

L'état, c'est qui?

When is a state-owned company not a state-owned company? When it's an Uzbek one, apparently. This is the lesson that the Swiss grain-trader Romak has learned in recent years. And it's been an expensive lesson: so far, the tuition fee stands at \$12m.

In 1996, a Romak spokesman says, his company was asked to supply wheat to Uzbekistan to make up for a failure to deliver by a private Uzbek company, Odil. The grain was to be shipped to Uzdon, which Romak describes as the foreign-trade subsidiary of Uzkhleboprodukt, a state-owned company that has assumed the role of the grain ministry (though this description of the companies' ownership has been questioned—see below). However, the spokesman says, representatives of the Uzbek side explained that as the budget for that year had been used up, it would not be able to pay Romak until the autumn. Romak entered into an agreement stating that for the purposes of the Uzbek companies' internal accounting, Romak's shipments could be credited to Odil, but that Romak would still be paid for them. After receiving a written guarantee from Uzkhleboprodukt—and, says the spokesman, the word of the prime minister, Otkir Sultanov—that it would be paid, Romak shipped 41,000 tonnes of wheat to the Uzbek border with Kazakhstan in July and August 1996.

Almost three years later, despite winning a decision in international arbitration, Romak is still waiting to be paid; from documents Romak has produced, it appears that Uzdon claims it paid Odil for the wheat instead, and has suggested that Romak seek redress from that company. The legal manoeuvring since the original arbitration award (by the London-based Grain and Feed Trade Association) has been intense and Byzantine. The upshot is that after the award Uzdon had 30 days to appeal; it was not until 11 months after this deadline had passed that it applied to an English court for an order to extend the time limit.

In a rather sharply worded opinion issued in November 1998, this request was turned down. Romak's attorney, Mark Havelock-Allan, had asked for the costs of the application to be assessed on an indemnity basis rather than the standard basis; his justification for this request was summarised by the judge in the case as being "that the application was hopeless and ill-founded, being based on a case which was inconsistent with Uzdon's own documents, which were dealt with by Uzdon in an unsatisfactory manner in the affidavit evidence filed on Uzdon's behalf". Describing his opinion on this argument, the judge said: "I have formed the view that Uzdon's conduct of the matter has been such as

Mr Havelock-Allan characterises it." In December the High Court issued an order granting the arbitration panel's award the status of a judgment of the court.

Ordinarily, the next step would be to seek to have the judgment enforced through the Uzbek courts. But Romak is wary of this procedure, citing an earlier questionable manoeuvre involving an Uzbek court, as well as grave warnings by bodies such as the US State Department that the Uzbek judiciary is far from independent. While the judgment is enforceable under English law, the spokesman says that Uzdon is careful never to hold any assets outside Uzbekistan. The company fears that if it does choose to press the case in the Uzbek courts, one of three things will happen: a rapid judgment will be handed down against Romak; the case will drag on indefinitely; or Romak will win, only to see Uzdon immediately declared bankrupt. Thus, Romak has chosen instead to launch a lobbying and PR campaign, seeking to raise awareness of its case among key figures, including the Uzbek president, Islam Karimov. Such a campaign would not be legitimate if a court case were under way in Uzbekistan, as Romak would then be requesting the country's executive branch to interfere in the judicial system. While the Romak spokesman will not comment on whom he suspects of being the final recipient of the money that was paid to Odil, he believes Mr Karimov was not involved.

Since Uzdon's failure to pay, Romak has effectively been sent into "hibernation", as the spokesman describes it. Because the grain-trading business runs on thin margins and heavy credit, if a company loses just a small percentage of its total sales, it can be put out of business. Thus the question immediately arises of whether Romak was at least a bit naïve to ship the grain in the first place. The spokesman admits that the company made a mistake in not asking for payment up front, adding: "We trusted the government. We took the word of the prime minister; we did not believe that a sovereign government could blatantly steal ... just take delivery and then not pay."

The spokesman says that even though the company knew what the local business environment was like, he has been surprised by how the case has proceeded. "What's amazed me, and continues to amaze me, is the length that they will go to to cover this thing up. He says Romak believed that once the initial money had been paid to Odil, there was no way to get a hard-currency payment to Romak out of the country without approval from Mr Karimov himself. Thus, Romak offered to ship more wheat in 1997, boosting the margins enough to cover the lost money. The spokesman says

that while this would not be entirely legitimate, Romak realised that Uzdon needed a face-saving way out. But this offer was declined.

