in its substance. It did not give the correct legal qualification to the actual legal relationship of the parties, did not analyze and did not evaluate the evidence presented, and did not decide the question of the existence of rights and obligations of the parties in relation to the material object of the dispute.

In fact, the court limited itself to a finding that the credit to the Plaintiff was issued in the form of the transfer of four bills of exchange, a so-called bill of exchange credit on the basis of the additional agreement No. 14 of 26/12/97, in the sum of 3,000,000 rubles. But since, in the opinion of the court, the obligation of the Respondent cannot be based upon a credit contract, then the Respondent is not obligated to return anything.

T**he conclusion of the court that the legal relations which developed between the Plaintiff and the Respondent could not be determined by a credit contract is incorrect, since the contract does not contradict any norm of legislation and was not recognized as void. And although it is not directly envisioned by law, on the basis of the general principles and the meaning of civil legislation it gives rise to civil-law**

rights and obligations of the parties in accordance with point 1 of Article 85 of the Civil Code of the RF.

The court completely ignored the evidence presented by the Plaintiff of the existence and lack of execution of obligations on the part of the Respondent concerning the payment of indebtedness, specifically:

On 11 April 1997, credit contract no. 32/97 was concluded between the Plaintiff and the Respondent. In accordance with point 1.1, the Respondent was provided credit in an amount of 1,000,000 rubles. For the conduct of banking operations concerning the credit, a credit account No. 45206810100160000037 was opened for the Respondent, on the basis of a notation from the tax inspectorate No. 4612.

In accordance with additional agreement No. 14 of 26/12/97 to the credit contract 32/97 of 11/04/97, the Respondent was provided with a bill of exchange credit, that is was provided a loan with the use of the bills of exchange without the purchase by the client of the bills of exchange of the bank. This type of credit is regulated by banking rules, including the Instructions of the Central Bank of the RF No. 26 of 23/02/95. Being guided by this the Plaintiff, in the issuance of the credit, took the following banking actions:

> deposited the sum of 3,000,000 rubles into the credit account, and from the credit account transferred them to the bill of exchange account of the client No. 1019677, opened o the basis of the instruction of 26/12/97. On the basis of the acknowledgement-acceptance, the Respondent received the bills of exchange, which was confirmed by the court of the first instance.

The Plaintiff by the given contract took upon itself the obligation to issue to the Respondent its own bills of exchange and upon the presentation of the bills of exchange to pay them. The Plaintiff showed by all of the material presented that it executed its obligations under the contract. The Respondent obligated itself to return the money in an amount equal to 3,000,000 and to pay interest in the procedure defined by the additional agreement No. 14. The Respondent did not execute its obligations. No evidence was presented of the payment of the indebtedness.

In the consideration of the given dispute it is important to answer only one question — did the Plaintiff provide money (credit) to the Respondent in the procedure and on the conditions envisioned by the credit contract? (Article 819 of the Civil Code of the RF).

In citing Article 819 of the Civil Code of the RF, the court interpreted literally the term “money” which is contained in the norm and did not take into account the statement of the law “in the amount and on the conditions envisioned in the contract.” And in addition to this, in accordance with Articles 861-862 of the Civil Code of the RF, the provision of money (banking operations) is conducted in a non-cash form. In the accomplishment of non-cash settlements, payment is permitted (Article 862 of the Civil

Code of the RF) by payment order, by credit, by check, by bank transfer, and also settlement in any other forms envisioned by law, by banking rules established in accordance with it, and by the customs of business activity applied in banking practice.

In existing banking practice, money on credit is provided by several means: directly transferred to the settlement account of the borrower, by instruction of the client transferred by payment order to the account of a contracting partner for particular purposes (directed use of the credit), or by means of the issuance of bills of exchange of the bank without their purchase.

A BILL OF EXCHANGE — in civil circulation is one of the forms of non-cash settlement, and in credit is a means for the provision of money, since the subject of a bill of exchange is also and only money.

The special features of a bill of exchange as one of the forms of non-cash settlement is that it is issued into the hands of the client and has a period and procedure for its presentation for payment.

Thus, the relations of the parties under the stated contract are, in their legal nature, analogous to those envisioned by Article 819 of the Civil Code of the RF, since money was provided by means of the issuance of simple bills of exchange, allowing the Respondent either to receive the money itself or to use the bill of exchange as a means of payment in a settlement [with another party], which is what it did.

On the basis of that set forth and being guided by Article 810, point 1, Article 8, point 1, and Article 6 of the Civil Code of the RF and Articles 145, 157 of the APC RF,

I REQUEST

1. That the decision of the court of first instance by wholly reversed and that a new decision be adopted.
2. The court costs for the payment of the state [filing] fee be imposed upon the Respondent.

Attachments:

1. Evidence of the sending of a copy of the appeal complaint to the Respondent.
2. Motion for delay in the payment of the state fee;
3. Power of attorney No. 227 of 29/03/99 for the authorized representative of the Plaintiff;
4. A copy of the decision of the arbitrazh court for Samara Oblast of 12 April 1999, No. A55-329/99-23.

