

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

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

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

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

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

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

A. Filing a Claim

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

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

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

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

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

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

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

2. Form of Filing

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

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

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

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

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

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

CHECKLIST

Information that Must Appear in the Petition of Suit:

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

Documents that Must be Appended to a Petition of Suit:

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

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

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

3. Combination of Several Claims in a Single Filing

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

4. Process for Review and Acceptance of a Petition

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

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

5. Where to File - Jurisdiction and Venue

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

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

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

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

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

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

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

c) Choice of Venue by the Petitioner or by Agreement

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

d) Special Rules for Particular Cases

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

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

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

⁶ See Articles 27 and 29 of the APC.

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

⁸ See Article 31 of the APC.

occurs during its consideration (e.g. a change in the legal location of the respondent) which would result in a differing venue, the arbitrazh court is obligated to continue the consideration of the case on its merits. An arbitrazh court may transfer a case outside the venue determined by the general rules if, as a result of the recusal⁹ of one or more judges or due to other factors, it is not possible for the case to be considered in the court in which it was filed. In these instances, the case is to be transferred to another court of the same level for consideration. In instances in which an arbitrazh court transfers a case for the consideration of another court, the receiving court cannot refuse to accept the case.

f) Rules Concerning Foreign Parties

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

6. Periods of Limitation

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

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

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

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

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

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

B. Responses to a Petition of Suit

1. Response Concerning the Substance of the Suit

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

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

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

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

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

2. Counter-Claims

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

3. Challenges to the Jurisdiction of the Court

a) Existence of an Arbitration Agreement

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

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

1. the existence of a valid arbitration agreement (clause);
2. confirmation that the ability to make recourse to the arbitration tribunal has not been lost; and
3. the respondent objecting on this ground to the court's jurisdiction makes this objection *no later* than the first response concerning the substance of the case.

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

b) Outside Arbitrazh Court Jurisdiction

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

¹² See generally Article 87 of the APC.

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

C. Participants and their Rights, Preliminary Proceedings

1. Persons Participating in the Case and their Rights

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

-  to acquaint themselves with the materials of the case and to take notes on them and make photocopies of them;
-  to petition for the recusal of judges or other participants (experts, interpreters);
-  to pose questions during the consideration of the case, and to make motions and petitions, and also to object to the motions and petitions of other participants;
-  to give explanations to the arbitrazh court, and to present opinions and arguments on all questions arising during the consideration of the case, and to object to the arguments of other participants; and
-  to appeal acts of the court and to exercise other procedural rights.

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

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

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

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

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

2. Additions and Changes of Parties to a Case

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

¹⁵ Article 36 of the APC, part 4.

3. Participation of the Procurator and of State Bodies

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

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

4. Witnesses, Experts and Interpreters

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

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

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

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

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

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

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

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

5. Representatives

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

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

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

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

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

If you want to authorize your representative to:

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

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

6. Language Issues and Interpretation

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

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

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

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

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

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

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

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

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

8. Measures for Securing the Suit

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

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

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

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

¹⁹ See Chapter 5 for a discussion of execution proceedings.

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

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

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

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

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

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

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

9. Preparation of the Case

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

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

Preparation of the Case

Judge's "To Do" List

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

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

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

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

1. General Principles

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

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

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

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

2. General Conduct of the Hearing; Appearances of Participants

The hearing of a case is conducted by the single judge hearing the case, or if the case is being heard by a panel of judges, by the presiding judge among them. The judge (presiding judge) conducts the session and also keeps order and makes the required announcements for the record, sometimes performing duties in the court session that are performed in some other systems by bailiffs, court clerks or other functionaries. The judge opens the court session, announcing the case to be considered and verifying the presence of the participants in the case and others summoned to take part in the hearing. If any of the participants²⁵ fails to appear in the hearing, the judge must determine whether they were informed of the place and time of the hearing in the proper manner. In the absence of evidence that a participant in the case who is absent was informed in the proper manner, the judge must delay the consideration of the case until there is certainty that all participants have been duly notified of a hearing.²⁶

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

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

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

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

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

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

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

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

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

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

3. Evidentiary Rules

a) Evidentiary Burdens

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

b) Relevance and Admissibility

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

c) Facts and Circumstances Not Requiring Proof

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

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

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

d) Form of Evidence

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

e) Presentation of Evidence; Demand for Evidence

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

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

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

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

f) Weighing and Evaluation of Evidence

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

g) Falsification of Evidence

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

4. Records of Case Proceedings

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

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

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

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

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

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

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

³² The absence of any protocol of the court session in the record will also serve as grounds for reversal.

³³ The period for submission of comments can be renewed or extended by the judge according to the general rules concerning procedural time periods, discussed below.

³⁴ They may, however, serve as the source for information to be used by the participants in making comments and corrections to the protocol, and may be useful in convincing the judge that a correction or addition proposed by a participant is warranted.

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

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

a) Suspension of Proceedings

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

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

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

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

- 🕒 the need to await a decision on another case, where that decision will have a mandatory force for the arbitrazh court concerning facts, circumstances or legal interpretation which are significant for the case being considered;³⁷
- 🕒 the entry of a person who is a respondent into the active armed forces, or a motion of a person who is a plaintiff and is entering into the active armed forces requesting suspension;³⁸
- 🕒 the death of a person participating in the case, if the rights and obligations in the legal relationship involved in the case may pass to a successor;³⁹ and
- 🕒 the loss by a person participating in the case of legal capacity.⁴⁰

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

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

- 🕒 where the arbitrazh court has appointed an expert to conduct an expert review or analysis and time is required for this process;
- 🕒 where an organization which is a participant in a case is undergoing reorganization; and
- 🕒 where a person participating in the case has been summoned to perform any kind of state duties.

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

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

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

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

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

b) Termination of Proceedings

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

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

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

c) Settlement Agreements

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

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

6. Decision of the Court in the Case

a) Closure of Proceedings and Deliberation

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

b) Form and Elements of the Decision

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

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

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

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

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

c) Issuance and Announcement of the Decision

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

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

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

d) Entry Into Legal Force

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

7. Determinations and “Private Determinations”

a) Determinations

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

b) Private Determinations

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

⁴³ In the few instances in which the Higher Arbitrazh Court serves as a court of first instance, its decision enters into force immediately from the time of its issuance.

⁴⁴ The Russian term is *opredelenie*.

⁴⁵ The Russian term is *chastnoe opredelenie*.

8. A Note on Procedural Time Periods

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

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

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

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

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

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

9. Filing Fees and Court Costs

a) Filing Fees

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

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

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

b) Court Costs

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