The crux of the matter is whether Romak's dispute is with the state of Uzbekistan, or simply with a private entity by the name of Uzdon: ie whether Romak has been sent into hibernation by a dodgy private company or by a sovereign state. The Romak spokesman has produced the original company charter of Uzkhleboprodukt, showing that it assumes the role of the Grain Ministry, and of Uzdon, which states that it is a unit of Uzkhleboprodukt. But John Emmott of the law firm Richards Butler, who represented Uzdon in its application for an extension of GAFTA's appeal deadline, counters that although Uzdon began its life as a state-owned company, its status was changed "very, very shortly" thereafter, and it became a private company—in 1995, he believes. Rather, he says, Romak has been "seeking to establish as a fact by repetition" that Uzdon is state-owned.

However, he also seemed to base his argument for Uzdon's status as a private company on the argument that Uzkhleboprodukt is not the controlling shareholder. This would presume that Uzkhleboprodukt is in fact a state-owned company, but very soon after the initial conversation Mr Emmott contacted your correspondent for the express purpose of pointing out that after "checking through [his] notes", he had realised that Uzkhleboprodukt is not a state-owned company either. In any case, documents produced by Romak indicate that throughout the dispute—and as late as October 1998—Uzdon was still using letterhead indicating that it was a subsidiary of Uzkhleboprodukt, which in turn was described on the letterhead as a "state stock corporation" [sic]. Thus, Romak can certainly be forgiven for believing that it was dealing with the Uzbek government itself—particularly if, as it claims, the purchase was approved by Mr Sultanov.

Thus, Romak has focused its lobbying efforts on Uzbek president, Islam Karimov, but this has largely been an exercise in frustration. The Swiss president, Flavio Cotti, wrote a letter to Mr Karimov on Romak's behalf, and never received a response. Pierre Chrzanovski, Switzerland's ambassador to Uzbekistan, confirmed that at Romak's request he asked Mr Karimov orally for a meeting to discuss the matter, but was directed to the foreign minister and then to Mr Sultanov. He added that, on two occasions, the Romak issue has been raised by high-placed Swiss officials in other intergovernmental contacts.

Help from unexpected quarters

So Romak has also retained the services of former US senator,

David Karnes, with the Omaha (Nebraska) office of the law firm Kutak Rock. He describes his role as one of "educating and informing members of Congress and the administration regarding the Romak-Uzdon arbitration process and the unwillingness of Uzdon and Uzkhleboprodukt to honour their international trade agreements and judicial obligations".

While at first glance the US government should have scant interest in a dispute between a Swiss grain trader and what may or may not be an Uzbek state-owned company, Mr Karnes points out that, in fact, the interest is substantial. For in 1995 and 1996 Romak's US subsidiary moved a total of about \$250m of wheat, soybeans and corn from the states of Kansas, Nebraska and Oklahoma. While this is tiny compared with the total volume of those states' production, Mr Karnes says that, particularly when prices are low (as they are now), small traders like Romak are "critical for stabilisation of grain markets".

He continues: "This is something that all members of Congress from grain-producing states understand. These members are generally very international in their agricultural perspectives." So Romak's attempts to lobby the US government may not be entirely a fool's errand after all—particularly as various senators and representatives from farm states sit on committees dealing with matters such as aid to Uzbekistan.

Romak has also received assistance from sources in Uzbekistan, who have supplied documents—including what the spokesman alleges to be a hand-written note from Mr Karimov to Mr Sultanov. And the help has come unsolicited (but, presumably, has not gone unrewarded). Asked where this letter came from, the spokesman replied: "The exact answer on how we got those specific documents is 'I don't know and I don't want to know.' I know we've gotten them. I know the way that it works there [in Uzbekistan] is that anyone who has access to anything that could be of value to someone else will try to sell it."

In the meantime, the lessons to be drawn from Romak's case are not complex. In an operating environment where a company can be state-owned on its letterhead but private in the belief of a London lawyer that represents it, government guarantees would seem to be of little value. In the absence of "an airtight letter of credit", says the spokesman, he can think of little that should prompt a company to trust an Uzbek counterparty. "Even then, if they find a way to escape the letter of credit for a missing comma or an uncrossed 't', they'll do it." Without such a letter, he says, "I can't think of anything that should give someone the confidence to trust the Uzbeks other than cash in the bank."