For AKB “TOKOBANK” T.P. Kalinkina
By Power of attorney No. 227

[signature]

D E T E R M I N A T I O N

On the Acceptance of an Appeal Complaint for Proceedings

Samara Case No. __A55-329/99-23___

__13 May 1999__

Judge of the Arbitrazh Court of Samara Oblast ___K.G. Viktorova_____, having considered the appeal complaint of ___OAO AKB "TOKOBANK" of the city of Samara___ concerning the decision (determination)

of ___12 April 1999 in case No. ___A55-329/99-23____

Being guided by Article 152 of the Arbitrazh Procedure Code of the Russian Federation

HAS DETERMINED:

1. To accept the appeal complaint of ____OAO AKB "TOKOBANK" of the City of Samara of __07/05/99____, No. __487 VX___ for proceedings.

2. Appoint the case for court consideration in the session of the arbitrazh court on _____11 June___ 199_9_, at ___10:30__ in the premises of the court, room No. __205A__.

The petitioner is granted a delay in the payment of the state fee until the adoption of the court decision._____

Judge K.G. Viktorovna
[signature]

Arbitrazh Court for Samara Oblast

ZAO "Ekvator"
[address]

Copy: OAO AKB "TOKOBANK"
[address]

RESPONSE
To the Appeal Complaint in Case No. A55-329/99-23

The plaintiff in this case — the Samara branch of OAO AKB "TOKOBANK" filed suit against ZAO "Ekvator" concerning the exaction from ZAO "Ekvator" of 3,570,000 new rubles according to credit contract No. 32/97 of 11/03/97 and additional agreements to it No. 14 of 26/12/97 and one without number of 26/12/97. Later, during the course of the court consideration of the case, the sum of the claims of the suit was increased to 4,086,250 rubles.

By a decision of the arbitrazh court for Samara Oblast of 12/04/99, the suit of the Samara branch of OAO AKB "TOKOBANK" was refused, in connection with the failure of the bank to fulfill its obligation to transfer to ZAO "Ekvator" a monetary sum of 3,000,000 rubles and the corresponding lack of right of claim on the part of the plaintiff to the return of the sum of money and the payment of interests for the use of the credit on the basis of credit contract No. 32/97 of 11/04/97.

The plaintiff has filed an appeal complaint concerning the decision of the court of 12/04/99.

ZAO "Ekvator" considers the arguments set forth in the appeal complaint as without basis for the following reasons:

In accordance with the unnumbered additional agreement of 26/12/97 and additional agreement No. 11 of 26/12/97, the bank should have transferred to ZAO "Ekvator" a sum of money equal to 3,000,000 rubles.

The bank did not fulfill its obligation. A monetary sum was not given to ZAO "Ekvator". Moreover, the bank is claiming through court process the return of the above-stated sum and the payment of interest for the use of the credit on the basis of credit contract No. 32/97 of 11/04/97 the additional agreements to it.

In confirmation of the fact of issuance of the credit, the bank refers to the transfer to ZAO "Ekvator" of securities — bills of exchange — and evaluates the given operation as a bill of exchange credit, which contradicts the norms of civil legislation.

Credit contracts may establish only completely monetary obligations - this is the specific feature of the given type of contracts (Article 819 of the Civil Code of the RF,

Decree of the Presidium of the Higher Arbitrazh Court of the RF of 07/07/98, No. 3762/98).

Thus, the obligation of ZAO "Ekvator", in connection with the transfer to it by the bank of bills of exchange may not be based on the credit contract between the parties which is the subject of the dispute. The given fact follows also from the factual circumstances of the case.

The subject of the credit contract No. 32/97 of 11/04/97 and of the additional agreements to it is the opening by the bank for ZAO "Ekvator" of a credit line and the provision to ZAO "Ekvator" of monetary sums by means of the transfer of them to the settlement account of ZAO "Ekvator" or to the settlement accounts of its contracting partners (point 1.2 of the unnumbered additional agreement of 26/12/97 and point 2 of the additional agreement No. 14 of 26/12/97), which was not done by the bank.

As concerns the bills of exchange, transferred by the bank to ZAO "Ekvator" the written document confirming the conclusion of the transaction is the act of transfer and acceptance of the bills of exchange. In the act of transfer and acceptance, the conditions on which the bills of exchange were transferred is not stated.

During the court consideration, despite the statement of the court (determination of 04/03/99), the legal basis for the claims made was never presented by the plaintiff.

The reference of the bank to the Letter of the Central Bank of the RF No. 26 of 23/02/95, supposedly regulating the issuance of so-called bill of exchange credits, is not appropriate, since it envisions the possibility for commercial banks to act only in the capacity of the issuer of a bill of exchange. (point 2 of the Letter) Moreover, the given Letter is not a normative document and has [only] a recommendatory nature for banks in the conduct of their banking operations. In particular, a procedure is recommended to banks for the conduct of accounting steps in the case of issuance by the banks of bills of exchange.

