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Dispute Resolution in the Commercial Law Tribunals of the Russian Federation: Law and Practice

Neil F. O'Donnell

Kirill Y. Ratnikov

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Dispute Resolution in the Commercial Law Tribunals of the Russian Federation: Law and Practice

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Dispute Resolution in the Commercial Law Tribunals of the Russian Federation: Law and Practice

Neil F. O'Donnell[†]
Kirill Y. Ratnikov[‡]

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[†] Neil F. O'Donnell, Esq. is an associate with Holme Roberts & Owen LLP ("HRO"), a Denver-based international law firm. Mr. O'Donnell engages in securities and corporate practice from the Firm's Denver office, and has spent time in HRO's Moscow office working on various commercial projects. He received his Juris Doctor, with honors, from the University of North Carolina School of Law in May 1996. The opinions and ideas expressed in this work are solely those of Mr. O'Donnell and do not reflect the views of Holme Roberts & Owen LLP or its attorneys.

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[‡] Kirill Y. Ratnikov, Esq. is an associate in the Moscow office of Freshfields, a London-based international law firm. Mr. Ratnikov received his law degree from Moscow State University, and is presently pursuing advanced legal study at the Institute of State and Law in Moscow. Consultative and editorial assistance rendered by Mr. Ratnikov in connection herewith is solely his own and does not express the views of Freshfields or its attorneys.

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I. Introduction

Since initially authorized in 1987,¹ foreign investment in Russia has certainly come a long way. No longer is the foreigner's sole concern a quick profit from the simple provision of consumer goods and services to the captive markets of Moscow and Saint Petersburg. Capital participation in Russian and joint ventures has progressed to the point where, for the years 1992-1994, seventy-five percent of the total foreign investment in the Russian Federation (RF) was directed toward heavy industry and raw-materials production, most of which was situated in the Far East and other remote regions of Russia.² Investors are understandably attracted by Russia's seemingly inexhaustible supply of natural resources and cost-effective skilled-labor and production bases, as

¹ See On Questions Concerning the Establishment and Operation of Joint Ventures, International Amalgamations and Management Organizations on the Territory of the U.S.S.R., Government's Decree No. 6362-XI, Ved. Verkh. Sov. SSSR, No. 2, item 35 (Jan. 13, 1987) (source on file with the American Bar Association Moscow).

² See Nadir Mukhetdinov, *Problems of Restoration of the Investment Process*, DELOVOY MIR (Moscow), Sept. 18-24, 1995, at 27.

well as a government which has, at least formally through law and regulation, taken measures to ensure favorable treatment of investment from abroad.³

While such capital-intensive projects have the potential for considerable long-term growth, investment risk naturally increases with the duration and irreversibility of the capital outlay. In addition to the usual economic factors bearing upon the success of any venture, investors in Russia face significant risks, as discussed herein, stemming from the prevalence of organized crime, political volatility, an unsteady legal basis of outdated and often conflicting law and regulation, and a number of unresolved questions of federal and local governmental authority. In an address before Russia's Foreign Investment Council, Prime Minister Viktor Chernomyrdin ranked Russia as second in the world, slightly safer than Iraq yet more worrisome than Nigeria, in terms of the degree of risk to foreign investment. Chernomyrdin noted that, due to frequent directives imposed by Mayor Yuri Luzhkov, this risk in the Moscow region "rises to a level of indeterminacy."⁴

The most crucial step for the foreign investor, therefore, is to make sufficient provision for effective dispute resolution. In choosing a forum, the prudent investor should consider not only the immediate parties to a given transaction, but also potential government and private-sector claimants for whom Russian law may provide an actionable interest. At present, there are four main avenues for the resolution of foreign investment disputes: 1) private arbitration abroad with execution of the award by an RF court; 2) submission of the matter to the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry; 3) litigation in the RF system of arbitration courts; and 4) informal arbitration by an ad hoc tribunal within the RF.⁵ The operation,

³ See, e.g., On Improving Work with Foreign Investment, RF President's Decree No. 1466, Sept. 27, 1993, at iii, available in LEXIS, Intlaw Library, Rflaw File (providing "lag time" in the applicability of new laws and regulations to foreign holdings). In practice, however, this concession has very limited efficacy. See *infra* notes 370-75 and accompanying text.

⁴ Aleksandr Shalnev, *Government Gives Green Light to Foreign Investment*, XLVI CURRENT DIG. OF POST-SOVIET PRESS, July 27, 1994, at 17, available in LEXIS, World Library, Cdsp File.

⁵ "Arbitration courts" in Russia are part of the RF *judicial* system, entertaining

advantages and disadvantages of these alternative fora will be discussed in the pages that follow. Primary consideration will be given to the third option, adversarial proceedings in the arbitration courts, as such appears to be, with some limitations, the most effective means of obtaining finality of judgment as to all interested parties.

II. Enforcement of Arbitral Award Obtained Outside the Territory of the Russian Federation

During the Communist era, recourse to a recognized arbitral tribunal outside of the Soviet Union⁶ was viewed as the only means by which a foreign citizen or entity could obtain impartial resolution of a commercial matter.⁷ The Soviet Union had long been a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, an agreement which remains in force in the RF to this date.⁸ Current federal law expressly stipulates that, upon presentation of a properly apostilled copy of the tribunal's decision, any RF court of

adversarial proceedings and having mandatory jurisdiction and rules of procedure. See *infra* notes 93-102 and accompanying text. Arbitration, as it is understood in the West, is available in the informal tribunals known as the "treteyskiye sud'" (the "third-party courts"). See, e.g., Eric Anderson, *Arbitration Courts Given Jurisdiction Over Many Commercial Issues*, EAST/WEST EXECUTIVE GUIDE, Vol. 5, No. 12, at 25, available in LEXIS, World Library, Allnews File. While the arbitration courts recognize and enforce the decisions of the treteyskiye sudi, see Interim Statute of Mediation Court for Settlement of Economic Disputes, RF Supreme Soviet Decree No. 3115-1 (June 24, 1992), available in LEXIS, World Library, Sovleg File, and will stay an action referred to them, the treteyskiye sudi appear to be ill-equipped to handle large claims or complex financial matters.

⁶ The most common locale chosen for U.S./Soviet arbitration was the Arbitration Institute of the Stockholm Chamber of Commerce, due largely to a model arbitration clause proposed and agreed upon in 1977 between the American Arbitration Association and the U.S.S.R. Chamber of Commerce and Industry. See Olga Zimenkova, *New Rules Prompt Rethinking: Is it Time to Arbitrate in Russia?*, 60 INT'L PRACTITIONER'S NOTEBOOK 14 (1995).

⁷ See Alan J. Koman, *Arbitrating Among the Russians?*, THE FED. LAW., Feb. 1995, at 28.

⁸ The Convention took effect in the Soviet Union on November 20, 1960. The RF, unless specifically excepted by statute, has acceded to all of the treaty obligations undertaken by the Soviet Union. See Letter from the RF Ministry of Foreign Affairs, No. 11/UGP (Jan. 13, 1992) (available in Garant-Service English language database).

competent jurisdiction will enforce the foreign award.⁹ It should be noted, however, that the procedural codes observed by the Russian courts do not provide any special means for the execution of foreign awards. Presumably, the party seeking enforcement is limited to those execution techniques typically applied by the Russian courts.

The RF Law on International Commercial Arbitration (ICA Law) governs all issues concerning the legal effect of foreign awards, with guidelines as to the content and validity of forum-selection clauses, the composition of the awarding tribunal, and the procedural and substantive challenges to recognition in the RF.¹⁰ This statute purports to encompass all of the grounds upon which an award may be contested in an RF court.¹¹ Procedural challenges include: 1) incapacity of a party signing the agreement to arbitrate; 2) invalidity of the arbitration clause under either the law chosen by the parties as supplying the rule of decision or the law of the country in which the arbitration takes place; 3) denial to one party of fair notice of the arbitration proceedings or other lack of opportunity to be heard; 4) that the decision taken by the arbitration tribunal violated or exceeded the scope of the arbitration agreement; and 5) that the composition or procedure of the tribunal contravened terms agreed to by the parties or violated the law of the forum state.¹² Substantive attacks to the award would seem to allow broader sway for argument against recognition. These include a showing that: 1) the claim is not the proper subject for arbitration under Russian law, or 2) recognition of the award would frustrate the public policy of the RF.¹³ Any

⁹ See On International Commercial Arbitration, RF Law No. 5338-1, 1993, art. 35 (Russ.), available in LEXIS, Intlaw Library, Rflaw File [hereinafter On International Commercial Arbitration].

¹⁰ See *id.* art. 1.

¹¹ See *id.* art. 36.

¹² See *id.*

¹³ See *id.* While these exceptions are acknowledged in U.S. practice, there appears to be no requirement in Russia that there exist a clearly articulated policy against recognition, thus leaving open the possibility for inconsistent, ad hoc determinations in each enforcement action. Due to the fact that foreign investment in Russia is an extensively regulated field, as discussed in the pages that follow, these exceptions could prove troublesome.

other challenges to enforcement will not be heard by Russian courts.¹⁴

The advantages of arbitration abroad, namely, impartiality of the tribunal and expertise in commercial matters, do remain as significant factors in the foreign investor's choice of a forum for dispute resolution. Additionally, there is a greater degree of certainty of result in an established international tribunal since procedural questions, where not stipulated otherwise, are resolved according to standing practice. This use of standing practice, in turn, avoids reference to many of the vagaries and inconsistencies of Russian procedure. These advantages, however, have waned in significance due to the application of more progressive international standards by the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry, as discussed in the following section.

III. The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry

A. The ICAC Generally

The International Commercial Arbitration Court (ICAC) traces its roots back to the Foreign Trade Arbitration Commission (FTAC) of the U.S.S.R. Chamber of Commerce and Industry, an organization established in 1932 to provide expeditious review of commercial and maritime disputes.¹⁵ The 1993 passage of the ICA Law officially replaced the Arbitration Court of the U.S.S.R. Chamber of Commerce and Industry, the immediate successor to the FTAC, with the ICAC,¹⁶ and brought commercial dispute-resolution in Russia into closer conformity with the 1985 United Nations Commission on International Trade Laws Model Law on Commercial Arbitration.¹⁷ The ICAC is now a meaningful

¹⁴ *See id.*

¹⁵ The FTAC's statutory authority and procedural rules have been updated several times since 1932. For the most recent comprehensive statute, see Law on the Arbitration Court of the U.S.S.R. Chamber of Commerce and Industry, *Ved. Verkh. Sov. SSSR*, No. 50, Item 806 (Dec. 14, 1987) (on file with author).

¹⁶ *See* On International Commercial Arbitration, *supra* note 9, at app. 2, item no. 4.

¹⁷ *See id.* pmbl.

alternative to arbitration abroad, and, due to its physical proximity to the matters commonly in dispute, it may offer significant enforcement advantages to the foreign investor.¹⁸

An arbitration clause complying with ICAC terms and regulations may be a valuable means by which to avoid suit in the RF courts. Federal law provides that any RF court must stay proceedings if the defendant, in his initial statement to the court, insists on observance of an arbitration clause entered into with the plaintiff.¹⁹ Even if a court denies a stay or such is not requested, the parties to suit may nonetheless continue in parallel ICAC arbitration, in hopes of later referral to, or recognition of an award obtained in, ICAC proceedings.²⁰ An RF court may condition its referral to arbitration upon the posting of security for the claim.²¹

B. Jurisdiction of the ICAC

The ICAC may assume jurisdiction over disputes where the parties have, by written agreement, consented to binding resolution of any existing or future claims.²² The ICAC Rules are applicable to any arbitration occurring on RF territory where such proceeding would, according to the jurisdictional requirements of the 1993 ICA Law, be an "international commercial arbitration."²³ The personal jurisdiction qualifications imposed by ICAC regulations are quite liberal, requiring only that the dispute stem from the foreign trade or other international commercial activities of the parties, one of which participants may be situated abroad.²⁴

¹⁸ See *Changes to International Commercial Arbitration Rules are Receiving a Favorable Review*, 5 RUSSIA AND COMMONWEALTH BUS. LAW REP., June 7, 1995, available in LEXIS, World Library, Rcb1r File [hereinafter *Changes*].

¹⁹ See On International Commercial Arbitration, *supra* note 9, art. 8(1). See, e.g., Code of Arbitration Procedure, RF Law No. 70-FZ, 1995, art. 87(2) (Russ.), available in LEXIS, Intlaw Library, Rflaw File [hereinafter Code of Arbitration Procedure]. This action is analogous to a special appearance in American practice.

²⁰ See On International Commercial Arbitration, *supra* note 9, art. 8(2).

²¹ See *id.* art. 9.

²² See Rules of Procedure for the International Commercial Arbitration Court, Chamber of Commerce and Industry Regulations, May 1, 1995, art. 3, available in LEXIS, Intlaw Library, Rflaw File.

²³ *Id.* art. 2.

²⁴ See *id.*

The Rules specifically direct to subject matter jurisdiction of the ICAC almost any conceivable type of commercial conflict, including matters arising from the sale of goods, rendition of services, shipping agreements, licensing, intellectual property exchanges, and any other form of cooperative investment.²⁵

Since the rules are very flexible, the ICAC has the authority to make its own determination as to its jurisdiction in individual cases. The ICAC reviews the validity of the arbitration reservation, the forum-selection clause, separately from the substantive provisions of contracts before it, meaning that the unenforceability of a contract or agreement as a whole will not strip the ICAC of authority to resolve a dispute on the basis of general principles of law.²⁶

C. Appointment of Arbitrators

Perhaps the most significant change in ICAC procedure is provision for the selection and appointment of arbitrators by the parties themselves.²⁷ Under prior law, arbitrators were assigned from the Chamber's List of Arbitrators,²⁸ thus raising some doubts among foreign claimants as to the prospects for expert and impartial treatment of a claim.²⁹ The ICAC Rules presently allow each of the participants to name an equal number of arbitrators (meeting certain minimum standards of business expertise) and such nominees will appoint an additional person to arrive at an odd number.³⁰ If the nominees cannot agree to a suitable candidate, the ICAC will make an appointment from its List of Arbitrators.³¹ The parties to an ICAC arbitration may also agree to a single

²⁵ *See id.*

²⁶ *See id.* art. 5.

²⁷ *See Koman, supra* note 7, at 31.

²⁸ To qualify for listing with the FTAC, arbitrators were required to be Soviet citizens. *See* Rules of Procedure for the International Commercial Arbitration Court, Chamber of Commerce and Industry Regulations, May 1, 1995, art. 3, *available in* LEXIS, Intlaw Library, Rflaw File. Current law expressly authorizes appointments without regard to nationality. *See* On International Commercial Arbitration, *supra* note 9, art. 11.

²⁹ *See* On International Commercial Arbitration, *supra* note 9, art. 11.

³⁰ *See id.*

³¹ *See id.*

arbitrator.³²

Another factor making an ICAC proceeding a more attractive option is the requirement that all arbitrators affirmatively disclose all actual and potential conflicts of interest.³³ A party may petition for the recusal or removal of an appointee, provided that such objection is raised within fifteen days of learning of the conflict.³⁴ Improper denial of this request is grounds for challenge to the arbitral decision in court.³⁵

D. Applicable Law

Under the current ICAC Rules, a tribunal is required to review the arbitration clause and all other contractual provisions according to the body of law chosen by the parties.³⁶ RF law expressly provides that the choice-of-law clause shall be construed as referring to the substantive provisions of the law of the country chosen, not to its conflicts rules.³⁷ Where the parties have not selected governing law, or where such stipulation has been found invalid, the tribunal may apply any appropriate legal solution to the conflict.³⁸ In such cases, however, Russian conflicts rules are generally employed, usually leading to the application of Russian substantive law.³⁹

Participants to an ICAC proceeding may present evidence of foreign law, and the tribunal will hear conclusions on the subject from experts put forth by the parties or, if not otherwise agreed by the parties, appointed by the arbitrators in the course of an

³² *See id.*

³³ *See id.* art. 12.

³⁴ *See id.* art. 13.

³⁵ No express provision for interlocutory appeal is found in the ICAC Rules or the ICA Law. Presumably, challenges can be made in a collateral proceeding opposing execution or in reasserting the claim in an RF or other court. For a discussion of the enforcement of ICAC rulings, see *infra* notes 54-56 and accompanying text.

³⁶ *See* On International Commercial Arbitration, *supra* note 9, art. 28(1).

³⁷ *See id.*

³⁸ *See id.* art. 28(2).

³⁹ For a discussion of Russian conflicts rules, see *infra* notes 174-77 and accompanying text.

independent examination.⁴⁰ Where the rule of decision is not clearly mandated by agreement or applicable conflicts rules, the ICAC will apply norms of general trade usage.⁴¹ Unlike most other arbitral bodies, an ICAC tribunal will generally frame its ruling with reference to a discrete set of recognized principles rather than crafting a fact-specific decision based on what is fair and equitable in the circumstances.⁴²

E. Discovery and Hearings in the ICAC

The ICAC does not possess any direct measures to compel discovery, but the parties or the tribunal may petition a competent RF court to secure assistance in obtaining evidence.⁴³ Available discovery options are limited to those envisioned in the procedural codes observed by the RF courts.⁴⁴ Noncompliance with a production request or court order may be a factor in the ICAC tribunal's apportionment of arbitration costs among the parties.⁴⁵

Upon initiation of an arbitration, either party may petition the ICAC President for a preliminary order of attachment in order to assure adequate means for satisfaction of a claim.⁴⁶ Counterclaims may be filed at any time during the proceedings, provided that such arise from the same contracts or obligations in dispute and operate in direct setoff of claims previously asserted.⁴⁷ The participation of interested third parties is not permitted, except with the consent of both parties to the arbitration.⁴⁸ Participants to an ICAC proceeding may terminate the arbitration at any time,

⁴⁰ See On International Commercial Arbitration, *supra* note 9, arts. 23(1), 24(3) and 26(1); see also Koman, *supra* note 7, at 31.

⁴¹ See On International Commercial Arbitration, *supra* note 9, art. 28(3).

⁴² See Koman, *supra* note 7, at 32.

⁴³ See On International Commercial Arbitration, *supra* note 9, art. 27.

⁴⁴ See *id.*; Koman *supra* note 7, at 31.

⁴⁵ See Rules of Procedure for the International Commercial Arbitration Court, Chamber of Commerce and Industry Regulations, May 1, 1995, art. 32(2), available in LEXIS, Intlaw Library, Rflaw File.

⁴⁶ See *id.* art. 30.

⁴⁷ See *id.* art. 33.

⁴⁸ See *id.* art. 35.

without the need for ICAC approval.⁴⁹

Other procedural matters, such as the language of the proceedings and provision for an arbitration transcript, are also addressed in the ICAC Rules.⁵⁰ The Rules permit the parties to arbitrate in a language other than Russian and allow for supplementation to the tribunal's reporting resources.⁵¹

F. The ICAC Decision: Execution and Appeal

The ICAC Rules do not exclude the possibility of an ex-parte award,⁵² but such practice would appear to run counter to the general policy of the relevant statutes and regulations favoring compromise and negotiation.⁵³ A default judgment may be issued where the respondent fails to come forward (presumably, after making an initial appearance) within thirty days of the claimant's request for judgment.⁵⁴ An ICAC decision is enforceable in any RF court, provided that the court is presented with properly certified copies of the award and agreement to arbitrate.⁵⁵ The exclusive grounds for collateral challenge to an award are the same as those discussed above in relation to the enforcement of foreign arbitral awards, i.e., incapacity of party, violation of law or agreement by tribunal, inappropriateness of subject matter for arbitration, or public policy considerations.⁵⁶

⁴⁹ *See id.* art. 36. While the right to voluntary settlement and the restriction on the entry of intervenors may seem fundamental by Western standards of arbitration, these practices are in marked contrast to procedure in the arbitration courts of the RF. In the arbitration courts, the judge(s) must approve any voluntary resolution of the dispute, in order to protect the interests of all parties potentially having an interest in the disposition of the matter.

