The Managing Partner of Hogan Lovells Moscow office Oxana BALAYAN

"THE WINNERS ARE THOSE WHO KNOW THE MARKET AND LEGISLATION OF THE ASIAN COUNTRIES"

Born in Moscow on 1 January 1970.

Graduated cum laude from the law school of Lomonosov Moscow State University in 1992. Received a Doctor of Law degree from the University of Regensburg in Germany in 1996. Underwent additional training at the Legal Summer School of Columbia University (New York), in Leiden in the Netherlands (1992), at the European Legal Academy in Florence in Italy (1994) and at the Harvard Business School in Boston in the USA (2000).

From 1995 through 2001 she worked in senior positions at international law firms. She has been the managing partner of the Moscow office of the firm Lovells. Since 1 May 2010 she has been the managing partner of Hogan Lovells in Russia, where she also heads the corporate / M&A practice. She is a dually-qualified lawyer in Russia and England, a Dr. iur in Germany and a member of the Moscow City Bar.

She specialises in cross-border mergers and acquisitions, corporate finances, joint ventures and private equity transactions in Russia. She advises a variety of major international and Russian clients operating in the retail, the media business, pharmaceuticals, the financial sector, automotive, manufacturing and real estate. She is widely recognized among key players in the market. She has worked with the structures of Alexander Mamut (A&NN Capital Fund Management), Mikhail Fridman (X5 Retail Group, Altimo), Dmitry Pumpyansky (Sinara, OAO TMK), Vadim Belyaev (Otkritie), and the companies Rostelecom, Sberbank, ProfMedia. She has been recommended as one of the leading corporate / M&A lawyers in Russia in the national and international ratings, such as Chambers Global and Chambers Europe, Legal 500 and The Best Lawyers.

She holds the titles Dealmaker of the Week (The American Lawyer, December 2010), and is a three-time finalist for a Euromoney award (nomination European Women in Business Law, 2011, 2013 and 2014). She is honoured with a Letter of Gratitude from The Minister of Justice of the Russian Federation for her significant contribution to the implementation of the state justice policy and for her great support with preparing and hosting the 3rd St. Petersburg International Legal Forum in 2013.

— At the last Saint Petersburg Legal Forum, information appeared that several foreign legal firms, particularly American, had refused to do business with Russian clients due to the sanctions. Is that true?

— There are legal and practical components when answering this question. From a legal point of view, there are restrictions imposed upon American and European companies and not allowing them to work with certain categories of individuals and legal entities in Russia. Many foreign legal firms are American or European by their place of registration or ownership structure. So they are legally required to comply with the prohibition. This means certain restrictions, not a total refusal to do business with Russian clients..

However, this is why lawyers are lawyers: we find solutions being faced up to the most difficult legal requirements. Therefore, in practice any refusal to work is a last resort. All possible legal options are checked before resorting to it. For example, a person hit by the sanctions changes the ownership structure of their business, separates the

sanctioned areas of work into independent legal entities. All these measures frequently permit to provide necessary legal services and not to give up cooperation.

— But is it possible to provide services to companies which have not been included on the sanctions list but are controlled by those who have been included on it?

— Companies in which persons on the list have a share of 50% or more are also on the list, so are companies controlled by such persons. Control is a fairly wide concept, but there is good practice of its interpretation, since this is not the first time when sanctions are applied. We use the criteria of control which have already been firmly established, and at the same time we receive enormous support from our colleagues in Washington and Brussels, who have been consulting on sanctions in the USA and in Europe for decades. At the end of the day, every foreign legal firm must develop its own approach, especially to situations which are on the borderline. For example, what is to be done if an individual affected by sanctions is the member of a client's board of directors? Such cases are not always unambiguous.

— At the Forum they also said that several firms had refused in advance to work with organisations who they thought might be put on the sanctions list. Has there ever been anything like this?

— I have already regretted several times that I have not attended the Forum this year. And the way things worked out, I was already halfway to St. Petersburg. This story shows precisely how the sanctions and cooling of relationships between Russia and Canada, in particular, can affect the partners of law firms. The global meeting of the partners of Hogan Lovells has been taking place in Canada this year, and we understood we had to miss the Forum 2014. Surprisingly, we six Russian partners of the firm were not issued Canadian visas. Before the imposition of sanctions it was difficult to imagine such a situation. We have very high regard for the organisers of the Forum who responded instantly and renewed our application to participate. But they ended up issuing visas to us at the last moment, so our plane flew to Toronto, and not to St. Pete.

