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RESOLVING ECONOMIC DISPUTES IN RUSSIA'S MARKET ECONOMY

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INTRODUCTION

> Law appears as a distinct social phenomenon not when we have one man standing over another, but only when we have men standing toward one another with rights and duties.[1]

In October 1992, Russia launched its mass privatization voucher program, under which each Russian citizen received a stake in Russian enterprises undergoing privatization. The program quickly created a

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1. Lon L. Fuller, *Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory*, 47 MICH. L. REV. 1157, 1160 (1949) (restating the ideas of EUGENE PASHUKANIS, GENERAL LEGAL THEORY AND MARXISM (3d ed. 1929)).

country of an estimated 40 million shareholders[2] and effected a transfer of state property to private ownership on a magnitude comparable to that of the reforms of Alexander II over one century ago.

Of course, formal conversion of certain ownership rights did not complete Russia's conversion into a market economy. One underpinning of a functioning market economy is meaningful protection of contract and property rights. For example, a basic principle of contract law is that a party who breaches a contract with another must pay damages to make the injured party whole. Russian contract law adheres to this basic principle.[3] But it is arguably an open question whether Russia's court system currently functions as a mechanism for effective contract enforcement, or whether the country's entrepreneurs rely on this mechanism.

In 1991, the Russian government enacted legislation creating a system of courts vested with the power to resolve economic disputes. These courts were not created from scratch but were, instead, converted from the existing Soviet system of economic courts, the system of state *arbitrazh*. Simultaneous with the conversion of state *arbitrazh* in the early 1990s was a spontaneous springing up of commercial arbitration tribunals in the country, in particular tribunals affiliated with Russia's developing network of commodities, currency and stock exchanges.

The most formidable constraints on Russia's dispute resolution system relate to the legal chaos associated with the dismantling of the Soviet system, corruption of the government and traditional views towards courts and legality. These are all problems that of course defy immediate correction and that affect government and society generally. Yet, commercial arbitration is an attractive alternative to adjudication. It is relatively free from association with the inefficiencies of the Soviet

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2. A reported 40 million Russians were direct shareholders in Russian companies as of June 1994, a figure that exceeds the number of U.S. shareholders both in absolute and relative terms. U.S. DEP'T OF TREASURY, NATIONAL TREATMENT STUDY: 1994 (1994), *reprinted in Russia's Securities Market*, 5 E. EUR. REP. (BNA) 42, at 44 (Jan. 9, 1995).

3. Article 15 of Russia's Civil Code provides that (i) a person whose rights have been violated may demand full indemnification and (ii) damages shall include restoration of the violated right and any loss resulting therefrom, as well as loss of expected benefit. CHAST' PERVAYA GRAZHDANSKOVO KODEKSA ROSSIISKOI FEDERATSII [PART I OF THE CIVIL CODE OF THE RUSSIAN FEDERATION], Nov. 30, 1994, Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Sobr. Zakonod. RF], 1994, No. 32, item 3301, art. 15.

Part II of the Civil Code came into force in 1996. CHAST' VTORAYA GRAZHDANSKOVO KODEKSA ROSSIISKOI FEDERATSII [PART II OF THE CIVIL CODE OF THE RUSSIAN FEDERATION], Jan. 26, 1996, Sobr. Zakonod. RF, 1996, No. 5, item 410 [together with Part I, hereinafter CIVIL CODE]. Only Part I (containing general principles, property law and general principles of tort and contract law) and Part II (containing specific principles of tort and contract law) have been adopted to date.

planned economy. The tendency in Russian business culture to attribute greater value to the maintenance of a business contact than to the sanctity of a legally enforceable contract would lead one to expect businesses to opt for arbitration. Nonetheless, commercial arbitration is not yet extensively utilized in Russia on the domestic level.

The purpose of this paper is to examine the recent transformation of state *arbitrazh* into economic courts along with the development of commercial arbitration in Russia, and to consider the relative utility of these mechanisms for resolving disputes in Russia's evolving market economy.[4] Part I describes state *arbitrazh* and details its evolution into the existing system of economic courts. Part II discusses the past and recent development of commercial arbitration in Russia as an alternative to litigating domestic disputes. Part III considers various social and historic factors that hinder genuine reform.

I. EVOLUTION OF RUSSIA'S ECONOMIC COURT SYSTEM

A. *Soviet Era*

Because Russia's system of economic courts[5] was essentially created out of the Soviet institution of state *arbitrazh*,[6] one should understand

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4. This paper proceeds from the premise that Russia's economy at least purports to be a "market" economy. For support of this premise, *see, e.g.*, ANDERS ÅSLUND, HOW RUSSIA BECAME A MARKET ECONOMY (1995). The central thesis of Åslund's book is that, however "messy and imperfect," Russia has already moved from a planned to a market economy. *Id.* at 5.

The Heritage Foundation, on the other hand, concluded in 1995 that Russia did not have a "free market economy." Peter Rutland, *Russia Still Not a Free Market Economy*, 2 OMRI DAILY DIG. 17, (Jan. 12, 1996), *available online* <http://www.omri.cz/Publications/Digests/9601/Digest.960112.html>. The Heritage Foundation report ranked Russia 100th on a list of 142 countries on the basis of a number of criteria, including the size of Russia's state sector and the degree to which Russia affords legal protection for private property. *Id.*

5. The literal translation from the Russian for what is referred to herein as an "economic court" is "arbitration court" [*arbitrazhnyi sud*]. The term "economic court" is used herein in order to avoid confusion with the institution of commercial arbitration (which in Russian is referred to as "*treteiskii sud*"). I believe that "economic court" is the more precise term, since the successor to the institution of state *arbitrazh* in Russia is not a system of arbitration tribunals, but is rather a system of courts vested with jurisdiction to resolve economic disputes. *See infra* notes 36–51 and accompanying text. Although prior drafts of the legislation creating these courts used the term "economic court" (*khoziaistvennyi sud*), the final legislation retained the Soviet-era reference to *arbitrazh*. *See* ARBITRAZHNYI PROTSESS: UCHEBNIK DLIA VUZOV [ECONOMIC COURT PROCEDURE: TEXTBOOK FOR UNIVERSITIES] 6 (M. Treushnikov ed., 1995) [hereinafter Treushnikov].

6. Although it is possible to conceive of the reforms as creating a new system of economic courts rather than reforming the existing Soviet institution of state *arbitrazh*, this process is generally described as one of transforming state *arbitrazh* into a system of Russian economic courts. *See, e.g.*, Venyamin Iakovlev & Mikhail Iukov, *Novoe v Deiatel'nosti Arbitrazhnykh Sudov* [*News on the Activity of Economic Courts*], ZAKON, 1995, No. 9, at 52, 53 (describing the Procedure Code as "completing the transformation of former state

certain fundamental principles of Soviet economic law as well as the historic purpose and function of state *arbitrazh* in the Soviet planned economy.[7]

Olympiad Ioffe maintains that the basic characteristics that underlay the Soviet economy were state ownership of economic resources and the separation of ownership from production.[8] Although Soviet enterprises utilized property in order to produce goods and services, as a matter of Soviet law this property was solely owned by the state.[9] The purpose of state planning, therefore, was to mitigate the Soviet government's loss of control over economic resources utilized by enterprises.[10] Whereas planning was the mechanism utilized to maintain centralized state control over economic resources, the decentralizing mechanism utilized by Soviet enterprises to transact with each other was the institution of contract.[11]

State *arbitrazh* was created by government decree[12] in 1931 as a system of special economic tribunals whose primary role was to supervise contracts entered into between state enterprises. The use of the term

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arbitrazh" into economic courts); Yuri Severin, *Treteiskii sud—Tozhe Instrument Rynka [Arbitration is also a Market Mechanism]*, ZAKON, 1994, No. 2, at 27 (referring to the "transformation" of state *arbitrazh*).

Treushnikov describes the reform process as follows: "The resolution of disputes between economic actors using the means and methods that were utilized under the conditions of the administrative-command system of *arbitrazh* became impossible. Therefore *arbitrazh* was transformed into a system of courts . . . ." Treushnikov, *supra* note 5, at 9.

7. For descriptions of the Soviet institution of state *arbitrazh*, see Harold J. Berman, *Commercial Contracts in Soviet Law*, 35 CAL. L. REV. 191, 204–09 (1947) [hereinafter Berman, *Commercial Contracts*]; HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW 124–44 (rev. ed. 1963) [hereinafter BERMAN, JUSTICE]; Stanislaw Pomorski, *State Arbitrazh in the U.S.S.R.: Development, Functions, Organization*, 9 RUT.-CAM. L.J. 61 (1977). For an excellent explanation of the relationship between plan and contract in the Soviet economy, see Olympiad S. Ioffe, *Law and Economy in the U.S.S.R.*, 95 HARV. L. REV. 1591 (1982).

8. Ioffe, *supra* note 7, at 1595.

9. Ioffe, *supra* note 7, at 1595 n.9. (citing KONSTITUTSIIA (OSNOVNOI ZAKON) SOIUZA SOVETSKIKH SOTSIALISTICHESKIKH RESPUBLIK [KONST. SSSR] [CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS] art. 11 (1977)).

10. Ioffe, *supra* note 7, at 1598.

11. *Id.* at 1609.

12. Berman, *Commercial Contracts*, *supra* note 7, at 204 n.44 (citing Decree of March 20, 1931, *On Changes in the System of Credit, the Strengthening of the Credit Reform, and the Securing of Business Accountability*, COLL. LAWS, U.S.S.R. (1931), No. 18, art. 166).

State *arbitrazh* had jurisdiction over inter-ministry disputes (*e.g.*, a contract dispute between enterprises belonging to different ministries). A separate institution known as departmental *arbitrazh* resolved disputes arising within the same ministry. BERMAN, JUSTICE, *supra* note 7, at 124. The difference between the two was in the lines of administrative authority under which each institution was subordinate: whereas state *arbitrazh* was ultimately accountable to the U.S.S.R. Council of Ministers, departmental *arbitrazh* was accountable to the ministry to which it belonged. *Id.* at 124.

"*arbitrazh*" to describe these tribunals is misleading in two respects. First, as Harold Berman has noted,[13] *arbitrazh* bore little resemblance to arbitration in that its jurisdiction was compulsory and state arbitrators generally were required to apply and adhere to legal rules. In addition, although the functioning of state *arbitrazh* as a resolver of contract disputes in some respects was similar to that of a court or arbitration tribunal in the West, the status of contract in Soviet economic law was ultimately subordinate to and legally dependent upon the plan. Thus, state *arbitrazh* as the adjudicator of contracts in the Soviet economy was not independent of the government bureaucracy; rather, it was an extension of the administrative apparatus.

The formal rules of Soviet contract law illustrate this relationship. First, any contract entered into independent of or inconsistent with a plan was invalid.[14] Similarly, parties were under an affirmative legal obligation to conclude a contract provided for in a plan.[15] Thus Soviet enterprises were not free to alter the terms of an agreement entered into under a plan, or to rescind such agreement. The role of *arbitrazh* in these cases ultimately was to ensure that contracts were performed in accordance with the plan. Although enterprises were under an affirmative legal obligation to bring suit to enforce violations of a contract,[16] *arbitrazh* was also empowered to bring proceedings on its own initiative, without any action on the part of the parties to a contract.[17]

Since the function of *arbitrazh* as a resolver of disputes was ulti-

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13. BERMAN, JUSTICE, *supra* note 7, at 124. *See also* Pomorski, *supra* note 7, at 61.

14. Heidi Kroll, *Breach of Contract in the Soviet Economy*, 16 J. LEGAL STUD. 119, 122 n.11 (1987) (citing Statute on the Deliveries of Consumer Goods, art. 98 (1981)); *id.* at 123 n.13 (citing Statute on the Deliveries of Producer Goods, art. 11 (1981)) [hereinafter Statute on Deliveries]. *See also* Pomorski, *supra* note 7, at 68.

Related to article 11 is the Soviet-era rule limiting the legal capacity of Soviet enterprises. To illustrate, Ioffe gives the example of a case involving a research institute that was bound by planned contract to design a model for new equipment. In order to utilize idle plant capacity, the institute entered into an additional contract (not planned) for the production and sale of a number of sets of the equipment to a customer. When a dispute later arose involving alleged defects in the equipment, the customer brought suit. *Arbitrazh* declared the contract void, since the institute was only authorized to design, not produce, equipment. Ioffe, *supra* note 7, at 1608 n.33.

Although contracts were subordinate to the plan, there was some scope for contract to contribute to the planning process. In particular, where a plan was worded generally, contracts allowed enterprises to provide the detail necessary to effectively implement the plan. Pomorski, *supra* note 7, at 69. Thus, the less specific the plan, the greater the role that contract could play and, thus, the greater the degree of economic decentralization. Ioffe, *supra* note 7, at 1613.

15. Ioffe, *supra* note 7, at 1613 n.42 (stating that *arbitrazh* could force an enterprise to execute any contract to which a plan designated it as a party).

16. *Id.* at 1607, n.32 (citing the Statute on Deliveries of Goods for Technical-Production Use, art. 101(7)).

17. Pomorski, *supra* note 7, at 81.

mately subordinate to its role in enforcing the plan, resort to *arbitrazh* was an imperfect and limited solution to the problems that repeatedly arose in the Soviet planned economy. An anecdote that typifies the sometimes ridiculous anomalies resulting from central planning and the limitations of *arbitrazh* in remedying them was recounted by Louise Shelley, who conducted a series of interviews during the 1980s with Soviet emigre lawyers and state arbitrators.[18] The anecdote, recounted to her by a former arbitrator, involved a bread factory and a neighboring food distributor. The parties entered into a contract for the delivery of flour to the bread factory, which was to be sent in sacks via a conveyor belt that linked the two enterprises. The contract obligated the bread factory to return the empty sacks. However, the conveyor belt only worked in one direction, and the ministry refused to grant permission for the bread factory to purchase a truck. The bread factory had no option but to utilize a small horse that could only deliver the sacks in small batches. The arbitrator was forced to impose huge fines on the bread factory for failure to return the sacks, payments that would have been sufficient to purchase several trucks. In this case, the role of *arbitrazh* was limited to enforcing the delivery contract; it could not as a legal matter remedy or alleviate the concerns of the bread factory by intervening with the relevant ministry or excusing performance.[19] Not surprisingly, Shelley found that the most significant disadvantage to arbitrators' work was the "perceived futility" of their decisions.[20]

As the Soviet political and economic system disintegrated during the late 1980s[21] and Mikhail Gorbachev's policy of *glasnost'* unleashed public opinion, criticism was levelled at *arbitrazh* for its inability to protect enterprises against the failings of the economy.[22] Although as a formal matter one of the primary functions of *arbitrazh* was to "guarantee the defense of rights and legal interests of enterprises" during the

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18. LOUISE I. SHELLEY, LAWYERS IN SOVIET WORK LIFE 75 (1984).

19. The limitations of the formal system were commonly subverted, however, by enterprises that would bypass *arbitrazh* and resort to informal mechanisms of dispute resolution. *See infra* note 222 and accompanying text.

20. SHELLEY, *supra* note 18, at 51.

21. As Anders Åslund points out, *perestroika* succeeded in tearing down the Soviet system without building anything to take its place. ÅSLUND, *supra* note 4, at 51.

22. R. Kallistratova cites the example of the general director of the enterprise "Pskovmash," who complained of *arbitrazh's* failure to compel the purchase of a very expensive machine that Pskovmash had been ordered to produce and no enterprise was willing to buy: "When I went to state *arbitrazh*, it turned out that these sorts of issues were not handled there. Who, then, will protect directors from unlawful action?" R.F. Kallistratova, *Perestroika i Budushchee Arbitrazha [Perestroika and the Future of Arbitrazh]*, SOVETSKOE GOSUDARSTVO I PRAVO [SOV. GOS. I PRAVO], 1989, No. 5, at 36.

process of *perestroika*,[23] it was apparent that the institution was unable to fulfill this task. Since *arbitrazh* was essentially a part of the bureaucratic system, it could not realisticially be expected to protect the interests of enterprises when these interests were at odds with the expressed priorities of the state.[24]

During the period preceding the break-up of the Soviet Union, at least two proposals were discussed in connection with reforming and restructuring the institution of state *arbitrazh* into an independent, market-oriented institution. One proposal was to convert state *arbitrazh* into an economic court that would have jurisdiction to resolve all commercial disputes, whether of a civil or administrative nature.[25] Another was to reform *arbitrazh* but limit the new institution's role to handling administrative disputes, transferring jurisdiction over other commercial disputes to courts of general jurisdiction.[26] As is discussed below, the legislation that was ultimately adopted took the first approach.[27] Any meaningful reform of state *arbitrazh* in Russia could only take effect, however, after the formal dismantling of the Soviet planned economy, which was implemented only when Russia achieved independence.

B. *Post-Soviet Era*

The legislation that founded Russia's modern system of economic courts was enacted by the Russian government in July 1991, just months

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23. Kallistratova, *supra* note 22, at 37 (citing Polozhenie O Gosudarstvennom Arbitrazhe SSSR [Regulation on USSR State Arbitrazh], Apr. 16, 1988, Sobr. Polozhenia SSSR, 1988, No. 19-20, item 59, art. 2).

24. Russian legal scholars made this argument during the years leading up to the reform of state *arbitrazh*. *See* I. Avilina, *Mekhaniszmy Zashchity Khoziaistvennykh Prav [Mechanisms for the Protection of Economic Rights]*, NARODNYI DEPUTAT, 1991, No. 1, at 71; Kallistratova, *supra* note 22, at 40. Even if an arbitrator did act independent of the government plan, it was unlikely that such a decision would ultimately be enforced. Kallistratova, *supra* note 22, at 40.

25. For a discussion of what constitutes a "civil" versus an "administrative" dispute, see *infra* note 37.

26. *See, e.g.*, Avilina, *supra* note 24, at 71; Kallistratova, *supra* note 22, at 43.

27. *See infra* Part I.B.1. It appears from Soviet legislation enacted just prior to the break-up of the country that the Russian reformers simply followed the approach taken by the Soviet government. In May 1991, the USSR Supreme Soviet adopted a law establishing a Supreme Economic Court, which was to replace state *arbitrazh* and was to be vested with jurisdiction to resolve both administrative and civil economic disputes between organizations and enterprises. *See* A. Arifulin, *Novye Zakony o Vysshem Arbitrazhnom Sude SSSR [New Law on USSR Supreme Arbitration Court]*, Vestnik Verkhovnovo Suda SSSR [Vest. Verkh. Suda SSSR], 1991, No. 9, at 22 (citing Zakon SSSR O Poriadke Razreshenia Khoziaistvennykh Sporov Vysshym Arbitrazhnym Sudom SSSR [USSR Law on the Order for Resolving Economic Disputes by the USSR Supreme Arbitration Court], adopted by the USSR Supreme Soviet on May 17, 1991).

prior to the formal dissolution of the Soviet Union in December 1991.[28] A revised law on economic courts was enacted in 1995,[29] introducing extensive revisions, but not reversing the direction of reform of state *arbitrazh* that began with the 1991 legislation. The legislation creating economic courts was accompanied by the adoption of a code of economic court procedure.[30] This section defines the jurisdiction of the new economic courts and considers the extent to which the courts' role has been redefined in light of the profound ideological shift of Russian commercial law in recent years.