⁵⁰ *See id.* art. 10.

⁵¹ *See id.*

⁵² *See, e.g.,* On International Commercial Arbitration, *supra* note 9, art. 36(1)1.

⁵³ *See id.* at app. No. 2, Item 5.

⁵⁴ *See* Rules of Procedure for the International Commercial Arbitration Court, Chamber of Commerce and Industry Regulations, May 1, 1995, art. 16(B), available in LEXIS, Intlaw Library, Rflaw File.

⁵⁵ *See* On International Commercial Arbitration, *supra* note 9, art. 35.

⁵⁶ *See id.* art. 36.

G. Arbitration Expenses and Costs

Upon filing a claim in the ICAC, the claimant must post a fee to cover administrative costs of the proceeding such as arbitrators' fees and reporting costs.⁵⁷ Additional advances may be required depending upon the need for independent experts, translations, travel, etc.⁵⁸ Ultimate responsibility for the costs of the proceeding, however, is allocated among the parties in proportion to their relative success in pursuing or defending the claim(s).⁵⁹ A prevailing party may, in certain cases, recover attorneys' fees.⁶⁰ The tribunal may alter the statutory distribution of costs by way of sanction where there is misconduct by a party.⁶¹

H. Arbitration at the ICAC: Pros and Cons

The RF Chamber of Commerce has vastly enhanced the attractiveness to foreign investors of the ICAC by adopting progressive, internationally-recognized standards for commercial arbitration.⁶² By allowing participants to nominate whomever they view as impartial expert arbitrators, the Chamber has removed the most significant deterrent to widespread use of the ICAC by foreigners.⁶³ The ICAC may be advantageous to arbitration abroad, since it will be much more likely for a Russian party to appear in Moscow than in Stockholm, Paris or London, thereby simplifying enforcement problems.⁶⁴ Moreover, the ICAC was recently described by a Russian attorney at a prominent American

⁵⁷ The fee schedule appended to the ICAC Rules sets the amount payable in proportion to the value of the claim(s) before the tribunal. *See* Rules of Procedure for the International Commercial Arbitration Court, Chamber of Commerce and Industry Regulations, May 1, 1995, appendix, available in LEXIS, Intlaw Library, Rflaw File.

⁵⁸ *See id.* appendix, art. 1(3).

⁵⁹ *See id.* art. 6(2).

⁶⁰ *See id.* art. 9.

⁶¹ *See id.* art. 10.

⁶² *See Changes, supra* note 18.

⁶³ *See* Koman, *supra* note 7, at 28.

⁶⁴ One Moscow-based American lawyer noted that the Stockholm tribunals, for example, are reluctant to issue ex-parte awards and do not possess the authority to compel appearance. *See Changes, supra* note 18.

law firm as “the most competent arbitration body in Russia.”⁶⁵ Proceeding in the ICAC has the further advantage of allowing purely “private” conflict resolution, with lesser risk of administrative intervention or judicial investigation of potential illegalities, as is possible in the arbitration courts.⁶⁶

The only drawback to arbitration in the ICAC is that it does not necessarily offer a determinative resolution of matters, since Russian legislation makes provision for a number of interested public and private sector parties in the field of foreign investment.⁶⁷ This leaves open the potential for collateral challenge to an ICAC award by means of an “outsider’s” claim that the dispute was not the proper subject for arbitration.⁶⁸ A judgment of an arbitration court, however, may not fare much better against a subsequent challenge, since the arbitration courts apply very narrow former-adjudication restrictions.⁶⁹

IV. The Arbitration Courts of the Russian Federation

Since their creation in 1991, the courts of arbitration have played an increasingly important role in the resolution of commercial disputes in the Russian Federation.⁷⁰ A review of recent decisions and happenings indicates that the proficiency of arbitration judges in both fact-finding and procedural matters is consistently improving.⁷¹ There remain, however, a number of procedural and practical concerns inherent in the court system, as discussed below, which may cause some hesitation on the part foreign investors to rely on the arbitration courts for effective protection of their rights.⁷²

The following analysis concerns the implications of court

⁶⁵ *Id.*

⁶⁶ See On International Commercial Arbitration, *supra* note 9, art. 5.

⁶⁷ See *id.* art. 36.

⁶⁸ See On International Commercial Arbitration, *supra* note 9, art. 36(1).

⁶⁹ See *infra* notes 344-46, 417-19 and accompanying text.

⁷⁰ See *Arbitration Courts Given Jurisdiction over Many Commercial Issues*, EAST/WEST EXECUTIVE GUIDE, Vol. 5, No. 12, available in LEXIS, Ceurobusg Library, Allnws File.

⁷¹ See, e.g., *infra* notes 287-90, 423-25 and accompanying text.

⁷² See *infra* notes 248-84 and accompanying text.

procedure for foreign investors where either a private or administrative action before the arbitration court involves issues which are, in some manner, the proper subject of governmental regulation. Unlike purely private contractual disputes in which the parties may, and usually do, stipulate in favor of international arbitration,⁷³ the cases discussed herein, in some aspect, fall within the mandatory jurisdiction of the RF regulatory regime. Depending on the centrality of the regulated activity to investment operations, an adverse ruling in the Russian courts could, as a practical matter, terminate an investor's interest, irrespective of any dispute resolution clause to the contrary.

Due to intensive regulation as herein discussed, this risk is nowhere more pronounced than in the land use context. It is yet unclear whether foreign investors may directly own land in the Russian Federation,⁷⁴ but at least one federal directive authorizes the sale, mortgage, exchange or contribution of real property to legal entities with foreign participation.⁷⁵ In any event, foreign venturers, like all other Russian natural and legal persons, do not secure rights in the subsoil, except for a limited duration and use as defined by contract with municipal, regional, or federal authorities.⁷⁶

Any investment arrangement which envisions substantial land

⁷³ See, e.g., Jim Vail, *Arbitration Courts Grow Slowly*, MOSCOW TIMES, Sept. 24, 1996, at 7, available in LEXIS, World Library, Curmws File.

⁷⁴ The primary vehicle for land use by foreigners envisioned in RF law is the short- or long-term lease. See, e.g., RSFSR Land Code, Ved. Verkh. Sov. RSFSR, No. 22, 1991, art. 768, available in LEXIS, World Library, Allnws File [hereinafter RSFSR Land Code]. The RF Civil Code, adopted in January 1996, purports to set generally applicable norms for ownership and leasing of immovable property, without distinction as to foreign or domestic participation. See GK RF art. 549 (1996). The adoption of a new Land Code, expected in the near future, should provide greater guidance on the question of foreign ownership.

⁷⁵ See On Regulation of Land Relations and Development of Agrarian Reform in Russia, President's Decree No. 1767, Oct. 27, 1993, XLV CURRENT DIGEST OF THE POST-SOVIET PRESS, No. 43, at 14, Nov. 24, 1993, available in LEXIS, World Library, Allnws File.

⁷⁶ See RSFSR Land Code, *supra* note 74. Exploration, prospecting, extraction, and related activities involving raw materials are authorized exclusively by federal grant "on a chargeable basis and for a certain period." On Production-Sharing Agreements, RF Law No. 225-FZ, 1995 (Russ.), available in LEXIS, World Library, Allnws File (emphasis added). Ownership in fee by private parties is not permitted. See *id.*

use necessitates that a government entity be a party to the investors' agreement.⁷⁷ Since the arbitration courts have, as examined below, allowed private challenges to the official grant of land use rights, the foreign investor failing to comply exactly with all formalities of corporate registration, licensing procedure, etc., may run a serious risk of summary divestment of property interests. Where substantial fixed assets are involved, the investor's only remedy may be to seek reliance damages from a government which has traditionally been immune from liability for mere negligence in the exercise of its ministerial functions.⁷⁸

The RSFSR Law on Foreign Investment contains a wide array of compensation schemes and guarantees against direct expropriation.⁷⁹ A more complex, and perhaps more common, question arises where official action, as a practical matter, has a confiscatory effect, yet does not clearly constitute a requisition of private property for official purposes. The Law on Foreign Investment attempts to address this issue by granting foreign investors rights equivalent to Russian nationals and allowing them

⁷⁷ See, e.g., Agreements on Product Sharing in Subsoil Use, President's Edict No. 2285, ROSS. GAZETA (Moscow), Dec. 24, 1993, available in LEXIS, World Library, Sovleg File ("Agreement on the sharing of products . . . shall be a form of contractual relations between the state and investors making use of the subsoil."); Law on Environmental Protection, VEDOMOSTI FED. SOBR. RF, Issue No. 10, Item No. 457 (1992), available in LEXIS, World Library, Sovleg File (envisioning a similar role for "the state" administration of contracts involving "comprehensive land use").

⁷⁸ See, e.g., Vladimir Khrenov, *Production Sharing in Russia: Investors Share Hope*, 63 PETROLEUM ECONOMIST, No. 5, at S-5, available in LEXIS, Ceurobusg Library, Allnws File.

⁷⁹ Law of the RSFSR of July 4, 1991, on Foreign Investment in the RSFR, Vedomosti RSFSR, Issue No. 29, Item No. 1008, 1991, art. 7, available in LEXIS, Intlaw Library, Rflaw File [hereinafter Law on Foreign Investment]. This law provides assurances against "nationalization, requisition, or confiscation" (with some "public interest" exceptions) and promises "prompt, adequate, and effective compensation" in cases of nationalization or requisition. *Id.* To the author's knowledge, there have not been any challenges, in Russian courts, to a direct expropriation as described in this context. Given the tenor of the negotiations over the U.S.-backed Bilateral Investment Treaty, signed in 1992 but not yet implemented by the Russian Federation, the efficacy of these guarantees appears to be more a question of international politics than one for adequate resolution by the Russian courts. See generally Deputy U.S. Trade Representative Michael, *The New Frontier: Economic Integration of Northeast Asia: Opportunities for U.S. Business*, REUTERS NEWS SERVICE, Oct. 20, 1992, available in LEXIS, News Library, Arcnws File.

judicial recourse to obtain compensation, including consequential damages, for "illegal instructions," "irresponsible implementation," and other acts and omissions by government officials, which, while not rising to the level of "nationalization" or "requisition," cause injury to foreign holdings.⁸⁰ While ostensibly a waiver of sovereign immunity, this provision does not add significantly to the rights of investors in land-use projects since they are presently required by the RSFSR Land Code to attain the status of Russian juridical persons and, as such, may challenge official action to the same extent as Russian citizens.⁸¹

A. Arbitration Tribunals in Russia—History

1. Arbitration in the Soviet Era

During the Soviet period, so-called "economic disputes" among state enterprises were referred to the system of "state arbitrazh," a network of quasi-administrative tribunals affiliated with various ministries, industries, and regional agencies.⁸² While the arbitration commissions were directed to encourage voluntary settlement, most claims were resolved in strict compliance with the dictates of state production plans.⁸³ According to one commentator, the arbitrator served as "mediator, judge, investigator-prosecutor, [and] state administrator."⁸⁴ As indicative of its prosecutorial stance, the arbitrazh commission had the right to commence proceedings, *sua sponte*, where it had reason to suspect that an enterprise or agreement was in violation of the law or state plan.⁸⁵

Arbitration practice in the Soviet era was extremely informal and expeditious, as the procedural norms of the civil courts,

⁸⁰ Law of the RSFSR of July 4, 1991 on Foreign Investments in the RSFR, Vedomosti RSFSR, No. 29, Item No. 1008, 1991, arts. 6,7, available in LEXIS, Intlaw Library, Rflaw File.

⁸¹ *See id.*

⁸² *See* Volker Viechtbauer, *Arbitration in Russia*, 29 STAN. J. INT'L L. 355, 442 (1993).

⁸³ *See id.* at 443.

⁸⁴ *Id.*

⁸⁵ *See id.*

governing evidence taking, motion practice, etc., were not applied.⁸⁶ As a prerequisite to an arbitrazh hearing, the parties were required to attempt "composition,"⁸⁷ or settlement, of the dispute, and thus it was assumed that the arbitrator's only role was to apply the law or plan to the facts and arguments as adduced in the prior negotiations.⁸⁸ Given the limited role of the commissions, substantial reform had to occur to enable the arbitration system to survive the transition to a market economy.

2. *Establishment of Arbitration Courts*

The Russian Federation system of arbitration courts was established in July 1991 to "exercise *judicial* power in settling disputes arising in the process of enterprise activity."⁸⁹ The stated mission of the court system "to promote observance of legislation and greater legality in economic relations" suggests that the courts, as originally founded, had retained some of the administrative flavor of their predecessor, the state arbitrazh.⁹⁰ While a number of decisions reached by the Superior Arbitration Court (the court of last resort in the arbitration system) have shown a willingness to break with the perceived interests of "the State," the perception of a prosecutorial bias continues to exist.⁹¹ When posed with the hypothetical case of a foreign litigant seeking to defend its rights

⁸⁶ See *id.* at 442.

⁸⁷ See RF Code of Arbitration Procedure, RF Act No. 2447-I, 1992, art. 2 (Russ.), available in LEXIS, World Library, Sovleg File. The most recent arbitration procedure code has, for the first time, omitted this requirement. See *infra* notes 149-52 and accompanying text on the reasons for this omission.

⁸⁸ See generally Viechtbauer, *supra* note 82, at 442-43.

⁸⁹ RSFSR Arbitration Court Act, Vedomosti RSFSR, No. 36, Item No. 1013, 1991, art. 1, available in LEXIS, World Library, Sovleg File (emphasis added).

⁹⁰ *Id.* art. 3. Other "tasks" of the court, such as the uniform application of legislation and the defense of the "law-protected rights and interests of organizations and citizens," seem a bit more consistent with the role of a judiciary as commonly perceived in American jurisprudence. *Id.* In some of the cases discussed herein, however, the system's concern for the "rights of citizens" seems to extend beyond the claims raised by the litigants to a case or dispute, leading to judgments reached upon the courts' conception of the "public interest." For discussion of the extent to which the arbitration courts appear to have retained the administrative role of Soviet arbitrazh, see *infra* notes 324-31 and accompanying text.

⁹¹ See *infra* notes 246-96 and accompanying text.

in a "public" or regulatory dispute, two Russian legal scholars agreed that it may be advantageous to the foreign investor to proceed, if such option were available, in the courts of general jurisdiction.⁹²

B. Jurisdiction of the Arbitration Courts

1. Personal Jurisdiction

Under the former Arbitration Court Act, passed in 1991, the arbitration system was established to resolve disputes arising among or between organizations, "citizens . . . engaged in enterprising activity," and state agencies.⁹³ As to Russian Federation officials, legal persons, and "entrepreneur citizens,"⁹⁴ the jurisdiction of the arbitration courts was mandatory if the case was properly characterized as an "economic dispute," as defined in the Act's subject-matter jurisdiction provisions.⁹⁵ Foreign investors, as well as enterprises with foreign capital, were *not* permitted to file or defend suit in the arbitration courts, unless such was provided for by stipulation of the parties, international agreement, or specific legislative directive.⁹⁶ All claims to which a

⁹² Interview with Drs. Natalia A. Sidarova and Yulia S. Mersulova, Professors of Law, Saint Petersburg University Law Department, in Chapel Hill, N.C. (Mar. 30, 1995). Professors Sidarova and Mersulova cautioned, however, that judicial expertise in complex commercial matters may be entirely lacking in the courts of general jurisdiction, and in such cases, this risk outweighs any potential administrative bias in the arbitration courts. *See id.* Choice of forum is available, pursuant to Article 30 of the 1995 Code of Arbitration Procedure, by private agreement between disputants. *See Code of Arbitration Procedure, supra* note 19, art. 30. Jurisdiction over, and removal by, foreign investors is discussed in the following section.

⁹³ RSFSR Arbitration Court Act, Vedomosti RSFSR, No. 146, 1991, art. 1, available in LEXIS, World Library, Sovleg File.

⁹⁴ Entrepreneur status is acquired "by means of state registration under the RF Natural Persons Business Registration and Fee Act." Jurisdictional Competence of the Courts of Law and Courts of Arbitration, RF Supreme Court Plenum and RF Supreme Arbitration Court Plenum Decree No. 12/12, Aug. 18, 1992, art. 2 (Russ.), available in LEXIS, World Library, Sovleg File.

⁹⁵ RSFSR Arbitration Court Act, Vedomosti RSFSR, No. 146, 1991, art. 22, available in LEXIS, World Library, Sovleg File; *see also infra* notes 110-13 and accompanying text.

⁹⁶ RSFSR Arbitration Court Act, Vedomosti RSFSR, No. 146, 1991, art. 1, available in LEXIS, World Library, Sovleg File.

foreign investor was a party were required to be heard in the courts of general jurisdiction.⁹⁷ This jurisdictional bar did not apply to arbitration proceedings where a foreign investor's rights were indirectly affected, that is, where the foreign investor was not a party to the action.⁹⁸

On April 28, 1995, the President of the Russian Federation signed a federal constitutional law entitled Arbitration Courts in the RF ("Court Act")⁹⁹ and on May 5, 1995, the Code of Arbitration Procedure ("Arbitration Code").¹⁰⁰ Under the new Arbitration Code, which took effect on July 1, 1995, disputes involving foreign-controlled and joint ventures, as well as those concerning individual foreign investors, are assigned to the arbitration courts.¹⁰¹ The new laws have, to a large extent, replaced the former discriminatory jurisdictional regime with one under which foreigners enjoy procedural rights similar to those of RF citizens.¹⁰²

a) Foreign Claimant's Rights to Initiate Proceedings

The Arbitration Code expressly authorizes foreign organizations and citizens to invoke the jurisdiction of the arbitration courts for protection of their rights.¹⁰³ Foreign participants to suit are guaranteed equal procedural footing with RF citizens, except in cases where the RF has established reciprocal restrictions on the rights of foreign nationals whose

⁹⁷ See *id.* art. 3 (interpreting the jurisdictional provisions of the RSFSR Law on the Arbitration Court and the RF 1995 Code of Arbitration Procedure). The courts of general jurisdiction are variously referred to as "civil courts," "courts of law," and "general courts."

⁹⁸ See *id.*

⁹⁹ Arbitration Courts in the RF, RF Law No. 1-FKZ, 1995 (Russ.), available in LEXIS, World Library, Sovleg File.

¹⁰⁰ Code of Arbitration Procedure, *supra* note 19.

¹⁰¹ See *id.* art. 210(1).

¹⁰² See discussion *infra* at notes 103-05 and accompanying text.

¹⁰³ See Code of Arbitration Procedure, *supra* note 19, art. 210(1). The only qualification appears to be that the foreign citizen or organization must be one "performing business activities." *Id.* Presumably, registration of "entrepreneurial status," as required of RF individuals, is not necessary to file suit. See *id.* art. 22.

nation's courts place limits on the procedural rights of RF citizens.¹⁰⁴ As a general rule, therefore, the only limitations on a foreign claimant's right to sue are issues of subject-matter jurisdiction.¹⁰⁵

b) Foreign Citizen as Defendant

Provided that subject-matter requirements are met, an arbitration court may, pursuant to Article 212 of the Arbitration Code, assert jurisdiction over a foreign organization or individual if: 1) the defendant has a permanent place of residence on the territory of the RF; 2) a subsidiary or representative office of the defendant is situated on RF territory; 3) the defendant possesses property in Russia; 4) the contract upon which suit was brought was executed in, or requires performance in, the RF;¹⁰⁶ 5) the wrongful activities alleged in an action for compensatory damages have taken place in Russia; 6) the defendant was unjustly enriched in the RF; 7) the plaintiff in a commercial defamation suit is located in Russia; or 8) the parties so agree.¹⁰⁷

Since the Arbitration Code expressly allows default judgments,¹⁰⁸ some of the more flexible grounds for jurisdiction (e.g., unjust enrichment, quasi-in-rem authority) may prove troublesome for an investor located abroad. In order to avoid the court's broad powers of execution, discussed below, the defendant must show lack of due notice at the time and location of the proceedings.¹⁰⁹

2. Subject-Matter Jurisdiction

As between proper parties, discussed above, an arbitration court resolves disputes concerning execution and performance of

¹⁰⁴ See *id.* art. 210(2), (3).