As for your question, I have not heard that anyone in the legal business has entered the fortune-telling business and dares to say precisely which companies will be on the sanctions list next. One has to take into consideration that foreign legal firms always work on a certain profile of their ideal client and that it can change. We just might not be a perfect fit for some as advisers, either we are too expensive or too Western, or we are not represented in one region or another or in a certain field of work. There is always a certain natural selection of clients. I do not exclude that some firms may cover their bases and restrict cooperation with certain companies from an industry which has traditionally often been hit by sectoral sanctions. There is good sense in this.

— But on the whole, do you agree that the sanctions will lead to a reduction in the volume of legal business in Russia?

— With certain reservations, one can say that this will probably occur. For example, restrictions have been imposed on the banking sector raising a certain type of financing on the American and European markets (VTB, Sberbank, the Bank of Moscow and others have been put on various lists). If there is no financing, there will not be any legal support for it. Who supports foreign financing for such large banks? Foreign legal firms. So one can assume that some volume of work will be lost by legal firms.

On the other hand, new fields of work are appearing. There is now an enormous wave of requests regarding the nature of the US or EU sanctions, and how they are applied. Many of our clients are conducting checks of the ownership structure of their counterparties, they are developing internal control mechanisms in order to rapidly identify those who are hit by sanctions and to establish rules for working with such parties. This is a huge reservoir of work for lawyers at the intersection of corporate practice, state regulation practice and compliance. Our employees are definitely not bored.

— Are the requests coming from abroad or from Russia?

— They mainly come to the Moscow office. In the majority of cases they are made by large Russian

companies or the local offices of foreign companies. For such projects, we always form an international team with the participation of employees from Moscow, Washington and Brussels in order to take into account both the particulars of Russian legislation and all sanctions requirements.

— So it turns out that the position in the market may change in favour of Russian law firms?

— I am not sure that Russian firms are able to consult on all questions. In any case, business community cannot exist only within the framework of the Russian market. Now there is an interesting and correct impulse: to develop actively the Russian-Asian area. One needs to know the mentality of Asians and how to work with them, so the winners will be the advisers who know this market and its laws. Does this imply Russian legal firms? Unlikely.

— They say the Chinese prefer to have their own advisers to support transactions, rather than turn to Western firms.

— I am not only speaking of the areas where a foreign legal firm supports Chinese or Asian partners. One can do this without having an office in Russia. I mean supporting Russian clients who are entering this market. For them it would be more appropriate to have an adviser with knowledge of Asian law and a network of offices in the region.

All in all, there is always work for lawyers. Remember 1998? There was a boom, and new firms entered the market. Then suddenly the financial crisis arrived. These firms started working on bankruptcies and made a great business out of them. Everything rebounded after a few years, and there were more projects with mergers and acquisitions as well as joint ventures. A few more years went by, and after consolidation, businessmen started to argue with each other. Many firms switched to litigation.

> Today we advise on sanctions. Tomorrow something new will appear.

— And there are also retaliatory sanctions. Russian state companies may stop working with foreign consultants.

— We have heard that state companies have tried this kind of approach and are hiring more Russian legal firms than foreign ones. We have not encountered this yet ourselves, but we are preparing for it. Some sector of our work may disappear. But there will always be a set of questions which a Russian legal firm simply cannot cope with. For example, these may touch upon a state company entering foreign markets or a major contract requiring advice on antitrust regulation outside of the Russian Federation.

— But if it turns out that there is a complete prohibition of cooperation with foreign firms, are you ready to work on the orders of Russian legal firms as their ‘subcontractors’?

— Of course, something like that could occur. I've never thought about this area, but sub-contracting work might also be interesting for us. We hope that Russian legal firms will not get hit by American or European sanctions.

— Such changes could also have impact on the employment market. Which strategy would be better for a lawyer in the new conditions: making a career in a foreign firm, expecting partnership, or cutting loose and charting one's own course?

— There is no one-size-fits-all answer. When studying foreign law, you expand your horizons, start to better understand your own legislation and to see its problem issues. Therefore I vote for grasping the opportunity to work in a foreign consulting company. However not everyone wants to become a partner in a foreign law firm. This career goal is gradually receding, and such a tendency is clearly visible not only in Russia.