1. Jurisdiction

In terms of the overall framework of Russia's court system, the Russian Constitution provides for three types of courts: courts of general jurisdiction (of which the Supreme Court is the highest judicial body),[31] economic courts (of which the Supreme Arbitration Court [*vyshyi arbitrazhni sud*][32] is the highest judicial body),[33] and a Constitutional Court.[34] The Constitution and Russian legislation define the jurisdiction of the economic courts vis-à-vis other courts. In general, economic courts have jurisdiction to entertain actions of companies and entrepreneurs. However, suits challenging the validity of legislation, although "economic," are outside economic court jurisdiction. Although the Procedure Code empowers economic courts to review the validity of certain administrative acts (such as the decision of the state property

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28. Zakon RSFSR Ob Arbitrazhnom Sude [RSFSR Law on Arbitration Courts], July 4, 1991, Vedomosti S'ezda Narodnih Deputatov RSFSR i Verkhovnovo Soveta RSFSR [Vedomosti RSFSR], 1991, No. 20, item 1013 [hereinafter 1991 Act].

29. Zakon Ob Arbitrazhnikh Sudakh v Rossiiskoi Federatsii [Law on Arbitration Courts in the Russian Federation], May 5, 1995, Sobr. Zakonod. RF, 1995, No. 18, item 1589 [hereinafter Economic Court Act].

30. The first Russian code of economic court procedure was enacted in 1992. ARBITRAZHNYI PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [CODE OF ARBITRATION PROCEDURE OF THE RUSSIAN FEDERATION], Apr. 16, 1992, Vedomosti RSFSR, 1992, No. 16, item 836, *translated in* LEXIS, Intlaw Library, RUSLEG file [hereinafter 1992 CODE].

As with the Economic Court Act, the procedure code was revised in 1995. APK RF, May 5, 1995, Sobr. Zakonod. RF, 1995, No. 19, item 1709 [hereinafter PROCEDURE CODE].

For an analysis of the provisions of the Economic Court Act and the Procedure Code, see Vratislav Pechota, *Survey of East European Law: Russia Overhauls the System of Arbitration Courts*, 2 PARKER SCH. J.E. EUR. L. 239 (1995).

31. KONSTITUTSIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION OF THE RUSSIAN FEDERATION] art. 126 (1993).

32. Hereinafter Supreme Economic Court.

33. KONST. RF, art. 127 (1993).

34. KONST. RF, art. 125 (1993).

committee to approve the privatization plan of an enterprise), if a disputed act of government is of a normative (i.e., law-making) character (such as the issuance by the state property committee of privatization regulations), then the proper court to review the validity of such an act would be the Constitutional Court or a court of general jurisdiction.[35]

As to defining the jurisdiction between economic courts and courts of general jurisdiction, recall that in reforming the institution of *arbitrazh*, the reformers opted to vest the new courts with jurisdiction to resolve all "economic disputes" [*ekonomicheskie spori*], thus retaining the historic nature of state *arbitrazh* as a sort of economic court.[36] The reformers thus rejected the approach of limiting the jurisdiction of *arbitrazh* to administrative disputes and delegating jurisdiction over civil disputes to courts of general jurisdiction.[37]

By creating a special system of "economic" courts, Russia is to a certain extent following the example of a number of other European countries, such as France and Germany, that utilize specialized courts that handle commercial matters.[38] And in a sense, Russia chose an

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35. Procedure Code, Article 22(2) provides that economic courts have jurisdiction, among other things, to declare invalid any "non-normative" act of government. PROCEDURE CODE, *supra* note 30, art. 22(2). *See also* Treushnikov, *supra* note 5, at 100.

As to the constitutionality of a normative act of government, Article 125 of the Russian Constitution vests jurisdiction to resolve this issue with the Constitutional Court. KONST. RF, art. 125(2) (1993).

36. PROCEDURE CODE, *supra* note 30, art. 22(1). The Plenum of the RF Supreme Court and the Plenum of the Supreme Economic Court issued a joint ruling to provide guidance on the question of jurisdiction between economic courts and courts of general jurisdiction. *See* E.A. VINOGRADOVA, TRETEISKII SUD V ROSSII [ARBITRATION IN RUSSIA] 29 (1993) (citing Postanovlenie No. 12/12 Plenuma Verkhovnovo Suda RF i Plenuma Vyishevo Arbitrazhnovo Suda RF O Nekotorykh Voprosakh Podvedomstvennosti Del Sudam i Arbitrazhnym Sudam [On Several Jurisdictional Questions of Courts and Arbitration Courts], Vestnik Vyshevo Arbitrazhnovo Suda RF [Vestn. Vysh. Arb. Suda RF], 1992, No. 1, at 84).

37. As to defining what constitutes an "administrative" versus a "civil" dispute, a study issued by the International Monetary Fund and other multilateral organizations referred to administrative disputes as those arising out of economic relationships of a "planned," as opposed to a "voluntary," nature. 2 INT'L MONETARY FUND *et al.*, A STUDY OF THE SOVIET ECONOMY 253 (1991). The IMF study cited above analyzed early drafts of Soviet-level reform legislation that most likely formed the basis for the Russian Economic Court Act. *See* Arifulin, *supra* note 27.

38. The French *tribunaux de commerce*, for example, are specialized commercial courts that adjudicate business disputes and commercial transactions such as bankruptcy. The Germans also utilize specialized commercial courts. Unlike Russia's new economic courts, however, the commercial courts in Germany and France are presided over by lay judges that possess specialized knowledge of business and commerce. *See, e.g.*, John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1762 (1988); David Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1829–31 (1988).

During and after the reform of *arbitrazh*, Russian jurists looked to the experience of other European countries as precedent for the Russian approach. *See* Iakovlev and Iukov, *supra* note 6, at 54 (citing Germany, France and Great Britain as countries with economic

approach that has roots in its own pre-Revolutionary history.[39] Prior to 1917, there existed four special courts in what was then Russia (in Moscow, Saint Petersburg, Odessa and Warsaw), each vested with jurisdiction to resolve commercial disputes.[40] All but the court in Warsaw operated independently of the legal system and were governed by special rules of commercial procedure.[41] In contrast to the current courts, the make-up of the pre-Revolutionary commercial courts was unique: some of the judges were designated by the government, whereas the others were experienced merchants chosen for the court by the local merchant association.[42] Another significant difference between the pre-Revolutionary commercial courts and Russia's current economic courts is that the present-day courts handle both administrative and commercial disputes, whereas the pre-Revolutionary courts only handled commercial disputes.[43] In terms of jurisdiction, therefore, the present-day economic courts are something of a cross between Soviet state *arbitrazh* (which—by virtue of the planned economy—had jurisdiction over disputes that were essentially administrative) and the pre-Revolutionary commercial courts.

A survey of the published opinions issued by the Plenum[44] of the Supreme Economic Court during the twelve-month period between May 1994 and May 1995 demonstrates that a substantial portion of the caseload of the present-day economic courts has been devoted to addressing administrative disputes, particularly in the area of privatization.[45] Of the forty-one opinions reviewed, twenty-seven of them, or

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courts); Kallistratova, *supra* note 22, at 42 (suggesting that the Soviet Union might adopt the approach of Hungary and former Yugoslavia as transition economies that had set up economic courts).

39. Iakovlev and Iukov, *supra* note 6, at 54.

40. E.V. VAS'KOVSKII, UCHEBNIK GRAZHDANSKOVO PROTSESSA [MANUAL OF CIVIL PROCEDURE] 419 (1917). The first of these courts was set up by the local authorities in Odessa upon the petition of foreign merchants who lived there. *Id.* at 420.

41. *Id.* at 419.

42. *Id.* at 420.

43. The pre-Revolutionary commercial courts were vested with jurisdiction to handle three types of disputes: (i) most commercial disputes (with a few exceptions such as small claims), (ii) disputes involving bills of exchange [*veksel'*]; and (iii) bankruptcy. *Id.* at 131–32. Special judicial-administrative tribunals [*sudebno-administrativnyia uchrezhdenia*] handled administrative disputes. *Id.* at 40.

44. Until the 1995 reforms to the Economic Court Act, the Plenum was the supreme reviewing body of decisions rendered by economic courts. Under the 1995 reforms, that function was transferred to a new body, the Presidium of the Supreme Economic Court. *See infra* notes 68–79 and accompanying text for a discussion of the review process.

45. These opinions are published in ROSSIISKAYA IUSTITSIIA [ROSS. IUST.], No. 10, (1994) and Nos. 1-3, 6, 9-10 (1995).

A dispute was characterized "administrative" if the complaint challenged the validity of

roughly two-thirds of the opinions, were administrative. Fifteen of the administrative cases involved privatization or lease [*arenda*] transactions.[46] Of the fourteen civil suits, one involved enforcement of an arbitration decision[47] and ten involved credit agreements or insurance contracts against debtor default. Although the cases reviewed may not be entirely representative of the types of disputes brought to economic courts, the figures indicate that (i) at least during the period surveyed, economic courts have functioned more as administrative than commercial courts, and (ii) the commercial disputes that have been brought to economic courts commonly have sought to enforce a promise to make payment.[48]

Although the jurisdiction of the economic courts is broad in the sense that it covers both administrative and civil disputes, it is limited to "economic" [*ekonomicheskie*] disputes as defined by the Procedure Code. Generally speaking, economic court jurisdiction exists only where *each* party to the dispute (or, if the suit is brought against a government body, the plaintiff) is either an organization or a person officially registered with the government as an entrepreneur.[49] If a party to a given

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an act of government or governmental agency. However, determining whether a particular dispute involved administrative or civil relations was not always clear-cut. Two of the cases that are classified as administrative involved banks challenging acts of the Central Bank as administrator of the banking system. Another case involving a construction contract was classified as administrative since the dispute arose over whether a subdivision of the Rostov regional administration of Promstroibank had authority to conclude the contract. For an exact breakdown of the cases reviewed, see Appendix.

46. President Gorbachev issued legislation in 1989 which made possible an early form of privatizing state-owned property by concluding a long-term contract for lease [*arenda*]. 2 ROMAN FRYDMAN ET AL., THE PRIVATIZATION PROCESS IN RUSSIA, UKRAINE AND THE BALTIC STATES 20–21 (CEU Privatization Reports, 1993). *See also*, E. A. Suhanov, *Privatization in the Soviet Union and Various Forms of Property Accompanying the Transition to a Market Economy*, *in* PRIVATIZATION IN CENTRAL AND EASTERN EUROPE 73 (Petar Šarčević ed., 1992) (citing "Fundamentals of Legislation of the USSR and Union Republics on Leasing," Vedomosti S'ezda Narodnih Deputatov SSSR i Verhovnogo Soveta SSSR [Vedomosti SSSR], 1989, No. 25, item 481). By early 1992, the number of enterprises that had been leased in this manner had reached 9,451. FRYDMAN ET AL., *supra* at 22.

47. As discussed below, decisions issued by domestic arbitration tribunals are enforceable by application to the economic court having jurisdiction over the territory where the arbitration tribunal is located. *See infra* note 113 and accompanying text.

48. Resorting to litigation in economic court (as opposed to commercial arbitration) in these types of cases may be motivated by the economic court's relatively broad formal powers to enforce judgment, *e.g.*, by ordering Russian banks to apply any funds in defendant's accounts to satisfy judgment. *See infra* notes 147–51 and accompanying text.

49. PROCEDURE CODE, *supra* note 30, art. 22(1). Article 23 of the Civil Code authorizes registered individuals to engage in entrepreneurial activity. CIVIL CODE, *supra* note 3, art. 23(1). For a discussion of the procedure for registration, see Treushnikov, *supra* note 5, at 56 (citing RSFSR Zakon O Registratsionom Sbore s Fizicheskikh Lits, Zanimaiushchikhsia Predprinimatel'skoi Deiatel'nost'iu, i Poriadke ikh Registratsii [On the Registration Duty of Physical Persons Engaged in Entrepreneurial Activity and Registration Procedure], Dec. 7,

action is neither an organization nor a registered entrepreneur, then the proper court to review the dispute is a court of general jurisdiction. In addition, even if both parties to a dispute are organizations or entrepreneurs, the subject matter of the dispute must be "economic" in order to confer economic court jurisdiction.[50] For example, disputes involving housing or labor relations would be handled by a court of general jurisdiction regardless of the status of the parties.[51]

2. Role of Economic Courts

As Russia's economy underwent fundamental change during and after *perestroika*, the need to redefine and recreate state *arbitrazh* in response to this economic change became obvious.[52] To a certain extent, the Economic Court Act and the Procedure Code successfully redefine Soviet state *arbitrazh*. Now that the economy has moved from plan to market, economic courts are no longer an extension of the administrative apparatus but are politically independent institutions whose formal role is to protect the legal rights and interests of citizens. These principles are enshrined in the Russian Constitution, which guarantees the independence,[53] life tenure[54] and immunity[55] of judges, as well as a public judicial process[56] and the financial independence of courts from local administration.[57]

1991, Vedomosti S'ezda Narodnikh Deputatov RF i Verkhovnovo Soveta RF [Vedomosti RF], 1992, No. 8, item 360).

So long as the jurisdictional requirements are otherwise met, economic courts also may resolve economic disputes where one or both parties to the dispute is foreign or is an organization with foreign investment. PROCEDURE CODE, *supra* note 30, art. 22(6).

50. Article 22 of the Procedure Code does not define the term "economic," but provides a nonexclusive list of what constitutes an economic dispute, including any contract dispute, property dispute, request to declare invalid any non-normative act of government, or dispute arising out of bankruptcy. PROCEDURE CODE, *supra* note 30, art. 22(2). In addition, economic court jurisdiction may be conferred by agreement of the parties. *Id.*

Economic courts also have sole jurisdiction to enforce the domestic decisions of commercial arbitration tribunals. *See infra* note 113 and accompanying text.

51. *See* Treushnikov, *supra* note 5, at 55.

52. A judge in Saint Petersburg recalls how state arbiters "suffocated" under the weight of economic cases that were brought to *arbitrazh* prior to the institution's reform. Karl Rendel, *Okruzhnye Arbitrazhnye Sudi—Tol'ko vo Blago* [*Regional Economic Courts—Only for Good*], ZAKON, 1995, No. 9, at 58 (interview with Saint Petersburg Economic Court Judge Liudmila Batalova). *See also* Avilina, *supra* note 24, at 71 (pointing out the futility of limiting the reform of state *arbitrazh* to "minor repairs" [*nebol'shoi remont*]).

53. KONST. RF, art. 120 (1993).

54. KONST. RF, art. 121 (1993).

55. KONST. RF, art. 122 (1993).

56. KONST. RF, art. 123 (1993).

57. KONST. RF, art. 124 (1993). The Russian government also adopted legislation that details and expands upon the basic protection for judges provided for in the Constitution. *See*

Act provides that economic court activity shall proceed on the basis of the principles discussed above, plus an additional principle: the primacy of the adversary process.[64] Organizing economic court activity on the basis of the adversary process requires economic court proceedings to be driven not by the initiative of the judge but by that of the parties. This orientation is a significant departure from the role that state *arbitrazh* played in the past. In describing *arbitrazh* procedure during the Soviet era, Berman has compared the function of the Soviet state arbitrator to that of a bankruptcy judge in the United States legal system, where the "judge-referee often makes his own 'preliminary investigation' of the case, consulting personally in advance with the various parties involved," although the formal hearing is governed by procedural rules.[65] In other words, in the past Soviet state arbitrators played an active, and somewhat paternal,[66] role in the cases they adjudicated.

Although the importance of the adversary process is espoused in principle in the reform legislation, one suspects that economic court judges still take a relatively active and paternal approach to adjudicating disputes. For example, the chief judge of the Supreme Economic Court, while acknowledging the importance of allowing parties to control adjudication through the adversary process, also believes there is a need to "strengthen" active participation by judges in this process in order to protect the fairness of court decisions, particularly where there is a patent discrepancy in wealth between the parties to a dispute.[67]

Even on a formal level, however, certain provisions of the Economic Court Act and the Procedure Code perpetuate the traditional role of *arbitrazh* as a regulator that actively participates in the adjudication process. In contrast to the principles of judicial independence and adversary process articulated in Article 6 of Economic Court Act, Article 5 describes the role of economic courts as "strengthening legality and preventing unlawful acts" in the economic sphere.[68] Thus Article 5 articulates a supervisory role for the court that is somewhat at odds with notions of an adversarial process and party autonomy, particularly in the context of adjudicating commercial contract disputes.

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64. Article 6 of the Act states that economic court activity shall be based upon legality, independence of judges, equality of persons before the law and the court, the adversary process, equality of parties and openness in the adjudication of cases. Economic Court Act, *supra* note 29, art. 6. *See also* PROCEDURE CODE, *supra* note 30, art. 7 (stating that economic court procedure shall proceed on the basis of party equality and the adversary process).

65. BERMAN, JUSTICE, *supra* note 7, at 310–11.

66. *Id.*

67. Iakovlev and Iukov, *supra* note 6, at 54.

68. Economic Court Act, *supra* note 29, art. 5.

The shift from plan to market also is reflected in Russia's new Civil Code,[58] the fundamental legislation governing economic relations in the country. Article 1 includes in the list of the basic principles of civil legislation the notion of freedom of contract.[59] In addition, Article 421 expressly provides that parties shall be free in concluding contracts and prohibits coercion to conclude an agreement.[60] Russian companies, therefore, are no longer under an affirmative obligation to enter into planned contracts. As to legal capacity, which under the Soviet planned economy operated to restrict severely an enterprise's permitted activities,[61] the Civil Code now allows a company to engage in any legal activity permitted in its founding documents.[62] More generally, in contrast to the Soviet era, the contract law principles set forth in the Civil Code are predominantly dispositive norms.[63] The courts' implicit role in this new legal regime, therefore, is not to police the compulsory execution and implementation of contracts but rather to enforce contracts entered into freely.

As to the legislation reforming state *arbitrazh*, the Economic Court

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Zakon O Statuse Sud'ei v Rossiiskoi Federatsii [Law on the Status of Judges in the Russian Federation], June 26, 1992, Vedomosti RF, 1992, No. 30, item 1792 [hereinafter Law on Judges]. The Law on Judges was extensively amended in 1995. *See* Zakon O Vnesenii Izmenenii i Dopolnenii v Zakon Rossiiskoi Federatsii 'O Statuse Sud'ei v Rossiiskoi Federatsii' [Law on Amending and Supplementing the Russian Federation Law on the Status of Judges in the Russian Federation], June 21, 1995, Sobr. Zakonod. RF, 1995, No. 26, item 2399 [hereinafter Law Amending Status of Judges].

For an analysis of the Law on Judges prior to the 1995 reforms, see Mikhail S. Paleev, *The Establishment of an Independent Judiciary in Russia*, 1 PARKER SCH. J.E. EUR. L. 647, 651 (1994). *See also* John Quigley, *Law Reform and the Soviet Courts*, 28 COLUM. J. TRANSNAT'L L. 59 (1990).