¹⁰⁵ See *infra* notes 110-13 and accompanying text.

¹⁰⁶ Under Russian conflicts rules, the locus of the contract is always determined by reference to RF law. See *infra* note 177 and accompanying text.

¹⁰⁷ See Code of Arbitration Procedure, *supra* note 19, art. 212.

¹⁰⁸ See *id.* art. 119(1)

¹⁰⁹ See *id.* arts. 158(2)2 (dealing with appellate instance) and 176(3)2 (pertaining to cassation). For definitions of appellate instance and cassation, see *infra* notes 128, 135 and accompanying text.

contracts, ownership rights in real or personal property, and other matters properly identifiable as "economic disputes."¹¹⁰ The arbitration system also has mandatory jurisdiction over business-related "administrative disputes" including, but not limited to, claims involving state property grants and concessions, just-compensation assessments, and the imposition of fines by officials and agencies.¹¹¹ As each of the jurisdictional provisions of the Arbitration Code are followed by "catch-all" clauses, it appears that the case-specific examples referenced therein are to be merely illustrative.¹¹² The subject-matter determination will likely turn, therefore, on whether the matter is properly cast as an "economic dispute."¹¹³

3. Opportunities for Forum Shopping

Although the new laws purport to assign all commercial disputes involving foreign parties to the jurisdiction of the arbitration courts, neither the Arbitration Code nor the Arbitration Court Act contains express language as to exclusivity of jurisdiction.¹¹⁴ By reference to Article 25(4) of the RSFSR Civil Procedure Code of 1964, a foreign party may have technical grounds to challenge the assertion by an arbitration court of

¹¹⁰ See *id.* art. 22.

¹¹¹ See *id.* Arbitration courts also hear cases involving administrative interference with contract. See *id.* Article 22 makes primary reference to disputes where the state is a contracting party, but also contains a "catch-all" provision which purports to bestow jurisdiction in "administrative" matters as between private litigants. See *id.*

¹¹² See *id.*

¹¹³ See *id.* In a case in which an investment fund sued the RF government to have restrictions on its mass-media advertising lifted, the Superior Arbitration Court declined jurisdiction, holding that relations between the government and the mass media are not "economic in their nature." Olga Solodova, *Notorious "MMM" Ads Remain Banned*, *ITAR-TASS REP.*, Jan. 24, 1995, available in LEXIS, World Library, Arcnws File. This case appears to be an anomaly, misconstruing the interests of the actual parties to suit. Most foreign investment activity would seem to fall within arbitration-court jurisdiction, especially in light of the fact that even tort claims such as property damage and commercial defamation are enumerated grounds for personal jurisdiction. See Code of Arbitration Procedure, *supra* note 100, art. 22.

¹¹⁴ See *id.* art. 210; Arbitration Courts in the RF, RF Law No. 1-FKZ, 1995, art. 10 (Russ.), available in LEXIS, World Library, Sovleg File.

exclusive jurisdiction.¹¹⁵ Such litigant could, relying upon an authoritative 1992 ruling, assert an additional claim or counterclaim uniquely cognizable in the courts of general jurisdiction in an attempt to attain removal of the entire controversy.¹¹⁶

This technique, however, would probably be unavailing since the arbitration court would likely be inclined to construe the Arbitration Code's "catch-all" provisions broadly in order to rely upon the overall character of the dispute in its assessment of subject-matter jurisdiction. Moreover, the arbitration courts have the authority to proceed¹¹⁷ unless resolution of an issue falling outside of the court's jurisdiction makes it *impossible* for it to do

¹¹⁵ Article 25 provides that the civil courts, i.e., the courts of general jurisdiction, shall have cognizance over foreign commercial disputes in the absence of international treaty or stipulation between the parties. *See* GK RF art. 25 (1996). Since the Civil and Arbitration Procedure Codes are of equal legal force in the RF, argument could not be made that this provision, in itself, precludes the exercise of arbitration jurisdiction. *See* KONST. RF art. 15 (1993). It could, however, be asserted that the Civil Procedure Code provides an alternative forum which the 1995 Arbitration Procedure Code could not, and does not purport to, withdraw.

¹¹⁶ *See* Jurisdictional Competence of the Courts of Law and Courts of Arbitration, RF Supreme Court Plenum and RF Arbitration Court Plenum Decree No. 12/12, Aug. 18, 1992, art. 5 (Russ.), available in LEXIS, World Library, Sovleg File. The Arbitration Plenum is a body of selected Superior Arbitration Court judges empowered to make interpretive rulings on questions of practice and procedure. *See* RSFSR Arbitration Court Act, Vedomosti RSFSR, No. 146, 1991, art. 12-13, available in LEXIS, World Library, Sovleg File. The Arbitration Plenum, construing article 28 of the RSFSR Code of Civil Procedure, determined that "[w]here there is joinder of several interconnected claims, one of which comes within the jurisdictional competence of a court of law, and the others, of the arbitration court, all the claims shall be subject to adjudication in a court of law." *Id.*

¹¹⁷ Article 105(3) of the 1995 Code authorizes the severance of claims into "separate legal cases." *See* Code of Arbitration Procedure, *supra* note 19, art. 105(3). It is unclear whether an arbitration court could detach a claim properly within the jurisdiction of the "civil" courts, since it cannot immediately put the matter on its own docket as a "separate case." In any event, the enactment of a new Arbitration Code does not necessarily supersede the Plenum Decree, since the latter decision was an authoritative interpretation of the current Civil Code, not the lapsed Arbitration Procedural Code. *See generally*, Jurisdictional Competence of the Courts of Law and Courts of Arbitration, RF Supreme Court Plenum and RF Superior Arbitration Court Plenum Decree No. 12/12, Aug. 18, 1992, available in LEXIS, World Library, Sovleg File.

so.¹¹⁸ Even if further adjudication would violate the 1992 ruling,¹¹⁹ the foreign party would have difficulty showing the required prejudice on appeal unless the extrajurisdictional claim was central to the court's ruling.¹²⁰ All in all, such a circuitous route to forum shopping would probably not be particularly well-received in the Russian courts, which tend to apply the codes in a somewhat mechanical fashion.

C. Structure of the Arbitration Court System

1. General Remarks

The structure and operation of the arbitration courts is governed by the new Arbitration Court Act, which became effective on July 1, 1995.¹²¹ The Court Act federalized all arbitration courts in the RF, merging spheres of federal and regional authority into a single, unified hierarchy.¹²² The courts operate on three tiers: the regional courts, the federal circuit courts, and the RF Superior Arbitration Court.¹²³ Their respective functions and powers are discussed in the following sections.

2. The Regional Courts

Serving as the trial courts for most commercial disputes, these are the courts of the "subjects of the Russian Federation," *i.e.*, the Republics, territories, regions, autonomous formations and "federal importance cities" (Moscow and St. Petersburg).¹²⁴ At the trial stage (the "first instance"), cases are heard by a single judge, except in bankruptcy proceedings or in actions to enjoin government acts, where the court must sit collegially.¹²⁵ Upon

¹¹⁸ See Code of Arbitration Procedure, *supra* note 19, art. 81(1).

¹¹⁹ See *supra* note 116.

¹²⁰ See *id.*

¹²¹ See On Arbitration Courts in the Russian Federation, RF Constitutional Law No. 1-FKZ, Apr. 28, 1995 (Russ.), available in LEXIS, World Library, Sovleg File.

¹²² See *id.* art. 1.

¹²³ See *id.* art. 3.

¹²⁴ *Id.* art. 3.

¹²⁵ See Code of Arbitration Procedure, *supra* note 19, art. 14. A case heard "collegially" is reviewed by three or any greater uneven number of judges and is decided

application within one month of the trial court decision, appeals are heard, as of right,¹²⁶ by a collegial panel of judges from that same trial court.¹²⁷

On appeal (the "appellate instance"), the regional court may engage in substantially *de novo* review of the conclusions of the trial judge.¹²⁸ While the Arbitration Code precludes the introduction of new claims or evidence (at least without good cause shown),¹²⁹ the appellate tribunal is free to examine and reevaluate the sufficiency of the evidence.¹³⁰ The court may also reverse any substantive or procedural errors made by the trial judge, provided that the appellant can show prejudice resulting therefrom.¹³¹ The ruling on appeal takes effect immediately upon its issuance.¹³²

3. *The Federal Circuit Courts of Arbitration*

The federal circuit courts were created with the passage of the 1995 Court Act in order to: 1) reduce the caseload of the RF Superior Arbitration Court; 2) avoid duplicative suits in various regions by a party seeking a favorable result; and 3) facilitate a more uniform pronouncement of federal law.¹³³ Operating among ten circuits,¹³⁴ these courts perform the function of "cassation," the review of the propriety of the legal rulings and decisions of the

by simple majority vote. *See id.*

¹²⁶ In one case, the Moscow Arbitration Court denied the right of appeal and ordered immediate execution of its judgment, purporting to eliminate the one month period for which, pending notice of appeal, the court's judgment does not enter into legal effect. *See* Ivan Zhagel, *Gloria-Bank Charges Microdin Company with Defrauding It of \$4.5 Million*, DELOVOY PETERBURG (St. Petersburg), Aug. 1995, at 3, available in LEXIS, World Library, Sbe File.

¹²⁷ *See* Code of Arbitration Procedure, *supra* note 19, art. 14, 145-47.

¹²⁸ *See id.* art. 158.

¹²⁹ *See id.* art. 155.

¹³⁰ *See id.* art. 158.

¹³¹ *See id.*

¹³² *See id.* art. 159.

¹³³ *See* Interview by V. Maslennikov with M. K. Yuzov, RF Superior Arbitration Court, in Moscow (Sept. 13, 1995) (translation in FBIS-SOV-95-189).

¹³⁴ *See* On Arbitration Courts in the Russian Federation, RF Constitutional Law No. 1-FKZ, Apr. 28, 1995, art. 24 (Russ.), available in LEXIS, World Library, Sovleg File.

lower instances which have entered into legal effect.¹³⁵ At the cassation stage, no factual allegations or challenges to the application of law to fact may be heard. Grounds for reversal are limited to either mistakes of law with demonstrated prejudice or to such denial of due process as to negate a fair opportunity to be heard at trial or on appeal.¹³⁶ Persons whose rights were affected by lower court proceedings without their participation are permitted to file a cassation appeal.¹³⁷ The decision of the federal circuit court is immediately effective and may not be appealed by the parties to suit.¹³⁸

4. Superior Arbitration Court of the Russian Federation

Pursuant to Article 127 of the RF Constitution, the Superior Arbitration Court is the final judicial authority on "economic disputes" and all other issues falling within the jurisdiction of the arbitration courts.¹³⁹ The Court, in almost all circumstances,¹⁴⁰ reviews cases by way of "supervision," that is, only upon the petition of the Chairman (or Deputy) of the RF Superior Arbitration Court or the RF Procurator-General (or Deputy) for an authoritative pronouncement on an unresolved legal issue or matter of court procedure.¹⁴¹ The Court has the right of legislative initiative and may certify questions of constitutionality to the RF

¹³⁵ See Code of Arbitration Procedure, *supra* note 19, arts. 165, 168.

¹³⁶ See *id.* art. 176.

¹³⁷ See *id.* This provision does not seem to confer a broad right of intervention on interested parties; rather, it appears to have been included in the 1995 Code to protect absent persons named in the suit or otherwise referred to in the judgment. Article 161 limits the right of cassation appeal to those "participating" in the case. See *id.* art. 161. "Participant" status is determined by reference to Articles 28-43 of the Arbitration Code and would seem to cover only actual litigants and those persons whose rights and duties are expressly mentioned in, not merely affected by, the judgment. See *id.* arts. 28-43.

¹³⁸ See *id.* art. 177.

¹³⁹ KONST. RF art. 27 (1993).

¹⁴⁰ The Court has *original* jurisdiction over: 1) disputes between the RF and the "subjects of the RF," 2) conflicts arising among the "subjects," and 3) proceedings to nullify executive and legislative acts. See On Arbitration Courts in the Russian Federation, RF Constitutional Law No. 1-FKZ, Apr. 28, 1995, art. 10 (Russ.), available in LEXIS, World Library, Sovleg File.

¹⁴¹ See Code of Arbitration Procedure, *supra* note 19, arts. 180-81.

Constitutional Court.¹⁴² The Superior Arbitration Court is divided into a Plenum (issues interpretations and instructions on the application of laws), a Presidium (hears cases and clarifies matters of practice), and Civil and Administrative Judicial Divisions (review disputes falling within the Superior Court's original jurisdiction).¹⁴³ The pronouncements of the Plenum and Presidium are binding on all courts within the arbitration system.¹⁴⁴

D. Initiating Suit in the Arbitration Courts

1. The Statement of Claim

An action is commenced when a claimant files a proper "statement of claim" and supporting documents to an arbitration court of proper jurisdiction.¹⁴⁵

The statement of claim must indicate, among other things: 1) the names and addresses of potential parties; 2) the amount of the claim; 3) the facts upon which the claim is based; 4) the evidence which the claimant intends to offer; 5) the legal basis upon which plaintiff seeks a remedy; and 6) the measures taken by the plaintiff to comply with pre-trial orders (in those cases where any such order is a condition precedent to standing).¹⁴⁶ The claimant is also required to file supporting affidavits verifying that: 1) filing fees (discussed below) have been paid; 2) the statement of claim and supporting documents have been forwarded to all participants; 3) any mandatory pre-trial orders have been complied with; and 4) the facts alleged in the statement of claim are true.¹⁴⁷ Once these materials are properly filed with the court, the suit is commenced and a decision must be rendered within two months from this date.¹⁴⁸

¹⁴² See On Arbitration Courts in the Russian Federation, RF Constitutional Law No. 1-FKZ, Apr. 28, 1995, art. 10 (Russ.), available in LEXIS, World Library, Sovleg File.

¹⁴³ See *id.* arts. 11-17.

¹⁴⁴ See *id.* arts. 7, 10.

¹⁴⁵ See Code of Arbitration Procedure, *supra* note 19, art. 102.

¹⁴⁶ See *id.* art. 102.

¹⁴⁷ See *id.* art. 104.

¹⁴⁸ Supreme Arbitration Court Chairman V. Yakovlev noted that the passage of new laws on the arbitration courts had drastically expedited proceedings to the extent that

Noticeably absent from the pleading criteria is a requirement that the claimant establish prior attempts to settle the dispute before turning to the arbitration courts.¹⁴⁹ Both the rules of Soviet state arbitrazh and the pre-1995 Arbitration Code provided that the failure to exhaust all possibilities of voluntary settlement would deny a plaintiff standing to sue.¹⁵⁰ While the present Arbitration Code does not prohibit attempts at pre-trial dispute resolution, it no longer requires such efforts. The drafters of the new Arbitration Code concluded that pre-trial negotiations were usually an empty formality, often allowing bad faith defendants the time and opportunity to conceal assets potentially subject to claims.¹⁵¹ By permitting a plaintiff to file immediately upon discovery of a claim, there would appear to be a much greater chance that the claimant would be able to take full advantage of the Arbitration Code's new provisions for securing the amount in suit.

The elimination of the settlement-attempt requirement does not mean that a plaintiff can forego other legal rights against the defendant and simply file suit. The arbitration courts will, for example, dismiss an action where the claimant could have exercised rights under a security agreement or bank credit in satisfaction of a claim.¹⁵²

2. Filing Fees (the "State Duty")

As noted above, a plaintiff, immediately upon initiating suit, is required to certify that the appropriate filing fees have been forwarded to the arbitration court.¹⁵³ The ultimate responsibility

trial, appeal and cassational review could (and must, by virtue of time limitations imposed by the 1995 Code) be accomplished within four months. See Yuri Feofanov, *Arbitration Court Facing Black Business*, IZVESTIIA (Moscow), Sept. 21, 1995, at 2, available in LEXIS, World Library, Allnws File. It is hard to imagine that the trial of a complex multi-million dollar bankruptcy or production-sharing dispute could be concluded within two months from the date on which the complaint is filed. Since no provision is made in the Arbitration Code for the dismissal of active matters exceeding this time limit, it does not appear that the guarantee of expeditious proceedings is, by any means, strictly observed.

¹⁴⁹ See *supra* note 87 and accompanying text.

¹⁵⁰ See Code of Arbitration Procedure, *supra* note 19, art. 104.

¹⁵¹ See Maslennikov, *supra* note 133, at 5.

¹⁵² See Code of Arbitration Procedure, *supra* note 19, art. 87(4).

¹⁵³ See *id.* art. 104.

for filing costs, however, will depend upon the outcome of the action, with expenses allocated in proportion to the degree of each party's success on the merits.¹⁵⁴ The state duty is assessed as a given percentage of the total value of the claims in suit.¹⁵⁵ The rate at which the duty was initially set, ten percent of the amount in dispute, drew sharp criticism from judges and legal scholars, who noted that filing fees would prove a powerful deterrent to some less wealthy potential plaintiffs with substantial, meritorious claims.¹⁵⁶ The state duty was reduced in early 1995 to a maximum of five percent, with a sliding scale down to one-half of one percent for the largest claims.¹⁵⁷ Provision was also made for repayment by installment and other methods.¹⁵⁸

3. Dismissal of Claim: Prior Adjudication and Alternative Fora

Article 85 of the Arbitration Code lists a number of grounds for summary dismissal of claims, with prejudice, including: 1) improper subject matter for an arbitration court; 2) the existence of a prior decision issued by an RF arbitration court or court of general jurisdiction on the *same subject matter, between the same parties and on the same grounds*; 3) a prior arbitral award meeting the same criteria, unless an arbitration court has previously rejected a petition for its execution; 4) liquidation or death of a party unless provision for succession is made; or 5) withdrawal of claim(s) or voluntary settlement, provided that such is approved by the court.¹⁵⁹

Arbitration courts will dismiss a claim, without prejudice, where: 1) a case meeting the former-adjudication standards listed above is pending in an RF arbitration court, a court of general

¹⁵⁴ See *id.* art. 93; see *infra* notes 212-18.

¹⁵⁵ See *id.* art. 91.

¹⁵⁶ See Maslennikov, *supra* note 133, at 5.

¹⁵⁷ See, e.g., On the Introduction of Amendments and Addenda to the Law of the Russian Federation 'On the State Duty,' RF Law No. 226-FZ of Dec. 31, 1995, *Sobr. Zak. i Norm. Akt. RF*, Issue No. 35, Item No. 3503 (1995) (on file with the author).

¹⁵⁸ See, e.g., *id.*

¹⁵⁹ See Code of Arbitration Procedure, *supra* note 19, art. 85.

jurisdiction or arbitration tribunal (*i.e.*, a *treteyskiy sud*¹⁶⁰); 2) the parties to suit have agreed to private arbitration of such claims and defendant insists on arbitration in a limited appearance before the court; or 3) the plaintiff has failed to exhaust other remedies against the defendant or has not, where applicable, complied with a pre-trial order.¹⁶¹ The plaintiff will be able to reinstate the action upon resolution of the circumstances requiring abstention.¹⁶²

Decisions of most foreign courts and tribunals will also preclude further adjudication between *the same parties on the same subject matter and legal grounds*.¹⁶³ A pending proceeding in another forum, if commenced prior to the suit in the RF court, will result in a stay of the Russian action.¹⁶⁴

4. Other Grounds for Refusal to Hear Claim

While the Arbitration Code purports to list the exclusive bases for summary denial of a complaint, the application of these grounds, or the establishment of new criteria by the courts, has muddled the question of access to the arbitration court system. Observers have noted that the courts have been quite creative in dismissing suits, especially in large-scale bankruptcies and other complex matters.¹⁶⁵ Some decisions have exceeded the express provisions of the Arbitration Code to find dismissal merited where: 1) a registered mail receipt failed to indicate the proper title of defendant's agent signing for service of process, even though defendant acknowledged agency; 2) plaintiff failed to provide "indisputable evidence" of defendant's indebtedness, a quantum of proof found nowhere in the Arbitration Code; and 3) plaintiff did not offer evidence of measures taken to resolve the claim, a

¹⁶⁰ See *supra* note 5.