— Why?

— People understand that partnership implies not only privileges, but also a large workload and responsibility. Few are ready for this. And somehow one has to succeed in combining one's professional life with a personal life and a social life.

But most of our lawyers like working with us, after all, the conditions are very attractive. You work in a sunny office in Moscow Tverskaya Street with a great team, you are treated with great respect, sent on business trips and meetings at the company's offices in London, Paris, New York, Singapore, Madrid and even Rio de Janeiro.

— And it's like that 24 hours a day.

— Incidentally, now it's not 24 hours a day. They said before that the schedule was 24/7, now they say 25/8… But seriously, we have very successful people who try to build a more or less acceptable schedule for their families. I consider that we employers should support this.

— Maybe then it is better for them to open their own business?

— When you have your own business, it is very difficult to go on vacation. It is very difficult to get sick and say to yourself that unfortunately today you cannot come to work. It is not for everyone. You have to do your own marketing. OK, when you left you were able to 'take away' several projects and clients. But since these projects and transactions end you need to replace them with something. Not everyone is skilled at finding new clients.

— Have lawyers left your company in order to open their own business?

— Yes. We had one employee in the corporate practice who now works quite successfully on his own, yet in the less segment. And we work very well together. If, for example, a transaction does not meet our budget requirements, he provides good service for it and serves our clients well.

— Did he have good career prospects within the firm?

— Yes, he had a good prospects for growth. But he wanted to control the entire process by himself and he achieved this.

— Do partners at large foreign firms have little independence?

— The partnership system is built upon the fact that you are very independent in your actions. But there are all sorts of situations.

For example, partners have a fairly large amount of freedom at foreign legal firms, but I am told that at some Russian firms, the autonomy of partners is questionable. There they have "founding fathers" who live quite well, and there are partners who have this partnership status but in fact are no more than hired employees.

— You have said that a lawyer who leaves must do their own marketing. Do you find new clients by yourself? Or do the clients come to you through the head office?

— Of course we actively and successfully participate in developing relationships with clients ourselves. Clients also come to us through the head office, and this is our great advantage. But the reverse process also happens. Frequently the firm tries to obtain a global company as a client, but this does not happen immediately, and Russia turns out to be the first jurisdiction where we are able to support a serious project. And after working with our Moscow office, these companies become global clients.

— What share of revenue comes from clients who you have attracted by yourselves?

— Approximately 50%. The other half are our network clients, and there are more and more of these as our business becomes more and more global.

— Is it difficult to explain Russian law to foreign clients?

— Yes, of course. But I see it as a great benefit that we usually work with major corporations. They have already been in Brazil, China, some of them — in Africa. So when they come to Russia, they breathe a sigh of relief and say: "You know, you don't have things so bad here". It is less and less frequent that clients call and ask: "Oxana, are you sure that everything is as complicated as your employees explained?" In such cases it was necessary to say: yes, I am sure, this is a particularity of the national legislation.

— So it is client experience, not a change for the better with Russian legislation which helps in your work?

— No doubts, Russian legislation is also improving, but there are still many questions and contradictions. They change one law, but they have not changed 10 others.

> It seems that now we have a shareholders’ agreement for joint-stock companies, but there is no established judicial practice yet. And no one knows precisely, how all this will work.

— Are amendments to the Civil Code regarding corporate law a step forward?

— Things are moving in the proper direction. For example, one needs to welcome the division of companies into public and private ones. The current regulation of companies of a small number of shareholders who are not preparing to enter the stock market is too detailed. We hope that there will be more flexibility for such private companies. This would correspond to what we see in other jurisdictions.

— But here almost all limited liability companies turned out to be private, moreover some of them conduct large business. How correct is it to regard them as private?

— A limited liability company is after all a closed business, there is a priority right when transferring participatory shares and a limited number of participants, these are the main criteria of a private company. If a company wants to attract an unlimited number of investors and have a truly large business, it should become a public company. It seems to me that time, and more specifically the application of the new rules will put everything in its place.

— Certain scholars are dissatisfied with the fact that corporate agreements may regulate the structure of governance bodies. What is your opinion on this?

— We have been working with English law for a long time, and we have not encountered such shareholders’ agreements in joint-stock companies. I have not seen that they have created any barriers for business, and I have a good opinion of them.