58. CIVIL CODE, *supra* note 3. For a comparative discussion of Part I of the Civil Code and civil law principles under Soviet law, see Iakov Shestopal, *Potentsial Grazhdanskovo Prava i Sudi [The Potential of Civil Law and the Courts]*, ZAKON, 1995, No. 5, at 86 (interview with Venyamin Iakovlev, Chief Judge of Russia's Supreme Economic Court). *See also* E. Sukhanov, *Russia's New Civil Code*, 1 PARKER SCH. J.E. EUR. L. 619, 635 (1994).

59. CIVIL CODE, *supra* note 3, art. 1(1).

60. *Id.* art. 421; Shestopal, *supra* note 58, at 89. *See also* CIVIL CODE, *supra* note 3, art. 450 (allowing parties to amend or rescind a contract by agreement).

61. See the anecdote cited *supra* at note 14. The enterprise at issue was not able to produce the specialized equipment because it did not have legal capacity to do so.

62. CIVIL CODE, *supra* note 3, art. 49. *See also id.* art. 22(1) (principle of unrestricted legal capacity of individuals). Changes in the concept of legal capacity under the new Civil Code are discussed in Shestopal, *supra* note 58, at 90.

In addition, Article 2 of the Civil Code provides that only civil legislation shall regulate legal relations arising from entrepreneurial activity. CIVIL CODE, *supra* note 3, art. 2(1). The Civil Code therefore refutes the notion that "economic" law, or the law governing entrepreneurial activity, is a body of law separate from civil law. In the past this distinction provided a rationalization for state interference in economic activity. Sukhanov, *supra* note 58, at 635.

63. Dispositive norms refer to background rules that apply unless the parties agree otherwise. Shestopal, *supra* note 58, at 90.

instance for party appeal. Whereas previously, the economic court system included courts of first instance and the Supreme Economic Court, the 1995 reforms provide for the addition of ten regional courts with jurisdiction to conduct cassation review on issues of law.[79] In providing for independent cassation review and by narrowing the scope of supervisory review, the system has in large part moved away from the Soviet administrative-bureaucratic economy and towards judicial independence and party autonomy in contractual relations.

The reforms have also narrowed, but not eliminated, the scope for government involvement in the adjudication of economic disputes. First, the Economic Court Act allows for persons other than judges to participate in sessions of the Presidium, including the Procurator General and (by invitation) the Minister of Justice, judges of other courts or "other persons."[80] In other words, the Act allows government officials to participate in the supervisory review of economic court cases. Second, the Procedure Code empowers the Procuracy to submit complaints to an economic court "in the protection of governmental and societal interests,"[81] and to apply for appellate and cassation review of any complaint that it has submitted at first instance.[82] The law does not prohibit, for example, a local procurator from bringing an action in the interests of "society" to enforce a breach of contract entered into between two businesses.[83] The 1995 amendments to the Procedure Code, however,

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79. Economic Court Act, *supra* note 29, arts. 24, 26 (outlining the jurisdiction and role of each of the ten new regional courts); PROCEDURE CODE, *supra* note 30, arts. 161-62 (providing for the right of a party to appeal a decision to a regional court for cassation review) and art. 176(1) (limiting the basis for reversing or remanding decisions to issues of law). For a discussion of the historic significance of the new regional courts, *see Prebavitsia li Nizavicimosti Arbitrazhnomu Sudu?* [*Will the Independence of Arbitration Courts Increase?*], ZAKON, 1995, No. 9, at 3.

80. Economic Court Act, *supra* note 29, art. 15(3).

81. PROCEDURE CODE, *supra* note 30, art. 41(1). In fact, the Procedure Code extends this power to other government officials as well. *Id.* art. 42.

82. *Id.* art. 41(3) (allowing a procurator who submits a complaint to exercise the rights to which a party is entitled); Treushnikov, *supra* note 5, at 255, 280.

83. Of the Supreme Arbitration Court cases published in 1994–95 (see Appendix), however, the four actions that were brought by the Procuracy were all complaints challenging the validity of administrative acts.

When a member of the Procuracy was recently asked what is meant by "governmental and societal interests," he responded by listing the following concerns: (i) the failure of registered founding documents of organizations to comply with legal requirements; (ii) economic activity engaged in without the requisite permission or license; (iii) violations of environmental legislation; and (iv) the failure to comply with obligations, where such failure might disrupt significant investment projects or other programs of governmental importance. Viktor Pecherskii, *Procuror v Arbitrazhnom Protsesse* [*Procurators in the Economic Court Process*], ZAKON, 1995, No. 9, at 75, 76 (interview with Alexandr Karlinyi).

In 1994, the Procuracy submitted 2,383 complaints for the protection of governmental and societal interests, seeking aggregate damages in the amount of 1.3 trillion rubles. *Id.* A

have added a limitation to this power: if the party in whose interests the complaint is submitted (in the example above, the injured party to the contract) rejects the complaint, then the court will not review the dispute.[84] The Procedure Code now allows party autonomy to trump the power of the government to intervene in the resolution of private economic disputes.

As to the role of the Procuracy in Russian civil practice, it should be noted that plaintiffs often welcome the participation of the Procuracy in civil and administrative disputes, especially in light of the fact that a Procurator's involvement in a suit allows the injured party a vehicle for bringing an action without paying court fees.[85] In practice, complaints submitted by the Procuracy are typically brought at the initiative of the injured party (who may not be able to afford the expense of bringing an action on its own).[86] Complaints brought by the Procuracy in economic court also enjoy a higher chance of winning: according to the Procuracy's figures, 82 percent of complaints brought by procurators are successful, as opposed to the overall success rate of 51 percent.[87] As a matter of national policy, however, in addition to the potential for political interference in commercial disputes, observers question the wisdom of devoting scarce judicial resources to the general oversight function of the Procuracy, rather than focusing on its prosecutorial functions in fighting crime.[88]

In summary, the economic courts, while formally operating more independently than did *arbitrazh*, retain certain features of the Soviet-era system. The reform legislation still allows for potential government

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significant number of these complaints involved legal abuses in the privatization process. *Id.* at 77. One such case involved the chief doctor of a hospital who, with the permission of city authorities, sold a two-story children's nursery building to a bank cooperative and a polyclinic to an individual entrepreneur, property that belonged to the hospital. *Id.*

84. PROCEDURE CODE, *supra* note 30, arts. 41(5), 42(4).

85. The provisions of the Procedure Code (*see id.* arts. 91-2) that require plaintiffs to pay court costs when submitting a complaint do not apply to the Procuracy. *See* Treushnikov, *supra* note 5, at 99.

86. Interview with Andrei Maximovitch (Senior researcher at the Institute of State and Law of the Russian Academy of Sciences), in Moscow (June 21, 1996) [hereinafter Maximovitch interview].

Court costs can be significant. When filing a complaint involving a property dispute under the 1992 Procedure Code, for example, plaintiffs were required to pay ten percent of the amount of the claim as court costs. 1992 CODE, *supra* note 30, art. 69. More recent legislation on court fees differentiates fee amounts depending on both the type and amount of the claim. *See* G. Shuleva, KHOZIAISTVO I PRAVO [KHOZ. I PRAVO], 1996, No. 5, at 128–29 (citing Zakon O Gosudarstvennoi Poshline [Law on Government Duties], Dec. 31, 1995, Sobr. Zakonod. RF, 1996, No. 1, item 19).

87. Pecherskii, *supra* note 83, at 78.

88. *See* Thaman, *supra* note 69, at 13.

interference in the resolution of private economic disputes. Economic court jurisdiction is defined to embrace disputes arising out of both civil law and administrative law relations. Although in a sense the reforms restore the pre-Revolutionary institution of specialized commercial courts, the present-day courts function rather differently from the commercial courts of old.

II. COMMERCIAL ARBITRATION

The resurrection of arbitration [*treteiskii sud*] as a mechanism for resolving domestic commercial disputes in Russia has proceeded somewhat spontaneously since the time of the break-up of the Soviet Union. Arbitration, however, has been utilized in Russia to resolve disputes since as early as the fourteenth century.[89] Even during the Soviet era, special arbitration tribunals were utilized to resolve commercial disputes between Soviet entities and their foreign trading partners. This section details the evolution of arbitration practice in Russia and discusses current legislation.

A. *History*

The first legislative enactments on Russian arbitration existed three centuries ago, in the code of Tsar Aleksei,[90] although it was only during the mid-19th century that general regulation of arbitration first appeared in Russia's 1857 Code of Laws, subsequently revised by the Code of Civil Procedure of 1864 (1864 Code).[91] The drafters of the 1864 Code intended in particular to address the inadequacies of existing law in order to make arbitration a convenient mechanism for private dispute resolution.[92] Pre-Revolutionary jurists argued in favor of encouraging the resolution of disputes through arbitration based on the rationale that private dispute resolution relieved government courts of "unnecessary matters."[93] Consistent with this policy, the 1864 Code allowed parties considerable scope to resolve civil disputes privately through arbitration,

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89. According to Mintz, monuments from as early as the fourteenth century evidence the arbitration of ancient disputes in Russia by third parties. P.M. Mintz, *Treteiskaia Sdelka i Treteiskii Sud* [*Agreements to Arbitrate and Arbitration*], ZHURNAL MINISTERSTVA IUSTITSII, 1917, Nos. 5-6, at 154, 189.

90. *Id.* The Code was promulgated in the late 17th century.

91. *Id.* at 189–91 (citing USTAV GRAZHDANSKOVO SUDOPROIZVODSTVA [CODE OF CIVIL PROCEDURE]) [hereinafter 1864 CODE].

92. *Id.* at 190.

93. V.L. ISACHENKO, 1 RUSSKOE GRAZHDANSKOE SUDOPROIZVODSTVO [RUSSIAN CIVIL PROCEDURE] 202 (1901).

provided that certain formalities were met in the arbitration agreement.[94]

The treatment of arbitration under the 1864 Code can be contrasted with the most recent Russian legislation regulating domestic arbitration.[95] First, the arbitration provisions of the 1864 Code did not require arbitrators to apply Russian law; generally, an arbitrator rendered decisions by relying on life experience and his own conscience. One jurist argued in 1901 that ruling by conscience was in fact preferable to a legalistic approach. He noted that "it is more advantageous and pleasant for the dispute to be resolved on the basis of higher justice and life truths, rather than on the basis of codified law," particularly when parties are convinced that neither side is wrong.[96] In addition, although courts had jurisdiction to enforce arbitration decisions during the pre-Revolutionary era, the permitted bases for overturning or failing to enforce an arbitration decision were narrowly defined.[97] Although a reviewing court could in limited instances refuse to enforce an arbitration decision (e.g., if the arbitrators exceeded their authority as set forth in the arbitration agreement), courts were not authorized to consider whether a decision was rendered in accordance with Russian law. The provisions of the 1864 Code, therefore, formally supported private resolution of contract and property disputes by limiting government interference in arbitration.

When the Soviet government came to power in 1917, the institution of arbitration was abolished, only to be temporarily reestablished by decree in 1924 as a dispute resolution mechanism for merchants during the years of the New Economic Policy (NEP).[98] Although the 1924 Decree remained on the books for decades, and was eventually included as an appendix to the Russian Code of Civil Procedure,[99] the formal

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94. For example, in order to be valid, an arbitration agreement had to designate an odd number of arbitrators, and the agreement had to be signed and notarized not only by the parties to the potential dispute, but also by the designated arbitrators. *Id.* at 204–05 (citing to the 1864 Code of Civil Procedure).

95. *See infra* Part II.B.1 and accompanying text for a discussion of domestic arbitration practice under current legislation.

96. ISACHENKO, *supra* note 93, at 203. This approach is not inconsistent with United States and international commercial practice, according to which arbitrators may decide a dispute *ex aequo et bono* or as *amiable compositeurs* if the parties so provide in the arbitration agreement. *See, e.g.*, GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES (1994) 135–36 (1994) (discussing international commercial practice).

97. ISACHENKO, *supra* note 93, at 208. *See also* VAC'KOVSKII, *supra* note 40, at 365.

98. *See* John N. Hazard, *Russian Decree on Ad Hoc Arbitration*, 3 P.S. S.E.E.L. Nov. 1992(I), at 1, 5. *See also* Avilina, *supra* note 24, at 72–73.

99. *See* E. VINOGRADOVA, *supra* note 36, at 26 (citing Polozhenie O Treteiskom Sude [Regulation on Arbitration], Prilozhenie No. 3 k GPK RSFSR [Attachment No. 3 to the RSFSR Civil Procedure Code], June 11, 1964, Vedomosti RSFSR, 1964, No. 24, item 407).

to make feasible the resolution of external trade disputes in Soviet tribunals, the norms of the Soviet administrative-bureaucratic economy were set aside in favor of commercial arbitration according to internationally accepted standards.[105] Indeed, the ICAC and the MAC have enjoyed a solid reputation over the years for being competent, fair and independent,[106] and have developed rather extensive experience in the resolution of international commercial disputes.[107]

B. *Post-Soviet Development of Domestic Arbitration*

1. Regulation

During the first months following the break-up of the Soviet Union, the Supreme Soviet of the Russian Federation passed a "temporary" regulation to provide a legal framework for commercial arbitration of

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Arbitration, 10 HARV. INT'L L.J. 34 (1969); Pisar, *supra* note 100; Volker Viechtbauer, *Arbitration in Russia*, 29 STAN. J. INT'L L. 355 (1993).

After the break-up of the Soviet Union, the Russian government enacted legislation on international commercial arbitration that reaffirms the status of the MAC and the ICAC as permanent arbitration tribunals with competence to handle international disputes. *See* Zakon RF O Mezhdynarodnom Kommercheskom Arbitrazhe [On International Commercial Arbitration], July 7, 1993, Vedomosti RF, No. 32, item 1240 [hereinafter, International Arbitration Law].

105. Samuel Pisar noted a paradox of totalitarian regimes such as the Soviet Union, which did not as a formal matter reject doctrines of party autonomy in contractual relations and the resolution of disputes through international arbitration. Pisar, *supra* note 100, at 1442, 1458. Although freedom of contract was touted as a principle of Communist law, the right to contract was circumscribed in many respects by the exigencies of the plan. Pisar noted that in spite of formal notions of party autonomy under Soviet law, the state's demands were found to control contractual relations through "extralegal channels." *Id.* at 1443.

106. According to William Butler, in contrast with the Soviet-era judicial system, Soviet arbitration "enjoyed a sound reputation." BUTLER, *supra* note 101, at 6. Samuel Pisar found that opinions issued by the ICAC and MAC were often analytically comparable to "judgments of authoritative courts of high instance" and that procedural rules were "scrupulously adhered to." Pisar, *supra* note 100, at 1441–42. He cited one western arbitrator who considered the ICAC to be "one of the best arbitral institutions of its kind in the world." *Id.* at 1417 n.26 (citing Frances Kellor, *Coordination of Commercial Arbitration Systems*, 1 ARB. J. (n.s.) 139, 140 (1946)). *See also* King-Smith, *supra* note 104, at 37.

One historic limitation of the ICAC and the MAC that has deterred Western counterparts from utilizing these tribunals in the past was the fact that arbitrators could only be chosen from a limited list of Soviet arbitrators. The Rules of the ICAC have been liberalized so that currently, only the chairman of the arbitral tribunal is to be chosen from the ICAC list of arbitrators. Rules of the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry, secs. 2(3), 20(3), *reprinted in* 5 E. EUR. REP. (BNA) 702 at 703, 705 (Sept. 11, 1995) [hereinafter ICAC Rules]. In addition, the ICAC's list of arbitrators has been expanded to include foreign (including mainly American and European) arbitrators: of the 106 acting arbitrators, 34 are foreign. List of Arbitrators of the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry (current as of June 1996—on file with author)[hereinafter List of Arbitrators].

107. During the period between 1984–86, for example, the ICAC issued decisions in at least 610 disputes. VINOGRADOVA, *supra* note 36, at 34 (these decisions are published in PRAKTIKA ARBITRAZHNOVA SUDA [ARBITRATION COURT PRACTICE] (1989)).

availability of arbitration was rendered meaningless in practice by the advent of central planning in the 1930s.[100] Soviet legal encyclopedias during the 1950s claimed that Soviets did not utilize arbitration because they had "full confidence" in the People's Courts.[101] In fact, private settlement of commercial disputes through arbitration was impossible since private enterprise was not permitted under the Soviet regime; any other approach would have undermined the state's control over the economy as exercised via central planning and the administrative resolution of disputes by state *arbitrazh*. Although weak development of domestic arbitration during the Soviet era has been attributed to ideology (e.g., to the private, autonomous nature of arbitration and the rights it defends),[102] more fundamentally, domestic arbitration did not exist by virtue of the state's effective monopoly over domestic economic activity.

In one important respect, commercial arbitration was regularly utilized to resolve economic disputes during the Soviet era. Shortly after NEP was abandoned and state *arbitrazh* was introduced to the Soviet economy during the 1930s, the Soviet government passed legislation establishing two permanent arbitration tribunals to handle disputes between Soviet trading organizations and their foreign counterparts: the External Commerce Arbitration Commission (ICAC)[103] and the Maritime Arbitration Commission at the Allunion Chamber of Commerce (MAC).[104] In order to adapt to the realities of international business and

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In addition to the regulation cited above, a Soviet-era decree provided for the resolution of economic disputes by "courts of conciliation" [*treteiskie sudi*]. Pomorski, *supra* note 7, at 71 n.55. These conciliation courts, however, were only vested with jurisdiction to resolve disputes that were otherwise under the jurisdiction of *arbitrazh*, and were governed by a statute issued by *arbitrazh*. In addition, it appears that the courts of conciliation were seldom utilized. *Id.*

100. Avilina, *supra* note 24, at 73. *See also* Samuel Pisar, *The Communist System of Foreign-Trade Adjudication*, 72 HARV. L. REV. 1409, 1459 (1959) ("[T]he progressive attrition of all private initiative of any consequence has turned [the 1924 Arbitration Decree] into a dead letter.").

101. Hazard, *supra* note 98, at 5. *See also* WILLIAM BUTLER, ARBITRATION IN THE SOVIET UNION 77 (1989) (commenting that domestic arbitration was not widely used by Soviet citizens and organizations, which seemed to "prefer" permanent institutions of dispute resolution).

102. *See* Avilina, *supra* note 24, at 73.

103. *See* 1932 Decree of the Central Executive Committee and the Council of People's Commissars of the USSR on the Foreign Trade Arbitration Commission attached to the USSR All-Union Chamber of Commerce, *translated in* BUTLER, *supra* note 101, at 115. The ICAC still exists in Russia and is now known as the International Commercial Arbitration Court (ICAC) at the RF Chamber of Commerce and Industry.