¹⁶¹ See *id.* art. 87.

¹⁶² See *id.* art. 88.

¹⁶³ See *id.* art. 214.

¹⁶⁴ See *id.* art. 87.

¹⁶⁵ Moscow courts have rejected almost all of the bankruptcy cases on wildly disparate grounds, leading Moscow lawyers to suspect that there exists some local instruction within the court system encouraging the dismissal of such suits. See Pyotr Barenboim, *Courts Hindering Application of New Bankruptcy Law*, BUS. INTELLIGENCE BULL., Vol. 18, May 11, 1995, available in 1995 WL 7966075.

requirement dropped by the current Arbitration Code.¹⁶⁶

There have also been instances where the arbitration courts have altered the substantive content of federal law to find dismissal warranted. The Moscow Regional Court and the RF Superior Arbitration Court have openly expressed dissatisfaction with the current bankruptcy statute and have been charged with ignoring remedies contained therein to which claimants have been clearly entitled.¹⁶⁷ In early 1995, the Moscow Regional Court, without even colorable authority to do so, reportedly attempted to deprive foreign firms of the right to institute bankruptcy proceedings.¹⁶⁸ In light of these decisions, it may be difficult to ascertain, at least until a claim is filed, the extent to which procedural and substantive rights guaranteed by RF law will be available in practice in the arbitration courts.

E. Applicable Law of Decision in the Arbitration Courts

1. Application of Foreign Law

The new Arbitration Code, consistent with prior legislation, provides that an arbitration court shall, where appropriate, apply principles of foreign law in conformity with prevailing interpretations and practices in the country of origin.¹⁶⁹ The applicability of foreign law to specific types of disputes is determined by international treaties of the RF and Russian conflicts-of-law rules.¹⁷⁰ In order to ascertain the contents of

¹⁶⁶ See Ivan Fyodorov, *Court Afraid to Deal with Bankruptcy*, BUS. INTELLIGENCE BULL., Vol. 23, June 15, 1995, available in 1995 WL 7966102.

¹⁶⁷ See Barenboim, *supra* note 165, at 3.

¹⁶⁸ See Pyotr Barenboim, *Court Proceedings on Insolvency are Slow*, BUS. INTELLIGENCE BULL., Vol. 5, Feb. 3, 1995, available in 1995 WL 7966008.

¹⁶⁹ See Code of Arbitration Procedure, *supra* note 19, art. 12(1).

¹⁷⁰ See *id.* art. 11(5). While the Arbitration Code does not make specific reference to the enforceability of choice of law clauses, Russian conflicts rules allow parties to a dispute to contract out of the application of law which would control in the absence of agreement. See *infra* note 175 and accompanying text. This "indirect" route to recognition of a choice-of-law clause may require that the validity of the clause first be determined by reference to Russian contract law. This is in marked contrast to ICAC procedure where a choice-of-law clause determines both the substantive law *and* the conflicts rules applied.

foreign law, an arbitration court may consult with government agencies and organizations in the RF and abroad or may consult specialists in foreign law.¹⁷¹ If, after taking these measures, the court cannot adequately establish the rule of decision, Russian law will be applied to the dispute.¹⁷² Questions of court procedure and execution of judgments will be resolved by Russian law.¹⁷³

2. Russian Conflicts Rules

Pending adoption of Part Three of the new RF Civil Code,¹⁷⁴ conflicts of law are governed by the 1964 RSFSR Civil Code and the Fundamentals of Civil Legislation of the U.S.S.R. and the Republics of 1991 ("Fundamentals"). The Russian conflicts rules can be supplanted by private agreement providing for an alternate rule of decision.¹⁷⁵ Where the application of Russian law would conflict with an international agreement of the RF, such treaty controls.¹⁷⁶

The Fundamentals are context-specific, assigning controlling law to particular types of cases. In general terms, the applicable law is determined as follows: 1) property disputes: location of the contested property at the time of suit or when grounds for suit arose; 2) contracts cases (enforceability and terms): state in which agreement has been concluded, with Russian law determining the place of contract formation; 3) shipping disputes: seller's location or, for determining title, country of origin of the goods; 4) other international business matters: residence/principal place of business of party in capacity of lessor, vendor, licensor, lender, insurer, etc.; 5) disputes arising from joint-venture agreement:

¹⁷¹ See Code of Arbitration Procedure, *supra* note 19, art. 12. Additional expenses will be added to the "state duty." See *id.* art. 94; *supra* notes 153-58 and accompanying text.

¹⁷² See *id.* art. 12(3).

¹⁷³ See *id.* art. 215(3).

¹⁷⁴ In addition to revising Russia's conflicts rules, Part Three will address other questions of "private international law," potentially affecting many of the issues discussed in this section. See Simon Baker, *Code Defines Contracts, Tenders*, MOSCOW TIMES, Feb. 6, 1996, available in LEXIS, World Library, Allnws File.

¹⁷⁵ See Fundamentals of Civil Legislation of the U.S.S.R. and the Republics, Vedomosti RSFSR, No. 26, Item 733, 1991, arts. 164-5 (on file with the author).

¹⁷⁶ See KONST. RF art. 15(4) (1993).

forum where venture established; and 6) unjust enrichment, commercial torts and compensatory actions for business losses: place where wrongful actions took place.¹⁷⁷ The phraseology of many of the criteria set by the Fundamentals is vague, potentially leaving open a number of factual and interpretive questions likely to be resolved in favor of the application of Russian law.

3. Conflict Among Russian Federal Laws and Regulations

Russia's rapid transition from a closed command economy toward participation in global markets has left the nation's legal infrastructure in a somewhat ill-defined state. Because of uncertainties as to respective spheres of authority, the President, legislature, ministries and administrative agencies face the real possibility of issuing conflicting directives on a given topic. Adding to the complexity is the fact that, pursuant to federal order, Soviet law (both U.S.S.R. and RSFSR acts) remains effective in the RF to the extent to which it is not superseded by newer RF enactments.¹⁷⁸ In the absence of clear preemption doctrines in Russian jurisprudence, it is difficult to ascertain the degree of conflict required for an older law to lose effectiveness.

Article 15 of the RF Constitution sets forth the framework by which conflicts among federal law and regulation are to be resolved.¹⁷⁹ The Constitution is paramount, followed by, in decreasing significance: 1) federal legislation (statutory law), 2) Presidential orders and decrees, and 3) administrative or ministerial regulations. The Constitution does not specifically address the difficulty arising where conflicting directives are

¹⁷⁷ For organizational purposes, the Fundamentals assign each case to one of three general categories: 1) property disputes, 2) contracts cases, and 3) conflicts arising out of international trade transactions. See Fundamentals of Civil Legislation of the U.S.S.R. and the Republics, Vedomosti RSFSR, No. 26, Item 733, 1991, arts. 164-6 (on file with the author).

¹⁷⁸ On the Ratification of the Agreement on the Creation of the Commonwealth of Independent States, RSFSR Supreme Soviet Resolution No. 2014-1 of Dec. 12, 1991, art. 2 (on file with the author); see also, On Regulation of Civil Legal Relations During the Period of Economic Reform, RSFSR Supreme Soviet Decree of July 14, 1992, Vedomosti RF Issue No. 30, Item 1800 (1992) (on file with author).

¹⁷⁹ See KONST. RF art. 15 (1993).

issued by agencies sharing the same tier of federal authority.¹⁸⁰ On a number of occasions, Russia's highest courts have stepped in to issue authoritative rulings on these conflicts.¹⁸¹ The courts, however, will never be able to catch up with the legal inconsistencies generated daily unless there is greater intra-governmental cooperation on regulatory jurisdiction issues.

4. *Conflicts Between Federal and Local Authority*

In its provisions on federalism, the Constitution begins with a blanket reservation of regulatory authority to local government.¹⁸² The Constitution then sets forth the areas in which the federal government may act, broadly dividing regulatory issues into matters of federal, concurrent or regional jurisdiction.¹⁸³ Within the RF government's exclusive federal authority are those matters common to any country's assertion of national sovereignty, *e.g.*, foreign relations, currency, national security, etc.¹⁸⁴ While a variety of issues are reserved to the exercise of regional "police powers," the concurrent jurisdiction of the federal government extends to matters which would, in American jurisprudence, typically be issues of local concern.¹⁸⁵

In essence, local laws and regulations must generally be followed unless federal authorities, acting within the scope of exclusive federal or joint jurisdiction, enact a contradictory

¹⁸⁰ *See id.*

¹⁸¹ *See* Igor Karpenko, *Arbitration Court Dons the Robes*, IZVESTZIA (Moscow), Oct. 23, 1994, at 4, *translated in* FBIS-VSR-93-146. Such rulings are binding on all lower courts. *See* RSFSR Arbitration Court Act, Vedomosti RSFSR, No. 146, 1991, art. 7, *available in* LEXIS, World Library, Sovleg File.

¹⁸² Article 73 declares the sovereignty of the "subjects of the RF," and provides for "equal, plenary authority" of each subject on matters where not preempted by federal enactments. KONST. RF art. 73 (1993). In the absence of direct conflict between federal and local acts, judicial decisions on the question of preemption are often varied since there appear to be no standards by which the court can analyze whether the federal authorities intended to preempt the field.

¹⁸³ *See id.* arts. 70-72.

¹⁸⁴ *See id.* art. 70.

¹⁸⁵ Article 72 of the Constitution places within joint federal/regional jurisdiction such matters as general public health and safety, domestic relations, real property ownership and the preservation of "law and order." *See id.* art. 72.

mandate directly on point.¹⁸⁶ Where there is conflicting authority on a question of concurrent ("joint") jurisdiction, the federal enactments control.¹⁸⁷ A private party cannot, however, assume that a local regulation has lost legal force due to the issuance of an inconsistent federal directive. The acts and decisions of regional administration remain effective until overturned by judicial decision.¹⁸⁸ The best strategy for the foreign investor is compliance with clear federal mandates, with due deference for the instructions and opinion letters of local administration.

F. Obtaining Discovery in the Arbitration Courts

1. Assistance of RF Courts in Litigation Proceeding Abroad

Pursuant to a long-standing international agreement, Russian courts will provide assistance with evidence gathering and other matters upon petition of a foreign court.¹⁸⁹ Arbitration courts will carry out requests relating to service of process, obtaining documentary evidence and examination of experts, as well as other factual inquiries requiring local investigation.¹⁹⁰ While it is unclear whether factual witnesses (i.e., non-expert or "lay" witnesses) may be subpoenaed and examined, the Arbitration Code notes that all applications for assistance will be carried out in conformity with Russian rules of procedure.¹⁹¹ Whether this is intended as a limitation on procedural rights, or rather as a grant of court privileges equal to those of domestic litigants, is uncertain. As to the types of assistance specifically addressed in the Arbitration Code and international agreements, an arbitration court will only

¹⁸⁶ See *id.* art. 73.

¹⁸⁷ See *id.* art. 76(5).

¹⁸⁸ See On Guarantees of Local Self-Government in the RF, RF President's Decree No. 2265, Dec. 22, 1993, art. 3, available in LEXIS, Intlaw Library, Rflaw File.

¹⁸⁹ The Consular Convention was signed by the United States and the U.S.S.R. on June 1, 1964 and became effective in the Soviet Union on July 13, 1968. International obligations of the U.S.S.R. have been assumed by the RF. See *supra* note 8 and accompanying text.

¹⁹⁰ See Code of Arbitration Procedure, *supra* note 19, art. 215(1).

¹⁹¹ See *id.* art. 215(3).

deny a request if execution of such would exceed the court's jurisdiction or would threaten the sovereignty or national security of the RF.¹⁹²

2. *Discovery in Proceedings Filed in Arbitration Court*

The process of evidence gathering in the arbitration courts of the RF relies more heavily on "informal" discovery. A litigant may only turn to an arbitration court for discovery assistance upon a showing that there is "no possibility to independently obtain the necessary proof from another person."¹⁹³ To obtain a discovery order, a party must state with specificity, as to each piece of evidence, what the requested materials are expected to establish.¹⁹⁴ A recipient of a court order, whether a non-party or a participant in the proceeding, has the option of submitting the evidence to the court or directly to the party lodging the request.¹⁹⁵ As may be of special concern to foreign investors, persons complying with discovery orders may request, before production, that trade secrets and other commercial information be protected by a confidentiality order.¹⁹⁶ A regional court is competent to compel discovery of documents and things located anywhere in the RF by referral to an appropriate court in the region in which the evidence is found.¹⁹⁷

As is common in civil law systems, RF courts take an active role in factual investigation.¹⁹⁸ While it is incumbent upon the parties to come forward with proof of their claims, it is the court that will largely determine what evidence is presented.¹⁹⁹ Interrogatories and depositions, as understood in the West, do not

¹⁹² See *id.* art. 215(2).

¹⁹³ *Id.* art. 54(2).

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See *id.* art. 9. The language of this Article purports to limit this protection to persons "participating in the case." *Id.* "Participants" are identified in Article 32 of the 1995 Code, and the definition appears to extend only to those qualifying as "interested persons." *Id.* art. 32.

¹⁹⁷ See *id.* art. 73.

¹⁹⁸ See, e.g., *id.* art. 69-70.

¹⁹⁹ See *id.*

take place in Russian litigation, and the testimony of witnesses is more commonly used to explain the documentary evidence presented than to establish independently the facts in dispute.²⁰⁰ An arbitration court may request that the parties produce additional evidence²⁰¹ and may appoint experts to initiate its own investigation if it is dissatisfied with the presentations by the parties.²⁰²

3. *Discovery Sanctions*

Careful compliance with discovery rules is essential in an arbitration court proceeding since any evidence obtained in violation of the Arbitration Code or other federal law will be excluded.²⁰³ A party or other person subject to a discovery order may face fines of up to \$2,500 for noncompliance,²⁰⁴ and assessment of such penalty does not release the person fined from the obligation to produce the evidence or from liability for future penalties such as contempt.²⁰⁵ In the event that the evidence sought cannot be produced, notice stating the reasons for nonproduction must be sent to the court within five days of receipt of the order.²⁰⁶ It is unlikely that an arbitration court, by way of sanction, will accept a fact as established where it has reason to believe that evidence wrongfully withheld would establish otherwise.²⁰⁷ Willful noncompliance with court orders, however, may affect the court's final allocation of litigation costs.²⁰⁸

²⁰⁰ See *id.* arts. 69-70.

²⁰¹ See *id.* art. 53(2).

²⁰² See *id.* art. 68(4), (5).

²⁰³ See *id.* art. 52.

²⁰⁴ See *id.* art. 54(3). This article specifies that the assessment may reach 200 times the federally-set monthly minimum wage, which, as of August 1, 1995, was set at 55,000 rubles, or \$12.50 at then prevailing exchange rates. See *id.*

²⁰⁵ See *id.* art. 54(4).

²⁰⁶ See *id.* art. 54(3).

²⁰⁷ Even in the case of admissions, a court will independently investigate as to whether each assertion is consistent with the facts of the case. See *id.* art. 70(3). Perhaps stemming from the Soviet-era concept of a lawsuit as the search for a single "objective truth," a Russian court would be unlikely to regard a fact as true simply to punish a litigant.

²⁰⁸ See *id.* art. 95(3).

G. Voluntary Settlements

While it is common practice in many legal systems for a court, before authorization, to review a settlement agreement for signs of fraud or duress, the measure of scrutiny in Russian courts appears to be much broader. An arbitration court will not accept an amicable resolution if such would countenance a violation of the law or the rights of third persons.²⁰⁹ The court, upon discovering a legal infraction, may require that the culpable party take measures to comply with the law.²¹⁰ Given the broad intervention rights of administrative and law enforcement authorities,²¹¹ these limitations on voluntary resolution could prove problematic for a litigant where the court learns of a violation asserted by an adversary as a bargaining chip toward settlement.

H. Court Costs

A claimant must, upon instituting an action, forward to the court a statutorily-determined filing fee, the "state duty," which is applied to the general administrative fund of the arbitration courts.²¹² Additional expenses, such as those involved in summoning and presenting witnesses and executing the judgment are posted by the party making the request for such action.²¹³ The state duty and all other expenses are placed into the court's trust account to be allocated among the parties at the conclusion of the suit.²¹⁴ All costs incurred by the court in engaging in an independent investigation are paid out of the court's own operating funds into this account, but the ultimate responsibility for these expenses rests with the parties.²¹⁵

At the termination of proceedings, the court allocates liability

²⁰⁹ See *id.* art. 37(4).

²¹⁰ See *id.* art. 141.

²¹¹ See *id.* arts. 32, 41, 42.

²¹² See *id.* art. 91. The state duty owed to the court is determined as a percentage of the value of the plaintiff's claim. See *id.* If the amount sought by the plaintiff is increased, additional fees must be paid into the court, with no entitlement to rebate if the claim is later reduced. See *id.*

²¹³ See *id.*

²¹⁴ See *id.* art. 93.

²¹⁵ See *id.* arts. 94-95.

for the state duty and other expenses among the parties in proportion to their relative success on the claims.²¹⁶ If, for example, the plaintiff fails entirely to recover on the claim, all expenses will rest with the plaintiff. The parties may, by private agreement, stipulate out of this method of allocation.²¹⁷ In the event of misconduct by a party, the court may disregard the outcome of the case and increase the expenses to be borne by the offending party, in addition to any fines assessed.²¹⁸

I. Remedies and Enforcement/Execution of Judgments

1. Types of Relief Available in Arbitration Courts

The Arbitration Code, in broad terms, authorizes essentially four categories of remedy: damages, injunctive relief, specific performance and declaratory relief.²¹⁹ Available remedies under the Arbitration Code are not mutually exclusive. The courts may combine aspects of each to fashion certain unique forms of redress.²²⁰ Upon review of recent decisions, it would appear that, in cases other than claims for collection of a straight-forward debt, the preferred remedies are specific performance and declaratory relief.²²¹

This apparent preference for non-monetary relief may stem from two factors. First, Russian courts have encountered difficulties in tracing accounts and avoiding dissipation of funds needed to pay judgments.²²² Second, accurate ascertainment of actual monetary losses is often an unrealistic option due to the volatility of the Russian market and the inexperience of the court in dealing with constantly emerging types of business activities.²²³ A common remedy employed by the courts is simply to declare a transaction a legal nullity without further investigation as to losses

²¹⁶ See *id.* art. 95.

²¹⁷ See *id.*

²¹⁸ See *id.*

²¹⁹ See *id.* arts. 128-34.

²²⁰ See *id.*

²²¹ See, e.g., *infra* notes 291-92 and accompanying text.

²²² See, e.g., *infra* note 412 and accompanying text.

²²³ See, e.g., Barenboim, *supra* note 165; Fyodorov, *supra* note 166; *infra* note 268.

or unjust gains occasioned in entering into the deal.²²⁴ In a March 1996 case involving the Nick and C. Corporation, the Moscow Arbitration Court ordered the return to the government of privatization shares found to have been illegally sold, but made no provision for rebate of the purchase price or for opportunity losses claimed by good-faith participants in the share auction.²²⁵ Such "incidentals" were again overlooked by another arbitration court which nullified the result of a tender offer for shares in the Bratsk Aluminum smelting plant without further comment as to the parties' rights to shares and compensation, leaving vigorous trading in the shares while the matter stood on appeal.²²⁶ In both cases, the court apparently failed to recognize that, in a rapidly changing market, simply voiding a deal does not necessarily restore the status quo.

