

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

CASE NO 142683

BETWEEN

VALE S.A.

(Claimant)

and

BSG RESOURCES LIMITED

(Respondent)

Witness Statement

DAVID BARNETT

I, **DAVID JOEL BARRY BARNETT**, will say as follows:

A. INTRODUCTION

1. I am a corporate and commercial lawyer and have been a partner at Barnea & Co in Tel Aviv since 2012. I specialise in international M&A transactions. Prior to joining Barnea & Co, I was employed as a corporate lawyer for various companies within the BSG group of companies.
2. I make this statement in relation to the claim by Vale SA ("Vale") against BSG Resources Limited ("BSGR"). Save where I indicate otherwise, the facts and matters set out in this statement are based on my own knowledge and recollection.

3. This witness statement has been prepared with the assistance of BSGR's lawyers, Mishcon de Reya. I have refreshed my memory by looking at correspondence and other documents from the relevant time. I have also reviewed Vale's Request for Arbitration and Statement of Claim, along with the accompanying documents and witness statements, as well as BSGR's Response to the Request for Arbitration.
4. Much of the evidence I have to give in relation to these matters relates to advice I gave to BSGR and/or other BSG group companies at the time of these events. I have sought not to give evidence as to the advice I was asked to give, or gave. For the avoidance of doubt, my evidence in this case is given categorically without any waiver of privilege in relation to my advice or any other advice, whether given at the time of these events, earlier or subsequently.

B. BACKGROUND AND HISTORY WITH BSGR

5. I have been practising as a corporate and commercial lawyer for over 20 years, initially in London and, from 1998, in Israel.
6. In this statement I refer to the 'BSG group of companies' or the 'BSG group'. Mr Steinmetz is a beneficiary of a Lichtenstein foundation called the Balda Foundation ("Balda"). Balda indirectly owns a group of companies whose businesses focus on resources, diamonds, real estate and capital markets. These are what I refer to as the 'BSG group of companies' or the 'BSG group', although there is no legal entity by that name. BSGR is the company in that group which owns all the resources projects.
7. I first came into contact with Mr Steinmetz when I was working for the Israeli law firm Hertzog, Fox and Neeman in 2000 and Mr Steinmetz was involved in investing in one of my clients.
8. Later that year I joined STI Ventures Advisors (Israel) Limited ("STI"), an Israeli advisory company which was part of a venture capital fund investing in technology in Israel, as STI's in-house lawyer. STI was part of the BSG group of companies. In 2004, I moved to work for Scorpio (BSG) Limited ("Scorpio") (which is a company owned by Mr Steinmetz) but began acting generally for the BSG group of companies as was required. I was sometimes described as BSG's in-house counsel, although in reality I was employed solely by Scorpio. In 2012 I joined Barnea & Co (an Israeli law firm) as a partner.

C. MY INVOLVEMENT IN SIMANDOU

9. My role for the BSG companies was mainly mergers and acquisitions and related corporate work. I did not have any experience in, nor was I involved in, legal work relating to mining. My involvement with Guinea and Simandou was mostly restricted to providing corporate and commercial advice to BSGR when called upon to do so. Occasionally I would be asked to advise in relation to commercial or corporate issues for BSGR's subsidiaries.
10. I was not involved in BSGR's work in Guinea at all and knew very little about it until 2008. Sometime towards the beginning of that year, I was asked to look at a shareholders' agreement relating to shares in BSG Resources (Guinea) Limited (a BVI company) ("BSGR Guinea") between a company called Pentler Holdings Limited ("Pentler") and BSGR Steel Holdings Limited ("BSGR Steel") in the context of a dispute between those parties.¹

2008 dispute with Pentler and the share purchase agreement

11. I was asked to assist, I believe by Marc Struik (CEO of BSGR's Mining and Metals division), because BSGR believed that under the shareholders' agreement Pentler was obliged to pay money to BSGR Guinea towards financing its work in Guinea. Pentler disagreed and was refusing to do so. This was the first time I had heard of Pentler.
12. It was explained to me, I think by Mr Struik, that Pentler had introduced BSG to Guinea which was why they were a shareholder in BSGR Guinea.
13. Following this, Mr Steinmetz (on behalf of BSGR) and Michael Noy (on behalf of Pentler) negotiated a share purchase agreement dated 24 March 2008 whereby Pentler's shares in BSGR Guinea were sold to BSGR Steel for US\$22 million, to be paid in four instalments (the "Pentler Share Purchase Agreement").² Once Mr Steinmetz and Mr Noy had drafted the basic terms, I drafted the structure and legal framework for the agreement.