104. *See* Statute on the Maritime Arbitration Commission attached to the All-Union Chamber of Commerce, *translated in* BUTLER, *supra* note 101, at 150. The MAC still exists in Russia and is now known as the Maritime Arbitration Commission at the RF Chamber of Commerce and Industry. For discussions of the historical development and practice of the ICAC and the MAC, see generally Sandford B. King-Smith, *Communist Foreign-Trade*

The operative provisions of the Act and the Procedure Code have narrowed but not eliminated the supervisory and educational role traditionally vested in state *arbitrazh* and in another Soviet judicial institution, the Procuracy.[69] The Procedure Code vests the power to conduct a "supervisory review" [*peresmotr v poriadke nadzora*] of lower court decisions in the Presidium of the Supreme Economic Court (Presidium).[70] There are several purposes cited for conducting supervisory review: to prevent errors in the application of law, to guarantee the rights of the parties, and to ensure uniform application of the law.[71] Another purpose of the process is an educational one—the Economic Court Act charges the Supreme Economic Court, among other things, with publishing explanations on issues of judicial practice.[72] The idea of the court providing guidance to the lower courts and to the public on legal issues follows the traditional practice of former state *arbitrazh* and of Soviet courts generally.[73]

The power to present a request for supervisory review is vested in four officials: the Procurator General, the Deputy Procurator General, the Chairman of the Supreme Arbitration Court or the Deputy Chair-

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69. In fact, the Procuracy has existed in Russia since the 18th century, thus predating the Soviet system. The powers of the Procuracy have been narrowed or expanded over the years to suit the needs of the government in power at the time. Thus the powers of the Procuracy were defined relatively narrowly during the years prior to the 1917 Revolution, but were greatly expanded under Soviet rule. BERMAN, JUSTICE, *supra* note 7, at 240–47. The position of the Procuracy in the justice system is roughly analogous to that of public prosecutors in the United States. In addition to its prosecutorial role in criminal actions, however, the Russian Procuracy is vested with supervisory authority over civil actions and administrative acts. Professor Berman describes the office of the Procuracy during the Soviet era as combining the functions of the U.S. Attorney General, Congressional investigating committees, grand juries and public prosecutors. *Id.* at 239.

For a recent discussion of Procuracy reform in Russia, see Stephen Thaman, *Reform of the Procuracy and Bar in Russia*, 3 PARKER SCH. J. E. EUR. L. 1 (1996). Drafts of Russia's Constitution provided for a Procuracy with narrower powers, restricted to supervising criminal investigations and prosecuting criminal cases. *Id.* at 11. The version of the Constitution that was eventually adopted, however, left the scope of the Procuracy's powers to be determined by federal legislation. KONST. RF, art. 129(5) (1993). Russia's most recent legislation on the Procuracy still entrusts the institution with broad oversight powers for both civil and criminal matters. *See* Thaman, *supra* at 16 n.77 (citing Zakon O Prokuratore RF [Law on the RF Procuracy], Nov. 20, 1995, Sobr. Zakonod. RF (1995), No. 47, item 472).

70. PROCEDURE CODE, *supra* note 30, art. 180. The provisions of the Procedure Code dealing with supervisory review refer only to the Presidium as the body authorized to conduct supervisory review of lower court decisions. *Id.* art. 91. *See also* Iakovlev and Iukov, *supra* note 6, at 53.

71. Treushnikov, *supra* note 5, at 293.

72. Economic Court Act, *supra* note 29, art. 10(1.5).

73. For a discussion of the traditional educational role of Soviet courts, see BERMAN, JUSTICE, *supra* note 7, at 299–311.

man.[74] Each of these judicial officials has the right to initiate review of lower court cases, whether arising in the area of administrative or civil law relations. For example, the Supreme Economic Court recently allowed the Procurator General to initiate review of a lower court decision upholding a commercial arbitration award.[75] Although far-reaching by western standards, the Procuracy's oversight powers to bring a supervisory appeal are less broad than they were prior to the 1995 reform of the Procedure Code,[76] not to mention during the Soviet era.

In contrast to the U.S. Supreme Court, the Supreme Economic Court is not a court of ultimate appeal by the parties. The only way to present a case to the Supreme Economic Court is through the above-mentioned mechanism of supervisory appeal.[77] This is not to say, however, that the right of a party to appeal an economic court decision is completely foreclosed. The Procedure Code allows a party to appeal at two levels: appeal at the appellate instance [*apelliatsionnaia instantsia*] (appellate review) and appeal at the cassation instance [*kassatsionnaia instantsia*] (cassation review). Appellate review allows a party to appeal a decision to the same economic court that heard the case at first instance, to review issues of both fact and law.[78] Cassation review is conducted by a new institution in Russia, established by the 1995 reforms as a second

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74. PROCEDURE CODE, *supra* note 30, art. 181. Decisions of the Supreme Economic Court may be appealed to the Presidium by only two officials: the Procurator General or the President of the Supreme Economic Court. *Id.*

75. Postanovlenie No. 15 Plenuma Vyshevo Arbitrazhnovo Suda RF [Ruling No. 15 of the Plenum of the RF Supreme Economic Court], May 24, 1994, *reprinted in* ROSS. IUST., 1994, No. 10, at 55. The plaintiff in this case, Interrepublic Commerce-Production Concern (ICPC), submitted a motion to the Moscow Regional Arbitration Court to enforce a judgment for 166.9 million rubles in damages and 6 million rubles in arbitration fees against the defendant, Promkombinat No. 3. The Procurator General initiated a supervisory appeal of the decision of the Moscow court which had granted the motion and issued an order of enforcement. The Plenum of the Supreme Arbitration Court (which at the time was authorized to conduct supervisory review) rejected the argument that the enforcement of arbitration decisions was immune from supervisory appeal and reversed and remanded the decision to the Moscow court. The Plenum found that the ruling of the Moscow court was not well-grounded in that it failed to set forth the physical location of "Iurinf" as then required by the Procedure Code.

76. *See, e.g.*, 1992 CODE, *supra* note 30, art. 34 (authorizing a procurator other than the Procurator General or his deputy to initiate a supervisory appeal). *See also infra* note 84 and accompanying text (allowing a party's wishes to trump the procurator's right to bring suit at first instance).

77. Treushnikov, *supra* note 5, at 281 (stating that the Supreme Arbitration Court does not have jurisdiction to review an appeal brought by a party).

78. PROCEDURE CODE, *supra* note 30, arts. 145–146, 158. The rule providing for appellate review in the court of first instance, apparently adopted to economize on judicial resources, has been criticized by Russian scholars as undermining judicial independence. *See* Treushnikov, *supra* note 5, at 256–57. Note that the Procedure Code prohibits a judge who reviewed a case at first instance to conduct appellate review of the same case. PROCEDURE CODE, *supra* note 30, art. 18(1).

economic disputes.[108] The Arbitration Regulation, while providing a much-needed legislative basis for governing the activity of arbitration tribunals, also hinders the development of domestic arbitration in Russia by limiting the availability of domestic arbitration and providing broad scope for government interference in the arbitration process.

First, the regulation limits the availability of commercial arbitration to disputes that (i) are otherwise within the jurisdiction of an economic court[109] and (ii) do not involve management [*upravlenie*], i.e., are not administrative.[110] While it may be natural to declare administrative cases off-limits from arbitration, limiting commercial arbitration to disputes that are otherwise within economic court jurisdiction effectively limits arbitration to disputes among businesses and registered entrepreneurs. Since the Arbitration Regulation defines the scope of arbitration by the scope of economic court jurisdiction, disputes involving individual consumers (i.e., non-entrepreneurs) lie outside of economic court jurisdiction and therefore are not arbitrable. Although there may be a legitimate concern about forcing inexperienced, weaker parties into arbitration, the Civil Code's existing provision on adhesion contracts addresses this concern directly.[111] Limiting arbitration to disputes among entrepreneurs is particularly restrictive given the meaning of this term under the Procedure Code: entrepreneurs include either legal entities or individuals that are registered as organizations or entrepreneurs under Russian law.[112] In other words, the availability of arbitration hinges on the legal formality of registration

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108. Vremennoe Polozhenie o Treteiskom Sude dlia Razreshenie Ekonomicheskih Sporov [Temporary Regulation on Commercial Arbitration for the Resolution of Economic Disputes], June 24, 1992, Vedomosti RF, No. 30, item 1790 [hereinafter Arbitration Regulation]. A law on arbitration has been pending for several years. Current drafts indicate that the pending law will govern only domestic arbitration. Interview with Alexei Kostin, in Moscow, Russ. (June 21, 1996) (Vice-President of the ICAC and President of the MICEX Arbitration Commission) [hereinafter Kostin interview]. Therefore, international arbitration conducted by tribunals such as the ICAC and the MAC most likely will continue to be regulated by the International Arbitration Law even if the pending law is passed.

For a detailed description of the Arbitration Regulation, see Hazard, *supra* note 98, at 5.

109. The Arbitration Regulation applies when an economic dispute that is "within economic court jurisdiction" is referred to arbitration. Arbitration Regulation, *supra* note 108, art. 1.

110. As is discussed below, an economic court may refuse to enforce an arbitration decision if, among other things, "the dispute arose in the sphere of management and is not subject to review by an arbitration tribunal." *Id.* art. 26.

111. One concern may be the use of standard form contracts. The Civil Code allows the adhering party to an adhesion contract [*dogovor prisoedinenia*] to demand cancellation or modification if the contract deprives the party of rights to which it is otherwise entitled under contracts of this type, eliminates or limits the liability of the other party for breach or otherwise contains provisions that the adhering party would not have accepted had it been able to participate in determining the terms of the agreement. CIVIL CODE, *supra* note 3, art. 428(2).

The chief judge of Russia's Supreme Economic Court, while praising the inclusion of Article 428 in the Civil Code, believes that the concept of adhesion contract is still insufficiently developed under Russian law. *See* Shestopal, *supra* note 58, at 88.

112. PROCEDURE CODE, *supra* note 30, art. 22(1.1). As to the requisite procedure for registering as an entrepreneur, see *supra* note 49.

by each of the parties. Thus in Russia, a contract between a stock broker and a client could not be resolved by arbitration under the Arbitration Regulation unless the client was also a registered entrepreneur.

The most problematic aspect of the Arbitration Regulation, however, relates to the compulsory enforcement of arbitration decisions. The Arbitration Regulation gives the authority of compulsory enforcement to the economic courts; it provides that jurisdiction over any action to enforce an arbitral decision is vested in the economic court having jurisdiction over the territory in which the arbitration tribunal is located.[113] For example, if a party to arbitration conducted by the Moscow Interbank Currency Exchange's tribunal wished to legally enforce the tribunal's decision, it would need to apply to the economic court located in Moscow.

Article 26 of the Arbitration Regulation enumerates the bases on which a reviewing economic court may refuse to issue an order of enforcement of an arbitration award. An economic court might refuse to enforce a decision rendered by an arbitration tribunal, for example, if the make-up of the arbitration panel was inconsistent with the intent of the parties as expressed in the arbitration agreement.[114] Such a procedural

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113. Arbitration Regulation, *supra* note 108, art. 25. Note that, in contrast with domestic arbitration decisions, decisions of international commercial arbitration tribunals are enforced by courts of general jurisdiction in accordance with the 1964 RSFSR Code of Civil Procedure. GRAZHDANSKYI PROTSESSUAL'NYI KODEKS RSFSR [GPK RSFSR][RSFSR CIVIL PROCEDURE CODE], Part 5, ch.38, §§ 338, 340, *as amended on* June 11, 1964, *translated in The Code of Civil Procedure of the RSFSR*, *in* THE SOVIET CODES OF LAW 543 (William Simons ed. & A.K.R. Kiralfy trans., 1980).

114. Article 26 of the Arbitration Regulation reads as follows:

> An economic court [*arbitrazhnyi sud*] may refuse to issue an order for the enforcement of an arbitration decision in the following cases:
>
> if the parties did not reach agreement on the submission of the dispute to arbitration;
>
> if the makeup of the arbitration tribunal or the procedure for reviewing the dispute was not in accordance with the parties' agreement to arbitrate;
>
> if the party against whom an arbitration award was decided was not informed in an appropriate manner of the date for arbitration proceedings or for another reason was not able to present his arguments;
>
> if the dispute arose in the sphere of administration and was not capable of resolution in arbitration.
>
> Determinations of an economic court may be appealed in the manner provided in the RF Arbitration Procedure Code.
>
> If, in reviewing an application for the issuance of an order of compulsory enforcement of an arbitration award, it is established that the award is not in accordance with the law or was issued on the basis of unexamined material, the economic court shall remand the case for additional review by the arbitration tribunal that issued the award.
>
> If it is not possible for the dispute to be reviewed in the same arbitration tribunal, the complaint may be transferred to the arbitration court that has jurisdiction over the dispute.

Arbitration Regulation, *supra* note 108, art. 26.

basis for refusing to enforce an arbitration decision is not unusual.

What is controversial, however, is that Article 26 also authorizes a reviewing economic court to conduct a substantive review of the arbitration decision in order to determine whether the decision was rendered in accordance with Russian law. If the reviewing court finds either that the decision contradicts Russian law or that the decision is unsubstantiated, Article 26 directs the reviewing court to remand the dispute to the arbitration tribunal that issued the decision or—if review by the same arbitration tribunal is not feasible—to transfer the dispute to an economic court.[115] Because it allows for substantive review of arbitration decisions, Article 26 has been harshly criticized by Russian jurists as permitting excessive involvement by economic courts in the arbitration process.[116] By allowing economic courts to conduct substantive review of arbitration decisions, the Arbitration Regulation departs from U.S. arbitration practice[117] as well as from Russian arbitration practice prior to 1917.

Related to substantive review is the question of whether arbitrators may decide disputes on the basis of commercial or equitable principles. Arbitrators associated with the Association of Russian Banks, for example, might be guided by standards of what is customary in the banking industry.[118] The Arbitration Regulation directs arbitrators to make decisions in light of "trade practices suitable to the contract at hand."[119] It is uncertain, however, whether an arbitration agreement providing that

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115. In addition, an economic court decision enforcing or refusing to enforce an arbitration decision is subject to supervisory review [*peresmotr v poriadke nadzora*]. *See supra* note 75 and accompanying text.

116. *See generally*, E.A. Vinogradova, *Zakonodatel'stvo o Treteiskom Sude*, KHOZ I PRAVO, 1992, No. 10, at 92, 97–98 (criticizing the last two paragraphs of Article 26 as the "fundamental deficiency" of the Arbitration Regulation). A Russian arbitrator and law professor has commented that the principal defect of the Arbitration Regulation lies in the potential Article 26 allows for government interference in arbitration. Kostin interview, *supra* note 108.

117. Under U.S. law, a federal court is authorized to vacate an arbitration award solely on one of the following grounds (all relating to arbitrator misconduct): (i) corruption or fraud; (ii) partiality; (iii) improper failure to postpone a hearing or admit evidence; or (iv) exceeding its powers. Federal Arbitration Act, 9 U.S.C. §10 (1994). Although U.S. courts have articulated what appear to be non-statutory grounds for vacating arbitration awards, such as "manifest disregard for the law," in substance these grounds are similar to concluding that the arbitrator exceeded his powers. *See* IAN MACNEIL ET AL., FEDERAL ARBITRATION LAW § 40.1.3.2. (1995). It is perhaps ironic that the Arbitration Regulation directs a court to reverse arbitration awards on substantive grounds (that is, on whether the arbitrators correctly applied Russian law) but not on grounds of corruption of the arbitrators.

118. In an analysis of arbitration practice in the New York diamond trading industry, Lisa Bernstein found that arbitrators did not rely primarily on the New York law of contract and damages, but rather drew on "trade custom and usage, a little common sense, some Jewish law, and, last, common-law legal principles." Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 126–27 (1992).

119. Arbitration Regulation, *supra* note 108, art. 18.

arbitrators shall apply only equitable or commercial law principles would be upheld, or whether a decision issued in accordance with such a clause would be reversed as inconsistent with Russian law pursuant to Article 26. The orientation towards applicable norms expressed in the Arbitration Regulation appears to be more limited than the approach taken under Russian law prior to 1917.[120]

2. Practice

Although the Arbitration Regulation was passed soon after the dissolution of the Soviet Union, Russian lawyers and businessmen had been forming domestic arbitration tribunals for many months prior to the promulgation of the regulation. These tribunals were set up spontaneously—that is, without comprehensive legislation establishing their legitimacy, defining their permitted sphere of activity, or providing a procedure for the enforcement of their decisions.[121]

Among the first arbitration tribunals set up in the Soviet Union since the establishment of the MAC and ICAC in the 1930s was an arbitration tribunal sponsored by the USSR Union of Jurists in August 1990. The Union of Jurists is an organization open to all members of the legal profession, with a membership during the Soviet era of over 30,000.[122] Although the Union of Jurists established its arbitration tribunal in August 1990 (almost two years prior to the adoption of the Arbitration Regulation), the establishment of the tribunal was expressly authorized by the Soviet government in the form of a special decree.[123]

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120. *See supra* notes 95–97 and accompanying text for a discussion of arbitration practice prior to 1917.

121. There was still on the books the seldom-utilized decree on arbitration that became part of the 1964 Civil Procedure Code. *See* GPK RSFSR *supra* note 113, Attachment No. 3. In addition, the 1992 Procedure Code included provisions on the enforcement of decisions issued by arbitration tribunals. These provisions of the 1992 Procedure Code were eventually incorporated into the Arbitration Regulation. 1992 CODE, *supra* note 30, art. 157.

122. Viechtbauer, *supra* note 104, at 433. After the break-up of the Soviet Union, the USSR Union of Jurists was renamed as a international non-governmental organization, the Union of Jurists [*Soiuz Iuristov*—hereinafter Union of Jurists]. V. Grebennikov, *Spor Razreshaetsia v Treteiskom Sude* [*Disputes are Resolved by Arbitration*], KHOZ. I PRAVO, 1992, No. 11, at 81, 83.

I have been told that the Union of Jurists was originally formed during the Soviet era as an organic, independent movement organized at the initiative of Russian lawyers. Later, the Soviet government asserted control over the Union of Jurists and bureaucratized it.

123. *See* Postanovlenie Soveta Ministrov SSSR Voprosi Soiuza Iuristov SSSR [Resolution of the USSR Council of Ministers on Questions regarding the USSR Union of Jurists], Apr. 13, 1990, point 2, *reprinted in* VINOGRADOVA, *supra* note 36, at 70. *See also* Vinogradova, *supra* note 116, at 98 (citing Zakon USSR Ob Obshchestvennykh Ob'edineniakh [USSR Law on Social Organizations], Oct. 9, 1990, art. 17 (authorizing the activity of the arbitration tribunal as a social organization)). Legislation specifically addressing the activity of arbitration tribunals in resolving civil disputes was not enacted, however, until the Arbitration Regulation was passed

One distinguishing feature of the arbitration tribunal sponsored by the Union of Jurists is the quality of its arbitrators. As the former chief arbitrator affiliated with the Union of Jurists points out, its list of arbitrators includes doctors and doctoral candidates in law, jurists "whose names are literally known throughout all of Russia."[124] Another interesting feature is the importance that the institution's rules place on mediating disputes. The rules for Union of Jurists arbitration set forth in detail a voluntary procedure for the mediation of disputes conducted by an arbitrator designated by the president of the tribunal.[125] The Union of Jurists was one of the first organizations in Russia to recognize the desirability of supporting Russian business by sponsoring institutional arbitration staffed with a list of highly respected arbitrators.