Thus, the claims of the bank, based on a credit contract, and its attempt to impose liability on ZAO "Ekvator" on the basis of the given type of contract are improper.

On the basis of that set forth, we request the appellate instance of the arbitrazh court for Samara Oblast to:

Leave the decision of the Arbitrazh Court of Samara Oblast of 12/04/99 in case No. A55-329/99-23 without change and the appeal complaint of the Samara branch of OAO AKB "TOKOBANK" without satisfaction.

I.P. Pavlova

Representative by power of attorney
No. 181 of 11/06/99

Appendix M: Decree of an Arbitrazh Court of the Appellate Instance

DECREE

Of the Appellate Instance on the Verification of the Legality and Basis for a Decision of the Arbitrazh Court Which Has Not Yet Entered into Legal Force

City of Samara

_15_ __June__ 199_9_ Case No. __A55-329/99-23__

The Arbitrazh Court for Samara Oblast,

in the composition of :

Presiding Judge _____Viktorova, K.G._____
And judges: _____Kornilov, B.A., Balaslov, V. N._____

with the participation in the court session of: _____on behalf of the plaintiff, T.P. Kalinkina, power of attorney of 03/03/99 No. 321_____
_____on behalf of the respondent, A.A. Samoilov, representative by power of attorney of 11/06/99 No. 180 and I.P. Pavlova, power of attorney No. 181 of 11/06/99_____

having considered in the court session the appeal complaint of
___OAO AKB "TOKOBANK" in the person of its Samara branch office, city of Samara_____

concerning the decision (determination) of the arbitrazh court of Samara Oblast

of __12__ __April___ 199_9_, in case No. ___A55-329/99-23_____
_____Evstifeev, V.V._____
(family name of the judge who adopted the court act in question)

has established: The plaintiff made recourse [to the court] with a suit on the exaction from the respondent of 4,086,250 rubles, taking account of the change [in the value of the claim] under Article 37 of the APC RF, including: 3,000,000 rubles in indebtedness under credit contract No. 32/97 of 11/04/97 and the additional agreement of 26/12/97, and 1,086,250 rubles indebtedness for interest, including at a heightened rate.

By a decision of 12/04/99, the suit was refused.

OAO AKB “TOKOBANK” requests that the decision be reversed and the suit satisfied, as it considers that by the additional agreement of 26/12/97 to the credit contract No. 32/97 of 11/04/97, a bill of exchange credit was issued by the bank, which does not violate the norms of civil legislation. A bill of exchange is a means of payment and the issuance of the security instead of the sum of money is not a violation of the requirements of Article 819 of the Civil Code of the RF. The appellant considers that the court crudely violated the norms of substantive and procedural law, which is the basis for the reversal of the decision.

Having considered the materials of the case and having heard the explanations of the parties, the Arbitrazh court has established:

Credit contract No. 32/97 of 11/04/97 was concluded between the parties, in accordance with the conditions of which AKB “Tokobank” provided to ZAO “Ekvator” credit in the amount of 1,000,000 rubles, with a date for repayment of 15/07/97, with interest of 45%.

As a result of an additional agreement of 15/07/97, the date for the repayment of the credit was extended to 15/12/97. The amount of the interests on the credit was changed several times by additional agreements. The materials of the case confirm that the loan in the sum of 1,000,000 rubles and the interest for the use of the credit by were repaid by the borrower on 29/12/97.

By an additional agreement to the credit contract of 26/12/97 “changing the credit contract” (according to the text of the contract), the parties defined the subject of the credit contract (point 1.1) as the opening of a credit line to “the borrower” in the amount of 3,000,000 rubles for current commercial activity, with a date for repayment of 25/12/98.

It is envisioned by point 2.1 that the provision of the credit shall be done by the transfer of sums to “Borrower” or by its instruction to the account of a contracting partner.

On 26/12/97, that is, on the same day, the parties signed one more additional agreement, No. 14, point 1.1 of which defines the subject of the contract as a bill of exchange credit in the amount of 3,000,000 rubles, and the procedure for the presentation — as the issuance of four simple bills of exchange of the bank.

However, point 2 of the additional agreement No. 14 envisions that the bank is obligated to transfer a sum of money in the amount of 3,000,000 rubles according to the instructions of the “Borrower” — that is, not to the “Borrower” itself, while the latter is obligated to repay the credit and the interest for it not later than 10/15/98.

Thus, analyzing the text of the two additional agreements of 26/12/97, the court has arrived at the conclusion that the parties in concluding the additional agreements of 26/12/97 to the contract No. 32/97 did not come to a determination concerning a

significant condition — the subject of the credit contract. (Article 432 of the Civil Code of the RF).

Without definition of the subject of the contract it is not possible to consider the additional agreements to it to have been concluded.

