

WHO FINISHED KAMA OFF

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Bogdan Wroblewski
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Kama’s heart has beaten once again – one can parody the famous advert from the 90’s. In it, Bogusz Bilewski – Kwiczol from “Janosik” on film – holds up the margarine packaging and says: *“I only eat Kama, that’s why I remember everything and my heart is like a bell”*.

In 1994, Schooner Capital, an American company – its chairman is Vincent J. Ryan, a serious businessman and philanthropist – makes the best offer and becomes the strategic investor in the privatized Nadodrzańskie Zakłady Przemysłu Tłuszczowego in Brzeg (the name was later changed to Kama Foods). At the start, Schooner invests over 18 million USD.

The model of consuming fats changes in Poland, and the firm in Brzeg quickly gains one third of the margarine market in Poland. The American businessman wants to build a fats concern, before such behemoths as Unilever strengthen their presence in the CEE region.

The Americans invest further millions of dollars into Brzeg and hand control of the factory over to White Eagle Industries Poland (WEIP). This company’s sole shareholder is Schooner. WEIP renders advisory and consultancy services: it delivers know-how, negotiates and trains personnel. It includes the so-called management fees – remuneration for these services – in its costs. The tax authorities don’t like this. First there are lots of cross checking inspections, then additional tax assessments.

“They ruined Kama, because we also lost our reputation and access to bank loans” – claims Wiesław Buchowiecki, Kama’s last chairman. After 1998, the firm generates losses. In 2003, the court announces its bankruptcy, and the prosecutors initiate an investigation into multi-million abuses and actions of the next management and supervisory boards to the detriment of the company.

The criminal proceedings of Buchowiecki (he agreed to give his name) and Robert M, once a well known rally driver and then lobbyist, are still ongoing before the Opole court today. It was precisely during these proceedings that the information on Vincent Ryan’s claim against Poland and the international arbitration emerged.

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It emerges from the information to the court that the American is accusing Poland of the tax inspections ruining Kama. He is demanding the return of “at least the full value of the investment made”. According to our sources, he is also calculating interest from the day the company was announced bankrupt. Together, this totals around 180 million USD, so just over half a billion PLN.

The amount and other details of the arbitration are confidential. Poland, represented by the law firm of K&L Gates Jamka sp.k, has not yet given it reply. Most likely, Poland will demand that the claim be dismissed. It can be expected that we will argue as follows: admittedly, the Polish-American treaty invoked by the investor guarantees reciprocal “protection” of investments, but does that protection also cover bad management?

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Margarine for half a billion

Reporters from “Gazeta Wyborcza” and RMF FM have found out that American investor Vincent J. Ryan is demanding over half a billion PLN from the Polish state for causing the bankruptcy of the margarine factory. The international arbitration is ongoing.

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This dispute is being monitored by business and top business law firms. The issue - in short - is about whether the state through decisions by the tax authorities, butchered a promising business. Or did it fall rather because Kama was badly managed? This will surely be Poland's defence.

Vincent Ryan, 76 years old today, is a serious American businessman – apparently, he started alongside the multi billionaire Warren Buffett. He is active in the technology and telecommunications sectors. He is a philanthropist. Above all in particular – he is the chairman of the board of Schooner Capital LCC, a private investment firm from Boston in existence for over 40 years. He specializes among others, in finding investment opportunities in budding companies.

After the breakthrough in 1989, his eyes fell on Poland, or more widely – on Central and Eastern Europe. He had an idea to create a concern in the fats industry, even before such sector giants such as Unilever noticed our market.

The coachman won't steer a Porsche

In 1994, Schooner Capital makes the best offer and becomes the strategic investor in the privatized Nadodrzańskie Zakłady Przemysłu Tłuszczowego (the name was changed to Kama Foods in 1998). That there was no better option is later confirmed by the expert witnesses examining the matter for the prosecutors and the court. Schooner invests over 18 million USD, but the engagement of the Americans quickly exceeds 30 million USD.

Ryan's idea is supported by among others, the EBRD. Schooner, through affiliated companies, also invests in fats company Bolmar and buys shares in the Bulgarian firm Kaliakra which uses sunflower seed (in Poland, production is based on rapeseed).

In the middle of the 90's, the plant in Brzeg alone has over one third of the share in the margarine market. The entire margarine-oil holding has excellent perspectives because the consumption model in Poland is changing – we are eating much less butter. In 1998, the Kama plant is already the most modern and one of the biggest in Europe.