2009 dispute with Pentler and the settlement agreement

14. In 2009 a dispute arose between Pentler and BSGR because on 15 April 2009 BSGR had failed to make a payment that was required under the Pentler Share Purchase Agreement.
15. In April 2009, BSGR started receiving correspondence from Pentler about the non-payment of the April 2009 tranche due under the Pentler Share Purchase Agreement. BSGR was

¹ Shareholders Agreement between BSGR Steel, Pentler and BSGR (Guinea), dated 19 July 2007, (Exhibit R-24).

² Share Purchase Agreement between BSGR Steel and Pentler, dated 24 March 2008, (Exhibit R-28).

affected by the global liquidity crisis and required cash for other more pressing matters, so needed more time to pay. Accordingly, BSGR sought to renegotiate the payments and when they fell due.

16. In addition, at around the same time I was told that BSGR had received a demand for payment from Mr Aboubacar Bah and have a general recollection that Mr Bah was using his influence to stir up ill feeling among local people in Guinea in the areas in which BSGR was mining at this time.
17. I am sure that BSGR representatives would have discussed Mr Bah's approach with Pentler, but I did not take part in those discussions. I believe from looking at the contemporaneous documents that Pentler explained to BSGR that it had had a commercial relationship with Mr Bah when it had come to Guinea and that he had helped it by introducing it to various business people in Guinea. Pentler assured BSGR Steel that Mr Bah was their problem and was not relevant to BSGR. They explained that he was approaching BSGR and/or BSGR Steel only because he saw that that was where there might be funds that he could exploit. I provide more detail on Mr Bah and his relationship with Pentler in the section below.
18. BSGR Steel and BSGR sought to push back on Pentler's demands for payment and in particular sought to argue that Pentler itself was in breach of clauses 6 and 8 of the Pentler Share Purchase Agreement because it had failed to act in the best interests of BSG Resources (Guinea) Limited and because it had breached its confidentiality obligations. I have no recollection now of what exactly BSGR was saying Pentler had done in respect of these breaches, and Pentler itself strongly rebuffed the allegations, but I believe from having reviewed the correspondence that we were basing our assertions on Pentler being responsible for Mr Bah, and Mr Bah causing us trouble with the locals in our mining areas.
19. In response, Pentler made its own threats about people in Guinea discovering that BSGR would not or could not honour its obligations and also threatened that if this information reached Mali it would damage both Pentler and BSGR. I think from reviewing the various correspondence that the reference to Mali was a reference to Mr Bah. At this point, I believe from the contemporaneous documents that BSGR internally thought that Mr Bah had some kind of interest in Pentler.
20. The negotiations and correspondence between Pentler and BSGR about these two issues (Mr Bah's demand for payment and Pentler's attempts to enforce the payment terms of the Pentler Share Purchase Agreement) went on throughout May, June and July 2009. On 17

June 2009, Pentler escalated the dispute by claiming that it still had ownership of its shares in BSGR Guinea, and would attempt to sell them.