2. *Methods for Securing the Availability of Remedy*

Due to the frequently precarious financial condition of many Russian enterprises, as well as the absence of stringent fraudulent-conveyance laws, commentators have long stressed the need for effective prejudgment remedies to assure the availability of meaningful relief when judgment is rendered.²²⁷ Under the Arbitration Code, an arbitration court will, at any time in the proceedings, entertain a request for preliminary relief to be considered within twenty-four hours of filing a petition.²²⁸

²²⁴ See, e.g., Valentina Alexeyeva, *U.S. Firm Leaders Cannot Explain Huge Profits in Russia*, ITAR-TASS (Moscow), Mar. 22, 1996, available in LEXIS, World Library, Curnws File.

²²⁵ See *id.*

²²⁶ See *Shareholders' Composition May Change*, CIS ECON. & FOREIGN TRADE (Moscow), Feb. 21, 1995, available in 1995 WL 8290525.

²²⁷ See, e.g., Jason Verville, *Commercial Litigation and the Enforcement of Civil Judgments in Russia*, COM. LAW BULL., Vol. 11, No. 4, July/Aug. 1996, at 41-47, available in LEXIS, World Library, Allnws File.

²²⁸ Implementation of such requests can be rapid as well. In the widely-publicized case involving the Lebedinsk Ore-Dressing Mill, plant management, on the eve of a shareholders' meeting, filed suit in an arbitration court alleging violations of federal antitrust laws by outside shareholders. See Valor Volkov, *Owner-Investor Conflict Leads to the Attachment of Shares*, BUS. INTELLIGENCE BULL., Jan. 26, 1996, available in 1996 WL 8405554. Within hours of filing the action, the court issued an order freezing the shares, thereby denying the "outsiders" voting rights to oppose a resolution,

Measures available to the plaintiff for securing the claim include, among others: 1) arrest of defendant's property and freezing of accounts; 2) prohibition on defendant from engaging in certain activities; and 3) injunction of third parties from acting with respect to the property in dispute.²²⁹ The failure of defendant to comply with the prejudgment order may result in a fine of up to fifty percent of the value of the claim *in addition to* liability for any damages incurred by plaintiff as a result of noncompliance.²³⁰ The defendant, on the other hand, may petition the court to require that the plaintiff post adequate security for potential losses from the preliminary measures requested²³¹ and may file suit to recover actual damages sustained if plaintiff's claim is denied in full.²³² If the Lebedinsk shareholder suit mentioned above is an indication of the general willingness of the courts to issue prejudgment orders, the latter remedy would appear to be a necessary adjunct to a process so easily abused.

3. Execution of Judgments

As soon as a judgment becomes effective,²³³ the prevailing claimant may seek a writ of execution.²³⁴ Upon issuance of the writ, the judgment debtor has up to six months, in most cases, to comply fully with its terms before the holder can turn to the court

adopted at the meeting, authorizing the issuance of a second class of securities. *See id.* Not surprisingly, the plant did not file an appeal when its allegations were found to be without merit. *See id.* The outside shareholders filed a complaint against plant management seeking compensation for economic losses sustained as a result of the suspension of voting rights. *See id.* One year later, the same regional arbitration court that froze the outsiders' shares issued an order nullifying the secondary issuance, merely restoring the plant's stock ledger to pre-dilution status. *See Moscow Shareholders Come Back to Ore-Dressing Mill*, COMMERSANT (Moscow), Nov. 16, 1996, at 8, available in LEXIS, World Library, Txtlne File.

²²⁹ *See* Code of Arbitration Procedure, *supra* note 19, art. 76.

²³⁰ *See id.*

²³¹ *See id.*

²³² *See id.* art. 80.

²³³ A judgment's entry into legal force occurs one month after it is rendered unless it is appealed, in which case, it is effective immediately upon issuance of the appellate decision. *See id.* art. 135. Approved settlements and declaratory judgments against government acts take immediate effect upon the trial court's ruling. *See id.*

²³⁴ *See id.* art. 198.

for more austere measures of compulsion.²³⁵ Unless the court accepts a petition for modification, installment payment or substituted performance on the debt,²³⁶ the expiration of the execution period allows the claimant recourse to the debtor's property and may trigger substantial fines.²³⁷ Penalties of up to \$2,500²³⁸ may be assessed against the debtor, and a bank or other institution in violation of an earlier court order for the release of debtor's property may be fined in an amount up to fifty percent of the debt or, for repeated violations, may have its banking license revoked.²³⁹ Any fines exacted do not offset liability on the underlying debt.²⁴⁰

As to a judgment calling for specific performance, there are a few enforcement options available. First of all, the judgment holder may make arrangements to perform, or have performed, the obligations directed by the court and may assess the costs to the debtor.²⁴¹ Secondly, a request may be lodged with the court for the exaction of fines up to \$2,500 in order to compel satisfaction of the judgment.²⁴² Alternatively, or by way of supplement to the previous two options, the prevailing claimant may file an action seeking compensatory damages from the debtor for losses resulting from delay in execution.²⁴³ As to judgments against government agencies and officials, the court may direct that certain ministerial functions be performed (i.e., a mandamus action)²⁴⁴ but, as a general rule, monetary assessments or damages

²³⁵ See *id.* art. 201.

²³⁶ See *id.*

²³⁷ See, e.g., *id.* arts. 206-09.

²³⁸ This amount may exceed 200 times the federal minimum wage. See *id.* art. 53(3).

²³⁹ See *id.* art. 206. Criminal charges may also be levied against bank officials. See On Payments Resolution, Letter from the RF Superior Court of Arbitration No. S1-7/OP-557, Aug. 10, 1994 (on file with the author).

²⁴⁰ See Code of Arbitration Procedure, *supra* note 19, art. 206(4).

²⁴¹ See *id.* art. 131.

²⁴² See *id.* art. 207.

²⁴³ See *id.* art. 129.

²⁴⁴ See *id.* art. 132.

actions will not lie unless specifically authorized.²⁴⁵ Unfortunately, seeking execution of an arbitration court judgment is not always as orderly and systematic in practice as the law might suggest.

J. Public Perceptions and General Comments on the Effectiveness of the Arbitration Courts

Since its establishment in 1991, Russia's system of arbitration courts has endured substantial criticism from litigants, foreign investors, and legal scholars. Observers point out that, among other things, judicial treatment of the issues and interpretations of the law vary widely from region to region and case to case.²⁴⁶ Although many specific procedural and practical shortcomings have been highlighted, most criticisms, in broader terms, focus on: 1) the courts' relative inexperience and lack of expertise in sophisticated commercial matters; 2) the susceptibility of the arbitration process to the dictates of government agencies and officials; and 3) the total lack of effective means to enforce an arbitration court judgment.²⁴⁷ A review of these complaints, however, reveals that a number of advancements have already been made and that prospects are strong for improvement.

1. The Criticisms

a) The Prosecutorial Bias: Reality or Rationalization?

Many commentators expected the May 1995 enactment of the Code of Arbitration Procedure to signify a clear break from the former role of the arbitration courts as an aggressive vehicle of law enforcement.²⁴⁸ While the Arbitration Code reaffirms the

²⁴⁵ The Chairman of the RF Superior Court, V. Yakovlev, expressed doubts as to a court's ability to force government action, noting that "the court of arbitration can't do that; the law has no provisions for compelling the government." Feofanov, *supra* note 148. This statement, made subsequent to enactment of the Arbitration Code's "mandamus" terms, may simply mean that the courts may issue such orders but are without practical means to enforce them. See Maslennikov, *supra* note 133.

²⁴⁶ See *id.*

²⁴⁷ See *id.*; see also Vail, *supra* note 73.

²⁴⁸ See, e.g., Vladimir V. Mironov, *Rules of Procedure of the International Court of Commercial Arbitration*, RUSSIA & COMMONWEALTH BUS. L. REP., Aug. 2, 1995, available in LEXIS, World Library, Reblr File.

independence of the courts vis-a-vis other branches of government and administration,²⁴⁹ it also retains as one of the primary goals of arbitration proceedings “assistance in the strengthening of legality and in the prevention of law breaches in the sphere of . . . economic activity.”²⁵⁰ Such broad statements would appear to mandate a prosecutorial mission for the courts,²⁵¹ but a closer analysis of recent cases reveals that the operation of the arbitration courts may not be easily classified as such.²⁵²

The common complaint levied by the Western investor against the arbitration court system is essentially that, in light of the morass of conflicting law and regulation currently effective in the RF, the court is always able to find some infraction, and, where it would benefit government interests to do so, it will vigorously pursue the violation in reaching its decision.²⁵³ One lawyer noted that one way for the government to avoid paying compensation for renationalization is to declare the privatization of a particular property or enterprise illegal.²⁵⁴ Another attorney, noting the inevitability of *some* legal violation, commented that “[b]ecause of the presumption of state power, I don’t think [state entities] would have much of a problem making that argument [that the grant of property rights was illegal].”²⁵⁵

There have been some widely-publicized decisions supporting a cynical view of the arbitration courts as the result-driven arbiter of state interests.²⁵⁶ Some observers have attempted to show that the arbitration courts are being used systematically as a vehicle for the expropriation of foreign investment. For example, a report in a

²⁴⁹ See Code of Arbitration Procedure, *supra* note 19, art. 5.

²⁵⁰ *Id.* art. 2(2).

²⁵¹ In addition to such declarations, there are certain provisions in the current Arbitration Code which would allow the arbitration courts, if so inclined, to carry out effectively the enforcement interests of government entities. For example, a procurator (essentially a federal prosecutor) or other state organ has the right to intervene in proceedings at anytime for “the protection of state and public interests.” *Id.* arts. 41, 42.

²⁵² See *infra* notes 291-92, 301-12 and accompanying text.

²⁵³ See, e.g., *infra* notes 301-12 and accompanying text.

²⁵⁴ See Natasha Mileusnic, *Paths to Renationalization*, MOSCOW TIMES, Feb. 20, 1996, at 3, available in LEXIS, World Library, Curnws File.

²⁵⁵ *Id.*

²⁵⁶ See *infra* notes 301-12 and accompanying text.

petroleum industry journal noted that, in 1993, a local prosecutor in the Khanti-Mansiisk region had brought eleven court challenges to the issuance of field-development licenses and was successful in overturning three of them.²⁵⁷

Any conclusion as to the existence or non-existence of a prosecutorial bias in the arbitration courts, based solely upon a selective review of only the most widely-known cases, would be premature. Arbitration courts have, on a number of occasions in the past few years, resolved major disputes in favor of the investor over strenuous objection by local and federal authorities.²⁵⁸ The willingness of the courts to confront government dictates has increased as the courts gain greater expertise in commercial matters.²⁵⁹ Investors, however, would probably rest more easily if the arbitration courts, in following the example of the courts of general jurisdiction, relinquished their affirmative investigatory duties and the obligation to protect the rights of potentially interested parties.²⁶⁰ Until such time, the specter of a prosecutorial bias, whether justified or not, will continue to taint the investor's view of the RF arbitration courts.

²⁵⁷ See Vladimir Afanasiev, *Russian Supreme Court Ruling Delivers Big Blow to Joint Venture Oil Projects; Hunt Oil Co. Prohibited from Developing Khanti-Mansiisk Field*, OIL DAILY, Sept. 2, 1994, at 1, available in LEXIS, News Library, Arcnws File. Although the *Hunt* case was decided by the Supreme Court (general jurisdiction), the primary focus of Mr. Afanasiev's article is the system of arbitration courts. See *id.*

²⁵⁸ See, e.g., Vladimir Afanasiev, *Russian Firm's Appeal Complicates Matters as Amoco Nears Agreement to Develop Field*, OIL DAILY, Dec. 12, 1994, at 1, available in LEXIS, News Library, Arcnws File. This article suggests, however, that the regional court based its decision more upon the local need for revenue derived from the Amoco venture than upon Amoco's legal basis for its claims. See *id.*

²⁵⁹ See, e.g., *infra* notes 287-92 and accompanying text.

²⁶⁰ The Civil Procedure Code, governing practice in the RF courts of general jurisdiction, was amended to eliminate the court's independent obligations to seek evidence and to assure that the parties rights are adequately protected in any proposed voluntary settlement. For a summary of this change and other recent amendments, see Daniel J. Rothstein, *Amendments to Civil Procedure Code*, EAST/WEST EXECUTIVE GUIDE, Feb. 1, 1996, available in LEXIS, World Library, Allwld File.

b) Arbitration Courts Do Not Have Sufficient Commercial Law Expertise for Resolution of Complex Matters.

Many observers have noted that the arbitration courts have a tendency to oversimplify cases and claims brought before them in order to resolve disputes in conformity with the clear dictates of federal law.²⁶¹ Proponents of this argument cite the caseload in the arbitration system and the inexperience of judges as the primary factors in the courts' unwillingness to hear argument and resolve cases with full consideration of the legal nuances of the particular transactions at bar, especially where doing so would involve inquiry into novel areas of commercial law.²⁶² All of the blame should not fall to the judges or the courts themselves, however, since there is frequently little legislative or administrative guidance on the subject in suit. This fact is compounded by the tireless efforts of Russian and foreign dealmakers to explore new sectors of commercial activity.²⁶³ The lack of a clear rule of decision is understandably troublesome to a judicial system which, in keeping with its civil law tradition, is accustomed to resolving disputes in strict conformity with comprehensive legislation.²⁶⁴

These criticisms do find some support in recent court practice. In early 1995, the Moscow Arbitration Court, citing a lack of financial expertise, was forced to suspend proceedings indeterminately in a letter-of-credit transaction involving the sale of securities.²⁶⁵ Observers noted that, as the judge's desk piled up with articles, forms, hornbooks and other materials, the proceedings became so convoluted that the lawyers simply began to laugh.²⁶⁶ The judge stated that she would contact experts at the Finance Ministry and the Central Bank for guidance as to matters

²⁶¹ See, e.g., Barenboim, *supra* note 165; Fyodorov, *supra* note 166.

²⁶² See Maslennikov, *supra* note 133.

²⁶³ See *id.*

²⁶⁴ See, e.g., Viechtbauer, *supra* note 82, at 442-43.

²⁶⁵ *Russian Court Fails to Decide on Shares Dispute*, REUTERS EUROPEAN BUS. REP., Feb. 16, 1995, available in LEXIS, World Library, Reueub File.

²⁶⁶ See *id.*

of standard commercial practice in such credit arrangements.²⁶⁷ Such delays and uncertainties can be costly, as one litigant found, with the expense of the court's inexperience left to the parties to suit.²⁶⁸

c) The Arbitration Courts Will Always Resolve Legal Uncertainties in Favor of Government Interests, Especially in the Foreign-Investment Context.

This criticism appears to be the almost reflexive response of each dissatisfied litigant losing on a debatable regulatory issue. Proponents of this theory bemoan the common court practice of turning to legislative and executive authorities for their interpretations of the law and opinions on how law is to be applied to concrete factual settings.²⁶⁹ Foreign investors are especially critical of the courts' ability to protect their rights once an administrative or executive body has made the policy determination that a ruling against the investor would be in the government's best interests.²⁷⁰

Such concerns were even raised with those cases drawing intense media attention, disputes in which one would expect the court to make a pronounced showing of the integrity and independence of the arbitration court system. In a 1995 case, the Moscow Arbitration Court summarily dismissed a challenge to the government's controversial "shares-for-loans" program, sparking even greater condemnation from industrialists and now,

²⁶⁷ *See id.*

²⁶⁸ *See Maslennikov, supra* note 133. A basic misunderstanding by a trial court judge, later overruled by the RF Superior Arbitration Court, cost an enterprise five billion rubles (approximately \$1 million) in business losses, unrecoverable due to the finality of Superior Arbitration Court decisions and the general immunity from damages remedies enjoyed by the court system in the absence of bribery or willful misconduct. *See id.*

²⁶⁹ *See, e.g., Barenboim, supra* note 168.

²⁷⁰ *See, e.g., Mileusnic, supra* note 254 (citing a "presumption of state power" in the courts). *See also Afanasiev, supra* note 258 (arguing that courts will not interfere with investment, even upon the insistence of local administration, where there is a perceived federal interest in the project). Rulings such as these, as well as that passed in the Conoco matter discussed below, suggest to some that the legality or illegality of a venture's activities may depend on its economic importance to a region or the nation.

government officials.²⁷¹ The Court did not consider arguments as to the allegedly unfair practices authorized by the program, the fact that government-sanctioned auctions consistently drew bids grossly under market value or that the program as a whole was illegal.²⁷² Rather, the court simply ruled that the auction in suit was carried out in compliance with the procedure set by the government, thus obviating the need for further inquiry.²⁷³ Public outcry following the decision had prompted various official agencies to seek changes in the “shares-for-loans” initiative, and federal prosecutors immediately began preparing challenges to auctions effected under the program.²⁷⁴ In May 1996, the Moscow Arbitration Court annulled the shares-for-loans auction of oil giant Sibneft, citing violations of action rules and federal law. The extent to which the court’s move signaled a willingness to invalidate a government-sponsored agenda was undercut somewhat by the fact that the legislature had already sponsored and appointed investigatory committees to look into various auctions.²⁷⁵

The perception that the arbitration system is overly deferential to the government may be widespread. In the wake of Russia’s first nationwide investment-fraud scandal, the All-Russian Association of Entrepreneurial Unions and Movements offered to arbitrate disputes, noting that it was the only “independent and

²⁷¹ Plaintiffs claimed that the practice amounted to nationalization without compensation, in violation of the Constitution and Articles 235 and 306 of the RF Civil Code. See Elmar Murtazayev, *Anatoly Kulikov is a “Real Anpilovite,”* SEVODNYA (Moscow), Feb. 16, 1996, available in LEXIS, World Library, Allwld File. The RF State Property Committee supported this argument, noting that “shares-for-loans,” if carried out in a manner consistent with “just-compensation” requirements, would result in losses to the federal treasury. See *id.*

²⁷² See *id.*

²⁷³ See *Yukos Sale Challenge Imminent*, MOSCOW TIMES, Mar. 16, 1996, available in LEXIS, World Library, Mostms File.

²⁷⁴ See Aleksandra Budrys, *Russia Shares-For-Loans Suit Would Fail*, Committee Says, REUTERS—MONEY REPORT—BONDS CAPITAL MARKET, Mar. 15, 1996, available in LEXIS, Nexis Library, Reuters File.

²⁷⁵ See *Business News Abstracts: Russia—Privatization of Norilsk Nickel*, EAST/WEST COMMERSANT, Vol. 14, No. 11, June 15, 1996, available in LEXIS, Market Library, Iacnws File.

competent" body to resolve claims effectively and impartially.²⁷⁶ While this statement may simply have been meant by way of promotion to attract arbitration fees, it is significant that such a bold declaration was made by one of Russia's largest non-governmental organizations, established to represent the views of Russia's entrepreneurs and business leaders.

d) Execution and Satisfaction of Arbitration Court Judgments Can Be Problematic.