In addition, under part 1 of Article 819 of the Civil Code of the RF, the subject of a credit contract is a sum of money, which a bank or other credit organization provides to a borrower, but not other things defined by their characteristics. The stated norm of the Civil Code is imperative. The reference of the plaintiff to the fact that the conditions for the provision to the "Borrower" of the credit of 3,000,000 rubles as a sum of money are void and that the conditions for the issuances of a credit by bills of exchange should be considered to have effect is not appropriate, since in the case of a conflict with the contract conditions, the imperative norm has absolute priority. The plaintiff did not provide any evidence of the provision of a sum of money in the amount of 3,000,000 rubles.

In accordance with the legislation in effect, a bill of exchange is a security, that is, it is not money.

Under the conditions stated above, the conclusion of the court concerning the absence of obligation of the respondent to the plaintiff under the credit contract should be recognized as properly based and the decision legal, in connection with which there is no basis for the satisfaction of the appellate complaint.

Proceeding from that set forth and being guided by Article 159 of the APC RF -

THE ARBITRAZH COURT HAS DECREED:

The decision of 12/04/99 is to be left without change and the appellate complaint without satisfaction.

16,015 rubles 56 kopecks state fee is to be exacted from OAO "Tokobank" in the person of the Samara branch office into the federal budget of the RF.

This decree shall enter into legal force from the time of its adoption.

Presiding Judge	[signature]	K.G. Viktorova
Judges	[signature]	Balaslov, V. N.
	[signature]	Kornilov, B. A.

Appendix N: Cassational Complaint

Federal Arbitrazh Court for
the Urals Circuit
[address]

Respondent: State Tax Inspectorate for the City of Satka, Chelyabinsk Oblast
[address]

Plaintiff: OAO "Kombinat Magnezit"
[address]

CASSATIONAL COMPLAINT

On the Decision of the Arbitrazh Court for Chelyabinsk Oblast of May 26 1999 in the Case No. A76-3051/99/39-102 on the suit of OAO "Kombinat Magnezit" against the State Tax Inspectorate of the City of Satka

By a decision of the Arbitrazh Court of Chelyabinsk Oblast of 26 May 1999, the claims of the suit of OAO "Kombinat Magnezit" were satisfied in full and the decision of the State Tax Inspectorate [STI] of the City of Satka No. 75 was recognized as void.

We consider that in the issuance of the decision and decree the norms of substantive law were violated, and we therefore are unable to agree with it for the following reasons:

By the Law of the RF "On the Value Added Tax [VAT]" (taking account of the later amendments and additions) and the Instructions of the STI of the RF of 11/10/95 No. 39, "On the procedure for the calculation and payment of VAT" (taking account of the later amendments and additions) it is determined that "goods of own production and also those acquired, which are exported beyond the bounds of the member-states of the CIS, and work and services exported beyond the bounds of the member-states of the CIS, are freed from VAT, after documentary confirmation of the actual export of the goods (work, services).

The named instruction and the amendments in it, before coming into force, underwent mandatory registration with the Ministry of Justice of the RF for the purpose of confirmation of its consistency with the Constitution of the RF and other legislative acts.

The provisions contained in the above-stated points of the instructions do not amend or make additions to, but only determine the procedure for the realization of the legislative norms.

In the verification of the documents presented, in particular freight customs declarations, only the fact of the transit of the freight over the border of the Russian

Federation was reflected and the freight remained in the territory of the CIS countries, which contradicts the conditions of the above-stated instruction No. 39 [for release from VAT]. (Act of tax verification in place, pages 10, 13 and 20).

By the amendments and additions No. 4 to Instruction No. 39, it was established that along with other conditions determining the export regime for realization of goods, transport, customs or other documents with the notation of the border customs bodies of the member states of the CIS or of the customs bodies of the countries located beyond the bounds of the CIS, which confirm the export of goods coming from Russia beyond the bounds of the member states of the CIS, would serve as the basis for the receipt of the [tax] privilege.

It follows that the privileges in respect of the VAT, in accordance with the above-stated Law, are provided to economic subject only upon the export of the goods (work, services) into third countries, beyond the bounds of the member-states of the CIS.

We direct attention also to the fact that the Supreme Court of the RF in its decision of 23/09/97 No. GKPI 97-368, and of 07/08/97 No. GKPI 97-327, recognized the points of the instruction of the State Tax Service No. 39 of 11/10/95 restricting the group of export operations in which such export is recognized as realization beyond the bounds of the member countries of the CIS as being consistent with effective legislation. In accordance with point 3 of Article 10 of the Law of the RF "On the Value Added Tax," instructions on the application of the stated Law are to be elaborated and published by the State Tax Service of the RF in cooperation with the Ministry of Finances of the RF. The provisions of the Instructions are completely in agreement with the requirements of point 2 of Article 10 of the stated Law of the RF "On the VAT" and with the inter-governmental decision of the countries-participants of the CIS on the given question of 13/11/92.