21. Following this, I instructed Skadden, Arps, Slate, Meagher & Flom (UK) LLP ("Skadden"), which was already acting for BSGR in respect of negotiations it was having about potential joint ventures with third parties, to represent BSGR in the matter. Pentler also instructed lawyers and the correspondence and negotiations continued until 25 July 2009, when the parties signed a settlement agreement.³
22. The settlement agreement altered the timings of the payments under the Pentler Share Purchase Agreement. On the same date, the parties also signed an indemnity under which Pentler indemnified BSGR and its group companies in respect of any claims by Mr Bah (the "Bah Indemnity").⁴

10 May 2010 confirmation of final settlement with Pentler

23. I have seen a letter from Pentler to BSGR Steel dated 10 May 2010 which confirms that BSGR Steel will make a payment of US\$22 million to Pentler.⁵ This payment is stated to be made further to the Pentler Share Purchase Agreement and the settlement agreement dated 25 July 2009. From reviewing the contemporaneous emails I see that Mr Tchelet and I were both involved in drafting it.
24. I believe, from reviewing the contemporaneous documents, that it was agreed that BSGR would now make the entire payment due under the settlement agreement of July 2009, plus an additional payment of US\$8 million in accordance with clause 5 of the Pentler Share Purchase Agreement, which made provision for an additional payment of US\$8 million to be paid in the event that BSGR Steel realized a profit in excess of US\$1 billion. A letter from Pentler confirming this was drawn up. In addition to this letter, Mr Noy and Avraham Lev Ran personally provided a further indemnity in the same terms as the previous Bah Indemnity (the "2010 Bah Indemnity").⁶ From my memory of the time, I believe that I thought a personal indemnity would be more valuable to BSGR than a corporate indemnity from Pentler, and BSGR took the opportunity of the payment to Pentler to extract this.

³ Settlement Agreement between BSGR Steel and Pentler, dated 25 July 2009, (Exhibit R-33).

⁴ Indemnity from Pentler to BSGR, dated 25 July 2009, (Exhibit R-34).

⁵ Letter from Pentler to BSGR Steel, dated 10 May 2010, (Exhibit R-49).

⁶ Indemnity from Michael Noy and Avraham Lev Ran to BSGR Steel, dated 10 May 2010, (Exhibit R-52).

2009 – 2010 Contact from Aboubacar Bah

25. As I mention above, sometime around May 2009, BSGR received a demand for payment from a gentleman called Mr Bah, apparently in relation to work he did for Pentler in Guinea. I have reviewed the contemporaneous documentation in relation to it. What I say below is a reconstruction based on those documents. I do not believe that I had previously heard of Mr Bah. I did not then and do not now fully understand why Mr Bah thought that BSGR owed him anything at all. I had no recollection at all of him or even of his name until it reappeared in the context of matters associated with this dispute. I assume someone at the time in BSGR would have explained to me what Pentler had told them about him: that he was a businessman in Guinea with whom Pentler had had dealings, and that he was attempting to exert pressure on BSGR because he knew that BSGR would potentially make a great deal of money out its business in Guinea.
26. In June, I can see that I received a few emails from Mr Noy about Mr Bah. My impression of Mr Bah was that he was a local Guinean trying his luck, and it therefore did not register with me as being a very important issue. My chief concern was that Pentler indemnified BSGR in relation to Mr Bah. Other than that I don't believe that I focused on the correspondence relating to him, and only engaged with it when specifically instructed to do so, for example, to draft or assist with a letter to Pentler. I do recall being extremely busy at that time dealing with other very pressing matters caused by the global financial crisis.
27. On 7 June 2009, I received an email from Mr Noy addressed "Dear Beni", in which he says that following "*our meeting*" he has checked the issue of Mr Bah and Ibrahima Sory Touré "*and the letter you have showed me*". Mr Noy attaches a letter from Mr Bah and Mr Touré apparently "*desisting Pentler from any responsibility*". Mr Noy explains that responsibility for Mr Bah has now been passed to "*Matinda and Co Limited (company belongs to Mrs Toure, wife of late president of Guinea)*" and confirms that "*in any case, BSGR has no responsibility what so ever with regards to Mr Bah*" [sic].⁷ I note the attachment is in French.
28. I did not know then who Ms Touré or Matinda and Co Limited ("Matinda") were, or why they would take responsibility for Mr Bah. This may well have been the first time I heard either of those names – certainly they would not have meant anything to me then. I believe the first time it was explained to me who Ms Touré and Matinda were was relatively recently, probably in relation to the Comité Technique process. It is possible I heard those

⁷ Email from Michael Noy to David Barnett, dated 7 June 2009, (exhibit R-153).

names before that in relation to internal discussions about blackmail attempts, but as I never advised on those, nor knew much about them at the time, I think it is unlikely.

