

**IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF
THE LONDON COURT OF INTERNATIONAL ARBITRATION**

CASE NO 142683

BETWEEN

VALE S.A.

Claimant

and

BSG RESOURCES LIMITED

Respondent

Second Witness Statement

DAVID BARNETT

I, DAVID JOEL BARRY BARNETT, will state as follows:

1. I provided an account of my involvement in the subject matter of this dispute in my first witness statement dated 25 June 2015 (Barnett-1). In this second witness statement, I will respond to certain allegations made against me by Vale in its Statement of Reply (“**SoR**”) and accompanying witness evidence. Rather than commenting on each of Vale’s claims, I have sought to limit myself to addressing those allegations and inaccuracies which I understand to be the most central to the issues in these proceedings. Where I do not comment on a particular aspect of Vale’s claim, this should not be construed as an admission on the part of BSGR.

Second Witness Statement of David Barnett

2. The contents of this witness statement are true to the best of my knowledge and belief. Where the facts and matters referred to are not within my own personal knowledge I state the source of my knowledge and belief.
3. I repeat the contents of paragraph 4 of Barnett-1 in relation to legal professional privilege.
4. I will use the same definitions adopted in Barnett-1.

A. SHARE PURCHASE AGREEMENT

5. I explain at paragraph 13 of Barnett-1 that I was sent basic terms for the SPA and that I then drafted the structure and legal framework. So far as I can recall, I was sent by fax the outline terms in a handwritten note, I believe by Beny, once he and Michael Noy had reached agreement in principle. I was not involved in the commercial negotiation.
6. Clause 6 of the SPA provides:

“The Consultant (Pentler’s shareholders) will continue to advise and act as a consultant for the period of 5 years from signing date hereof to the best interest of the Company.”

To the best of my knowledge this was my wording. I don’t recall whether or not the word “Consultant” appeared on the faxed piece of paper, or what I had been told about what Pentler had done in the past to obtain its shares, or what if anything was expected of it in the future. I believe that I intended the clause to act as a way of maintaining the ability for BSGR to ask Pentler’s shareholders for relevant information or to assist if needed, or possibly, to tie them in and prevent them acting against BSGR’s interests. The word Consultant was widely used within BSGR to describe a wide range of third party service provider relationships.

B. INDEMNITIES FROM PENTLER

7. At paragraph 663 of the SoR Vale suggest that the US\$22 million paid to Pentler on 17 May 2010 “*was at least in part in exchange for the indemnities*” As I explained at paragraph 24 of Barnett-1, we took the opportunity of agreeing the “*full and final settlement*” in May 2010 to ask Michael Noy and Avraham Lev Ran to provide a personal indemnity. However, the monies owed to Pentler, the remaining US\$14 million under clause 2 of the SPA and the

bonus of US\$8 million under clause 5 of the SPA, were owed to Pentler regardless of the letters from Bah. The sums paid were not connected with the indemnity other than to the extent already explained in Barnett-1.

C. THE VALE DEAL

8. What stands out in my mind about the Vale transaction is the speed with which the deal was put together. We signed the Heads of Terms on Friday 19 March 2010. At this early stage BSGR's representatives and those of Vale made clear that they wanted to close the deal by the end of April and this deadline was included in numbered row 2 of the Heads of Terms.¹ This was followed by very frantic activity on both sides in relation to due diligence and the preparation of the contractual documentation. Whilst I live in Israel, I spent most of the month of April 2010 in the UK, moving between the offices of Skadden and Clifford Chance in Canary Wharf. I was not involved on the due diligence side because I was intensively involved in negotiating the commercial documents – the Framework Agreement, loan agreement, marketing agreement, shareholder agreement, etc. The negotiations were extremely intense. The first draft Framework Agreement was produced after about a week.
9. In light of the very short timetable within which the parties wished to complete the deal, the parties agreed in late March 2010 to limit the scope of the due diligence to matters relating to BSGR Guernsey, the target company and its subsidiaries. This was discussed both during a conference call between Dag, Yossie, myself and the in-house lawyer for Vale, Daniela Chimisso dos Santos, and between Gary DiBianco of Skadden and Clifford Chance. The due diligence, going forward, proceeded on this basis.
10. BSGR relied very heavily on Skadden to advise on all material aspects of the deal with Vale. The BSG group had retained Skadden on corporate matters since the proposed transaction with the Libyan Investment Authority in the first half of 2009. Michael Hatchard of the Corporate team also acted as relationship manager for BSG. It was Michael Hatchard who I contacted when I first requested assistance with the Pentler dispute. Michael put BSGR in contact with the arbitration team and it was principally David Kavanagh who took matters forward. My understanding was that Michael Hatchard was being kept in the loop. I do not waive privilege as to the advice given by Skadden. Skadden's assistance on the dispute and the correspondence from Bah continued intermittently until May 2010. Michael's team