After clearing all of the procedural hurdles, obtaining an arbitration court judgment is far from the end of the battle. Russia's fast-paced economy, and the laws trying to catch up to it, have allowed almost unlimited opportunities for the concealment of assets designated by the courts for the satisfaction of judgments.²⁷⁷ The arbitration courts, under the Arbitration Code, now have a wide selection of pre- and post-judgment measures to secure claims and have employed them aggressively.²⁷⁸ The challenges in enforcing judgments stem more from a confluence of circumstances, such as the prevalence of organized crime, disjointed inter-agency efforts in law enforcement, and substantive deficiencies in corporate and bankruptcy laws, than from any specific shortcoming of the court system.²⁷⁹ Nevertheless, the unwillingness or the inability of the arbitration courts to meet the dispute-resolution needs of the new Russian economy has led many claimants and debtors alike to question the relevance of that forum.²⁸⁰

Dissatisfaction with the effectiveness of the arbitration courts has prompted the growth of a parallel system for the settlement of commercial disputes: the "bandit," "black," or "mafia" courts.²⁸¹ For obvious reasons, concrete data as to the prevalence of this

²⁷⁶ *Russian Bankers and Entrepreneurs Offer to Arbitrate in MMM Affair*, BBC SUMMARY OF WORLD BROADCASTS, Aug. 10, 1994, available in LEXIS, World Library, Bbc File.

²⁷⁷ See, e.g., *infra* note 412 and accompanying text.

²⁷⁸ See *supra* notes 228-32 and accompanying text.

²⁷⁹ See Feofanov, *supra* note 148.

²⁸⁰ See Barenboim, *supra* note 165.

²⁸¹ See *id.*; Feofanov, *supra* note 148.

form of dispute resolution are entirely lacking, but the issue is of sufficient import to have been addressed by RF Superior Arbitration Court Chairman Venyamin F. Yakovlev.²⁸² As noted by the interviewer, and confirmed by Yakovlev, these “courts” observe certain procedural standards in allowing each party to present its case, with judgment rendered by a mediator educated in the law.²⁸³ In one example, an otherwise lawfully-operating enterprise turned to a “bandit” court to enforce a debt and was successful in obtaining judgment *and* execution within three days of filing “complaint.”²⁸⁴ One can only speculate as to the content of the execution order. The use of such proceedings, however, does not necessarily reflect negatively on the arbitration system, since no judicial system respectful of due process and the rule of law could compete with the enforcement options offered in the unofficial “courts.” It will be important, however, that lawmakers address this practice by making provision for better access to summary or small-claims proceedings within the judicial system so that the “bandit courts” do not become a fallback means of debt collection in the RF.

2. Positive Trends and Prospects for Improvement in Arbitration-Court Practice

As noted above, the enactment of the Arbitration Code has supplied the arbitration courts with certain procedural tools to effect major improvements in operation.²⁸⁵ Questions remain, however, as to whether the courts will be able to exercise greater initiative and autonomy as concerns such as organized crime, political pressure and market volatility continue to factor significantly in Russian commercial life.²⁸⁶

There have been some recent cases in which arbitration courts have shown a greater level of confidence as to their role in the RF system of government, taking on difficult questions of law and, on occasion, challenging the government decisions. In a 1995 case

²⁸² See Feofanov, *supra* note 148.

²⁸³ See *id.*

²⁸⁴ See *id.*

²⁸⁵ See, e.g., *supra* notes 151, 159-64, 169-73 and accompanying text.

²⁸⁶ See, e.g., Maslennikov, *supra* note 133.

involving the Shopinsky Glassworks,²⁸⁷ the Superior Court of Arbitration took a more critical look into the financial records of a company declared bankrupt by local officials and ordered dissolved by the regional arbitration court.²⁸⁸ The Court, overturning both decisions, concluded that the determination of regional bankruptcy authorities may be considered simply as factual evidence and need not be adopted by an arbitration court.²⁸⁹ One Russian bankruptcy attorney characterized the decision as an "important step toward the civilized use of bankruptcy legislation."²⁹⁰

In a landmark real estate case decided in 1995, the Saint Petersburg Automotive Repair Plant No. 1 chose to bypass the usual administrative procedures entirely on application for a land grant, instead pinning its hopes for a declaration of title on the Saint Petersburg Regional Arbitration Court.²⁹¹ Notwithstanding vigorous opposition from municipal administration, the regional court granted the plaintiff an unqualified right of indeterminate use in the property and ordered municipal officials to certify this result and terminate any rent obligations of the plaintiff.²⁹² Authorities promised an appeal of the ruling to the Superior Arbitration Court,²⁹³ but it is unclear whether the challenge was ever filed. Regardless of the ultimate result, it is significant that the plaintiff chose to rely solely on the arbitration court, and the court defied political pressure to grant relief in a case so squarely adverse to state interests by ordering the divestment of property rights and rental income claimed by the government.

It is impossible to draw steadfast conclusions as to the impartiality or effectiveness of Russia's system of arbitration

²⁸⁷ See Pyotr Barenboim, *Court Cancelled Decision on Bankruptcy*, MOSCOW NEWS, Dec. 29, 1995, available in LEXIS, World Library, Mosnws File.

²⁸⁸ See *id.*

²⁸⁹ See *id.*

²⁹⁰ *Id.*

²⁹¹ See Sergei Vladimirov, *Saint Petersburg Land-Investors Aren't Giving In*, CURRENT DIGEST OF THE POST-SOVIET PRESS, Vol. XLVII, No. 18, May 31, 1995, at 15, available in LEXIS, World Library, Cdsp File.

²⁹² See *id.*

²⁹³ See *id.*

courts based solely on these cases. The discussion is offered merely to illustrate some of the practical considerations that may be encountered in dispute-resolution in the Russian courts. Foreign investors anticipating arbitration court litigation should make every effort to familiarize themselves with the myriad procedural rights guaranteed by the Arbitration Code and the recent judicial treatment of relevant substantive and procedural issues, with particular attention given to provisions relating to potentially-interested third parties. A litigant well-versed in, and vigorously insistent upon, his or her rights, and able to offer expert testimony as to international commercial practice, should find the arbitration courts to be an adequate forum. As noted by two attorneys at the Moscow office of a prominent U.S.-based law firm, the arbitration courts may be the most sensible choice of forum, in light of procedural refinements inaugurated by the Arbitration Code, in disputes where the amount claimed is inadequate to warrant the expense and inconvenience of arbitration abroad.²⁹⁴ Additionally, a court judgment, given the obligation of judges to assure legality and protection of the public interest,²⁹⁵ is more likely than a private award to withstand collateral attack by non-parties claiming unresolved interests in the earlier adjudication.²⁹⁶

V. Implications of Arbitration Procedure for Foreign Investors—Some Specific Contexts and Case Studies

In any transnational dispute where a choice of forum is available, there are a number of particular procedural characteristics of any single legal system which could produce an outcome different from that which could have been achieved in another jurisdiction on the same facts. Some specifics of RF arbitration court practice, as discussed herein, could, however, potentially have effects so wide-ranging as to frustrate the interest of a litigant or affected non-party in having a full and fair

²⁹⁴ See Lev Simkin & Ted Smith, *Foreign Investors Win Greater Access to Arbitration Courts*, EAST/WEST EXECUTIVE GUIDE, Vol. 5, No. 8, Aug. 1, 1995, available in LEXIS, World Library, Arcnws File.

²⁹⁵ See *infra* note 299 and *infra* note 300 and accompanying text.

²⁹⁶ See *infra* notes 344-46 and accompanying text.

opportunity to prosecute a claim or defense. These concerns are summarized in the discussion that follows under four general headings, namely: (1) justiciability considerations; (2) questions of former adjudication; (3) the application of rules-of-decision; and (4) execution of judgments.

A. Justiciability Considerations

1. Standing

As noted above, foreign investment in the Russian Federation is a heavily regulated field, and land use by foreign-controlled or joint ventures is strictly circumscribed by a vast array of public-interest legislation.²⁹⁷ Given a willingness of the arbitration courts to hear private actions in the sphere of regulation and administration,²⁹⁸ questions of standing take on particular significance for foreign investors. At present, the Arbitration Code does not attempt to define factors to be considered by courts in determining whether a plaintiff may bring suit on given facts.²⁹⁹ Likewise, the lack of identifiable judicial doctrine on the issue ensures that a "standing" determination is largely an ad hoc ruling,

²⁹⁷ See *supra* notes 74-81 and accompanying text.

²⁹⁸ See Poul Larsen, *Officials to Tighten Controls on Tenders*, MOSCOW TIMES, Jun. 28, 1996, available in LEXIS, World Library, Mostms File (noting that approximately ten percent of privatization tenders to date have ended up in arbitration courts).

²⁹⁹ Article 42 of the Arbitration Code allows "state and other bodies" to file claims "for the protection of state and public interests." Code of Arbitration Procedure, *supra* note 100, art. 42 (emphasis added). This provision condenses the list of actionable interests found in Article 37 of a former version of the Arbitration Code, which allowed suit by "state and other organs" in vindication of "the legitimate rights and interests of organizations and business persons." RSFSR Arbitration Court Act, 1991, art. 37, available in LEXIS, World Library, Sovleg File. Provision for "other organs," for purposes of public-interest representation under the prior Arbitration Code, was interpreted to have included state enterprises, registered public organizations, and other readily identifiable groups. See, e.g., Plenum Decree, No. 12/12, Aug. 18, 1992 (Russ.), available in LEXIS, World Library, Sovleg File. Presumably, given the similar placement, language and ostensible purpose of the provisions in both of the Arbitration Codes, "other bodies" in the current Arbitration Code bears a comparable meaning to "other organs" in the former. The only significant change in the current Arbitration Code is the restriction on the types of interests for which a group can claim representation.

variable upon an individual court's perception of the need to allow the claim "in protection of the public interest."³⁰⁰

A comparison of two recent cases illustrates the inconsistency with which issues of standing may be addressed in the arbitration courts. In a matter involving the interests of the American oil-company Conoco, the Social Ecological Union (SEU), a registered public organization, sought to challenge the grant of certain tax and land use concessions to Conoco.³⁰¹ The SEU, claiming that it represented the environmental and land use interests of citizens affected by Conoco's operations, filed suit against a number of federal agencies and officials.³⁰² The Superior Arbitration Court held that the SEU did not have standing since "the public interest" had already been adequately promoted by the presence in the courtroom of "a direct representative of the public," a deputy in the local administration who had voted in favor of the concessions.³⁰³ One commentator, attempting to explain the Court's apparent departure from the dictates of the Arbitration Code then in effect,³⁰⁴ noted cynically that the Court did not want to see Conoco's interests "jeopardized," since "other potential investors [would] be watching to see what happen[ed]."³⁰⁵

In a more recent case, however, the Moscow Arbitration Court sustained a challenge by a public interest group to an official license grant, allowing a private right of action under the

³⁰⁰ Code of Arbitration Procedure, *supra* note 19, art. 42. The Arbitration Plenum has, on a number of occasions, failed to agree on the range of permissible claimants in various contexts. See, e.g., Karpenko, *supra* note 181. These attempts indicate that the Plenum does not intend to create flexible doctrine analogous to the "zone of interests" or "statutory class" analyses familiar to American jurisprudence, but rather seeks to generate exclusive lists of the permissible parties in defined categories of disputes. See *id.*

³⁰¹ See Aleksey Portansky, *The Complaint Against the Government Has Been Dismissed, and the Road to Oil Has Been Cleared*, IZVESTIYA (Moscow), Nov. 25, 1992, at 2, available in LEXIS, World Library, Txtline File.

³⁰² See *id.*

³⁰³ *Id.*

³⁰⁴ See RSFSR Arbitration Court Act, Vedomosti RSFSR, No. 146, 1991, art. 1, 37, available in LEXIS, World Library, Sovleg File.

³⁰⁵ *Id.*

regulations governing license-tender procedure.³⁰⁶ Tayozhnik, a coalition of several indigenous groups, filed suit against the Russian Committee for Natural Resources (Goskomnedr) and local authorities, claiming that the allegedly illegal grant of a drilling license to the White Nights venture had adversely affected the group's property rights.³⁰⁷ White Nights, a joint venture between Phibro Energy Production, Anglo-Suisse, and Varyeganneftgaz, the Russian oil-production association, was not a party to the action, yet its rights under the license were extinguished upon a finding that officials had violated the license-tender regulations.³⁰⁸

In both of these cases, decided under the previous Arbitration Code, public groups brought suit against state actors, claiming violations of the environmental and land use rights of those they sought to represent. In *Conoco*, the SEU was a properly registered public organization seeking to further its purposes as stated in its charter: to provide political and legal assistance to citizens adversely affected by official or business activity.³⁰⁹ In *White Nights*, the plaintiffs were an ad hoc group of local clans who had neither participated in the regulated activity nor had expressed a desire to take part in future license-tender proceedings.³¹⁰ For purposes of standing, there do not appear to be any material factual differences which would favor the *White Nights* plaintiffs; rather, it would appear, in light of the procedural rules of the former Arbitration Code conferring rights on registered public interest organizations³¹¹ that the SEU would have a stronger claim toward "representation of the public interest." Some, like a commentator on the *Conoco* matter, would attribute these disparate rulings to the judges' concerns over the "political" consequences of the allowance or disallowance of the claims.³¹²

Over the course of the past five years, the willingness of the

³⁰⁶ See Paul Podolsky, *Court Suspends License of Oil Firm*, MOSCOW TIMES, May 27, 1994, available in LEXIS, World Library, Mostms File.

³⁰⁷ See *id.*

³⁰⁸ See *id.*

³⁰⁹ See Portansky, *supra* note 301, at 2.

³¹⁰ See Podolsky, *supra* note 306.

³¹¹ See *supra* note 299 and accompanying text.

³¹² See Portansky, *supra* note 301.

courts to hear implied private regulatory actions³¹³ has naturally expanded the investor's potential liability to a broader spectrum of the population. In the absence of clear standards for the identification of possible adverse claimants to any given transaction, the foreign investor can neither anticipate nor accommodate the concerns of all interested parties.³¹⁴ Article 42 of the Arbitration Code restricts the permissible stated interests of "representative suits" to broad notions of the "state and public interests,"³¹⁵ presumably limiting the ability of representative claimants to establish, as the SEU failed to do in *Conoco*, some unique connection to a concrete interest asserted. It remains to be seen whether this new provision will add certainty to arbitration court litigation by requiring that all plaintiffs share a common injury or those officials are filing suit pursuant to their regulatory duties to enforce the laws in the public interest.

2. Ripeness

The Arbitration Code allows judicial recourse by all persons, natural or legal, "seeking protection of [their] violated *or disputed* rights and lawful interests."³¹⁶ A plaintiff need not allege an actual violation of a protected right, but rather may seek declaratory recognition of a right or interest, which, once established, can be the predicate for recovery in later proceedings in the same suit.³¹⁷ Unlike in American practice, the availability of injunctive and declaratory relief, respectively, does not depend on a plaintiff's ability to demonstrate an imminent threat to an established right or that an immediate suit adverse to a disputed right is likely.³¹⁸ A

³¹³ See, e.g., Afanasiev, *supra* note 258.

³¹⁴ See R. Narzikulov, *Corrosive Properties of Competition in Oil*, SEVODNYA (Moscow), July 19, 1994, translated in FBIS-USR-94-085. The director of White Nights stated that he had never heard of the Tayozhnik group. See *id.* Similarly, a reporter, commenting on another administrative dispute, noted that, "[Chevron] executives could not have foreseen that, having begun to invest money on the territory of the U.S.S.R., they would be forced to enter into negotiations with several interested parties." *Id.*

³¹⁵ Code of Arbitration Procedure, *supra* note 19, art. 42; see *supra* note 299.

³¹⁶ Code of Arbitration Procedure, *supra* note 19, art. 4.

³¹⁷ See *id.*

³¹⁸ See *id.*

plaintiff in the arbitration system may obtain a full hearing on the merits of a case merely by claiming a right or interest which is potentially the subject of dispute or threat.³¹⁹

Initially, the arbitration system attempted to deal with the issue of "ripeness" by requiring that a plaintiff demonstrate a prior attempt at "composition," or settlement, as a prerequisite to justiciability.³²⁰ This condition has been dropped from the Arbitration Code in response to criticisms that the procedure was rarely effective in narrowing the issues and was often abused by the parties as a vehicle for information gathering and litigation planning.³²¹

Additionally, arbitration procedure, for the reasons discussed below, presents no substantial deterrent to the filing of "premature" claims. The Arbitration Code provides for postponement of proceedings where plaintiff is unable to adduce a quantum of evidence required for decision or cannot produce other materials requested by the court.³²² The suit, when resumed, will receive full *de novo* review.³²³ A claimant may, therefore, without solid factual basis to believe that a claim exists, commence an action to preview the defendant's case and the court's treatment of the issues. Unlike in American practice where the preclusive effects of summary judgment and directed verdict would deter such a strategy, a plaintiff in an arbitration proceeding apparently may file first and develop evidence for a later claim.

3. Justiciability of Claims

In an arbitration proceeding, the court is not limited to hearing only those claims or defenses raised by the parties in the pleadings or during hearings.³²⁴ The Arbitration Code provides that the court may order inclusion of additional plaintiffs and claims, with or without the original plaintiff's consent, at which time the case will

³¹⁹ *See id.*

³²⁰ *See supra* note 87 and accompanying text.

³²¹ *See Maslennikov, supra* note 133.

³²² *See Code of Arbitration Procedure, supra* note 19, art. 120.

³²³ *See id.*

³²⁴ *See id.* arts. 36(4), 37.

be examined anew.³²⁵ The court may also, on its own initiative, name additional defendant(s) to be joined to the proceedings³²⁶ and may award damages in excess of the original claim filed where the court deems this necessary “for the protection of the state and public interests.”³²⁷ The court may deny a claimant the right to settle or reduce the amount claimed where doing so would “violate the rights and lawful interests of other persons.”³²⁸

These Code provisions suggest that the arbitration system has retained some of the prosecutorial tendencies of its predecessor, the state arbitrazh.³²⁹ As is common practice in most civil law countries, the arbitration judge frames the issues to be adjudicated and may request any information necessary to resolve the dispute between the parties to the suit.³³⁰ The arbitration court, however, in the exercise of its broad investigative and remedial powers, may expand an action to include participants and claims not originally contemplated by the initial parties to suit. The Arbitration Code imposes upon the arbitration court an affirmative duty, independent of the claims raised by litigants, to protect the public interest and to enforce the law.³³¹ Such a role for the court may be particularly troublesome to those engaged in heavily-regulated activity, since potential liability is not limited to the extent of the plaintiff’s claims, but rather may be found in any violation of law or regulation which the court may discover in its review of plaintiff’s case.

4. *Third-Party Rights*

In the *White Nights* case, the foreign-investor grantee was subject to ex-parte nullification of its rights under a federal license since, in the conclusion of the Moscow Arbitration Court,

³²⁵ *See id.*

³²⁶ *See id.*

³²⁷ *Id.* arts. 41-42 (allowing prosecutors and organizations to demand additional relief).

³²⁸ *Id.* art. 37.

³²⁹ *See supra* notes 82-85 and accompanying text.

³³⁰ *See Code of Arbitration Procedure, supra* note 19, arts. 105-06.

³³¹ *See id.* art 2.

defendant officials had acted illegally in granting the license.³³² This result is entirely consistent with the Arbitration Code, which makes no meaningful provision for either permissive defensive intervention, intervention as of right, or application for a stay of the proceedings by an interested party.³³³ The Arbitration Code allows an interested entity to join an action as a party plaintiff, conferring upon such party all rights to assert independent claims and present evidence.³³⁴ As to an interested non-party seeking to defend a claim, however, the Arbitration Code does not allow intervention as a recognized participant in the action unless the non-party can assert an independent claim against the plaintiff.³³⁵ The only recourse for such person envisioned in the Arbitration Code is cooperation with the parties defendant in the presentation of their case.³³⁶ Cooperation does not provide a non-party with any legal right to insist on the assertion or modification of any defense, nor does it allow such person, in light of the former-adjudication provisions discussed below, to rely on the judgment in a subsequent dispute with such "parties plaintiff."³³⁷

As is evident in a matter like *White Nights*, a case which is illustrative of a potential litigation scenario for foreign land use investors, the Arbitration Code provides no meaningful recourse of intervention for interested entities.³³⁸ In cases where plaintiff offers evidence of a regulatory violation, it is hardly certain that the defendant official or administrator will cooperate with a foreign investor to argue, for example, such investor's bona fides in complying with regulation or the equities as applied to the foreign investor. Rather, the administrator will occasionally have

³³² See Podolsky, *supra* note 306.

