

Chapter 4. Appeals in the Arbitrazh Court System

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

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

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

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

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

1. Period for Appeal, Place and Manner of Consideration

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

2. Who May File

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

3. Form of Appeal, Required Content

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

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

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

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

CHECKLIST FOR AN APPEAL FILING

Information Required in an Appeal Filing

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

Documents Required as Appendices to an Appeal Filing

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

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

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

4. Consideration of the Appeal by the Arbitrazh Court

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

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

5. Grounds for Appeal

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

- ▣ incomplete clarification of the circumstances of the case having significance for the case. This usually refers to failure of the court to examine all of the evidence in the case, refusal to call witnesses or demand evidence of significance to the case, mistaken exclusion of relevant evidence from the case, and similar problems;
- ▣ inadequate proof of circumstances that the first arbitrazh court found to have been established by the evidence, and which have significance in the case. This may include reliance by the court on evidence improperly obtained, on unreliable evidence, on evidence that does not meet requirements of relevance and admissibility, or on mutually contradictory evidence. It may also refer to case in which the court made presumptions on the basis of the evidence, but the presumed facts or circumstances themselves were not proved;
- ▣ failure of the conclusions set forth in the decision to correspond to the circumstances and materials of the case. This may include cases in which the conclusion of the court is presented without justification, is self-contradictory, or is unsupported by the evidence in the case. It may also relate to cases in which the court failed to consider some of the evidence or circumstances in the case which were significant; or
- ▣ violation or improper application of the norms of substantive or procedural law, if the violation resulted or might have resulted in the issuance of an incorrect decision. This may include cases in which the court applied the wrong law, failed to apply an applicable law, or interpreted the law incorrectly in its application. It may also include cases in which the court applied a law which was no longer or not yet in force, or a regulatory act which was not consistent with governing law.

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

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

GROUNDS FOR UNCONDITIONAL (AUTOMATIC) REVERSAL OF A COURT DECISION

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

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

6. Issuance and Content of Decree; Entry into Force

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

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

REQUIRED CONTENTS OF A DECREE OF THE APPEALS COURT

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

C. Cassational Appeals

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

1. Form, Period and Place of Submission

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

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

CHECKLIST FOR A CASSATIONAL APPEAL FILING

Information Required in a Cassational Appeal Filing

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

Documents Required as Appendices to the Filing

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

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

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

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

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

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

2. Procedure and Period for Consideration

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

3. Grounds for Cassational Appeal

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

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

4. Authority of the Cassational Instance

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

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

5. Content of the Decree of the Cassational Court

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

REQUIRED CONTENT OF A DECREE OF THE CASSATIONAL COURT

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

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

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

D. Reconsideration of a Case in Supervisory Proceedings

1. Nature of Supervisory Proceedings

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

2. Standing to Submit a Protest

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

3. Procedure for Consideration; Authority of the Presidium

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

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

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

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

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

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

1. Grounds for Reconsideration of the Case

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

- ▣ circumstances having significance for the resolution of the case that were not and could not have been known to the petitioner at the time of its consideration;
- ▣ the deliberately false character of evidence or information provided to the court which resulted in the adoption of an illegal or unsubstantiated decision. This may include false witness testimony or expert conclusions, incorrect interpretation or translation of evidence or testimony provided in a language other than Russian, and/or falsified documents or physical evidence. The deliberate falsity of the evidence or information must be established by a judgment of a court that has entered into legal force;
- ▣ criminal actions of the parties to the case or their representatives, or of the judges in consideration of the case, as established by the judgment of a court that has entered into legal force; or
- ▣ the reversal of an act of the arbitrazh court or of another court or of the decree of another state body that served as the basis for the original decision.

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

2. Procedure for Submission of a Petition

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

3. Consideration of the Petition and Effects of its Satisfaction

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