— Another complaint is confidentiality agreements concluded among a group of shareholders. Their content may not be known to other shareholders. Is it bad?

— Unless otherwise is required by articles of regulations or legislation, the content of such agreements is also not disclosed in many foreign jurisdictions. There is nothing bad in this. For example, there are transactions when financial investors, private equity. They receive additional rights and may reach agreements with one shareholder, and if he or she leaves the company and sells his or her shares, then they can sell their shares to the same buyer. This is a question of relations between two shareholders.

— And would it be good if it is not a shareholder, but a third party who becomes a party to an agreement? Russian Civil Code currently also provides such a possibility.

— I think this possibility is intended first of all for a joint-stock company itself. Many things depend on the behaviour of the company: has it accepted or not a request from a shareholder etc. Therefore it may enter into an agreement in order to incur the corresponding obligations.

— But it is not directly written that the company itself may become a party. Isn't it a risk here?

— I agree that we do not know the full extent of what was meant. We will find out in practice how this will work.

— What other third parties might there be?

— The parent company or a beneficiary of one of the parties to the shareholders’ agreement of a joint-stock company. Such agreements frequently provide that one of the parties is required to buy out the shares of the other party in certain circumstances, for example, if the financial targets for the project are not met. In this case it is important that such a buyout take place, and that the purchasing party (shareholder) performs its financial obligations. These are the cases where the parent company or the beneficiaries of such shareholders act as parties to the agreement.

— Why?

— Frequently a specially created company (SPV), which has no property, acts as the direct shareholders of a company. The parent company takes on certain obligations of such an SPV upon itself as a party to the shareholder agreement and incurs responsibility for it. This reduces the risk of the parties failing to perform their obligations under the agreement, since the parties may raise it to a higher level and impose liability upon a solvent entity. So this is a positive rule of the Civil Code.

— There are also questions on the possibilities of distributing corporate rights which are not in proportion to the share. What do you think of this?

— This is also a good possibility, existing in many jurisdictions. Due to such distribution, participants of agreements can solve their specific business task. Some need to consolidate their reporting, others need to have a veto right. And financial investors often don't need votes, they are more interested in the distribution of profits, and not votes.

— Is there interest in Russian shareholders' agreements?

— There is, great interest! The state companies themselves more and more often turn precisely to this instrument. One can note a trend towards deoffshorization, investments are frequently going directly into Russian companies.

> Foreign investors frequently need to examine the possibility of concluding shareholders' agreements under Russian law.

By the way, one might ask whether it is worthwhile to transfer a dispute under such an agreement, for example, to London arbitration…

— How do you respond to this question now?

— There are some disputes related to a Russian company which we cannot transfer to a foreign court, like those regarding corporate governance. Other disputes which are not directly related to the work of the company may indeed be resolved outside of Russia.

For example, disputes over the procedures for developing the business and carrying out joint investments in Russia, as well as exclusivity. Frequently the parties reach agreement so that if the Russian government proposes a new project, then it first examines the possibility of realising it through a joint-venture. And only afterwards each of the participants of this project gets the right to examine this request of the level of its company.

— And how should one deal with antitrust legislation?

— Well, I only gave an example. In any case, this is a very unusual construction for a Russian judge. Therefore sometimes it makes sense to transfer such disputes abroad.

— You mentioned deoffshorization. What were the reasons for business to go offshore?

— First of all there are tax advantages. But there were other factors also. Some simply made an assembly line out of structuring their investments with offshores. Sometimes the existence of, let us say, a Cypriot structure made it possible for a Russian business to form a joint venture with a foreign business. Without this superstructure, a project may not have taken place at all. The foreigners feared that the Russian legal system was still imperfect and that it created more risks.

— What kind of risks?

— Well, the risk of not being able to exit the joint-venture. A foreigner knows how to exit from a Luxembourg or Netherlands company, but it is unclear how to perform that in Russia.

> Besides offering tax benefits, the superstructure provided foreign investors with flexibility in resolving issues regarding the regulation of the joint business. With deoffshorisation, we are taking away this possibility. But what do we give in return?

Business is asking us this question, and unfortunately we do not have an answer yet.

— Does this mean that advisers were not able to explain Russian law to foreign business?