29. There was no indication that this Ms Touré had anything to do with BSGR's business and it is clear from the internal exchanges that followed that our only concern was to obtain proper comfort from Pentler in relation to Mr Bah because the agreement they had sent was not adequate.
30. In the end I see that in a letter dated 11 June 2009 from Sandra Merloni-Horemans on behalf of BSGR to Pentler, Ms Merloni-Horemans makes the point that Pentler had sought to pass the responsibility for Mr Bah onto another person and that this was not satisfactory.⁸ I believe that I assisted by drafting this letter, but have no memory of having done so. Looking back, the position I took at the time was a sensible one. Pentler was trying to avoid providing an indemnity in relation to Mr Bah, by trying to say that he was not only not BSGR's responsibility, but he was not Pentler's either. Clearly this was insufficient: BSGR did not know Mr Bah or whose responsibility he was, but had been approached by him nevertheless, knew that he had some kind of a relationship with Pentler, and accordingly required an indemnity from Pentler in relation to him.
31. I see from the contemporaneous documentation that we received several further demands for money from Mr Bah in 2009, 2010 and 2011. I assume that we would have passed these onto Pentler for them to deal with, although I see that in December 2010, I drafted a response to Mr Bah from BSGR.⁹ The letter says that BSGR does not understand why Mr Bah is contacting it when it is not a party to any agreement with him. It goes on to say that BSGR is treating Mr Bah's attempts to contact it as attempts to extort BSGR and disrupt its business, and that if his harassment continues BSGR had instructed lawyers to bring a claim against you *"for harassment, defamation and extortion as well as to prepare a report to the relevant law enforcement agencies."*

D. THE DEAL WITH VALE

32. An element of BSGR Guinea that I was certainly involved with was negotiating the heads of terms with Vale SA ("Vale") in March 2010 and negotiating the commercial agreements forming the basis of the deal (the shareholders' and joint venture agreements, for example) in April 2010.

⁸ Letter from BSGR to Pentler, dated 11 June 2009, (Exhibit R-172).

⁹ Letter from BSGR to Mr Bah, dated 3 December 2010, (Exhibit R-173).

33. Before discussions started with Vale, the Libyan Investment Authority (the "LIA") was interested in acquiring a stake in BSGR Guinea. The LIA negotiations fell through after a couple of months, and sometime after that Chinalco expressed interest, so there followed some meetings with them in Beijing. Those negotiations both progressed to the stage of drafting memoranda of understanding, but were ultimately unsuccessful. I believe that BSG was also briefly speaking to another Chinese company, Baosteel, but I was never involved in those discussions.
34. In March 2010, I was asked to go to Brazil at short notice to join discussions that were in progress with Vale.
35. I arrived first thing Monday morning on 15 March 2010, and went straight into a meeting with Vale's representatives. We sat round a table for an initial meeting of one to two hours and discussed the basic terms of Vale's interest in Simandou. On BSGR's side Mr Steinmetz, Mr Avidan, Mr Struik and I attended these initial meetings. On Vale's side I believe from memory that their Alex Monteiro and Eduardo Ledsham attended, along with others. I am aware that Vale's Statement of Claim says that Daniela Chimisso dos Santos, Vale's General Counsel, also attended these meetings. I am not sure whether she did or not – I remember that my negotiations with her were delayed by a couple of days because she was away at the beginning of the week, but she may have been in the initial meetings and then been called away for some reason.
36. Following this meeting, those involved in the technical side of the business were taken to see Vale's mine in Carajás because it was apparently very similar to the mines in Simandou, leaving me to negotiate the heads of terms with Ms Chimisso. We spent Wednesday and Thursday negotiating the heads of terms, which were signed on that Friday, 19 March 2010.¹⁰
37. An incident in this period does stand out in my memory. When we signed the heads of terms on that Friday afternoon, one of the Vale directors, José Carlos Martins, said that this was a great deal for Vale, and that Vale thought of this deal as an option. He looked embarrassed, and it was clear to me that he felt he had said more than he had intended to. He quickly corrected himself by saying that it was a great deal for both parties. The incident always stuck in my memory because it was so odd, especially because the BSGR team believed that the proposed joint venture was the beginning of a long term relationship between the parties. The deal was structured as an upfront payment of \$500 million to