At the other end of the spectrum, as arbitration became a viable alternative to *arbitrazh*, certain Russians (for example, retired judges or other jurists) have been known to "set up shop" as individual arbitrators to earn a living.[126] The potential for individual arbitrators to operate as

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in June 1992.

124. Grebennikov, *supra* note 122, at 83.

In terms of resolving international disputes, however, it is doubtful that Union of Jurists enjoys more credibility than the ICAC. *Cf.* Viechtbauer, *supra* note 104, at 434. Both the ICAC and the Union of Jurists maintain a list of arbitrators that include some of the most respected jurists in Russia. Indeed, eight of the 32 arbitrators on the Union of Jurist's list of arbitrators are also on the ICAC's list of arbitrators. List of Arbitrators of the Union of Jurists [current as of January 1993], *reprinted in* Vinogradova, *supra* note 116, at 94; List of Arbitrators, *supra* note 106. Most significantly, in spite of the high credentials of its arbitrators, in practice arbitration sponsored by the Union of Jurists is infrequently utilized. Maximovitch interview, *supra* note 86.

125. Reglament Treteiskovo Suda, Utverzhden Postanovleniem Ispolkoma Tsentral'novo Soveta Soiuza Iuristov [Rules of the Arbitration Court, Affirmed by Resolution of the Executive Committee of the Central Committee of the Union of Jurists], Aug. 30, 1990, §15, *reprinted in* VINOGRADOVA, *supra* note 36, at 79 [hereinafter Union of Jurists Rules]. Revisions to the rules adopted in 1993 further expand and set forth in greater detail the procedure for mediation of disputes. The expressed purpose of these revisions is to assist better the parties to the dispute in preserving a cooperative business relationship. R.F. Kallistratova, *O Pravovom Statuse Treteiskovo Suda [On the Legal Status of Arbitration Tribunals]*, KHOZ. I PRAVO, 1993, No. 12, at 105.

The Union of Jurists may be responding to a perceived demand for mediation. A number of institutional arbitration rules fail to provide expressly for mediation of disputes. *Compare, e.g.*, ICAC Rules, *supra* note 106, §43 (terminating arbitration in the event of settlement without specifying a procedure for mediation); Reglament Arbitrazhnoi Komissii pri Moskovskoi Tovarnoi Birzhe [Rules of the Arbitration Commission at the Moscow Commodities Exchange (MCE)] Oct. 16, 1991, *as amended on* July 29, 1992, *reprinted in* VINOGRADOVA, *supra* note 36, at 168 (no provision for mediation or settlement) [hereinafter MCE rules].

The arbitration tribunal at the Moscow Interbank Currency Exchange (MICEX), on the other hand, has expanded its rules to provide a special mediation procedure. *See* Soglasitel'nyi Reglament Arbitrazhnoi Komissii pri MMVB [Conciliatory Rules of the Arbitration Commission of MICEX], *as amended on* Sept. 28, 1995 (on file with author). This was done at the request of the member banks, who are interested in an alternative to arbitration as a mechanism for resolving disputes among member banks. Kostin interview, *supra* note 108.

126. Kostin interview, *supra* note 108.

small businesses in Russia has prompted a certain amount of debate in Russian academic literature as to whether the law should limit the permitted form of arbitration tribunals, such as requiring tribunals to be not-for-profit organizations.[127]

Another type of arbitration tribunal that has spontaneously evolved in recent years is a by-product of the transformation of *arbitrazh* into economic courts. Because the reform of Soviet state *arbitrazh* involved the abolition of the branch courts of departmental *arbitrazh*, some of the abolished departmental *arbitrazh* courts were converted into what R. Kallistratova refers to as "pseudo-arbitration tribunals."[128] Some of these tribunals operate with lists of as few as three arbitrators and resolve disputes without the parties' agreement on the selection of arbitrators.[129] Most likely, these "pseudo" tribunals are an attempt by former Soviet departmental arbitrators and enterprise management to perpetuate the preexisting system of inter-enterprise dispute resolution.[130]

One example of departmental *arbitrazh*-turned-arbitration tribunal is the tribunal attached to the company "Avtocel'khozmash-Holding."[131] This tribunal was created in 1992 out of the departmental *arbitrazh* subordinate to the USSR Ministry of Automobile and Farm Machine Production.[132] When the activity of departmental *arbitrazh* was completed

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127. *See, e.g.*, Kallistratova, *supra* note 125 (arguing in favor of defining the status of arbitration tribunals); *cf.* E.A. Vinogradova, *K Voprosy o Tak Nazyvaimom 'Statuse' Postoianno Deistvuiushchevo Treteiskovo Suda [On the Question of the So-called 'Status' of Permanent Arbitration Tribunals]*, KHOZ. I PRAVO, 1994, No. 3 (arguing that the law should not limit the status or organizational form of arbitration tribunals).

128. R.F. Kallistratova, *Eshcho Raz o Treteiskikh Sudakh [More on Arbitration]*, KHOZ. I PRAVO, 1993, No. 9, at 69.

129. *Id.*

130. Some Russians believe that the arbitrators of these "pseudo" tribunals do not act independent of enterprise management, but continue to respond to orders from above. In fact, management may support the establishment of these tribunals as a mechanism for controlling enterprise activity.

Also relevant in this regard is a statement of A. Arifulin, former deputy president of the short-lived USSR Supreme Economic Court (precurser to the Supreme Economic Court). In an article discussing the USSR law on the USSR Supreme Economic Court (enacted a few months prior to the break-up of the Soviet Union, in May 1991), Arifulin referred to the role that arbitration was expected to play in the new system:

> In connection with the gradual liquidation of ministerial and departmental *arbitrazh* as organs of compulsory jurisdiction we see the development of arbitration tribunals .... these hastily organized arbitration tribunals will either lie idle or will in essence replace ministerial and departmental *arbitrazh*.

Arifulin, *supra* note 27, at 23.

131. Roughly translated, "Auto-Farm Machine Holding Company" [hereinafter ACM-Holding].

132. For a discussion of the activity of this tribunal, see A. Sergeev, *Treteiskii Sud: Opyt Raboty [Arbitration: Work Experience]*, KHOZ. I PRAVO, 1993, No. 12, at 105 (discussing the

in the fall of 1991 (when the first version of the Economic Court Act came into force), the chief arbitrator of what is now ACM-Holding approached enterprise management in the industry with the proposal to set up an arbitration tribunal. Over one hundred enterprises endorsed the proposal, and the tribunal was established.

However, without the Soviet institution of *arbitrazh*, the number of disputes brought to arbitration fell significantly.[133] The chief arbitrator attributes the decline in part to the change in dynamic between suppliers and purchasers in the transition economy: in an environment where contracts are no longer obligatory but where parties have long-term trading relationships, purchasers are not in a position to litigate breaches of contract for fear of losing existing suppliers.[134] The example of ACM-Holding, however, illustrates another interesting consequence of replacing compulsory state *arbitrazh* with "pseudo-arbitration": once the affirmative obligation to litigate contract disputes was eliminated, Russian enterprises apparently conducted business relations without resorting to litigation or arbitration.

The area of the domestic economy where arbitration has been most actively utilized in recent years is Russia's burgeoning network of exchanges. As the Soviet planned economy metamorphosed into a market economy during the last months of the Soviet Union, the lack of a developed market gave rise to a proliferation of exchanges, beginning in the summer of 1990 with the establishment of the Moscow Commodities Exchange (MCE).[135]

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activity of this tribunal).

133. *Id.* at 106.

134. *Id.*

135. E. Shmeleva, *Zakonodatel'noe Regulirovanie Fondovykh Birzh v Rossii* [*Legal Regulation of Stock Exchanges in Russia*], KHOZI. I PRAVO, 1995, No. 3, at 52. As Shmeleva puts it, enterprises transacted with each other almost "blindly," given the lack of market information among buyers and sellers. The exchanges provided an immediate market, where brokers made immense profits matching buyers and sellers. The exchanges traded everything from computers to bricks to human hair, and grew rapidly in number—there were as many as 1,000 of them before the exchanges began to specialize and decrease. *See Russia: Milestones on the Capitalist Road*, EUROMONEY, July 19, 1994, at 34. The MCE recently went out of business, in March 1996.

Russia's largest currency exchange is the Moscow Interbank Currency Exchange (MICEX), which was established in early 1992 as the successor to the USSR state bank (whose currency auction market had accounted for the vast majority of foreign currency transactions under Soviet rule). *Id.* Membership to MICEX is restricted to banks.

Exchanges began to specialize in stock transactions with the advent of voucher privatization in the fall of 1992; however, when the voucher program was phased out in mid-1994, the bulk of the exchanges' stock trading went away as well. *See Russia: Teething Troubles for the Baby Giant*, EUROMONEY, Sept. 30, 1994, at 92. Most stock trading is transacted in the over-the-counter market. In fact, more powerful than the stock exchanges is the National Association of Stock Market Participants (known by its Russian acronym, NAUFOR), a brokers' associa-

Many of these exchanges have established arbitration tribunals to handle disputes arising out of transactions executed on the exchanges. In 1993, Kallistratova estimated that the exchanges had formed over 400 arbitration tribunals.[136] Prominent examples of the specialized arbitration tribunals that have been set up include tribunals sponsored by the Moscow Interbank Currency Exchange (MICEX) and the MCE.[137]

Since transactions on the exchanges may be executed by brokers, disputes on the exchanges could potentially arise out of either the contract between a broker and his client or the contract between a buyer and seller. Either type of contract may be resolved by an exchange's arbitration commission, but only if the parties have contractually agreed to resolve their disputes in this manner.[138] If a dispute arises out of a contract containing an arbitration clause and executed by the brokers as agents for buyer and seller, the dispute may be resolved by arbitration only if each broker was expressly authorized to include an arbitration clause in the sales contract.[139] Published opinions of the MCE illustrate

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tion. NAUFOR has recently applied for formal status of a self-regulatory association, which, if granted, would enhance NAUFOR's leverage in controlling brokerage activity. Natasha Mileusnic, *Stockbroker Group Seeks Regulatory Status*, MOSCOW TIMES, Aug. 3, 1996, at 10. NAUFOR's predecessor, PAUFOR, recently set up an arbitration tribunal. Kostin interview, *supra* note 108.

136. Kallistratova, *supra* note 128, at 72.

137. One of the most active and successful domestic arbitration tribunals set up in Russia is not sponsored by an exchange, but by the Association of Russian Banks. This arbitration tribunal was set up to resolve disputes arising out of banking transactions, although its authority is not limited to this (in fact, one of the disputes that it decided involved a contract for the delivery of lumber). Professor Kostin attributes the relative success of arbitration sponsored by the Association of Russian Banks to the fact the Association's members are very powerful; thus the threat of expulsion from the organization provides an extralegal means of enforcing arbitration decisions issued by the tribunal. Kostin interview, *supra* note 108.

For a discussion of the practice of the arbitration tribunal sponsored by the Association of Russian Banks, *see* L. Balayan, *Treteiskii Sud Assotsiatsii Rossiiskikh Bankov: Itogi Pervovo Goda Raboty [Arbitration Tribunal of the Association of Russian Banks: Results of the First Year of Operation]*, VESTN. VYSH. ARB. SUDA RF, 1994, No. 10, at 117.

138. *See* Arbitration Regulation, *supra* note 108, art. 26 (allowing an economic court to refuse to enforce an arbitration decision in the absence of an agreement to arbitrate). The agreement to arbitrate must be in writing. *Id.* art. 3.

The MCE, for example, recommended that the following contractual language be included to submit contractual disputes to arbitration:

> In the event of a dispute arising out of or relating to [BROKER-CLIENT CONTRACTS: the amendment, rescission or execution of this agreement] [SALES CONTRACTS: any exchange transaction completed on the MCE and authorized by this contract], unless the parties agree otherwise, the dispute will be submitted to arbitration in accordance with the Statute and Rules of the Arbitration Commission of the MCE.

Iz Praktiki Arbitrazhnoi Komissii pri MTB [From the Practice of the MCE Arbitration Commission], Oct. 16, 1991, *as amended on* Mar. 4, 1992, *reprinted in* VINOGRADOVA, *supra* note 36, at 220–21.

139. The Supreme Economic Court issued a letter instructing economic courts to consider

the types of disputes that have been brought to arbitration on the commodities exchanges.[140] Perhaps because of the widespread use of prepayment clauses in sales contracts,[141] these opinions typically involved actions by buyers seeking a remedy for nondelivery or delivery of defective goods, or actions by sellers seeking liquidated damages.[142]

In spite of the interest that commercial arbitration has generated among jurists and the flurry of activity in recent years to establish domestic arbitration tribunals, it is necessary to emphasize that the institution of arbitration is still only rarely utilized in Russia. In her book on Russian arbitration, E. Vinogradova reported that the number of disputes heard by arbitration tribunals is "incomparably less" than the number of disputes brought to economic courts.[143] Even the most successful tribunals, for example, have heard at most 100 cases in the first year of operations.[144]

3. Enforcement of Decisions

As was discussed above, the enforcement provisions of the Arbitration Regulation have generated a great deal of criticism among Russian

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invalid any arbitration clause entered into by a broker without express client authorization. *See Informatsionnoe Pis'mo RF Vysshevo Arbitrazhnovo Suda "Ob Otdel'nykh Resheniiakh, Priniatykh na Soveshchaniiakh po Sudebno-Arbitrazhnoi Praktike" [Information Letter of the RF Supreme Economic Court "On Separate Decisions taken at Meetings on Judicial-Arbitration Practice"]*, Nov. 27, 1992, *reprinted in* VESTN. VYSH. ARB. SUDA RF, 1993, No. 1, at 105–06. Of course, a sales agreement executed by brokers on an exchange could also be submitted to arbitration if the buyer and seller subsequently agreed to arbitration. *Id.*

140. These opinions are published in VINOGRADOVA, *supra* note 36, at 226–35.

141. The published MCE opinions evidence a tendency to use prepayment clauses. This tendency is also consistent with Kathryn Hendley's research on post-privatization contracts entered into by Russian enterprise managers, which found widespread usage of prepayment clauses in procurement contracts. *See* Kathryn Hendley, *The Spillover Effects of Privatization on Russian Legal Culture*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 39, 55–56 (1995).

142. Liquidated damages clauses appear to be common in Russian sales contracts, perhaps because monetary penalties for nonperformance were also utilized under the Soviet system. *See Id.* at 52. On the use of liquidated damages in Soviet contract law, *see* Kroll, *supra* note 14, at 123. The Russian Civil Code allows the award of liquidated damages [*neustoika*] without proof of actual damages, but allows a court to reduce the amount of liquidated damages where they are clearly incommensurate with the consequences of breach. CIVIL CODE, *supra* note 3, arts. 330, 333. In one case decided by MCE arbitration, for example, brokers on the MCE executed a sales contract, pursuant to which the buyer was obligated to pay the contract price within a three-day period. After the period had expired, the buyer sent a telegram requesting permission to make payment. The seller refused payment and brought an action seeking liquidated damages in the amount of 15% of the contract price. The tribunal ruled in favor of the seller, finding that the buyer's failure to pay within the specified period amounted to a repudiation of the contract. *Resheniia Arbitrazhnoi Komissii i MTB po Otdel'nym Delam [Decisions of the MCE Arbitration Commission on Separate Matters]*, Case No. 16, *reprinted in* VINOGRADOVA, *supra* note 36, at 235.

143. VINOGRADOVA, *supra* note 36, at 34.

144. *Id.*

jurists.[145] Some attribute Russians' failure to utilize arbitration to the enforcement provisions of the law. If the only means of enforcing an arbitration award requires subjecting the award to substantive review by an economic court, the rationale for resorting to arbitration in the first place is undermined, which arguably has a chilling effect on arbitration.[146]

Others attribute an apparent preference for litigation over arbitration in part to the enforcement powers of economic courts.[147] One advantage of economic court litigation as opposed to arbitration relates to enforcement: compulsory enforcement of an arbitration decision ultimately requires a court order. In contrast, Russian law vests economic courts with the power to freeze bank accounts[148] and to direct banks (under threat of severe penalties) to pay defendants' funds over to injured parties to enforce judgments.[149] Russian litigants are particularly concerned about ensuring that defendants do not frustrate enforcement by removing assets from the jurisdiction,[150] and thus need to move quickly. Although the rules of certain arbitration tribunals provide for the granting of interim orders of protection,[151] compulsory enforcement

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145. *See supra* notes 116–17.

146. Kostin interview, *supra* note 108. Other critics, while condemning the law's enforcement provisions as an undue interference in the arbitration process, have noted on the other hand the relatively high level of voluntary enforcement of arbitration awards. *See* Sergeev, *supra* note 132, at 109 (stating that parties to arbitration at ACM-Holding have not yet been forced to petition economic court for compulsory enforcement); VINOGRADOVA, *supra* note 36, at 137 (observing a high level of voluntary enforcement of domestic arbitration awards).

147. Maximovitch interview, *supra* note 86.

148. The Procedure Code authorizes an economic court to take provisional measures, including the placing of defendant's assets under arrest, if the plaintiff can demonstrate that the failure to take such measures would burden or render impossible the enforcement of an award. PROCEDURE CODE, *supra* note 30, arts. 75-76.

149. An economic court enforcement order directing the payment of money to a plaintiff is issued directly to the bank or financial institution holding the defendant's monetary assets. PROCEDURE CODE, *supra* note 30, art 198. If a bank or financial institution fails to comply with such an enforcement order, it may be subject to a fine of up to 50% of the amount of payment requested, and may also risk losing its license. *Id.* art. 206.

150. In a recent article published in the Russian financial press, a court marshal for the city of Moscow recounted how Russian defendants tend to purchase phony addresses for purposes of frustrating the enforcement of court judgments. In one instance, the company "Aero-Nika" was held liable for the death of 104 passengers and crew in an airplane crash. Implementation of the court's enforcement order was frustrated, as it turned out that the airline's bank account had a zero balance and the company's legal address belonged to a residential apartment. Management of the airline managed to flee abroad. M. Gordeeva, *'Ternovyi Venets' dlia Sudebnovo Ispolnitelia* ["*Crown of Thorns" for Court Marshals*], EKONOMIKA I ZHIZN [EKON. I ZH.] (Moscow issue), June 1996, No. 25, at 15 (interview with Court Marshal Elena Poliakova).

151. The rules of arbitration at the MICEX provide that a plaintiff may request interim measures of protection, including the arrest of defendant's monetary assets, if the plaintiff can demonstrate that failure to take such measures would fundamentally burden or make impossible enforcement of the arbitration decision. Reglament Treteiskovo Razbiratel'stva

of any such order can only be obtained through an economic court.

But the advantage of economic courts over arbitration with respect to enforcement powers is less significant in practice than in principle, given social and historical factors that undermine the strength and independence of the Russian judiciary.[152] In fact, the relatively strong enforcement powers vested in economic courts by law are often not implemented in practice.[153]

Moreover, in addition to being subject to compulsory enforcement in court, decisions of arbitration tribunals on the exchanges may be enforceable by extralegal mechanisms, which are particularly important in Russia given social and historic factors that weaken the judiciary. Membership on an exchange or in a trade association may be valuable or even essential to a Russian entrepreneur. Therefore, the threat of expulsion from such an organization or the loss of reputation among its members for failure to comply may operate as a sufficient deterrent to ensure that awards issued by an arbitration tribunal are enforced without resort to an economic court.[154] For example, the threat of reputation loss within the

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Arbitrazhnoi Komissii pri MMVB [Rules of Arbitration of the MICEX Arbitration Commission], *as amended on* Sept. 28, 1996, arts. 14-15 (on file with author).

