

## Points of View

BY ETHAN S. BURGER

A remarkably candid Russian judge, Elena Yalavina, has surprised some people by complaining about the extent of political interference by "influential insiders" in Russia's judicial process. What is notable about her recent remarks is not what she said, but that she had the courage to describe the situation publicly. It's an open secret that when the Russian political leadership and its favorites want something—say, control of a major oil producer—prosecutors, state officials, and judges can usually be counted on to accommodate them.

Perhaps she was hoping that Western business and political leaders would take note. Perhaps President Dmitry Medvedev would be reminded that cleaning up the country's "legal nihilism" will require more than rhetoric and Prime Minister Vladimir Putin would be pushed to implement the necessary policies.

But there's another group that should also be raising a public alarm: lawyers and legal experts who sell their expertise to foreign businesses investing in Russia, particularly in the natural resources sector, as well as the officers and directors who approve such investments. Despite the massive evidence of corruption, many so-called Russian specialists have for years given testimony in U.S. courts and to Congress—and, presumably, advice to clients—downplaying the extent of the problem and its consequences. In reliance on that testimony, U.S. judges have declined to hear cases that, as a result, can only proceed in a Russian court.

## THE RULE OF YUKOS

Western political leaders have been reluctant to take decisive steps, preferring to pursue "quiet diplomacy." They have tended to treat the tax evasion and fraud charges brought against Mikhail Khodorkovsky in 2004 as the exception—the rare case driven by politics and personality—and not the rule. Khodorkovsky was the head of the privately owned Yukos Oil Co. At the time of its de facto seizure by the state, the company was producing about 20 percent of Russia's oil.

In 2007, Yukos' three main oil production units were sold at auction for a bargain basement price to the oil company Rosneft, which was seemingly acting on behalf of the Kremlin. Just last week, Khodorkovsky, who is serving an eight-year prison term, was denied parole.

Also last year, the Russian government repeated itself: Regulatory threats were made, tax charges were threatened, and the head of the privately owned oil company Rosneft was driven to resign. Knowing not to expect justice in the courts, he fled the country.

Of course, the problem of corruption in the judiciary is not unique to Russia—it is worldwide. The situation in Russia receives the attention it does because the legal disputes often involve the country's enormous wealth in natural resources.

The money at stake may go a long way to explain why lawyers and others working in an advisory or expert capacity for foreign businesses have been insufficiently vocal in their warnings. If they were too candid about the state of things in Russia,

# Silence

## on the Court

*Lawyers need to speak out against corruption in the Russian judicial system.*



they might lose out on their share of the large sums of money being spent on commercial and technical assistance projects. Apparently, there are many lawyers paying little heed to Rule of Professional Responsibility 2.1, which provides that the lawyer acting as "advisor" shall "exercise independent professional judgment and render candid advice."

George Mason University professor Janine Wedel laid it out particularly well in *Collision and Collusion*, her award-winning book about the failures of Western aid to the former Soviet Union: Persons working for public and private institutions don't like to be told that their efforts are not achieving their stated goals, nor do they like having to face the possibility of finding new jobs.

## TAKE NOTE OF BP-TNK

Meanwhile, officers, directors, shareholders, and market analysts too often seem cavalier about the risks that corpo-

rations face when doing business where there is no rule of law. A rare exception is Robert Dudley, chief executive of BP-TNK, a British-Russian joint venture developing oil in Western Siberia.

Rather than put a positive gloss on the situation and attribute problems to misunderstandings, Dudley has frankly described BP's current problems with the Russian government and its Russian joint venture partners.

BP was not able to obtain Russian visas for many of its employees assigned to work on the joint venture. Dudley himself has deemed it the better part of wisdom to leave the country. And the project's Russian shareholders—including "oligarchs" Mikhail Fridman, Leonard Blavatnik, and Victor Vekselberg—operate under the auspices of an entity called Alfa-Access-Renova, which is now threatening to sue BP in a Moscow court.

They also want to arbitrate certain claims against BP in Stockholm. No doubt

they're well aware that the Russian courts are notorious for not enforcing major arbitral awards made in favor of Western parties, in contravention of a 1958 United Nations convention.

## TOO MUCH SILENCE

And meanwhile foreign businessmen have kept investing in Russia—although they may finally be putting on the brakes due to the conflict in Georgia. According to *The Financial Times*, foreign investors are moving their money out of Russia at a rate not seen in a decade. But this phenomenon is not attributable to the absence of the rule of law in Russia, which is still widely regarded as simply a business risk.

Have their lawyers not been loud and clear enough about the legal risks? Being too negative about a project is certainly not a good way to generate income for their employers or themselves. Perhaps they rationalize it thusly: Evaluating the wisdom of investments and commercial contracts is a business decision and, hence, outside the scope of their responsibility.

Even if the Russian government doesn't seek to run a particular company, it is often impossible to do business in Russia without paying bribes. Have lawyers been warning their clients that bribery violates the Foreign Corrupt Practices Act and equivalent legislation adopted by member-states of the Organization for Economic Co-operation and Development? Surely yes, and yet just as surely, bribes are being paid to get projects done by companies that still have lawyers.

As for those feeling subtle and not-so-subtle pressure to sell that and turn over control of this (never mind the original contract, never mind the law) before Russian prosecutors swoop down, there is little recourse in the U.S. legal system. U.S. judges are reluctant to assert their authority to hear foreign matters. They understand the difficulty in obtaining evidence abroad. They may not be knowledgeable about foreign law, and they do not like dealing with translated documents. In short, they are open to defendants' arguments against hearing the case.

One argument that works too often is to ask the judge to decline to hear the case on the grounds of forum non conveniens. Before granting a defendant's motion to dismiss because of the logistical difficulties of trying a case far from where the alleged misdeeds occurred, the judge must find there exists a legitimate alternative forum to hear the case on the merits. Such a forum will provide trained, impartial judges; protection of parties' rights; and laws that cover the misdeeds in question.

Russia's courts do not represent a legitimate alternative forum. Yet U.S. judges continue to find otherwise. And in the face of overwhelming evidence to the contrary, defense lawyers (and their experts) continue to argue that the Russian judicial system meets this standard.

If a Russian judge can find the courage to speak up, why can't we?

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