¹⁰ Heads of terms between BSGR and Vale, dated 19 March 2010, (Exhibit R-40).

BSGR, with the remaining amount due after Vale approved the feasibility study. If Vale did not approve the feasibility study, Vale's shareholding would be reduced to reflect the actual money paid.

38. Vale's conduct after signing, I believe, is indicative of that "slip of the tongue" from Mr Martins: Vale did think of Simandou as an option. It is possible that Vale never really committed to completing the deal and actually developing blocks 1 and 2. In reality, I think \$500 million was the price Vale paid to keep blocks 1 and 2 off the market for a period of time. This was further confirmed by an interview with Mr Agnelli that I read in Piau  (the Brazilian magazine). Mr Agnelli said in that interview that *"It was recorded in the minutes, and all the shareholders were aware that we would pay the 500 million dollars to have the option to buy 51% of Simandou. If we couldn't get the railroad to go through Liberia, we wouldn't pay the balance. We would lose the 500 million for not developing the mine, but we would remain partners in Simandou.....It was strategically important for Vale not to leave Rio Tinto alone with all that ore."*¹¹

Vale's suspicions

39. I have seen that in paragraph 11 of his statement, Alex Monteiro says that one of the main topics at these meetings in Brazil was Vale trying to understand how BSGR had obtained the mining rights.¹²
40. I do not remember Vale specifically raising doubts about the legality of BSGR's mining rights. As I understood it from conversations with my colleagues, Vale asked about this as part of their due diligence but I do not recall them making any point about doubts as to how the rights had been acquired. I do remember discussions in which we explained that the asset had been taken away from Rio Tinto because it had simply held the asset and had failed to develop it. I also remember that in the initial meetings BSGR explained that the GoG had liked our application for blocks 1 and 2 because BSGR had proven itself with Simandou North and South to be eager to develop, fast workers and capable of achieving progress quickly.
41. It was not a main or dominating topic in the meetings I was in, and I also do not remember Vale making any general points about BSGR lacking in experience.

¹¹ Piau , "Risk Contract", dated March 2014 (Exhibit R-96), p. 22.

¹² Witness Statement of Alex Monteiro, dated 29 January 2015, para 11.

42. In paragraph 29 of his witness statement, Mr Monteiro says that I, along with Skadden, told him that *"there was no impropriety whatsoever in the way that BSGR had obtained the mining rights"*.¹³ Although I am confident in BSGR's integrity in all its business dealings, it seems very unlikely to me that I would have said this. I have never been to Guinea, was not involved in BSGR's application for those rights and did not have the requisite knowledge of the history in Simandou, or of mining law generally, to be able to make such a statement. It may have been that I was asked whether I was aware of any impropriety, in which case I would have confirmed that I was not. I was not then and am still not aware now that BSGR did anything wrong in its acquisition of those rights.
43. Generally speaking the negotiations were totally normal, very friendly and conducted in good faith and good spirits. I do not recall any particular suspicion, or a suspicious approach, on Vale's part. The impression I had of, for example, the call with Mahmoud Thiam in March 2010, was that it was just a matter of giving Vale extra comfort, rather than dealing with any specific concern that Vale had. Conversely, given the speed that Vale pushed the deal along, my impression was that it was extremely keen to complete the deal as soon as possible.