152. *See infra* Part III.

153. Comprehensive legislation on the enforcement of court decisions has not been enacted since the Soviet era. Draft laws on enforcement procedure and on court marshals are currently pending in the government. Gordeeva, *supra* note 150, at 15. Court marshals in Moscow are overworked and underpaid, and complain of numerous difficulties of enforcing court judgments. For example, court orders often fail to identify the defendant's bank account from which the judgment is to be paid. *Id.*

One of the more alarming examples of the gap between the law and its implementation was recounted by the current president of the Supreme Economic Court. In late 1995, a court order was sent to the Central Bank of Russia, directing that certain funds from a defendant's account be transferred in order to enforce judgment against the defendant. The Central Bank revoked the order. As Justice Iakovlev put it, the defendant was effectively given the option of either paying the judgment or throwing it in the garbage. Iakov Shestopal, *Novie Vekhi, Novie i Starie Problemy Arbitrazhnovo Suda [New Landmarks, New and Old Problems of the Economic Court]*, ZAKON, 1996, No. 5, at 112, 114 (interview with Venyamin Iakovlev, Chief Judge of Russia's Supreme Economic Court).

154. As David Charny has argued, although contracts may provide for legal sanctions for breach, extralegal sanctions may also be necessary where legal sanctions are ineffective to induce performance. David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 394 (1990). These extralegal sanctions may include the loss of an asset under the control of the other party (a "bond"), loss of reputation, or psychic or social loss. *Id.* at 392–93. For example, the New York Diamond Dealers Club (DDC), a diamond exchange, typically resolves disputes that arise between its members through an arbitration board set up by the exchange. *See* Bernstein, *supra* note 118, 124–26. Although decisions of the DDC arbitration board may be confirmed in court under New York law, in practice arbitration decisions are rarely judicially enforced, since the extralegal sanctions provided under DDC rules are a sufficient, and often a more effective, deterrent. *Id.* at 129–30.

Another example of how the threat of social loss may act as an extralegal sanction is that of the Korean "kye," a type of rotating credit group among Korean immigrants and their families where a small number of people pool their money, enabling the members to borrow or save. *See* Eric Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal*

Russian banking community appears to account for the success of the arbitration sponsored by the Association of Russian Banks.[155] In addition, the (now defunct) MCE rules relied on extralegal enforcement mechanisms to induce compliance with the arbitration decisions of its tribunal. Under the MCE rules, if a party failed to comply with an arbitration decision, notice of such noncompliance was issued to members of the exchange as well as to those doing business on the exchange.[156] And if the offending party was a member of the exchange, noncompliance with an arbitration decision could result in sanctions.[157] To the extent that arbitration decisions are enforceable without resort to a court order, arbitration presents practical advantages over litigation.[158]

To summarize, in spite of the many domestic arbitration tribunals that have been established in Russia during recent years, these tribunals are seldom utilized by Russian businessmen. This may be true in part because of the enforcement powers of economic courts and the provisions of the Arbitration Regulation that allow for economic court interference in the arbitration process, factors that make arbitration potentially susceptible to the same practical problems that hinder adjudication. This author would suggest, however, that a more serious impediment to the further development of domestic arbitration in Russia is the mindset of many Russians who seem to prefer the imprimatur of even an incompetent and corrupt court decision to an arbitral award rendered by highly experienced specialists chosen by the parties. As to legal developments relating to arbitration, the law on arbitration that is currently pending in the Russian government ideally should treat domestic and international arbitration similarly. Most significantly, any new legislation on arbitration should eliminate the substantive basis for economic court review of arbitration decisions so as to eliminate the scope for governmental interference in the arbitration process and enhance the independence of domestic arbitration.

Sanctions on Collective Action, 63 U. CHI. L. REV. 133, 168–71 (1996). Breach (such as failure to make timely payments to the pot) result in extralegal sanctions including criticism and social ostracism. Since immigrant groups suffer discrimination from outsiders, ostracism from the group in turn leads to "isolation, loss of status, loss of security and economic deprivation." *Id.* at 169–70.

155. *See* Kostin interview, *supra* note 108.

156. MCE rules, *supra* note 125, at 188, §§26.4.1.1, 26.4.2.

157. *Id.* §26.4.1.2.

158. Bernstein has written on the substantive and procedural advantages of arbitration over adjudication in the diamond industry in the United States, including arbitration's relative speed, economy and secrecy in comparison with court litigation. Bernstein, *supra* note 118, at 148–51. Advantages of arbitration in Russia's context are discussed below. *See infra* notes 234–40 and accompanying text.

III. Social and Historic Factors Hindering Reform

A. *Limitations*

In spite of the transformation of the institution of state *arbitrazh* into economic courts and the other legal reforms discussed in the previous sections, many have observed that legal protections of even basic contract and property rights are extremely weak in Russia.[159] Although the pace of legal and economic reform in Russia over the past six years or so has been breathtaking, it would be naive to expect that formal changes of such magnitude would be accompanied by similarly rapid changes in social attitudes or in the mindset of the former Soviet bureaucratic apparatus. As one Soviet scholar remarked in 1989, definitively curing the ills of the Soviet legal and economic system (especially those of state *arbitrazh*) will require at least a quarter of a century.[160]

Arguably, therefore, the most significant impediments to meaningful reform in Russia are rooted in Russia's tradition, including its roughly seventy-year history as a planned economy. Discussed below are three aspects of this tradition that hinder any effort to protect economic rights: a chaotic legal environment combined with a history of distrust of the law and legal institutions, pervasive corruption of government officials and a lack of qualified judges trained in the law of a market economy.

1. Legal Chaos

The relative lawlessness that has characterized the Russian economy during its conversion to market exists at two levels: first, at the level of organized crime and second, less obvious but more pervasive, at the level of moral ambiguity that permeates the Russian business environment.

As to the criminalization of the market, Anders Åslund cites the rise in crime in Russia during the 1990s as the most worrisome recent

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159. *See, e.g.*, Daniel Yergin & Thane Gustafson, Russia 2010 and What It Means for the World 104 (1993). Mark Mobius (the manager of Templeton, a company that has set up a mutual fund investing in Russia) advises investors not to "even think about getting justice in a Russian court." Elif Kaban, *Russian Courts Akin to Comic Theatre*, The Ottowa Citizen, May 27, 1995, *available in* WESTLAW, Allnews Library.

Effecting legal reform is a stated priority of the newly-elected Yeltsin government. After Anatoly Chubais was recently appointed by President Yeltsin to serve as his chief of staff, Chubais (who has achieved fame and notoriety in the past as creator of Russia's privatization program) publicly stated that among his initial tasks in his new post would be to "strengthen the judiciary." Matt Bivens, *Yeltsin Appoints Chubais to Head Staff*, Moscow Times, July 16, 1996, at 1.

160. Kallistratova, *supra* note 22, at 41 (citing *Lunni landshaft* [*Lunar Landscape*], Komsomolskaya Pravda, Feb. 8, 1989).

development threatening the liberalization of the country's economy.[161] Although a comprehensive discussion of organized crime is beyond the scope of this article,[162] a description of organized crime's involvement in the privatization process illustrates how the spread of organized crime in Russia undermines the development of a rule of law culture. Observers have criticized the voucher privatization program,[163] for example, because it enabled organized crime groups (with the apparent cooperation of government authorities) illegally to acquire control of a significant percentage of enterprises undergoing privatization. These illegal methods include producing counterfeit vouchers, failing to cancel vouchers (thus allowing the holders to acquire additional property) and rigging voucher auctions to ensure the desired result.[164] A local press report describes how criminal groups in Russia have controlled privatization auctions that were supposed to be open to the public:

> Before a public auction begins, the information is conveyed to everyone that an 'authority' is interested in this piece of property, and that if anyone take [sic] the risk of competing for it, he shouldn't complain later that he wasn't warned. Then a representative of the 'authority' appears in the hall, escorted by 10 to 20 thugs . . . .[165]

As a result of this type of activity, two-thirds of Russians asked were of the opinion that privatization is "legalized theft," according to a poll

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161. ÅSLUND, *supra* note 4, at 167.

162. For discussions of the role that organized crime has played in Russia's economy, *see, e.g.*, COMM'N ON SEC. & COOPERATION IN EUR., CRIME AND CORRUPTION IN RUSSIA (briefing on June 10, 1994, of Louise Shelley and Stephen Handelman); STEPHEN HANDELMAN, *Comrade Criminal: Russia's New Mafiya* 131–206 (1995); Paul Klebnikov, *Joe Stalin's Heirs*, FORBES, Sept. 27, 1993, at 124; David Remnick, *The Tycoon and the Kremlin*, THE NEW YORKER, Feb. 20 & 27, 1995, at 118; Louise Shelley, *Privatization and Crime: The Post-Soviet Experience*, 11 J. CONTEMP. CRIM. JUST. 244 (1995); *The Rise of the Gangster Industrial Complex*, E. EUR. INVESTMENT MAG., Fall 1993, at 102.

Ironically, observers have also pointed out the utility of organized crime in the Russian economy as a provider of services (such as highway protection or dispute resolution) that the state is unable to guarantee due to the weakness of the judiciary and the law enforcement apparatus. *See, e.g.*, András Sajó, *Traditions of Corruption*, *in* CORRUPTION AND DEMOCRACY: POLITICAL INSTITUTIONS, PROCESSES AND CORRUPTION IN TRANSITION STATES IN EAST CENTRAL EUROPE AND IN THE FORMER SOVIET UNION 43 (Duc V. Trang ed., 1994); *see also infra* note 191 and accompanying text.

163. *See supra* note 2 and accompanying text (for a description of the voucher program).

164. Shelley, *supra* note 162, at 250.

165. Shelley, *supra* note 162, at 250 (citing *St. Petersburg Gangsters Push for Economic Power*, CURRENT DIG. OF THE SOVIET PRESS, Jan. 19, 1994).

conducted by the Academy of Sciences.[166] Such control of economic activity by criminal organizations breeds contempt for powerless judicial institutions and conveys an apparent futility in obeying the law.

The moral ambiguity of Russia's economic environment is at least as significant as the prevalence of organized crime. In part, this moral ambiguity results from the paradox of overlegislation: in spite of the weakness of Russia's judiciary, legislating is a subject of "feverish concern" to those in government, since writing the law one's own way is the means to wield power.[167] In addition, laws are often vaguely worded, internally inconsistent, and may contradict other legislation or regulations.[168] As a result, it is difficult to conduct business in Russia without being in technical violation of the myriad, constantly changing laws and regulations issued by the Russian bureaucracy.

Although some areas of law (especially taxation) have been overlegislated, other areas, such as securities regulation and official corruption, have gone unregulated, particularly during the early years of the transition. For example, one of the first pieces of Russian legislation signed into law by Boris Yeltsin (then chairman of the Russian Supreme Soviet) was the 1990 Law on Enterprises and Entrepreneurial Activity.[169] The Law on Enterprises encouraged private entrepreneurship by expressly prohibiting state interference in enterprise endeavors, "except on the grounds established by RSFSR legislation."[170] This encouragement of private enterprise was particularly striking given the fact that in January 1991 (when the Law on Enterprises was passed) "speculation" still constituted a crime under the Russian Criminal Code.[171] The dramatic

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166. Shelley, *supra* note 162, at 252 (citing N. Kuznetsova, *Crime in Russia: Causes and Prevention*, 2.3 DEMOKRATIZATSIYA 448 (1994)).

167. YERGIN & GUSTAFSON, *supra* note 159, at 56; *see also* Kathryn Hendley, *Legal Development and Privatization in Russia: A Case Study*, 8 SOVIET ECONOMY, Apr.–June 1992, at 130, 131. The tendency to adopt hastily-drafted and internally inconsistent legislation is a legacy of the Soviet era. *Id.*

168. An economic court judge for the region of Saint Petersburg complained of the difficulty that economic court judges face interpreting vague and constantly changing laws and regulations, particularly in the area of taxation. She commented that the legislative environment in practice is so difficult for judges to enforce that Russian entrepreneurs who are thus able to evade taxes and other regulations "smirk" and thank the legislators who draft the laws. Rendel, *supra* note 52, at 60.

169. Zakon RSFSR O Predpriatiakh i Predprinimatel'skoi Deiatel'nosti [RSFSR Law on Enterprises and Entrepreneurial Activity], Dec. 25, 1990, EKON. I ZH., No. 4 (Jan. 1991), at 16 [hereinafter, Law on Enterprises].

170. *Id.* art. 20(2). This provision of the Law on Enterprises was also noted in ÅSLUND, *supra* note 4, at 38–39.

171. Article 154 of the RSFSR Criminal Code criminalized speculation, or the "buying up and reselling of goods or any other articles for the purpose of making a profit." UGOLOVNYI KODEKS RSFSR [UK RSFSR][RSFSR CRIMINAL CODE], *as amended on* Oct. 27, 1960, *trans-*

shift in official policy towards economic activity, combined with an absence of laws regulating the market (such as laws against securities fraud or other financial scams) enabled a number of enterprising Russians to defraud the public of millions of rubles.[172]

Perhaps the most glaring gap in Russian legislation that still has not been closed is the absence of law regulating corruption. In spite of the Russian Parliament's recent success in adopting a new civil code, Parliament has not managed to pass a series of pending laws intended to regulate the activity of government officials.[173] Neither the preexisting nor recently enacted Criminal Code,[174] for example, makes it a crime for a Russian official to grant tax and tariff concessions to entrepreneurs in violation of the tax and customs laws, or to confer special benefits on favored investors in violation of privatization and foreign investment legislation.[175]

This puzzling combination of over- and under-regulation is in part a by-product of Russian legal tradition, according to which the formal content of the law tends to be less significant than the often selective manner in which the law is applied and enforced in practice. This personalized approach towards legality in Russia (driven by personal power rather than uniform application of law) is captured in an old

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lated in The Criminal Code of the RSFSR, in THE SOVIET CODES OF LAW 114 (William Simons ed. & Harold Berman & James W. Spindler trans., 1980). On the enactment of a new Criminal Code, *see infra* note 174. On Soviet-era criminalization of economic crime, *see* BERMAN, JUSTICE, *supra* note 7, at 149.

"Speculation" was only partially decriminalized by legislation passed by the RSFSR Supreme Soviet in February 1991. *See* Judith L. Anderson, *Changing Conceptions of Economic Crime Under Russian Law*, 14 WHITTIER L. REV. 451, 459–50 (discussing *Zakon RSFSR O Deistvii na Territoriu RSFSR Zakona SSSR ot 31 Oktiabria 1990 goda 'Ob Usilenii Otvetstvennosti za Spekulatsiu, Nezakonnuiu Torgovuiu Deiatel'nost' i za Zloupotreblenia v Torgovle'* [*RSFSR Law On the Enactment on the Territory of the RSFSR the USSR Law of Oct. 31, 1990 'On the Strengthening of Responsibility for Speculation, Illegal Trade Activity and Abuse of Trade'*], Feb. 28, 1991, ROSSIISKAYA GAZETA [ROSS. GAZETA], Mar. 12, 1991).

172. One of the more spectacular examples of this was the success of the notorious MMM fund, a pyramid scheme that collapsed in the summer of 1994. The founder of MMM, Sergei Mavrodi, bombarded Russian television with humorous advertisements featuring a down-to-earth Russian who became a millionaire from the income earned from his investment in MMM. *See, e.g., Russia's Crumbling Financial Pyramid*, THE ECONOMIST, Jul. 30, 1994, at 67, 67–68. *See also* Celestine Bohlen, *A New Russia: Now Thrive the Swindlers*, N.Y. TIMES, Mar. 17, 1994, at A1.

173. O. Damaskin, *Kakie Ekonomicheskie Pravonarushenia Stanoviats'a Kriminal'nymi* [*Which Economic Violations Will Become Criminal*], EKON. I ZH., June 1996, No. 22, at 35.

174. A new Russian Federation Criminal Code goes into effect January 1, 1997. Until that time, Russian criminal activity has been regulated by the Soviet-era code. *See* UGOLOVNYI KODEKS RF [UK RF] [RF CRIMINAL CODE], June 13, 1996, Sobr. Zakonod. RF, No. 25, item 2954.

175. Damaskin, *supra* note 173, at 35.

Russian proverb: "It is not what you say but how you say it to me."[176] Russians contrast western and Russian conceptions of legality: whereas notions of law and power tend to be interrelated in the West, many point out that power does not flow from the law in Russia.[177]

Power, rather than legal rights or economic wealth, was the predominant means of obtaining and preserving privileges under the Soviet system. Daniel Yergin and Thane Gustafson describe the Soviet system of power as one that utilizes the "whip and cake" method [*metod knuta i prianika*], a method which allocated (or withheld) scarce goods and services according to an individual's official position in the Soviet system.[178] As to post-Soviet Russia, Yergin and Gustafson conclude that in spite of the collapse of the Soviet system, in practice, power and connections continue to matter more in Russia than judicial protection of economic rights: "Political connections and the right friendships are still the best protection for property and contracts. So long as these things remain true, the law will remain a minor political resource, and a weak element in the growth of a true market economy."[179] This dynamic is exemplified in the Russian tendency to conduct business under the protection of a "roof," or *krysha*. According to some observers, a Russian business ultimately cannot be successful without *krysha*, or protection provided by powerful political or criminal contacts. *Krysha* serves a dual function in Russia: to protect against threats from organized crime groups and to ensure favorable application of the law or access to government benefits.[180]

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176. SHELLEY, *supra* note 18, at 149.

Another aspect to Russian legal tradition is a preference for spontaneous personal relationships over the formality of law. Harold Berman describes the repugnance with which Russians have regarded the law:

> Many of the greatest Russians have despised the legalism of the West, where, in the scornful words of the nineteenth-century Slavophile I.V. Kireevsky, "brothers make contracts with brothers." They have looked to spontaneous personal and administrative relationships rather than to the formality of law. . . .

BERMAN, JUSTICE *supra* note 7, at 224.

177. One Russian illustrates this difference by providing an example of how traffic regulations are selectively applied by the notoriously corrupt Moscow traffic police:

> A policeman does not stop those cars that break the rules: he stops the cars he feels like stopping. The driver comes out with his license and a bill folded inside . . . . [I]n other cases, a driver does not need to pay: he shows one ID or another and listens to the cop's profuse apologies as one hundred and fifty miles an hour is not a speeding violation, after all.

MATTHEW MALY, UNDERSTANDING RUSSIA 13 (1996). Maly's publication attempts to articulate the psychology and mores of Russian society to a Western business audience.

178. YERGIN & GUSTAFSON, *supra* note 159, at 48–49.

179. *Id.* at 54.