The above-stated Law of the RF "On the VAT" and Instruction No. 39 regulate the provision of privileges on the basis of the export of goods beyond the bounds of the member-countries of the CIS (upon the presentation of the necessary documents, confirming the transit of the freight over the borders of the given country) and not according to the place of the factual location of the purchaser of the products; and in and of itself the location of a foreign firm in a third country does not give the right to the privilege on the exported goods, if the goods themselves stay within the territory of the member-countries of the CIS.

Thus, the argument of the court that the owner of the goods may dispose of the goods at his discretion is certainly correct, however, there is no basis for the provision of the [tax] privileges.

On the basis of that set forth, we consider that the decision of the STI on the application of sanctions for a violation of the law as a result of the improper application of the privileges No. 75 of March 23, 1999, in the part concerning the exaction of the VAT and of penalties and financial sanctions, is in accord with effective legislation and we request that the court of the first instance be reversed.

Head of the Inspection
Adviser of the Tax Service of the
First Rank [signature] V. P. Korochkin

Appendix O: Decree of a Circuit Arbitrazh Court (Cassational Instance)

FEDERAL ARBITRAZH COURT FOR THE URALS CIRCUIT

D E C R E E

Of the Cassational Instance for the Verification of the Basis and Legality of the Decisions of Arbitrazh Courts that have Entered into Legal Force

Ekaterinburg
7 August 1999 **Case No. F09-661/99AK**

The Federal Arbitrazh Court for the Urals Circuit for the verification in cassational instance of the legality of decisions and decrees of the arbitrazh courts of the subjects of the Russian Federation, taken by them in the first and second instances, in the composition of:

Presiding judge: N. L. Menshikova
Judges: G. V. Annenkova
Yu. V. Merzlyakov

Considered in a court session the cassational complaint of the State Tax Inspectorate for the City of Satka concerning the decision of the Arbitrazh Court for Chelyabinsk Oblast of 26/05/99 in Case No. A76-3051/99 concerning the suit of OAO "Kombinat Magnezit" against the State Tax Inspectorate for the city of Satka concerning the recognition of the decision as void in part.

In the court session the following representatives of the plaintiff participated:
A.V. Tokarev, power of attorney of 06/08/97 No. 18ur-81
N.I. Genyakova, power of attorney of 18/05/99 No.72/26ur-58
N.V. Tyurina, power of attorney of 10/12/97 no. 79/26-172.

The State Tax Inspectorate for the city of Satka was properly informed of the time and place of consideration of the cassational appeal, but its representative did not appear at the court session.

Their rights and duties were explained to the representatives of the plaintiff. No recusals of judges were petitioned. There were no motions.

The open joint stock society "Kombinat Magnezit" made recourse to the Arbitrazh Court for Chelyabinsk Oblast with a suit on the recognition as void of decision No. 75 of

23/03/99 of the State Tax Inspectorate for the city of Satka (STI) in the part concerning the exaction of tax arrears on VAT in the sum of 83,423,627 rubles, a fine in the amount of 16,684,725 rubles, and a penalty in the amount of 34,690,266 rubles.

By decision of the arbitrazh court, the claims of the suit were satisfied in full [names of judges at the first instance].

In the issuance of the court act, the arbitrazh court made reference to the Law of the RF "On the Value Added Tax", believing that the plaintiff based the impropriety of application to it of financial sanctions [on this Law], since, being occupied with the export of goods beyond the bounds of the Russian Federation, it has privileges in being released from the VAT.

The decision was not considered on appeal.

The STI for the city of Satka did not agree with the decision of the court and requests its reversal and refusal of the suit [of the plaintiff], considering that the plaintiff did not have the right to privileges in the VAT in relation to goods exported upon the instructions of a foreign firm to countries of the CIS.

Having verification the legality of the court act issued through the procedures of Articles 162, 171 and 174 of the APC RF upon the complaint of the tax body, the court of the cassational instance did not find bases for its reversal.

In accordance with subpoint "a" of point 1 of Article 5 of the Law of the RF "On the Value Added Tax", taking account of the decision of 23/09/97 No. GKPI 97-368 of the Supreme Court of the RF, goods, work and services exported beyond the bounds of the member-countries of the CIS are freed from VAT.

As follows from the act of verification of 30/12/98 of the tax body and the export contracts in the materials of the case, the enterprise shipped the products to the countries of the CIS (Ukraine, Kazakhstan, Uzbekistan and so forth) according to contracts concluded with foreign firms from Canada, America, and Denmark, by whose instructions the freight was sent to the recipient, that is, to a legal person located on the territory of the CIS countries. The tax body did not establish the existence of any contractual relations between OAO "Kombinat Magnezit" and the economic subjects of the CIS receiving the plaintiff's products.

In connection with that set forth, the arbitrazh court made the correct conclusion that in the sale of the products to firms of the "far abroad", but shipment of them to a third party located on the territory of the CIS, the enterprise had the right to use the privileges in relation to VAT, since in the given instance, the special rule in relation to the CIS under point 2 of Article 10 of the Law of the RF "On the Value Added Tax" does not apply.