White Eagle Industries Poland (WEIP) whose sole shareholder is Schooner, has control over the fats company. Formally, WEIP renders advisory and consultancy services. It delivers know-how, negotiates and trains personnel. “*The coachman, I'm sorry, won't steer a Porsche*” explains Kama's last chairman, Wiesław Buchowiecki, connected with the plant in Brzeg since PRL [the People's Republic of Poland].

The privatization agreement imposes these requirements on the strategic investor. But it is precisely these management services rendered by WEIP that became the stone that started the avalanche which ended with Kama's bankruptcy in 2003. The bankruptcy proceedings are on-going today.

In the cross fire of the tax inspections

In 1996, the tax inspectors from Opole enter the company. They question the inclusion of the “management fees” in the costs. They clobber the company with tax assessments for unpaid VAT for so called “immaterial services”. The company loses its investment incentives. Including interest, the amount of liabilities to the state treasury reaches up to 50 million PLN. Kama doesn’t want to pay. Especially because it has a favorable opinion from the advisory firm of Arthur Anderson, confirming that these services are being correctly accounted for.

Today, rendering “advisory and consultancy services” is common and accepted practice, in the 90’s it served as a precedent. *“This situation was also a novelty for the tax authorities”* – prosecutor Tomasz Jandziak will write years later.

The tax authorities hand out several dozen decisions unfavorable to the company, and finally notify the prosecutors. *“They ruined Kama, because we also lost our reputation and access to bank loans”* – claims Buchowiecki.

Wieslaw Kaczmarek, the former Minister of the Treasury, signed the privatization agreement: *“it seems to me that Bank Pekao SA, which retracted its loans, played a significant role in the bankruptcy of that plant. I don’t know anything about the role of the tax authorities”*.

Buchowiecki admits that the bank lodged the petition for bankruptcy. After an investigation of several years, the former chairman is arrested by the CBA [Central Anticorruption Bureau] on December 2, 2006. This is the first well known operation by the Bureau – also because the operation was filmed (a claim is lodged in Strasbourg [European Court of Human Rights] about this). In 2007, Buchowiecki and Robert M, a member of the company’s supervisory board for many years, are charged with acting to the company’s detriment. They are accused of generating tens of millions of PLN losses. The charges also concern the advisory and consultancy agreements with WEIP.

The proceedings ongoing for three years before the Regional Court in Opole (the scale is equal to the famous FOZZ affair) are just coming to an end. Both defendants have been released pending trial, the court has already quashed the financial guarantee decision and the prohibition from travelling abroad. What is more, at the end of last year, the prosecutors in Opole discontinued the interconnected investigation in which the liability of the remaining members of Kama’s management and supervisory board between 1994-2003 was being examined.

Arbitration after several years

It is in the proceedings in Opole that it comes to light that in far away Washington, Vincent J. Ryan and Schooner Capital lodged a notice of commencing arbitration proceedings against Poland in April 2011.

Investment arbitration is not new. The most well known was the dispute of several years of the Dutch group Eureko, who, in 1999, invested in 30 percent of the shares of PZU. The controversy surrounding the privatization of the insurance giant resulted in international arbitration. Initially, the Dutch were demanding 36,5 billion PLN in compensation. The dispute ended in 2009 with a settlement with the state treasury. Eureko obtained a few billion PLN from the dividends and sale of the PZU shares.

Poland copes with arbitration. It won with German Nordzucker (which was about the withdrawal from selling the company a few sugar factories), and in the dispute with the American Cargill Incorporated, one of the biggest agricultural producers and processors in the world, we were obliged to pay out one tenth of the demanded amount – 14,5 million USD.

But the disputes in the Kama case and the simultaneously ongoing arbitration resulting from the application by American investors in the blood plasma factory which was not even built (the court proceedings are dealing with transferring money out of this investment and of rashly distributing bank guarantees) are precedents.

Vincent J. Ryan's claim is to be decided in Paris, but under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) in Washington. ICSID administers disputes resulting from investments on the basis of bilateral and multilateral international investment support and protection treaties, making reference to the so called Washington Convention. Poland is one of the few civilized countries that is not a party [to the Convention]. It transpires from our sources that we previously used this as an argument to torpedo similar arbitrations.