180. MALY, *supra* note 177, at 37. According to Maly, the role that *krysha* plays in Russian business is roughly analogous to that performed by in-house legal counsel in the West,

Russia's years as part of the Soviet system further weakened any influence law traditionally held over social behavior, particularly in the sphere of economic relations. First, Marxist-Leninist ideology itself denounced "bourgeois law" as an institution that protected the dominant, wealthy class and that ultimately had to be overthrown.[181] Although the Soviet state did not do away with law, law merely existed to reinforce the power of the state and the Communist Party.[182] In addition, since the Soviet system outlawed essentially all private economic activity,[183] Soviet law itself "normatively constructed" a relatively large sphere of activity that became part of the informal economy.[184] The relative ineffectiveness of the official economy necessitated resort to barter and other informal transactions that, although often formally illegal, were utilized extensively in order to cope with the realities of the Soviet system. The Soviet economy, for example, was characterized by widespread resort to informal channelling of state goods and services acquired by abuse of office.[185] These informal arrangements, adopted to survive the severity of the planned economy, over time legitimized within Soviet society a broad range of conduct that violated the law but was not perceived as morally wrong. Stanislaw Pomorski and George Ginsburgs observed how many in Soviet society perceived state property not as "communal" but as alien property, such that appropriating state property became an ordinary way of earning a living and was not considered to constitute "deviant" behav-

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although Maly also euphemistically observes that a Russian *krysha* is in other respects "a bit different" than a typical western law firm. *Id.*

181. Both Marx and Lenin wrote that bourgeois law purports to be equal but in fact perpetuates inequality. An early Soviet jurist attributed the following statement to Lenin "[e]very sort of law is the application of a like scale to different persons who in reality are not alike and are not equal to each other; accordingly 'equal law' is a violation of equality and an injustice." M.A. REISNER, LAW, OUR LAW, FOREIGN LAW, GENERAL LAW (1925), *translated in* HUGH W. BABB, SOVIET LEGAL PHILOSOPHY 83, 106 (1951). Given the inherent inequality of bourgeois law, Marx predicted that bourgeois law would be conquered in the "highest phase" of communist society. *Id.* at 107.

182. *See, e.g.*, BERMAN, JUSTICE, *supra* note 7, at 64; Ioffe, *supra* note 7, at 1625 (observing that Soviet law is successful in "strongly secur[ing] and vigilantly guard[ing] that state's economic monopoly.").

183. *See supra* note 171 (describing the Soviet-era crime of "speculation") and sources cited therein.

184. *See* Maria Los, *From Underground to Legitimacy: The Normative Dilemmas of Post-Communist Marketization, in* PRIVATIZATION AND ENTREPRENEURSHIP IN POST-SOCIALIST COUNTRIES 111, 111–12 (Bruno Dallago *et al.* eds., 1992). The informal transactions that Los describes were typical not only of the Soviet system but of planned economies generally.

185. The exchange of favors through granting access to goods and services has been described as a "salient feature" of the Soviet economy. *Id.* at 115 (quoting Gregory Grossman, *Informal Personal Incomes and Outlays of the Soviet Urban Population, in* THE INFORMAL ECONOMY 150, 154 (A. Portes *et al.* eds., 1989)).

ior.[186] Soviets who otherwise considered themselves honest citizens "evince[d] no inhibitions against stealing socialist property."[187]

Related to Russians' views on legality are popular perceptions of the judiciary's inability to enforce laws and protect rights. The impotence of Soviet state *arbitrazh* in addressing the economic ills of the Soviet planned economy[188] merely strengthened prevailing attitudes regarding the relative irrelevance of law and legal institutions and their ability to protect rights.[189]

The net result of these factors for the legal culture of Russian business today is what one western observer termed a "shadowland of legal chaos."[190] Given the country's history and traditions, it should not have been a surprise that when Soviet economic law began to introduce market principles, the entrepreneurs who first took advantage of market liberalization were, or maintained close ties with, organized crime groups. Nor should it be be surprising if Russians fail to comply with laws regulating economic activity. Thus, the prevailing legal culture in Russia impedes the perceived and actual effectiveness of economic courts in protecting property and contract rights.

It should also be noted in this context that criminal groups in Russia function to enforce legal rules and resolve economic disputes.[191] One of the ironies of Russian organized crime is that criminal groups have long governed themselves according to internal criminal "laws." Those who rule the criminal world are known as "thieves-in-law" [*vory v zakone*],[192]

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186. Stanislaw Pomorski & George Ginsburgs, Enforcement of Law and the Second Economy, 13 (1980) (Kennan Inst. for Advanced Russian Studies Occasional Paper No. 118).

187. *Id.* at 12.

188. *See supra* notes 18–24 and accompanying text.

189. Kathryn Hendley found that Soviet enterprise managers not only did not trust *arbitrazh* judges, but they also dismissed *arbitrazh* as "pointless" in light of the power wielded over *arbitrazh* by Soviet government ministries and the Communist party. Hendley, *supra* note 141, at 42.

190. Remnick describes the effects of this chaos on business culture in Russia: "Ask a banker, a politician, and a human-rights worker whether this or that businessman is honest, and they all give the same answer: In the standard sense of the word, honesty does not—*cannot*—exist in Russian business today." Remnick, *supra* note 162, at 128.

191. In their proposal for a "self-enforcing" model of corporate law, Bernard Black and Reinier Kraakman argue that a corporate law that defines norms clearly and in a manner that participants regard as reasonable can be effective even if enforced by resort to extralegal means, such as violence. Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1939–43 (1996). Black and Kraakman base their analytic model on a model statute that they assisted in drafting for the Russian Federation and that formed the basis for the Russian joint-stock company law. In fact, Black and Kraakman cite to the Russian example, where "extralegal enforcement of norms of business conduct already occurs to some extent." *Id.* at 1941 n.59 (citing Michael Specter, *Survival of the Fittest*, N.Y. TIMES, Dec. 17, 1995, (Magazine), at 66 (describing the criminal world's use of razborka)).

192. For a description of the historical development in Russia of thieves-in-law and the

and they resolve disputes between criminals (or between businesses protected by them) through a procedure known as a "sorting out" [*razborka*]. As one Russian described the *razborka* procedure, it may involve powerful bankers appointing a "barely literate," retired ex-convict to resolve a dispute according to the traditional rules followed in the criminal world.[193] Although often violent, a *razborka* may resemble a western-style negotiation session where each side brings its attorney and the parties follow the Russian Code of Civil Procedure.[194] At times, criminal groups may even adjudicate a dispute in economic court, not for purposes of marshalling the enforcement powers of the state, but rather to obtain an authoritative application of Russian law to the facts at hand.[195] The prevalence of the *razborka* indicates that extralegal institutions of dispute resolution are perceived by some Russians to be superior to the state, thus reinforcing the perceived ineffectiveness of the judiciary in Russia.

2. Independence of Judges

Russian government officials have a reputation for corruption that dates back at least to the nineteenth century.[196] Recent anecdotal evidence suggests that economic court judges, like government officials generally, are not immune from outside influence,[197] although in some cases judges may be influenced less by bribes than by fear of retribution.

During the Soviet era, the influence that Communist Party officials wielded over the judiciary was commonly referred to as "telephone justice" [*telefonnoe pravo*]. Even when judges were vested with the

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world they rule [the *vorovskoi mir*], *see* HANDELMAN, *supra* note 162, at 30–43.

193. MALY, *supra* note 177, at 76; *See also* ÅSLUND, *supra* note 4, at 170 ("as long as the Russian legal system is too weak to assure the collection of payments due, people in business need to resort to strong-arm methods to exact payments.").

194. According to Stas, a Russian who is part of the criminal underworld, it is now considered tasteless to arrive at a *razborka* dressed in the traditional running suit and sneakers. Alex Bratersky, *Rumble Fashion Ready-to-Wear*, MOSCOW TIMES, June 14, 1996, at 20. As Stas puts it, "[i]t is now time to dress as a civilized person because most of the things [sic] we discuss in negotiations." *Id.*

195. Maximovitch interview, *supra* note 86.

196. *See* Sajó, *supra* note 162, at 43 (quoting an 1850's report to the Russian Czar on the prevalence of corruption in the country). For an economic analysis of corruption in economies such as post-communist Russia, see Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599 (1993).

197. Of course, any legal system may be subject to outside influence. For an excellent discussion of how politics may undermine judicial independence in death penalty sentencing in the United States, see Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

formal power to rule on the legality of bureaucratic decisions, in practice judges often feared to do so. John Quigley recounts an anecdote which illustrates the influence that Soviet government officials held over judges. When one courageous judge struck down as illegal the decision of a local government committee, the committee refused to comply. The judge later informed the committee that if it did not comply with the court order within five days, it would be subject to a fine. A committee official called the judge and the chief judge to his office for a meeting at which he warned of the committee's displeasure and that the committee and the Party would "draw the appropriate conclusions." The trial judge was reduced to tears and the decision was reversed.[198]

In spite of the adoption of the Russian Constitution and federal legislation designed to ensure the independence of the judiciary,[199] observers still comment on the susceptibility of judges to bribery and coercion.[200] In part, this susceptibility stems from the continued poor economic and social condition of Russian judges. One of Boris Yeltsin's legal advisers concluded in 1994 that, in spite of the lip service paid in the Russian press to the importance of an independent judiciary, "in reality, the prestige and power of the courts has remained extremely low." He attributes the preponderence of female judges in Russia to the relatively low prestige attached to judicial positions.[201]

Arguably, economic courts are even more susceptible to outside pressure in Russia's current economic environment than was the case with *arbitrazh* under the Soviet system, since parties now have a meaningful stake in the outcome of economic disputes. It has been observed, for example, that during the Soviet era, state arbitrators were generally more "autonomous" and likely to resolve cases by resort to legal rules than Soviet judges, because the Communist Party interfered

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198. Quigley, *supra* note 57, at 62–63 (citing Borodin, *Kogda sud'ia plachet* [*When a Judge Cries*], OGONEK, Feb. 11–18, 1989, No. 7, at 16).

199. *See supra* notes 53–57 and accompanying text. The reforms are designed to promote judicial independence by providing for federal (as opposed to local) government financing, immunity from prosecution, life tenure and adequate salaries. *See* Law on Judges, *supra* note 57, arts. 9, 11.

200. One disillusioned lawyer sent a letter to the editor of *Rossiiskaya Gazeta*, complaining of a suit brought in Krasnodar, which the Krasnodar regional economic court decided only after resort to bribes, "telephone justice," and other informal contacts (the decision was eventually reversed by the Supreme Economic Court). *See "Na spravedlivosti ne ekonomiat"* [*One Does not Economize on Justice*] [Vitalii Kil'dishov, Letter to the Editor], ROSS. GAZETA, Feb. 22, 1996, at 5.

201. Mikhail Paleev, *The Establishment of an Independent Judiciary in Russia*, 1 PARKER SCH. J. E. EUR. L. 647, 650 (1994).

For an account by an economic court judge of the shabby work environment and the meagre pay for which judges work and how such conditions make judges susceptible to corruption, see Rendel, *supra* note 52, at 60.

less frequently in *arbitrazh* decisions than it did in criminal or other politically sensitive cases.[202] Although the susceptibility of economic court judges to Communist Party pressure may no longer exist, there still remains to some extent the potential for judicial influence by local political officials who control aspects of judges' livelihood, such as access to housing. Perhaps more significantly, economic court judges have become increasingly susceptible to threats from organized crime groups.[203] The chairman of the Supreme Economic Court recounted how increased stakes in economic disputes has meant greater susceptibility of economic court judges to coercion and other forms of influence. He reported, for example, how a female judge in Novosibirsk was once visited in her office by a party to a pending dispute, who threatened that he could apply "any means of influence" on her.[204] Criminal elements have resorted to a variety of methods to intimidate judges. Reflecting this new threat to judicial independence, the Law on Judges was amended in 1995 to enable judges to own and carry firearms.[205]

3. Competence of Judges

A final factor impeding the effectiveness of legal reform in Russia is the competence of judges to implement the law. This is in large part a pragmatic problem stemming from the lack of judicial personnel trained in the legal principles of a market-oriented system. When the system of Soviet state *arbitrazh* was overhauled in 1991, most of the judges appointed to the economic courts had served as arbitrators under the Soviet system. These judges are expected not only to keep up with the mass of evolving commercial legislation in Russia (including taxation and bankruptcy law, as there are no specialized courts in these areas as of yet), but also to reorient themselves from a socialist to a market economy—in most cases without the assistance of computerized research, a comprehensive system of published laws, word processors or even a photocopy machine.[206] Anecdotal evidence suggests that a number of

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202. SHELLEY, *supra* note 18, at 71.

203. Louise Shelley concluded in 1995 that the intimidation of judges by "gangster capitalists," along with the corruption of law enforcement, has thwarted the development of a rule of law society in Russia. Shelley, *supra* note 162, at 254.

204. Iakov Shestopal, *Pervyi god—pervye itogi* [*First Year—First Steps*], ZAKON, 1993, No. 5, at 45 (interview with Venyamin Iakovlev, Chief Judge of Russia's Supreme Economic Court).

205. Law on Amending Status of Judges, *supra* note 57, art. 9(2).

206. Robert Bayer of the Rule of Law consortium reported on the conditions under which Ukrainian lawyers operate since the collapse of the Soviet Union. He found that trial judges typically do not make independent decisions on the commercial disputes before them; rather, they telephone the senior court and request guidance. Among the factors that hinder trial court

economic court judges are less knowledgeable about the law than the Russian brokerage firm parties appearing before them. In one case reported in the press, the Russian brokerage firm Troika Dialog brought an action in economic court against the First Voucher investment fund, alleging that First Voucher breached its obligation to sell a block of shares. The trial judge continuously interrupted the trial to consult a Soviet-era law book. Finally, the judge ruled that the court lacked expertise to resolve the dispute and decided to bring in specialists from the Central Bank instead.[207] In another case, a Russian lawyer representing a foreign client in economic court wasted an entire day of trial attempting to explain to the judge what it means to utilize an "escrow account."[208]

Observers have also complained of the inaccuracy and carelessness of opinions issued by economic court judges. An economic court judge from the Vologodskyi region was so disgusted with the quality of judicial decision-drafting that he published a law journal article on the subject, complaining that courts fail to devote sufficient attention to the thorough preparation and drafting of opinions.[209] Many judges, for example, fail to identify parties and witnesses clearly or to spell out the legal basis for decisions rendered. Other transgressions include the use of slang, run-on sentences, and an excess of typographical errors.[210] A number of judges even utilize the pre-printed judgment forms of Soviet

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independence includes the simple fact that trial court judges lack access to current legislation and regulations:

> Regional Commercial Courts receive a single copy of a new law or regulation and most have no capacity to duplicate and distribute it. Conscientious judges subscribe to the official legal gazette, and then clip and paste to obtain a copy of the text of current legislation. . . . Such compilation of laws and regulations takes considerable time and dedication.

Robert Bayer, *Judicial Process and Ukraine's Commercial Courts*, R. OF L. CONSORTIUM NEWSL., July–Aug. 1995, at 14, 15–16 (on file with author). Bayer also reports that many decisions are handwritten due to the shortage of typewriters. *Id.* at 16. Russian courts face the same types of constraints as those described in Bayer's study. Russian press recently reported that regional courts in the region [*oblast*] of Tver are threatened with closure due to lack of funds for such basic necessities as paper. *Regional Courts Threatened with Closure*, MONITOR, Sept. 20, 1996 (citing INTERFAX, Sept. 18, 1996), *available online* from Jamestown Foundation. To subscribe send e-mail message to listserv@peach.ease.lsoft.com with text: subscribe jamestown-l [your name]. *See also* Rendel, *supra* note 52, at 60 (discussing the need for word processors and other material needs of the Russian economic courts).

207. Kaban, *supra* note 159.

208. Interview with Natalya Artemyeva, in Moscow, Russ. (May 25, 1996) (Professor of Civil Law at the Moscow State Institute of International Relations).

209. N. Materov, *O Kul'ture Sudebnovo Reshenia* [*On Standards for Judicial Decisions*] Vestn. Vysh. Arb. Suda RF, 1995, No. 1, at 134.

210. *Id.*

state *arbitrazh*, crossing out the names and phrases that no longer apply.[211]

As to the substantive quality of judicial decisions, a legacy of the Soviet era is the tendency of state *arbitrazh* to render carelessly drafted, sparse opinions that failed to set forth detailed legal analysis.[212] The discussion above indicates a post-Soviet continuation of this tradition; indeed, even decisions of the Supreme Economic Court follow a rigid formula, setting forth the procedural history of the case, the issue presented, and a citation to the legal rule supporting the decision, generally without elaboration of statutory interpretation or policy implications. Decisions of the Supreme Economic Court have occasionally been challenged for contradicting controlling law. For instance, a Russian lawyer recently published a letter to the president of Russian Chamber of Commerce and Industry in the Russian financial press, questioning the correctness of a number of commercial decisions issued by the Supreme Economic Court.[213] In response to the letter, the president cited the benefits of commercial arbitration as an attractive alternative for resolving economic disputes.[214]

The above examples highlight the significant practical limitations that economic court judges face. They also illustrate how judicial institutions in practice may actually undermine the development of a rule of law culture in Russia by reinforcing skepticism of the law's effectiveness in protecting economic rights.

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211. *Id.*

212. Pomorski, *supra* note 7, at 101.

213. *V Sashchitu Predprinimatelei*, [*In Defense of Entrepreneurs*] [*Letter to S. Smirnov, President of the Russian Chamber of Commerce and Industry from M. Lusnikov*], EKON. I ZH., June 1996, No. 25, at 25 [hereinafter *In Defense of Entrepreneurs*].

One of the cases cited in the letter, for example, involved the validity of a contract for the sale of assets from the Komi government property fund to "Konsha," a cooperative engaged in the breeding of cattle. Pursuant to the contract, Konsha paid a significant sum to the property fund to acquire ownership over the assets. However, when the Supreme Economic Court declared the contract invalid, it did not order restitution of the funds paid, on the rationale that Konsha was still able to utilize the property under a lease [*arenda*] contract that it had previously concluded. Postanovlenie No. 38-874-95 Presidium Vyshevo Arbitrazhnovo Suda RF [Ruling No. 38-874-95 of the Presidium of the RF Supreme Economic Court], Sept. 12, 1995, *published* in Vestnik Vyshevo Arbitrazhnovo Suda RF, 1995, No. 12, at 62. (For an explanation of the concept of *arenda*, see *supra* note 46.) The author of the letter points out that the Court's decision violates Article 167 of the Russian Civil Code, which requires that the parties to an invalid contract be returned to their pre-contract position. Such restitution was necessary, since Konsha's right to utilize the property under the *arenda* contract is not the economic equivalent of acquiring ownership. *In Defense of Entrepreneurs*, *supra*.

214. Note, however, that the case involving Konsha cited above involved a privatization transaction with a government property fund and therefore would not be arbitrable under the Arbitration Regulation. As to what constitutes an arbitrable dispute, see *supra* note 114.