The given conclusion does not contradict the decision of the Supreme Court of the RF of 23/09/97, explaining that "in relation to instances of the shipping of goods by instruction of the purchaser — a legal person of a member-state of the CIS, the question of privileges concerning taxation may be resolved in each concrete instance by the corresponding competent body or by the arbitrazh court."

The given conclusion was made by the court taking account of the content of point 2 of Article 10 of the Law of the RF "On the Value Added Tax", which established the particularities of export only in relation to economic subjects of the member-states of the CIS.

Thus, the arbitrazh court had a basis for the satisfaction of the claims of the suit and the application of subpoint "a" of point 1 of Article 5 of the above-stated Law.

In connection with that set forth, the decision of 26/05/99 of the Arbitrazh Court for Chelyabinsk Oblast is legal and is not subject to reversal.

Being guided by Articles 174, 175 and 177 of the Arbitrazh Procedure Code of the RF, the court

HAS DECREED:

The decision of 25/05/99 of the Arbitrazh Court of Chelyabinsk Oblast in Case No. A76-3051/99 is to be left without change, and the cassational complaint — without satisfaction.

Presiding Judge	[signature]	N.L. Menshikova
Judges	[signature]	G. V. Annenkova
	[signature]	Yu. V. Merzlyakov

Appendix P: Petition for Supervisory Protest

Letter head of Ryazan'chai

Date and number of letter

Chair of the Higher Arbitrazh Court
of the RF V. F. Yakovlev

Case No. 259/99

Petitioner (Respondent)
OAO "Ryazan'chai"
[address]

Plaintiff
GP "KF Pishchepromsir'yo"
[address]

PETITION

On the bringing of a protest and the suspension of execution of the decree of the Arbitrazh Court of Ryazan Oblast of 16/09/98 in Case No. 1-1496-98/C-9

By a decision of the Arbitrazh Court of Ryazan Oblast of 22/07/98, 551,529.96 rubles in underlying debt and 3,400,162.02 rubles in interest for the use of the money[1] were exacted from the respondent (OAO "Ryazan'chai") to the benefit of the plaintiff (GP KF Pishchepromsir'yo, under Article 395 of the Civil Code of the RF.

By a decree of the appellate instance of the same court of 16/09/98, the stated decision was changed, and specifically 551,529.96 rubles in underlying debt and 1,645,808.45 rubles in interest for the use of someone else's money was exacted to the benefit of the plaintiff under Article 395 of the Civil Code of the RF.

The cassational instance of the Federal Arbitrazh Court for the Central Circuit left the above-stated decree without change.

By a letter of 26/02/99 in Case No. 259/99, a Deputy Chair of the Higher Arbitrazh Court of the RF left without satisfaction the petition of OAO "Ryazan'chai" concerning the bringing of a protest.

By a letter of 28/06/99 in Case No. 259/99, the first Deputy Chair of the Higher Arbitrazh Court of the RF informed [the petitioner] of the absence of a basis for the bringing of a protest.

[1] Literally "interest for the use of someone else's money" — this is statutory interest applied where an obligation has not been met on time -Trans/Auth

I believe that the court instances did not fully examine circumstances having significance for the resolution of the case in its substance, which in its turn led to the issuance of court acts which are without basis and which violate the norms of substantive law.

On 21/04/93, a contract was concluded between the plaintiff and the respondent "On the provision of middleman services in the acquisition of imported raw tea", No. 6006-06/230-69. In accordance with the conditions of the contract (points 1, 3 and 6), GP "KF Pishchepromsir'yo" was obligated to provide to OAO "Ryazan'chai" middleman services in the acquisition of imported raw tea and to participate in the settlements between the foreign trade organizations and OAO "Ryazan'chai" concerning transport operations, for which the firm would take a mark-up in the amount of one percent of the value (issue price) of the product shipped, which would be stated in a copy of the demand for payment on account sent by post in a separate line.

On the basis of an account from VAO "Soyuzplodoimport" of 31/03/94 N. 20023, the plaintiff sent to the address of the respondent Tranzit a payment document of 11/04/94, No. 127, in the amount of 1,267,450.57 rubles. The value of the raw tea was 12,223,281.60 rubles. The mark-up (in accordance with point 6 of the Contract) was stated in the account on a separate line and consisted of 1% of the value of the raw tea, in the sum of 12,232.81 rubles.

In account No. 127, VAO "Soyuzplodoimport" is named as the shipper, there is a reference to the contract of 13/01/94 No. 6006/06-30-02 concluded between "Soyuzplodoimport" and "Pishchepromsir'yo" and to the account of VAO "Soyuzplodoimport" No. 20023.

It follows that the Plaintiff was not the owner of the goods (raw tea).

Taking into account the circumstances set forth, the contract of 21/04/93 No. 6006-06/230-69 is a contract of commission, the subject of which was the completion of trade-middleman operations for transport (Article 404 of the Civil Code of the RSFSR, Article 990 of the Civil Code of the RF).