³³³ See generally, Code of Arbitration Procedure, *supra* note 19.

³³⁴ See *id.* art. 38.

³³⁵ See *id.* arts. 34-39. Article 34 recognizes as defendants only those against whom a claim has been filed or those interested parties who can assert a counterclaim against the plaintiff. See *id.* art. 34.

³³⁶ See *id.* art. 39(2).

³³⁷ *Id.*

³³⁸ See *supra* note 333 and accompanying text; see also *supra* notes 306-08 and accompanying text.

interests adverse to the non-party investor³³⁹ or, as in most cases, an official will have no interest at all.³⁴⁰ While the Arbitration Code now grants an interested non-party recourse to the appellate division of the trial court,³⁴¹ a reversal is unlikely in the absence of an error of law or the failure of the trial court to consider all material evidence.

5. Conclusion: The Interaction of Justiciability Considerations

The above mentioned concerns regarding standing, ripeness, claims justiciability, and third-party rights, when taken together, present significant litigation risks for the foreign investor in a land use project. Simply put, these factors could merge to produce the following result: An unforeseeable plaintiff may bring an indefinite claim to prompt the court to locate potential regulatory violations, any of which could be grounds for the ex-parte nullification of the investor's interest. Given the lack of effective former-adjudication principles³⁴² and the inconsequential nature of sanctions for frivolous claims, the foreign investor could face any number of such ex-parte challenges, so long as the parties or the claims keep changing.

Viewed from an American perspective, one would think that a plaintiff would only bring an action either to receive compensation for a cognizable injury, or to attain a favorable settlement of a "nuisance" or "strike" suit. The cases discussed above, however, are regulatory actions brought against government authorities, a context in which the "strike-suit" rationale would appear to be

³³⁹ If, for example, plaintiff has alleged bribery or other joint illegal conduct, the official, to the extent that impropriety can no longer be denied, may attempt to show that the investor induced the illicit activity.

³⁴⁰ The potential for liability to the foreign investor would not, in all likelihood, provide sufficient incentive for officials to vigorously defend the propriety of their actions. See *infra* notes 244-45 and accompanying text. So long as the official is able to show that the improper activity was the result of slight negligence, an innocent omission, or some fault of the investor, the official would probably escape liability to the investor. For a discussion of the effectiveness of compensatory suits regarding official misconduct, see *infra* notes 420-22 and accompanying text.

³⁴¹ See Code of Arbitration Procedure, *supra* note 19, art. 158(3)(4).

³⁴² See *infra* notes 344-46 and accompanying text.

inapposite. There has been some speculation that state industries and local joint-venture partners have been assisting claimants in filing such suits, since some "public interest" plaintiffs, including some indigenous groups who barely speak Russian, have arrived in court with detailed information on matters such as corporate registration, tender negotiations, and other traditionally "insider" issues. Commenting on the *White Nights* matter, in which an indigenous group was successful on an implied private claim under license-tender rules, a representative of the joint venture noted that the court's decision had emboldened a local partner to attempt expropriation of the joint-venture's investment.³⁴³ Irrespective of the truth or falsity of such allegations of collusion, the *potential* for such abuse of arbitration procedure should give foreign investors serious concern.

B. Former Adjudication Issues

1. Former Adjudication: Issue and Claim Preclusion in the Arbitration Courts

Principles of *res judicata* and collateral estoppel have extremely limited effect in the Russian Federation courts. In fact, *res judicata*, as in the American conception of *claim* preclusion, cannot be said to exist in the arbitration system. The Arbitration Code provides that an arbitration court will terminate proceedings on the basis of a prior decision by a Russian or foreign court (or arbitral tribunal), provided that such was rendered in a dispute: 1) between the *same parties*, 2) on the *same subject matter*, and 3) on the *same grounds*.³⁴⁴ Unlike American practice, in which *res judicata* will bar all claims or defenses which *could have* been raised on a given set of facts, arbitration procedure would permit relitigation of a dispute, on the same facts, where a plaintiff had asserted a new theory of action.

The lack of genuine claim preclusion exacerbates the problem of inconsistent judgments between the arbitration and general

³⁴³ See Igor Karpenko, *Salomon Plans Appeal to Government, IMF Regarding White-Nights Venture*, IZVESTIYA (Moscow), June 8, 1994, at 3, available in LEXIS, World Library, Txtlne File.

³⁴⁴ See Code of Arbitration Procedure, *supra* note 19, art. 87(1).

courts, since, as a natural consequence of subject-matter jurisdiction, claims in the respective systems arise under different legal theories. Additionally, collateral estoppel is sharply limited, since arbitration procedure requires "identity of parties" for prior adjudication to have any preclusive effect as a matter of law.³⁴⁵ Any assertion of defensive collateral estoppel against subsequent claimants would, therefore, be a question of fact involving the court's review of the precedential merit of the previous decision.³⁴⁶ It would appear that an investor cannot rely on the preclusive effect of a favorable arbitration court ruling to protect against repetitive future litigation.

2. Former Adjudication Vis-A-Vis Administrative and Governmental Organizations

The Arbitration Court Act provides that, "[t]he judicial acts that have come into legal force—awards, rulings and judgments of the arbitration courts shall be binding on *all state bodies, local self-government bodies, other organs, organizations, officials, and private persons.*"³⁴⁷ A recent decision in the Superior Court of Arbitration, however, reveals that, as a practical matter, arbitration judgments will not always have a preclusive effect as against future governmental action.³⁴⁸ In 1993, the Publishing Division of the newspaper *Izvestia* brought suit against the Russian Federation State Property Committee (GKI) claiming that the GKI's grant of the newspaper building to the *Izvestia* Editorial Office was void as contrary to federal legislation.³⁴⁹ GKI defended its actions and the Superior Arbitration Court agreed, ruling that the property had properly been granted in fee to the Editorial Office.³⁵⁰ GKI, however, "in connection with newly-developed circumstances," decided to alter its grant by requiring that the Editorial Office take

³⁴⁵ See *id.* art. 88(2).

³⁴⁶ See *id.*

³⁴⁷ On the Arbitration Courts of the RF, RF Federal Constitutional Law No. 1-FKZ, 1995, art. 7 (Russ.) available in LEXIS, World Library, Sovleg File.

³⁴⁸ See Ivan Sidarov, *They Have Touched the Czar's Gift, and That is Enough*, ROSS. GAZETA (Moscow), May 25, 1993, at 1, translated in FBIS-USR-93-073.

³⁴⁹ See *id.*

³⁵⁰ See *id.*

the property under lease.³⁵¹ In a subsequent suit, the Court, after conferring with the legislature as to proper scope of the GKI's authority, concluded that, "*the act [was] a dispute in the sphere of administrative activity,*" and thus the GKI's subsequent actions were proper.³⁵² There was some suggestion that this resolution, clearly at odds with statutory provisions as to finality of judicial decisions, was attributable to pressure tactics employed by President Boris N. Yeltsin.³⁵³

Another recent case indicates that government and administrative agencies may be hesitant to accept the role of the judicial system as the final authority³⁵⁴ on legal rights and duties arising under law and regulation.³⁵⁵ In a 1994 suit, a regional arbitration court denied the petition of Neft Almaz Invest (the "Fund") to reinstate its issuer's license, revoked by GKI on findings that the licensee had violated federal securities laws.³⁵⁶ Satisfied with the ruling, the head of the investment funds section of GKI nevertheless noted, "even if the court had granted the Fund's petition, we would have withdrawn the license again. We have proof that the Fund is headed by crooks."³⁵⁷ While such defiance of a court ruling, especially on the basis of disagreement with the court's findings of fact, would clearly violate the Constitution,³⁵⁸ the Arbitration Court Act³⁵⁹ and the Code of

³⁵¹ *Id.*

³⁵² Eduard Gonzalyez, *Izvestia-A Full Joint-Stock Company. That is the Verdict of the Russian Superior Court of Arbitration*, IZVESTIA (Moscow), Jan. 11, 1994, at 3, available in LEXIS, World Library, Txtlne File.

³⁵³ *See id.* The *Izvestia* case is the only recent reported case in which the Superior Arbitration Court upheld the actions of federal administration in derogation of rights established under a prior decision. It is significant, however, that the Court recognized a broad "sphere of administrative activity." *Id.*

³⁵⁴ Administrative rulings may be appealed to a court of law pursuant to Article 46(2) of the RF Constitution. Federal law provides that the decision of the trial court is to be the final resolution of the dispute. *See* RSFSR Code of Administrative Violations, Vedomosti RSFSR, No. 27, Item 909, 1984, art. 266 (on file with the author).

³⁵⁵ *See* Julie Tolkacheva, *Neft Almaz Fails in License Bid*, MOSCOW TIMES, May 24, 1994, available in LEXIS, World Library, Allwld File.

³⁵⁶ *See id.*

³⁵⁷ *Id.*

³⁵⁸ *See* KONST. RF art. 127 (1993).

³⁵⁹ *See* RSFSR Arbitration Court Act, Vedomosti RSFSR, No. 146, 1991, art. 7,

Administrative Violations,³⁶⁰ this is little consolation to the businessperson needing a quick and certain determination of his or her legal rights. The prospect that a government agency may, in practice, *choose* to honor a court ruling should cause some hesitation on the part of the investor.

Practical considerations aside, the privilege of government challenge to an arbitration court ruling may, in rare instances, also be expressly authorized *in law*.³⁶¹ The Arbitration Code provides that, "decisions and rulings of all arbitration courts in the RF, which have come into legal force may be revised, by way of supervision on the protests of . . . the RF Procurator-General . . . [and the] RF Deputy Procurator-General."³⁶² The Office of the Procurator-General, structurally a rough analogue to the U.S. Department of Justice, is charged with the duty of "protecting the natural and legal rights of citizens."³⁶³ Neither the Constitution nor the procedural codes place any subject-matter limitation on the types of proceedings in which the Procurator may seek review.³⁶⁴ The Procurator's Office is, by Constitutional directive,³⁶⁵ well insulated from political influence and the Office has apparently exercised restraint in commercial matters in the arbitration courts. It remains to be seen, however, whether this trend will continue as events bring foreign investment and "the public interest" into closer conflict.³⁶⁶

available in LEXIS, World Library, Sovleg File.

³⁶⁰ See RSFSR Code of Administrative Violations, Vedomosti RSFSR, No. 27, Item 909, 1984, art. 266 (on file with the author).

³⁶¹ See Code of Arbitration Procedure, *supra* note 19, arts. 180-81.

³⁶² *Id.*

³⁶³ KONST. RF art. 126.

³⁶⁴ See, e.g., *id.* art. 126; Code of Arbitration Procedure, *supra* note 19, art. 41.

³⁶⁵ See *id.* The Office of the Procurator-General, while staffed by Presidential appointment, does not fit squarely within the tripartite separation-of-powers established by the Constitution. Constitutional provision for the Office is made separately from the respective chapters for the legislative, executive, and judicial branches. See *id.* arts. 128-29.

³⁶⁶ Developments in early 1996, however, indicate that the procurator's duty to protect "the public interest" will not always mean that it will pursue the interests of "the State" in seeking reversal of a court decision "by way of supervision." *Id.* The Office of the Procurator-General had intended to file challenges to the GKI-sponsored "shares-

C. Changing Rules of Decision in the Field of Foreign Investment

1. Legal Guarantees of Non-Retroactivity and Provision for "Lag Time" in the Application of New Laws to Foreign Investment

In September of 1993, President Yeltsin issued a decree which provided that, "newly issued normative acts *regulating foreign and joint enterprises' operating conditions* on Russian Federation territory shall not operate for three years in respect [to] enterprises in existence at the time these acts come into force."³⁶⁷ The Decree exempted "normative acts ensuring more favorable conditions" from the three year lag in application.³⁶⁸ The President further declared that any "normative acts" or "restrictions on the activity of foreign investors" by federal, regional, or local authorities shall be preempted unless specifically provided for in federal legislation or Presidential decree.³⁶⁹

2. Application of Presidential Decree by Regulatory Authorities

The construction given by regulators to the Decree indicates that, in determining whether a "normative act" shall be delayed in application, the dispositive inquiry is whether the act is one "regulating foreign and joint-enterprises' operating conditions."³⁷⁰ In 1994, the RF State Tax Service, responding to the complaints of foreign businesses regarding the immediate applicability of a new profits tax to the (then) current fiscal year, sent a letter of inquiry

for-loans" initiative. *See Yukos Sale Challenge Imminent*, MOSCOW TIMES, Mar. 16, 1996, available in LEXIS, World Library, Allwld File. Government support for "shares-for-loans" was at least split, so the extent to which the Procurator-General is willing to confront the interests of federal authorities is unclear. *See id.*

³⁶⁷ On Improving Operations With Foreign Investment, Presidential Decree No. 1466, ROSS. VESTI (Moscow), Oct. 12, 1993, at 3, available in LEXIS, Intlaw Library, Rflaw File.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ Payment of Taxes By Enterprises With Foreign Investments and By Foreign Investors, RF State Tax Service Letter of Instruction No. NP-8-01/449, Oct. 18, 1994, available in LEXIS, World Library, Law File.

to the RF President's State Law Department for an official interpretation of the Decree.³⁷¹ The State Law Department responded that the Decree shall apply to only those acts regulating "the special operating conditions of foreign and joint-venture enterprises in the RF territory."³⁷² The Department advised the Tax Service to apply the profits tax immediately, noting that "legislative acts of a generally binding nature are not affected by the aforesaid [Decree]."³⁷³ It appears that the narrow construction given to the Decree renders its guarantees illusory, since it is unlikely, in light of the government's need to appear "investment-friendly," that investors will need protection from "normative acts" specifically targeted to disadvantage foreign investment.³⁷⁴ In so holding, the State Law Department reduced the Decree from a concession, specifically favoring foreign investment, to a simple assurance of "national treatment," a guarantee already incorporated in federal legislation.³⁷⁵

Other regulatory authorities have similarly applied a restrictive approach to the President's Decree, holding that newly-enacted, generally-applicable laws are immediately effective as against foreign investors. As discussed below, this is equally true where the new laws, while facially neutral, have a disproportionate impact as applied to foreign investment. In late 1994, the Russian Federation Property Fund and State Property Committee directed their regional organizations to halt the sale of shares in aluminum plants and to cease share-registration of those who had *already*

³⁷¹ *See id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ In the author's July 1994 interview with Sergei Pashin, Chairman of the State Law Department, Mr. Pashin noted that an act is "normative" only if it sets generally-applicable standards of conduct. *See* Interview with Sergie Pashin, Chairman of the State Department, in Moscow (July 1994). Regulations governing specific activity or groups would not, in Mr. Pashin's opinion, be properly considered "normative." *See id.* In light of this view, the more plausible interpretation of the Decree is the broader view that the President, in allowing a three-year lag in the application of *normative acts* regulating "operating conditions" of foreign and joint ventures, sought to relieve foreign investors from generally-applicable laws *having a regulatory effect* on investment, not simply from those acts specifically targeting investors or investment activity. *See id.*

³⁷⁵ *See, e.g.* RSFSR Law on Foreign Investments, Vedomosti RSFSR, No. 29, Item 1008, 1991, art. 7 (Russ.), *available in* LEXIS, Intlaw Library, Rflaw File.

acquired interests.³⁷⁶ A British investors' group, noting that the only significant shareholders in the entire metals industry were either foreigners or employees at state-owned plants, claimed that the directive was one "regulating . . . operating conditions" for foreign investment.³⁷⁷ The investors pointed out that, as a practical matter, only foreign interests were at stake under the directive, since enterprises, in the event of share-redistribution, would not divest the interests of their own employees.³⁷⁸ The State Property Committee rejected this claim, finding the measure to be immediately effective as a law of general application.³⁷⁹ The Committee Chairman noted simply that, "treatment as nationals' in Russia differs from Western standards."³⁸⁰ Chevron Corporation learned a similar lesson when "generally applicable" restrictions on the export of oil through Kazakhstan, upon interaction with the realities of available transport in the region, severely curtailed Chevron's sales to the benefit of its competitors, state-owned oil producers.³⁸¹

3. The Arbitration Courts and the Application of Newly-Issued Laws and Regulations

The arbitration courts have, on occasion, similarly declined to consider the reliance interests of foreign investors in the application of newly-developed norms to investment activity. A recent case indicates that such practice is not limited to the enforcement of those new laws which would impair an investor's rights in present and future operations.³⁸² Rather, it is possible that the court may apply newly-enacted regulations to past activities, rendering previously-permissible conduct illegal, and all consequences of such conduct void as contrary to law. In *White*

³⁷⁶ See Mikhail Lantsman, *Expropriation: State Property Committee Saves Aluminum Industry From Expansion By Western Business Interests*, SEVODNYA (Moscow), Dec. 31, 1994, at 2, available in LEXIS, World Library, Allwld File.

³⁷⁷ *Id.*

³⁷⁸ *See id.*

³⁷⁹ *See id.*

³⁸⁰ *Id.*

³⁸¹ *See* Narzikulov, *supra* note 314.

³⁸² *See* Podolsky, *supra* note 307.

Nights, discussed above, the Moscow Arbitration Court invalidated the joint-venture's drilling license, obtained in 1991 negotiations with the government, under a 1992 law requiring that such rights be won through competitive tender.³⁸³ White Nights contended that it was standard practice, at the time the license was granted, for investors to obtain drilling rights in private negotiations.³⁸⁴ The Court held, without further discussion, that the venture's license was void under the 1992 law and ordered a new public-tender proceeding for rights to drill at the site.³⁸⁵ In light of the fact that White Nights had accumulated substantial fixed assets at the extraction site, the venture would have faced fierce competition for re-issuance of the license, with the winning bid reflecting the market value of assets for which White Nights had previously paid.³⁸⁶ Fortunately for White Nights, however, the plaintiffs elected to withdraw their claims in the days leading up to the appellate hearings and the matter was settled in negotiations.³⁸⁷

While *White Nights* was ultimately resolved in a manner avoiding the retroactive application of a federal law, it is by no means certain that the arbitration courts will refrain from such practice where regulation clearly envisions this possibility.³⁸⁸

³⁸³ See *id.*

³⁸⁴ See *id.*

³⁸⁵ See *id.*

³⁸⁶ See *id.* An attorney from a London-based law firm suggested that recovery of fixed investment would be difficult in light of the "illegal" nature of the venture's operations. Especially troublesome, the attorney noted, would be recovery of fixed assets invested after the enactment of the 1992 law. See *id.*

³⁸⁷ See *Russian White Nights Venture May Get Back Siberian License*, EAST EUROPEAN ENERGY REP., Nov. 25, 1994, available in LEXIS, World Library, Allwld File. Information is unavailable as to the exact disposition of the suit (e.g., reversal, order vacated, etc.), but White Nights has resumed full operations at the site. See *id.*

³⁸⁸ According to subsoil licensing procedures issued in 1992, licensees were given a one month period after promulgation to re-register (and often requalify) their interests, after which time the procedures would operate retroactively to nullify any nonconforming licenses. See Afanasiev, *supra* note 257, at 1. KMNH, a joint venture involving Hunt Oil Company, filed for and received regulatory reauthorization during this period. See *id.* In 1994, the RF Supreme Court, reversing a lower court ruling, found KMNH's filing insufficient to avoid the application of the new law to the rights previously granted, since such license was issued to the Russian partners (the proper persons to file, as the Court held) in KMNH, not the venture itself. See *id.* The Court found the contribution of license rights into the joint-venture to be irrelevant, requiring

Given the occasional tendency of local and federal lawmakers to legislate into the past,³⁸⁹ especially in an investment climate which some believe to be leaning toward renationalization,³⁹⁰ the position taken by the arbitration courts on retroactivity will be crucial to investor expectations. Some commercial entities, expressing dissatisfaction with the arbitration courts' retroactive application of the law, have turned to the RF Constitutional Court to vindicate constitutional guarantees against retroactivity.³⁹¹ Unfortunately, the next "test case" may have serious repercussions for an unsuspecting party.