B. *Consequences*

Even if Russia has a weak judiciary and legal culture, one may question the extent to which these factors adversely affect Russia's evolving market economy. To a degree, Russia's market will continue to develop without regard to the reliability of its legal institutions. Over thirty years ago, Stewart Macaulay demonstrated how American businesses typically do not resort to legal sanctions to resolve disputes.[215] Evidence shows that "deals march on" in Russia, regardless of whether the contracts that structure these deals are enforceable in practice.[216]

There is a substantial body of literature that considers the implications of weak judicial institutions for contracting behavior and economic development.[217] For example, parties can secure performance of a con-

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215. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Macaulay surveyed Wisconsin business and found that many exchanges reflected little or no planning with regard to legal sanctions and the effect of breach of contract. For example, although requirements contracts were of doubtful enforceability under Wisconsin law, a number of businessmen who were interviewed reported that their firms regularly utilized requirements contracts. *Id.* at 60.

Macaulay himself recently questioned the necessity of embracing the rule of law in countries such as Russia:

> [E]mpirical research suggests that contract law, at best, plays a small role in capitalist economies. These studies show that business people often do not plan with contract law in mind, they deal in ways that preclude the formation of a legally binding contract, and they do not assert contract rights to settle disputes.

Stewart Macaulay, *Organic Transactions: Contract, Frank Lloyd Wright and the Johnson Building*, 1996 WIS. L. REV. 75, 76 (1996). Under this view, then, the weakness of legal institutions in Russia should not significantly affect the structuring of transactions and development of the market.

216. Louis Uchitelle, *The Art of a Russian Deal: Ad-Libbing Contract Law*, N.Y. TIMES, Jan. 17, 1992, at A1. Uchitelle reports how, as early as 1992, businessmen in Russia operated largely on the basis of mutual benefit and trust, concluding contracts that at the time were not formally enforceable in a Russian court.

217. Anthony Kronman refers to this condition as a "state of nature" and considers a variety of mechanisms that parties may resort to in securing performance of contractual obligations without resort to legal sanctions. Anthony Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5 (1985). *See also* Bernstein, *supra* note 118; Posner, *supra* note 154; Paul Rubin, *Growing a Legal System in the Post-Communist Economies*, 27 CORNELL INT'L L.J. 1, 17 (1994) (arguing that conditions in post-Communist countries such as Russia somewhat resemble a "state of nature"); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979) [hereinafter Williamson, *Transaction-Cost*]. For analyses of the interrelationship between weak judicial institutions and economic development, *see* Hernando de Soto, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD (1990); Douglass North, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); Oliver E. Williamson, *The Institutions and Governance of Economic Development and Reform*, WORLD BANK RES. OBSERVER (1994) *available in* LEXIS, World library, Allwld File [hereinafter Williamson, *Institutions*].

tractual obligation by arranging for a simultaneous exchange[218] or by posting collateral,[219] but neither method necessarily requires legal sanctions for its effectiveness in inducing performance. Fear of reputation loss similarly may act as a sufficiently vigorous deterrent to ensure performance without resort to adjudication. There is some evidence that reputation plays a role in strengthening the extralegal enforcement of arbitration decisions within the banking industry and on the exchanges in Russia.[220] It is noteworthy that Russia's new Civil Code codifies a number of "self help" remedies that operate to secure the performance of obligations in the absence of resort to legal sanctions.[221] Resort to extralegal enforcement mechanisms obviates resort to adjudication and therefore renders less significant the question of whether Russia is a society governed by rule of law.[222]

Although Russians may conclude contracts without regard to their enforceability, it also seems evident that an unstable legal environment in Russia imposes economic costs on transacting by limiting the manner in which parties may safely transact and increasing the overall risks of transacting. In his analysis of contracting in a "state of nature," Anthony Kronman points out that alternative, non-legal mechanisms for protecting contract rights are limited in their effectiveness and increase the cost of

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218. *See* Kronman, *supra* note 217, at 10. Russian practice on the currency exchanges illustrates how simultaneous exchange reduces performance risk. For example, an arbitrator for MICEX noted that disputes brought to arbitration arising out of exchange transactions dropped significantly in the aftermath of Black Tuesday, when the ruble lost approximately one-fifth of its value on the MICEX in the course of one day. The decrease in arbitrated disputes is attributable to a change in MICEX rules adopted in the aftermath of Black Tuesday that eliminated the existing several-day clearing period for traders, thus mandating immediate clearing for transactions. Kostin interview, *supra* note 108.

219. *See* Kronman, *supra* note 217, at 15–18.

220. *See supra* notes 154–58 and accompanying text.

221. *See, e.g.*, CIVIL CODE, *supra* note 3, arts. 328 (suspension of return performance), 349 (satisfaction of pledged property without court proceedings in event of debtor default), 359 (retention of property in creditor's possession), 381 (retention of deposit).

222. Indeed, it was traditional during the Soviet era for parties to operate outside of the plan and avoid submitting disputes for resolution through state *arbitrazh*. In her study of Soviet lawyers, Louise Shelley drew a direct parallel between American and Soviet businessmen in their tendency to resolve disputes without resort to courts. Indeed, if anything, the tendency to resort to informal methods of enforcing and performing contracts was even greater in the Soviet Union, given the limitations of the Soviet economy. SHELLEY, *supra* note 18, at 148. Soviet enterprises did not have an economic incentive to bring suit, since any damages awarded were paid into the state budget. Ioffe, *supra* note 7, at 1607. Although the state compensated for the lack of economic incentive by imposing an affirmative obligation to bring suit, in practice Soviet lawyers devised often creative ways of forestalling litigation. *Id.* The in-house lawyer [*iurisconsult*] of one Soviet wine-producing enterprise reported how he typically travelled to the location of his enterprise's purchasers in order to negotiate, and thus resolve without resort to *arbitrazh*, potential claims for the delivery of substandard wine. SHELLEY, *supra* note 18, at 65–66.

transacting.[223] Strengthening judicial institutions in Russia will benefit the economy by reducing the cost of enforcing contracts, since posting collateral and other alternative enforcement mechanisms tend to be more costly than legal sanctions and more limited in application.[224]

Evidence of market practice in Russia also indicates that entrepreneurs may compensate for weak centralized enforcement by structuring exchange in a manner that reduces performance risk. Oliver Williamson predicts that a weak judiciary in countries such as Russia induces parties to transact either on the spot market or within a heirarchy.[225] He argues that spot-market traders can easily seek relief through substitute transactions,[226] whereas forming a hierarchy (through vertical integration) causes single ownership to span both sides of the transaction and eliminates the incentive for opportunism by one side (since "joint profit maximization" is presumed).[227] Spot-market trading involves immediate exchange in a highly liquid market which reduces the cost of breach whereas transacting within a vertically integrated structure reduces the risk of breach.

There has been a proliferation of both types of transactions in Russia during the post-Soviet era, which lends support to Williamson's argument and suggests how weak judicial institutions might be affecting Russian economic development. As to spot-market trading, the rapid expansion of trading on Russia's stock, currency and commodities exchanges is detailed above.[228] As to hierarchies, vertical integration in Russia through the formation of financial-industrial groups [*finansovo-promyshlennye gruppy*] (FIGs) has become increasingly common as well. A FIG is a group of Russian (and possibly foreign) companies organized around a bank and related through cross-shareholdings, similar to the Japanese

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223. Kronman, *supra* note 217, at 28. Kronman argues that state-sponsored enforcement increases the security of transacting at a relatively low cost "[T]he state is . . . a device for reducing the transaction costs of exchange, one whose own marginal cost is, at the outset, almost certainly lower than the marginal costs of alternative methods for achieving the same end." *Id.* (italics omitted). On the other hand, it is also the case that, even where effective legal sanctions exist, "an irreducible quantum of insecurity always remains." *Id.* at 25–26. Given the limitations of traditional legal remedies, legal sanctions will not do away with the need for extralegal enforcement mechanisms. *Id.*

224. Needless to say, resort to corruption of officials and other criminal methods of protecting economic rights imposes significant social and economic costs on the country. *See* sources cited in note 162.

225. Williamson, *Institutions*, *supra* note 217.

226. *Id.*

227. Williamson, *Transaction-Cost*, *supra* note 217, at 253. Kronman makes a similar point when he discusses "union" as a mechanism for ensuring contractual performance by "eliminat[ing] the condition of separateness that makes opposition of interests possible in the first place." Kronman, *supra* note 217, at 22.

228. *See supra* notes 132–42 and accompanying text.

keiretsu.[229] As of March 1996, thirty FIGs had been registered with the Russian government; however, many others remain unregistered.[230] Although the recent growth of FIGs in Russia is attributable to a variety of factors,[231] one factor that is often cited as motivating the formation of these groups is a desire to establish reliable sources of supply. For example, in July 1996, a number of Russia's largest aluminum companies teamed up with Zalog Bank, Trans World Ltd. (a British aluminum company), and raw material producers to create a powerful new FIG, "Siberian Aluminum."[232] One of the objectives cited in forming Siberian Aluminum was to "control the quality and stability of [raw material] deliveries through the creation of affiliated producers."[233] Companies that organize into FIGs, therefore, do so at least in part because of the legal risks inherent in contracting for inputs with outside suppliers.

A final question to consider is whether commercial arbitration offers a viable alternative to adjudication. In some respects, commercial arbitration avoids the social and practical limitations of adjudication in Russia. Most significantly, since parties to arbitration are empowered to choose the arbitration panel, problems of judicial independence and competence can be mitigated.[234] In addition, the relative secrecy and

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229. *See* Simon Baker & Liam Halligan, *Insider Banks Rebuild the Soviet Monopolies*, MOSCOW TIMES, Mar. 19, 1996, *available in* LEXIS, News Library, Curnws File. For a Russian account of the formation and activity of FIGs and a discussion of recent legislation, *see* E. Torkanovskii, *Finansovo-Promyshlennye Gruppy: perspektivy i problemy* [*Financial-Industrial Groups: Perspectives and Problems*], KHOZ. I PRAVO, 1996, No. 4, at 48–58; *id.* No. 5, at 28–38.

Although both horizontal and vertical groupings of companies have been loosely characterized as FIGs, the most powerful FIGs are vertically integrated. Baker & Halligan, *supra*.

230. Baker & Halligan, *supra* note 229. Charles Blitzer, chief economist for the World Bank in Moscow, views the development of FIGs as constituting a "major long-run concern" in the Russian economy. *Id.*

231. Torkanovskii mentions rather different purposes behind setting up a FIG: some companies group together to combine the resources of the participants, others link themselves to a FIG in order to attract investment whereas some FIGs are formed in an effort to recreate economic space along the lines of the former Soviet Union. Torkanovskii, *supra* note 229, No. 4, at 53.

232. Kirill Vishnepol'skii, *Aliuminievyi Titan* [Aluminum Giant], KOMMERSANT DAILY [KOMMERS.], July 23, 1996, at 1.

233. *Id.* at 11. A tendency of former Soviet enterprises to organize within heirarchies was also noted in a 1991 study by Simon Johnson and Heidi Kroll. Simon Johnson & Heidi Kroll, *Managerial Strategies for Spontaneous Privatization*, 7 SOVIET ECONOMY Oct.–Dec. 1991, at 281, 292–93. Johnson and Kroll cite the example of a group of Ukrainian enterprises that united in order to establish a unified chain of supply within Ukraine. The managers of the enterprises wanted all stages of production to be organized within the same firm, "because this is the only way to check whether everyone complies with their supply arrangements." *Id.* at 293.

234. Particularly in larger cities such as Moscow and Saint Petersburg, there is a significant number of well-qualified jurists available to arbitrate or mediate commercial disputes

independence of arbitration tribunals from government structures may attract Russian businesses concerned about formal compliance with tax and other regulations.[235]

A further advantage of commercial arbitration over adjudication is its orientation towards preserving the business relationship rather than determining winners and losers.[236] Given the traditional importance attached to informal relationships and the contempt with which many Russians view legalism,[237] arbitration may be an attractive alternative to litigation in Russia, particularly if the Arbitration Regulation is interpreted to allow disputes to be resolved on the basis of commercial principles and general notions of fairness.

In light of the fact that so few disputes are brought to arbitration in Russia in spite of these factors,[238] an argument can be made that arbitration is underutilized. Underutilization can be attributed in part to enforcement issues.[239] But perhaps a more significant limitation on

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for a modest fee. In fact, the fee charged by arbitration tribunals typically is less than that charged by an economic court. *See* Grebennikov, *supra* note 122, at 89 (citing the example of a dispute resolved by arbitration through the Union of Jurists at a savings of at least 45 million rubles compared with the fees that an economic court would have required).

Outside of the major cities, finding experienced arbitrators may be a more difficult task. An arbitrator recounted to me how he had participated in a training seminar designed to educate Russian jurists on commercial arbitration. One participant asked about the feasibility of setting up a tribunal in the north of Russia designed to handle international disputes, especially with Scandinavian parties. When faced with the question of finding qualified arbitrators in that part of the country, the participant responded that it was not imperative to find "clever" arbitrators to serve on the tribunal. Kostin interview, *supra* note 108.

235. *See, e.g.*, Grebennikov, *supra* note 122, at 87 (describing a dispute brought to arbitration through the Union of Jurists involving a privatization transaction that would have been invalidated as an illegal transaction had it been resolved in court). The dilemma is whether it is good for Russia to encourage market activity by providing a dispute resolution mechanism (such as arbitration) that shields disputants from prosecution or invalidation of an illegal contract. On the one hand, economic crime in Russia is rampant and needs regulation. On the other hand, the basic goal of reforming the Soviet economy is to limit state control and encourage party autonomy in economic transactions. Since in certain respects, Russian economic activity is rigidly (and not always rationally) regulated, the category of technically illegal transactions sweeps in both legitimate and illicit transactions. For example, the Russian Ministry of Interior has reported that virtually every privatization transaction executed in Russia has violated a Russian law or regulation. Shelley, *supra* note 162, at 244 (citing A. Krylov, Organizatsionno-pravovye problemy predprinimatel'stva [Organizational-Legal Problems of Entrepreneurship] (conference paper presented in Irkutsk, Russia, in May 1995).

236. Oliver Williamson argues that parties tend to avoid the "transaction-rupturing" features of litigation and turn to "third-party assistance" such as arbitration where the parties to the dispute have invested in the business relationship and attach value to preserving it. Williamson, *Transaction-Cost*, *supra* note 217, at 249–50. He cites Lon Fuller for the proposition that, "whereas continuity (at least completion of the contract) is presumed under the arbitration machinery, this presumption is much weaker when litigation is employed." *Id.* at 238 (citing Lon Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3).

237. *See supra* note 176.

238. *See supra* note 101 and accompanying text.

239. *See supra* notes 110, 116, 150, 153, and accompanying text.

parties' resort to commercial arbitration is a legacy of the formalistic, bureaucratic mentality of the Soviet system (with inordinate importance attached to obtaining the right stamps, whether by complying with government red-tape or by wielding power), a mentality that carries over into the business culture of present-day Russia. In spite of its weaknesses, the economic court system is a part of the Russian government and the successor of the Soviet system of state *arbitrazh*, the government institution that has traditionally handled economic disputes.

To the extent that social mores adjust away from the bureaucratic traditions of the Soviet system, the institution of domestic arbitration may become more widely utilized in Russia for some of the practical reasons outlined above. For the time being, however, neither the institution of commercial arbitration nor Russia's system of economic courts can be said to ensure stability in contractual relations or supplant *krysha*[240] as a means of protecting private rights.

CONCLUSION

The market-oriented reforms recently enacted in Russia have been compared to the eighteenth-century reforms of Peter the Great.[241] Peter the Great, like Boris Yeltsin, moved quickly upon taking power to reform Russia in the likeness of the countries of western Europe. After travelling across Europe absorbing western ideas to apply to his own society, Peter returned to Moscow and forcibly cut off the beards of his noblemen, removing what in his mind symbolized Russia's superstitious tradition, a tradition that he intended to "drag into the light of the West."[242] Peter also imported western corporate charters (translated into Russian) for companies that he had organized and established a stock exchange. However, relatively few of the companies he created survived his death.[243]

Taking the analogy one step further, one could argue that Yeltsin's reforms, like those of Peter the Great, apply western solutions that are nonresponsive to the problems and concerns of Russian society, are only superficial and temporary, and will be easily reversed when the political climate changes. This line of argument has some merit, particularly with

240. For a discussion of the concept of *krysha*, see *supra* note 180 and accompanying text.

241. Michael Gershaft, *The Pattern of Privatization in Russia: Trend Lines for the Future*, PRISM, August 11, 1995, *available online* from Jamestown Foundation. To subscribe send e-mail message to listserv@peach.ease.lsoft.com with text: subscribe jamestown-1 [your name].

242. HENRI TROYAT, PETER THE GREAT 113 (Joan Pinzham trans., 1987).

243. Gershaft, *supra* note 241.

respect to legal reform. Reform of the dispute resolution system in Russia requires reorientation of the court system from the bottom up as well as change in social attitudes towards law and legal institutions, neither of which can be imposed by legislative fiat. On the other hand, I believe that the economic and political changes that have taken place in Russia over the past decade are more fundamental and permanent than Peter's reforms. Like the emancipation of the serfs by Alexander II, privatization has altered the economic basis of Russian society and cannot be easily reversed. However, while the formal economic structure has been recast, it will take years for the full effects of this change to trickle down to the Russian people. Similarly, while the legal framework for resolving commercial disputes has been greatly modified to support Russia's new market economy, it will take time for this new system to sink into the mentality and business practice of Russian market players.

APPENDIX

PUBLISHED OPINIONS OF THE PLENUM OF RUSSIA'S SUPREME ECONOMIC COURT (MAY 1994–MAY 1995)[244]

Date	*Opinion No.*	*Category of Dispute*
5/24/94	12	Civil (sale/letter of credit)
"	13	Administrative (lease)
"	14	Administrative (privatization)
"	15	Civil (enforcement of arbitration)
"	16	Administrative (rights to real property)
"	17	Civil (sale)
"	18	Administrative (lease)
"	19	Administrative (privatization)
5/25/94	20	Administrative (privatization)
"	21	Administrative (privatization)
9/27/94	24	Administrative (privatization)
"	25	Administrative (privatization)
"	26	Administrative (privatization)
"	27	Civil (loan/contract insurance)
"	28	Administrative (Central Bank)
"	29	Administrative (authority of local administration to contract)
"	30	Administrative (privatization)
"	31	Administrative (lease)
9/28/94	32	Civil (loan/contract insurance)
	33	Administrative (company registration)
"	34	Administrative (tax)
"	35	Civil (sale)
"	36	Civil (commercial paper/contract insurance)
"	37	Administrative (land reform)
"	38	Administrative (privatization)
12/20/94	39	Administrative (privatization)
"	41	Civil (loan)
"	42	Civil (loan)
"	43	Civil (loan)
2/28/95	5	Civil (contract insurance)

244. Source: ROSS. IUST., 1994, No. 10; and 1995, Nos. 1, 2, 3, 6, 9 and 10.

Date	*Opinion No.*	*Category of Dispute*
5/23/95	8	Civil (loan/guaranty)
"	9	Administrative (tax)
"	10	Administrative (privatization)
"	11	Administrative (confiscation)
"	12	Administrative (Central Bank)
"	13	Administrative (tax)
"	14	Civil (housing construction)
"	15	Administrative (lease)
"	16	Administrative (privatization)
"	17	Civil (loan/guaranty)
"	19	Administrative (company registration)