The plaintiff, acting in the capacity of a principle, bears liability before the commissionaire (plaintiff) [agent] only for the payment to it of the commission payment (Article 415 of the Civil Code of the RSFSR, Article 991 of the Civil Code of the RF).

No evidence was provided by the plaintiff supporting the sum of the expenses incurred by it for the execution of the contract of commission and the period of delay in the payment of the sum of the commission payment, defined by point 6 of the contract as a mark-up in the amount of one percent of the value of the shipped product, and the interests on the stated sum.

In addition, the failure by the respondent to execute its monetary obligations is not due to its fault and the amount of interest requested by the plaintiff and recognized by the

court is clearly not proportional to the consequences of the delay in the execution of the monetary obligation.

Neither the court of the first instance nor the following instances investigated the question of the proper observance of the procedure for the payment for the product, nor concerning whether there was a change in this procedure.

By point 4 of the Contract of 21/04/93 No. 6006-06/230-69, the parties envisioned that the shipping of the product by the plaintiff to the respondent would take place only after 100% prepayment by the respondent. In fact, the plaintiff shipped the product without asking for payment and without confirmation from the respondent concerning the possibility of payment.

Thus, the plaintiff itself violated the conditions of the contract, the respondent is not at fault in the violation of the obligation to pay for the product and on the basis of Article 401 of the Civil Code of the RF, the respondent should not bear any civil-law liability, including in the form of interest.

In addition to this, the limitations period for filing the suit had passed when the plaintiff filed the suit, and the respondent petitioned concerning this in the court of the first instance. "Tranzit" presented its demand for payment No. 127 to the plaintiff on 11/04/94. The plaintiff made recourse to the court with its suit on 05/06/98, in violation of the three year limitations period (Articles 196 and 199 of the Civil Code of the RF).

On the basis of that set forth, we consider that the Decision and the Decrees of the court instances of the arbitrazh court are without basis and were adopted in violation of the norms of substantive law.

Being guided by Articles 180 and 182-185 APC RF, I request that the Chair of the Higher Arbitrazh Court of the RF:

1. Request from the Arbitrazh Court of Ryazan Oblast the materials of Case No. A54-1496-98/C-9;
2. Bring a protest in which the Presidium of the Higher Arbitrazh Court of the RF is requested to wholly reverse the decision of the Arbitrazh Court of Ryazan Oblast of 22/07/98 in Case No. A54-1496-98/C-9 and the decrees of the appellate and cassational instances and to refuse the suit of GP "KF Pishchepromsir'yo."
3. Suspend the execution of the Decree of the appellate instance of the Arbitrazh court of Ryazan Oblast of 16/09/98 until the completion of the supervision proceedings.

Director [of the enterprise "Ryazan'chai"] V.V. Nemchinov

Appendix Q: Decree on the Initiation of Execution Proceedings

DECREE No. 11559-62
On the Initiation of Execution Proceedings

__City of Ryazan__ "_16__" _October_ 199_8_

15 October 199_8_ there were received by the court bailiff-enforcer of _____railway,__city of Ryazan_____ region for enforcement _____three exec. Orders of the_ Arbitrazh Court of Ryazan Oblast of 16/09/1998, Nos. A54-1495/98-09, A54-1496/98-_ 09, and A54-1497/98-09 concerning the exaction of debt from AOOT "Ryazanchai" to__ the benefit of the state enterprise "Commercial Firm 'Pishchepromsiryo'" of 2,438,885.93 rubles_____
which correspond to the requirements for execution documents. Being guided by part 2 of Article 9 of the Federal law "On Execution Proceedings"

HAS DECREED:

To initiate execution proceedings _____concerning the exaction of debt from AOOT_ _____"Ryazanchai" of 2,438,885.93 _____
_____

It is proposed to the debtor to execute voluntarily within a five day period of the day of the initiation of the execution proceedings _____we propose the stated debt be paid to the judgement creditor or deposited in the account of the court bailiff's service No. 1_____
_____
_____

In the instance of failure to execute an execution document within the period established for voluntary execution of the stated document without sufficient reason, the court bailiff-enforcer shall issue a decree, according to which an execution fee shall be exacted from the debtor of 7% of the exacted amount or of the value of the property of the debtor. In the instance of failure to execute an execution document of a non-property nature, the execution fee shall be exacted from a debtor citizen in the amount of times the minimum wage, and from a debtor-organization of 50 times the minimum wage.

For purposes of providing for the execution I consider it necessary to conduct a listing of the property of the debtor and to impose arrest on it.

Copies of the decree are to be sent to ____ the parties at their addresses _____
_____
(judgement creditor, debtor, body issuing the execution document)

A decree on the initiation of execution proceedings may be appealed to the court within a 10 day period.