4. The Law on Production-Sharing: a Return to Some Uncertainties in the Oil and Gas Industry

By way of contrast to the tender procedures before the court in *White Nights*, at least the new federal law enacted on December 30, 1995, "On Production-Sharing Agreements," will not be retroactively applied.³⁹² Unfortunately, that guarantee is one of the few legal certainties for which the law provides. Among its contested provisions, the law permits the government to cancel contracts on the basis of a "substantial change in circumstances,"³⁹³

absolute technical compliance with the procedures, even where retroactivity was at issue. *See id.*

³⁸⁹ In 1994, the Moscow Registration Chamber ordered that each joint-stock company registered with city officials as having a single shareholder would have to reapply for registration, adding one or more shareholders to its charter. Amidst fears that wholly-owned subsidiaries of foreign companies would be forced to find local partners, an attorney at a major U.S.-based law firm assured that such would not be necessary unless other charter amendments were made. *See Euan Craik, Joint-Stock Firms Forced to Increase Shareholders*, MOSCOW TIMES, Sept. 27, 1994, available in LEXIS, World Library, Allwld File.

³⁹⁰ RF legislators have proposed site-specific legislation to revisit regulation of vested interests in Sakhalin-area projects. *See Vadim Bardin, Legislators Revisit Production Sharing*, KOMMERSANT-DAILY (Moscow), Dec. 1, 1995, at 1-2, available in LEXIS, World Library, Allwld File.

³⁹¹ *See* KONST. RF art. 57 (1993); Aleksa Kerpichnikov, *Commerce Uses Constitutional Court to Defend Itself Against State*, SEVODNYA (Moscow), Oct. 12, 1996, at 2, available in LEXIS, World Library, Cdsp File.

³⁹² *See* Agreements on Product Sharing in Subsoil Use, President's Edict No. 2285, ROSS. GAZETA (Moscow), Dec. 24, 1993, available in LEXIS, World Library, Sovleg File.

³⁹³ *Id.*

a standard nowhere defined in the statute. Critics suggest, based on the tenor of the legislative debate, that this term could readily include factors such as world oil prices or changes in tax legislation.³⁹⁴ While the Law also notes that the government *may, in its discretion*, waive its “sovereign immunity” to court challenges of its actions on “ownership rights,”³⁹⁵ this may not be much of a concession since both the RF Civil Code and the Law on Foreign Investment already purport to deprive the government of immunity in cases amounting to nationalization or expropriation.³⁹⁶

The Production-Sharing Law, in its assignment of regulatory duties, sets its new licensure regime into direct contrast with that envisioned under Russia’s subsoil legislation, codifying a conflict of regulatory jurisdiction which has generated frequent litigation to date (with almost split results).³⁹⁷ All licensees will also be obliged to purchase a yet-to-be-determined quantity of their equipment, processing and transportation requirements from Russian producers.³⁹⁸ The RF State Duma, dissatisfied with the inapplicability of the law to Sakhalin-area projects and the well-settled interests in that region, proposed a site-specific regime which, according to commentators, was intended to set a precedent for legislative approval of production-sharing agreements.³⁹⁹ With its passage, the law “On Production Sharing” may have legislated away, in one broad measure, many certainties that had been developing over the past decade of growing foreign-investment participation in Russia’s Far East oil ventures.

5. Concluding Comments on Retroactivity and Changing Rules of Decision

Changing rules of decision in Russian courts and

³⁹⁴ See Mike Comerford & Sergey Lukianov, *Oil Law ‘Clumsily Drafted,’* MOSCOW TIMES, Jan. 5, 1996, at 1, available in LEXIS, World Library, Allwld File.

³⁹⁵ Agreements on Product Sharing in Subsoil Use, President’s Edict No. 2285, 1993, available in LEXIS, World Library, Sovleg File.

³⁹⁶ See Code of Arbitration Procedure, *supra* note 100, arts. 235, 306.

³⁹⁷ See Afanasiev, *supra* note 257.

³⁹⁸ See Comerford & Lukianov, *supra* note 394.

³⁹⁹ See Bardin, *supra* note 390.

administration pose substantial risks for foreign investors. Retroactivity in the application of laws is, of course, a danger in any system since one subject to regulation cannot conform his or her conduct into compliance with its dictates. In the Russian Federation, however, even forward-acting, generally-applicable enactments pose a special threat to foreign ventures with fixed investment in ongoing activities. "National treatment" in Russia may be different from Western standards, as noted by the Chairman of the State Property Committee, since subsidies, idiosyncracies in transportation networks, predominant state- or "quasi-state"-ownership of industry, and other factors may combine to make changes in "generally-applicable" regulations a particular danger to foreign operations.⁴⁰⁰ It remains to be seen whether the arbitration courts will step forward in protection of the reliance interests of such investors.

D. Difficulties in Execution of Arbitration-Court Judgments

Over the course of the past five years, attempts at evasion of arbitration court judgments have run the spectrum from the quasi-legal manipulation of holding-company laws, to the clearly fraudulent misstatement of accounts and dissipation of assets, to downright murderous attacks on claimants and agents of the judiciary.⁴⁰¹ In response to such phenomena, the Code of Arbitration Procedure practically reinvented the means by which judgments are executed and claims are secured pending trial. Most notable among these revisions are 1) increased fines and criminal sanctions for noncompliance with the terms of the court's ruling; 2) enhanced ability of the courts to enter and execute ex parte judgments; 3) greater availability of summary procedures for execution on a broader range of the debtor's property; and 4) more stringent measures to compel the debtor's credit institutions to release funds directly to the prevailing claimant.⁴⁰² The arbitration

⁴⁰⁰ See *supra* notes 377-80 and accompanying text.

⁴⁰¹ See Maslennikov, *supra* note 133; *Transcript of Kremlin Press Briefing*, OFFICIAL KREMLIN INT'L NEWS BROADCAST, Feb. 9, 1996, at 2, available in LEXIS, World Library, Allwld File.

⁴⁰² Code of Arbitration Procedure, *supra* note 19, arts. 206-09; Letter of the RF Superior Arbitration Court, No. S1-7/OP-557, Aug. 10, 1994 (on file with the author).

courts have vigorously pursued both execution⁴⁰³ and prejudgment options,⁴⁰⁴ but sadly, approximately fifty percent of their rulings go unsatisfied.⁴⁰⁵

Concerns over the inefficacy of court rulings and bold interference in the administration of justice have prompted a number of proposals for the enactment of legislation to protect judges and enhance the powers of the judiciary. Such initiatives were renewed aggressively as recently as February of this year, when a court building was seized by armed attack, as the assailants destroyed more than seventy criminal files.⁴⁰⁶ One month prior to this incident, the legislature, citing budget limitations, rejected a comprehensive federal law, the "Law on Bailiffs," which called for, among other things, the establishment of a paramilitary enforcement agency within the RF Justice Ministry, as well as the interaction of the RF Tax Inspectorate, Bankruptcy Service, and the federal tax police in helping the courts locate concealed assets.⁴⁰⁷ Accepting the argument that non-enforcement is more costly to the government than the costs of implementing reform, the Yeltsin administration retracted its initial condemnation of the proposed law, thus allowing better prospects for its enactment upon resubmission to the legislature.⁴⁰⁸

The practice of evading judgment through the clever manipulation of Russia's nascent corporate law infrastructure presents a far more complex dilemma for the courts and the legislature. The mass expansion, in the past ten years, of Russian

⁴⁰³ Expecting resistance to a ruling granting plaintiffs a right of access to offices at Moscow's Sheremetyevo Airport, an arbitration court official arrived at the airport to deliver the order in the company of several armed transit police officers. *See Attack on Moscow Airport Was Legal Move to Settle Commercial Dispute*, AGENCE FRANCE-PRESSE, Dec. 28, 1995, available in LEXIS, World Library, Allwld File. Airport Director Anatoly Koryakin had described the incident as a siege by men bearing assault rifles, a report flatly denied by the transit police. *See id.*

⁴⁰⁴ The Belgorod Regional Arbitration Court ordered attachment of twenty percent of a plant's shares within twenty-four hours of the first allegations filed. *See supra* note 228.

⁴⁰⁵ *Transcript of Kremlin Press Briefing, supra* note 401, at 2.

⁴⁰⁶ *See id.*

⁴⁰⁷ *See id.*

⁴⁰⁸ *See id.*

corporate legislation has afforded debtors countless opportunities for the creation of elaborate, judgment-proof forms of operation. Capitalization requirements, geared primarily toward maintenance of "charter capital" (i.e., roughly the total par value of stock outstanding), naturally do not reflect the equity status of an enterprise and thus undermine the value of required advance notice of "charter capital" reductions to those who transact with the debtor on the basis of substantial equity holdings.⁴⁰⁹ It would appear that a Russian court, absent a clear statutory directive, would not overlook the formalities of corporate structure to provide an equitable remedy where assets appear to be thinly "partitioned off" among entities bearing no formal relationship to one another. For a court to seek consolidation and attachment of the holdings of two or more legally distinct companies, it would seem to require a showing that the joint activities forming the basis of suit rise to the level of fraud or conspiracy, i.e., "mere" undercapitalization of the venture, is apparently insufficient except, perhaps, in bankruptcy.

As to legally related companies, the enactment of a new Civil Code, as well as a revised law "On Joint-Stock Companies" (JSC Law),⁴¹⁰ has added some guidance (albeit somewhat conflicting) regarding the rights of creditors. Parent corporations, as well as other entities and individual shareholders qualifying as "controlling persons," are jointly and severally liable with the subsidiary or controlled entity for debts resulting from actions taken or instructions given by any other "controlling person."⁴¹¹

⁴⁰⁹ On Joint-Stock Companies, RF Law No. FZ-208, Nov. 24, 1995, arts. 26-29, available in LEXIS, Intlaw Library, Rflaw File [hereinafter JSC Law]. The JSC Law, in Article 26, sets minimum capitalization of an "open" JSC, i.e., one that is publicly tradable, at 1,000 times the monthly minimum wage, regardless of the size or charter activities of the company. See *id.* This computation, based on an August 1, 1995 ruling setting the wage at \$12.50 monthly, see Code of Arbitration Procedure, *supra* note 19, art. 215(1), provides a baseline requirement of \$12,500 in start-up capital.

⁴¹⁰ JSC Law, *supra* note 409.

⁴¹¹ See *id.* art. 6(3). "Controlling persons" are those entitled to issue "mandatory instructions" to the subsidiary or controlled corporation and, as such, they are only subject to liability where they are given this authority *by contract with the subsidiary*. *Id.* Article 3(3) of this law appears to broaden the class of "controlling persons" to those who "otherwise may determine" the controlled-corporation's actions, possibly including

The JSC Law may provide the courts with a valuable enforcement tool against the previously effective debt avoidance scenario posed by the establishment of limited liability companies loosely configured in a “brother-sister” relationship, with the mobility of “common” assets assured by the use of a holding company or other passive association.⁴¹² While a “controlling person” in a JSC is generally liable for corporate losses only to the extent of his or her investment in the company, such person causing the insolvency through acts or omissions known (or, as here, in the case of dissipation, intended) to have such tendency are liable to the full extent of the loss.⁴¹³ If the “controlling person,” whether determined to be the holding company or the brother-sister LLCs, cannot account for the sudden and substantial losses of the defendant corporation, the reassignment of liability now authorized by the JSC Law may reduce the primary incentive to playing the corporate shell game in the courts.

VI. Judicial Remedies for Foreign Investors: A Prognosis

As a general matter, foreign investors have not, up to this point, relied extensively on the arbitration courts for protection of their interests in operations on RF territory.⁴¹⁴ Most large-scale disputes are settled in international arbitration pursuant to negotiated dispute-resolution clauses.⁴¹⁵ In regulatory matters for which Russian courts have mandatory jurisdiction, foreign investors have commonly sought redress from unfavorable rulings

major shareholders. *Id.* art. 3(3).

⁴¹² See Zhagel, *supra* note 126. In a 1995 case cited by Mr. Zhagel, the Moscow Arbitration Court, after finding defendant’s bank accounts and inventory warehouses empty, levied a writ of execution upon the storage facility of the holding company used in common by defendant and several other technically-distinct limited liability companies (LLCs). *See id.* The legal basis for the attachment of the property of the other LLCs is questionable, since the court did not investigate whether the particular assets seized were secreted out of defendant’s LLC or were the common property of all of the LLCs. *See id.* Instead, the court ordered attachment on the basis of a personal relationship between the defendant and holding-company representatives. *See id.* The JSC Law should provide a more rational legal foundation for the resolution of brother-sister holding-company transfers.

⁴¹³ See JSC Law, *supra* note 409, art. 6(3).

⁴¹⁴ See Vail, *supra* note 73.

⁴¹⁵ *See id.*

by petition to their respective governments or by notice of complaint to the International Monetary Fund.⁴¹⁶ There are certain aspects of Russian Federation court practice, however, which merit further inquiry into to their effectiveness for protection of foreign investment.

A. Narrow Effect of Former Adjudication

The limited efficacy of former-adjudication principles, as discussed above, can have a countervailing benefit for a foreign venture seeking to challenge an adverse ruling. In matters where the foreign investor was *not* a party to the prior litigation, such person or entity can obtain full *de novo* review of disputed rights, with the previous decision bearing only *factual* significance to the matter in suit.⁴¹⁷ In such situation, the court likely will not apply analyses comparable to the American "full-and-fair-opportunity" or "incentive-to-vigorously-litigate" standards in order to divine a preclusive effect as against the non-party.⁴¹⁸ Where the investor *was* a participant in the previous suit, such party would have the benefit of *de novo* review before three judges at the appellate division of the trial court, as well as the opportunity for cassational supervision in the newly created federal circuit courts.⁴¹⁹

B. The Law on Appeal

In 1989, the Supreme Soviet of the U.S.S.R. enacted the "Law on the Right to Appeal to the Courts of the Actions and Decisions Violating the Rights and Liberties of Citizens" ("The Law on Appeal"), giving natural and legal persons the right to seek compensatory and/or injunctive relief from the willful or negligent actions of officials.⁴²⁰ Since its enactment, plaintiffs have enjoyed

⁴¹⁶ See, e.g., Andrei Vaganov, *Foreign Companies Consider Curtailing Operations in Russia*, NEZAVISIMAYA GAZETA (Moscow), June 9, 1993, at 1, available in LEXIS, World Library, Cdsp File.

⁴¹⁷ See *supra* notes 128-30 and accompanying text.

⁴¹⁸ See *supra* notes 128-30 and accompanying text.

⁴¹⁹ For a summary of appellate procedure, see *supra* notes 128-38 and accompanying text.

⁴²⁰ See Law on the Right to Appeal to the Courts of the Actions and Decisions Violating the Rights and Liberties of Citizens, Vedomosti RF, Issue No. 19, Item No. 685 (1993) (on file with the author).

a seventy-five percent success rate in suits brought under the Law on Appeal,⁴²¹ and it may likewise be an attractive remedy for the foreign investor injured as a proximate result of administrative or regulatory misconduct. This strategy, however, may be of limited efficacy where official conduct amounts only to slight negligence or an innocent omission or where the foreign investor is partially culpable in defendant's wrongful activity.⁴²²

C. Increasing Skill and Independence of the Judiciary

In the past five years, attorneys, judges, and legislators in the Russian Federation have worked together to effect numerous reforms designed to enhance the proficiency and integrity of the judicial system. Some commentators note that measures such as the creation of bar associations, the establishment of judicial training workshops, and the enactment of an obstruction-of-justice statute⁴²³ have improved the competence and autonomy of judges.⁴²⁴ In order to add to the courts' growing expertise, RF Superior Arbitration Court Chairman Venyamin F. Yakovlev noted that there are plans to have entrepreneurs, scientists, bankers and other professionals sit as arbitration court judges, a project which is already in the experimental stage.⁴²⁵

Most sources recognize that corruption and extra-judicial influence remain problematic, but statistics tend to show vast improvements over the Soviet era.⁴²⁶ It is unclear whether the

⁴²¹ The University of Wisconsin-Madison, *THE RULE OF LAW IN RUSSIA*, THE GLOBAL STUDIES RESEARCH PROGRAM 37 (1994).

⁴²² *See id.*

⁴²³ *See* On Disrespect for the Court, RSFSR Law of Oct. 9, 1989, *Vedomosti RSFSR* Issue No. 22, Item No. 416 (1989) (excerpted copy on file with the author).

⁴²⁴ Judge Mikhail Bobrov, Chairman of the RF Council of Judges, stated that deference toward the courts has increased in recent years, and this phenomenon is the probable result of a better-skilled judiciary. Any abatement in "external" meddling in judicial affairs, he concluded, cannot be traced to the fact that judges have been endowed with a cause of action for interference with their work. *See* Interview with Judge Mikhail Bobrov, Chairman of the RF Council of Judges, in Moscow Regional Court (July 19, 1994).

⁴²⁵ *See* Feofanov, *supra* note 148.

⁴²⁶ Judge Alexander Shannin, Chairman of the Lefortovo Regional Court, referring to data compiled by the Ministry of Justice, noted that official and civilian attempts at bribery and coercion affect only one in every five cases in the general courts. *See*

situation has improved in the arbitration context, where larger stakes and informal procedure provide greater incentives for litigants and other interested entities to attempt to influence the court's result. The Enactment of the "Law on Bailiffs," as well as aggressive enforcement of their rulings, would be a substantial step toward adequate protection for the courts.⁴²⁷

VII. Conclusion

Arbitration practice in the Russian Federation can be a risky proposition for the foreign investor. A variety of procedural issues, such as poorly-defined justiciability doctrines, inconsequential former-adjudication, changing rules of decision and inadequate enforcement measures, seem to undermine the reliability of arbitration-court judgments. Other factors, such as the controversial notion of a "prosecutorial" or "public-interest" orientation of the arbitration system, as well as the specter of widespread "external" influence upon the courts, cast further doubts on the trustworthiness of arbitration practice.

With the enactment of a new Arbitration Code and several well-drafted substantive laws on commercial subjects, the events of the past year may mark a significant break with the shortcomings of prior court practice. Access to the courts has been broadened greatly by the reduction of filing fees, the institution of a single-judge trial and the withdrawal of restrictions on the procedural rights of foreigners seeking to invoke arbitration-court jurisdiction. Litigants and the courts alike now enjoy the availability of more stringent measures to enforce court rulings and to secure claims. Greater judicial sensitivity to the complexities of commercial transactions has developed in some areas, with the growing sophistication of federal laws and the improved quality of argument at trial.

These advances are, to varying degrees, undercut by the chaotic nature of Russian business today. The arbitration courts often find themselves stuck between entrepreneurs seeking to push

Interview with Judge Alexander Shannin, Chairman of the Lefortovo Regional Court, in Moscow (Aug. 1, 1994). Judge Shannin pointed out that this rate was markedly lower than that during the Soviet period, where the figure was around fifty percent. *See id.*

⁴²⁷ *See supra* notes 406-08 and accompanying text for a discussion on the Law on Bailiffs.

the bounds of lawful economic activity and a government trying to reel them back in. It is no wonder that a procedural code seeming to mandate such fundamental changes can receive widely varying application from region to region, dispute to dispute. While the arbitration courts have received qualified approval from some Western lawyers and investors, the real import of the changes effected will be difficult to assess until Russia's economic and legal development reaches a steady pace.