¹ Exhibit R-40.

advised on the negotiations between BSGR and Chinalco in December 2009 and thereafter continued to advise in relation to the Vale deal. Skadden was aware that Pentler had been shareholders in the Guinea project, was aware of the terms of the SPA and was aware of the dispute with Pentler and the Bah correspondence.

11. I attended various meetings with members of the BSGR team and lawyers from Skadden in London. At one particular meeting there was some discussion about whether Pentler was relevant to the due diligence. This was just one of the items discussed at that meeting. I recall that Michael Hatchard of Skadden advised that Pentler did not fall within the disclosure requirements since Pentler related to a company outside the structure being sold.
12. BSGR's lawyers have approached Skadden in relation to this arbitration. As it currently stands, Skadden has said that it is not now prepared to engage with BSGR's lawyers in relation to this arbitration. I assume that they have concerns about their own position.
13. Vale criticises BSGR for failing to disclose the correspondence from Aboubacar Bah. Items of Mr Bah's correspondence had been passed onto me. However, I do not speak French and the letters and, for the most part, the attached documents were in French. I was given an explanation that Mr Bah was making threats against Marc Struik for monies that he claimed that Pentler owed to him and I was asked to draft an appropriate response which I then did. Since we were already working closely with them in relation to other matters, I passed a copy of the threat to Skadden.
14. My understanding, based on the brief background description given to me, was that the threat was not serious. BSGR had no contractual relationship with Bah and owed him no money. Rather, he had a relationship with Pentler, which agreed to be responsible for dealing with the threat. So far as I am aware, that is indeed what occurred and no claim was ever made.

As set out in my draft email to Michael Noy:

*"Although we are confident that Bah has no valid claim against us, his threats cause an unnecessary [sic] distraction from our business and we therefore turn to you to ensure that this matter is resolved without delay."*²

² Exhibit R-47.

15. Vale have pointed out that in BSGR's letter to Mr Bah of 3 December 2009 it is suggested that BSGR had retained counsel to bring proceedings for harassment, defamation and extortion (paragraph 670 of the SoR). As I have explained, we had retained Skadden in relation to the settlement with Pentler. I had informed Skadden about the threats from Mr Bah. The purpose of BSGR's letter was to prevent Mr Bah from sending further threats to BSGR. As I explain above the threats themselves were not seen as serious but were an irritant. BSGR had no relationship with Bah and owed him nothing; BSGR had indemnities in place in relation to Mr Bah from Pentler. For all these reasons the threat was treated as being of no consequence. I discussed with Skadden the way in which I responded to the threat from Bah and they also advised on the drafting of the indemnities from Pentler.
16. The warranties in the Framework Agreement were not, to my recollection, the subject of any intense negotiation. I knew that the disclosure letter was being prepared by Skadden together with the management of the company. There was no relevant information about BSGR Guinea which I knew which was not also known by both Skadden and the management (my involvement in BSGR and its Guinea operations had been very limited.) As I was fully occupied with the commercial aspects of the transaction, I expected Skadden, who had overall supervision of the transaction and the due diligence, with the assistance of management, to ensure that the warranties and the disclosures were accurate and consistent with the due diligence responses, which they had overseen.

D. CODED LANGUAGE

17. At paragraph 574 of the SoR, Vale states that I was shielding Beny from involvement in BSGR affairs by using "*coded language*" to refer to him or by acting as an "*intermediar[y]*" for his discussions with Michael Noy. I never attempted to 'shield' Beny in the way Vale suggests. "B" is just shorthand for Beny.

I confirm this statement is true to the best of my knowledge and belief.



David Joel Barry Barnett

14th July 2016