Court bailiff-enforcer __[signature]_____

Appendix R: Petition for Execution of Arbitral Award and Determination

S T R O I I N V E S T T S E N T R

ARBITRAZH COURT FOR MOSCOW OBLAST
[address]

via the Permanent Arbitration Tribunal at
[address]

Plaintiff: OOO NPP "Stroiinvesttsentr"
[address]

Respondent: ZAO "Izolator"
Vacation facility "Solovushka"
[address]

Value of the suit: 10,665,818 rubles

12.05.99 **CASE No. 45/99 a**

P E T I T I O N

On 29 April 1999, by a decision in Case No. 45/99a, the Permanent Arbitration Tribunal of the Association PLA obligated the ZAO "Izolyator" and vacation facility "Solovushka" to transfer 5,332,909 rubles in underlying debt and 3,999,681 rubles, 75 kopecks in penalty for late payment to OOO NPP "Stroiinvesttsentr" by the 6th of May 1999.

The respondent, however, did not execute the decision of the tribunal voluntarily.

In connection with that set forth we request You to issue an execution order for the mandatory execution of the decision of the Arbitration Tribunal of the Association PLA in Case No. 45/99a concerning the exaction of 5,332,909 rubles in debt and 3,999,681 rubles in penalty, and 75,000 rubles in compensation of expenses for the payment of the court fee and also 417 rubles and 45 kopecks as the state fee for the issuance of the execution order.

Attachments:

- information from the bookkeeper on the non-receipt of the funds;
- payment instruction on the payment of the state fee on 12/05/99.

General Director [signature] I.I. Ivanov

Arbitrazh Court for Moscow Oblast
[address]

D E T E R M I N A T I O N

"_15_" _06____ 199_9_ Case No. __A41-K1-7783/99__

The Arbitrazh Court for Moscow Oblast, in the composition of:

Presiding Judge: _____Judge D.I. Kolosova_____

Judges:_____

Considered in a court session the case concerning the suit of _____
(name of the plaintiff)

_____OOO NPP "Stroiinvesttsentr"_____

Against ___ZAO "Izolyator" vacation premises "Solovushka"_____
(name of respondent)

_____

concerning: __issuance of an execution order for a decision of an arbitration tribunal____

_____
with the participation in the session of
_____

_____

_____

has established:

OOO NPP "Stroiinvesttsentr" made recourse to the court with a petition o the issuance of an execution order for the mandatory exaction of 5,332,909 rubles in underlying debt, 3,999,681 rubles and 75 kopecks as a penalty for late payment, 75,000

rubles fee for the decision of the permanent arbitration tribunal of the “Professional Legal Assistance” Association of 29/04/99 in Case No. 45/99a.

By a decision of the arbitration tribunal, ZAO “Izolyator” vacation premises “Solovushka” was obligated to transfer to OOO NPP “Stroiinvesttsentr” the sum of a debt of 5,332,909 rubles, penalty of 3,999,681 rubles 75 kopecks, and expenses for payment of the fee for the arbitration tribunal, by 6 May 1999.

The respondent did not fulfill its obligation to pay the sum awarded and had not transferred the debt amount by 11 May 1999, that is, it did not voluntarily execute the award of the arbitration tribunal.

See reverse

[reverse of determination form]

Taking into account that the decision of the arbitration tribunal was issued in accordance with effective legislation, and with observance of the requirements of point 25 of the Temporary Statute on the Arbitration Tribunal for the Resolution of Economic Disputes, as amended on 16.11.97 [by] No. 144-FZ, the court considers it necessary to issue the execution order for the mandatory exaction. In addition, there shall be exacted from the respondent expenses for the state fee paid for the petition concerning the issuance of the execution order.

Being guided by point 25 of the Temporary Statute on the Arbitration Tribunal and Articles 140 and 198 of the APC RF, the court:

HAS DETERMINED:

To issue the execution order for the exaction from ZAO “Izolyator” vacation premises “Solovushka” to the benefit of OOO NPP “Stroiinvesttsentr” of 5,332,909 rubles in underlying debt, 3,999,681 rubles and 75 kopecks in penalty for late payment, 75,000 rubles in the arbitration fee and expenses for the state fee of 417.45 rubles, paid for the petition on the issuance of the execution order.

Judge [signature] D. I. Kolosova

About the Author

Sarah Reynolds is a scholar and consultant specializing in comparative law, with particular focus on civil law and process, and the development of legal institutions, and on the laws and legal systems of the Soviet Union and its successor states. She has lectured widely in her area of specialty, as Thayer Lecturer at the Harvard Law School, and at Leiden University, Central European University, the Russian Legal Academy, and in other venues, and works actively in cooperative legal development and research projects with a variety of Russian Federation bodies and institutions, including the Supreme Arbitrazh Court of the Russian Federation. She currently serves as Senior Research Fellow at the Institute for East European Law and Russian Studies of Leiden University and conducts a private consulting practice based in Cambridge, Massachusetts. She is the editor of the journal Statutes & Decisions: The Laws of the USSR and its Successor States and an associate editor of The Review of Central and East European Law, and the author of numerous works in her field. She can be reached in her U.S. office at (978) 579-9452 or at sarahreynolds@earthlink.net

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