— No. I think that the problem is the approach of Russian legislation. At first glance we have freedom of contract and can do anything. But it was still necessary for the Plenary Panel of the Supreme Arbitration Court of the RF to issue a decision to clarify what freedom of contract is. If such clarifications appear, this means that there are restrictions and uncertainty. If a foreign investor has a large project, why should they check whether these restrictions exist in Russia and how they are applied? Lawyers have a humorous classification system for countries: in the USA everything is allowed which is not prohibited, in Germany everything is prohibited which is not allowed, in Italy everything is allowed, especially that which is prohibited, and in Russia, it turns out that everything is prohibited, even that which is allowed.

— Is it possible that this is why foreign firms do not strive to resolve disputes in state courts?

— It seems to me that there was such a trend previously, and now a large segment of disputes has appeared that proceed under conditions which are perfectly understood by all of us. And we win cases for our clients with great success. About 3-4 years ago everything changed for the better.

> The thing which foreign firms still doubt in and do not understand how to work with are the practices related to lobbying and to government relations (GR).

In America, for example, such practices are brilliant. This is of a huge business, lobbying the legislation, preparing legislative bills.

— This business is regulated there. Special licences are required.

— We do not need an additional license as a lobbyist. We are involved in legal questions and act as experts in the committees. But in Russia even this kind of activity is still not sufficiently developed.

— And what is the problem? Don't companies turn to you for these services?

— They do. But in Russia, people associate lobbying activity with bribes. Foreign legal firms are deeply afraid it can damage their reputation.

— And do we have civilised lobbying?

— Yes, I think we do. There are business associations, the Russian Union of Industrialists and Entrepreneurs, and there are deputies who listen to them. Finally, there are experts councils at the ministries. We are now promoting several ideas regarding public-private partnerships in such areas as healthcare and infrastructure through them.

— As I remember, these normal methods of lobbying will not work while one can go to a deputy and say: ‘Hey, we need to make some amendments during the second reading of the bill without anyone noticing’. Can this really be prohibited?

— Everything can be improved. You know that in Russia any license can be received in two ways: to show up and ask to do it quickly or to file a full set of documents and wait patiently. We choose the second one. Sooner or later everyone comes to understanding that there are fewer worries this way.

— One can currently observe active lobbying in the form of the opposition to the reform of the third-party arbitration courts proposed by the Ministry of Justice. What is your opinion on this?

— I support the idea of developing this area in Russia. But everything depends on how the reform will be implemented in practice.

— And what is your opinion on the accreditation of third-party arbitration courts by the Ministry of Justice?

— This might not be bad. But I think, the main question is how to ensure high-quality decisions and raise the reputation of the Russian state courts for business disputes. The International Commercial Arbitration Court is a highly respected institution, but it is not the first choice of parties to an agreement. It is picked up if it is impossible to choose a court abroad, in London or Stockholm for example.

— Is it a matter of trust in the jurisdiction? For example, the Deposit Insurance Agency, which you represent, tried to place a court-ordered seizure upon

the assets of ex-senator S. Pugachev not through Russian court, but through an English one. It was the same story with another case of yours, against M. Ablyazov, the owner of BTA Bank in Kazakhstan. Why?

— There are many factors here. BTA and DIA are not the only players who go abroad. There is the example of the bank Otkritie, which got a court award against its previous brokers for many millions which had been stolen. They also went abroad. Why? Because one has to look where the assets for which injunctive relief can be obtained are located, and in the majority of cases they are not in Russia.

> The English courts can freeze assets throughout the world, but I cannot imagine the Russian courts obtain such capabilities for now. Simply because we do not even have agreements on provision of legal aid with the majority of countries, while England has them.

— Can it be that in England it is simply easier to pierce the corporate veil and seize the property of a beneficiary?

— No, it is very difficult to pierce the corporate veil everywhere. But this needs to be differentiated from a trust. It is much easier to prove the existence of a trust, and in such case it is not necessary to deal with a corporate veil. In general, after several centuries of work, the English courts have already developed all of these rules and they delve into the essence of economic relations between beneficiaries and companies more than into the legal formalities. The Russian legislative system is still very formalistic, we look at the letter of the law: yes-no, yes-no... We read this all very closely and rarely think, and what was the economic sense of all this? Everything is only beginning to change towards such an approach with us now, as in those Supreme Arbitration Court decisions on the freedom of contract or the liability of directors. But in other countries these steps were already taken decades ago.