This time, the so called Additional Facility has been applied because only one of the states of the parties to the dispute has joined the Convention. This is predicted by the Treaty between the United States of America and the Republic of Poland concerning Business and Economic Relations signed on the verge of the transformation of the political system in 1990 (entered into force in 1994). The Treaty guarantees reciprocal protection of investments. Wieslaw Kaczmarek: *"it is astonishing that somebody reminded themselves about arbitration after so many years"*.

An American against Poland in Paris

Vincent J. Ryan: *"we were contemplating bringing an international arbitration claim against Poland from the moment we lost our investment in Kama Foods SA as a result of it being announced bankrupt"*.

The American businessman says that it took his lawyers on both sides of the ocean several years to prepare for the arbitration.

The dispute will be solved by lawyers from countries that are exotic for Poles – Chile, Mexico – and the president is Professor Makhdoom Ali Khan, a Pakistani. But the legal expertise of the arbitrators commands respect.

Details of the dispute are confidential. According to the information on the ICSID webpage, Vincent Ryan is represented by Kochanski, Zieba, Rapala & Partners. Attorney-at-law Piotr Kochanski: *"the ICSID office in Washington informs people about the arbitration proceedings on its website. But I can't give out any information in detail about the course of the proceedings or any of the decisions rendered because I am bound by a confidentiality clause"*.

Poland is formally represented by the State Treasury Solicitors but hires leading law firms in arbitrations, in this case, K&L Gates Jamka sp.k. Attorney-at-law Maciej Jamka replies to a few of our questions: *"by decision of the tribunal, the parties are obliged to refrain from unilaterally making information available to third parties. Some of the questions concern Poland's procedural position, which has not yet been expressed, and questions connected to the strategy of settling this dispute, which in view of Poland's interests should not be revealed, even with the agreement of the other side"*.

Attorney-at-law Piotr Swieciki, a partner at the Squire Sanders law firm, not connected with the arbitration says: *"it's normal that the parties have agreed to keep the proceedings confidential. It was similar in Eureka, only the decision was revealed"*.

But the information for the court in Opole is somewhat more revealing. It transpires that the American Investor is accusing Poland of violating the principles resulting from the Treaty: *"fair and equitable treatment"*, *"protection of the investment"*, writing about not keeping *"the principle of free transfer of funds connected with the investment"*.

And most importantly, that *"the inspections by the tax inspection authorities in Opole in 1996, 1997 and 1999 (...) and the resulting decisions violated the rules of the Treaty, were incorrect and consequently, led to Kama's bankruptcy"*.

The document gives no concrete indication of the amount in dispute. The amount of damage has been described as *"at least the full value of the investment made"*. According to our sources, this means the funds invested but

also interest calculated from the day the bankruptcy was announced in 2003. Taken together, around 180 million USD, or over half a billion PLN.

The rules of the proceedings, among others the confidentiality and the place – Paris, were established by the parties in December 2011. On May 8, the Claimant, Vincent J. Ryan presented the so called memorial, that is, the full content of the complaint along with the documentation.

Poland – as we hear – will present its “*counter-memorial*” by the end of the year.

It wasn't the army that closed the factory

The specifics of a dispute under the ICSID rules also consist of the arbitrators using the Centre's case law database. And even though earlier decisions are not binding, the arbitrators refer to the international law concepts established therein. That is why it is interesting and important for the future how they will interpret the scope of “*investment protection*” guaranteed by the Treaty. Business and the world of big business law firms are waiting with baited breath.

A lawyer from a law firm specializing in economic relations: “*when we see how the Polish state is responsible for the affairs of its citizens – the brightest example is Optimus chairman Roman Kluska who managed to win 5 thousand PLN compensation in our courts – we have to admit that the protection of foreigners is far better*”.

Marcin Dziurda, the chairman of the Office of the Attorney General admits only that for a foreign investor “*avoiding the Polish courts*” and transferring the dispute to the “*ground of international public law*” is beneficial. Which does not mean that the Polish state is destined to failure.

“*It is not that the government, entering into this arbitration is fighting a losing battle*” confirms Attorney-at-law Swieciki.

Another lawyer tracking arbitrations: “*when the Polish-American treaty was signed, the protections were understood to mean only that there are guarantees that the investor would not be expropriated because the political vision at the helm would change. That the army will not come and close the factories. But it's clear that this is not the case*”.