Due diligence, FCPA investigations and BSGR's disclosures

44. Once we had signed the heads of terms, the deal negotiations began in earnest. The majority of the rest of the work was conducted in London, and the BSGR team and I were in the office of Vale's lawyers', Clifford Chance, morning to night most days. I was involved in negotiating the commercial terms and agreements which were extremely work intensive and took up all of my time. The due diligence and disclosure was dealt with by the people with the Guinea knowledge along with Skadden who had access to the data room.
45. The due diligence documents were uploaded to an online dataroom by Mr Tchelet and Mr Struik and then managed by them with Skadden. This left me free to focus on negotiating the commercial documents such as the framework and shareholders' agreements, along with all the accompanying documents such as the loan and marketing agreements.
46. Similarly, the FCPA elements of the negotiations were dealt with by those with actual knowledge of the events and processes in question (Mr Tchelet, Asher Avidan and Mr Struik) along with Skadden's FCPA team.

¹³ *Ibid.*, para 29.

47. I have seen paragraph 55 of Vale's Statement of Claim, in which it is said that Vale had heard rumours of corruption in BSGR's business in Sierra Leone and the Democratic Republic of Congo. I do not know what these rumours were that they allude to, but I do not remember them being raised with us as part of Vale's enquiries.

ABL solution

48. I was involved in the negotiation of what Vale describes as 'the ABL solution'. It was a very complicated proposition and gave Vale a huge amount of discretion over whether to exercise its right to remove itself from the deal. I remember being concerned about that. I also remember that it was possibly introduced but certainly negotiated quite late on in the process, when the pressure was on to close the deal.
49. My view on it was that as far as I was aware BSGR had nothing to worry about regarding bribery or corruption so should not be concerned in this regard, but from a drafting point of view the clause was so broad that Vale could use any rumours or allegations, however unsubstantiated, to extract itself on very favourable terms. I have looked at the clause for the first time since 2010 in preparing this statement, and I see exactly why I was concerned at how widely it was drafted.
50. I believe Skadden attempted to negotiate the wording of this clause to restrict it. As Vale says in its Statement of Claim, this was rejected.¹⁴
51. At this stage, both we and Vale wanted to close the deal. BSGR's position was that it had nothing to worry about and had done nothing wrong that would give rise to any concerns under this provision. BSGR therefore accepted the proposed ABL solution and went on to complete the deal.
52. I am aware that, in his witness statement, Mr Monteiro says that Vale's FCPA concerns arose because of the location of the deposit and because Vale was not familiar with BSGR.¹⁵ He also says their concerns existed because of various rumours that he and his colleagues had heard about possible BSGR corruption in the Democratic Republic of Congo and that the former President of Guinea's wife had signed her husband's name on the decree awarding BSGR's rights because the President was too ill to sign himself.¹⁶ I cannot comment on whether they had in fact heard these rumours or not, but, as I say above, as

¹⁴ Statement of Case, dated 30 January 2015, para 94; and Monteiro WS, para 33.

¹⁵ Monteiro WS, para 36.

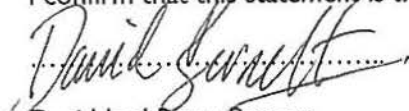
¹⁶ *Ibid.*, paras 37 and 38.

far as I can remember no one from Vale ever brought them up with me, nor am I aware that they were raised with anyone else from BSGR.

E. CONCLUSION

53. This deal, potentially one of the largest mining deals ever done, was completed in a month. It was extraordinarily quick. I had never before and have never since seen such a significant deal completed in such a short space of time. I have worked on deals worth less than half that amount and dealing with much less complicated issues which have taken over six months to complete.
54. Generally speaking, I had concerns that the deal was risky. It was structured to be very purchaser-friendly with elements such as the ABL solution all drafted to give Vale the benefit of the doubt at the expense of BSGR. However, BSGR's commercial view was that this was the deal to be done, and whilst it might have been able to get better terms by waiting for another party or may have been able to raise the funds it needed from elsewhere, this was a good option and was the deal that was on the table. BSGR was also confident about Vale's resources and that the long term deal was attractive enough for Vale to remain interested, and therefore was willing to take on some level of risk.
55. In addition, the fact that Vale were pushing the deal through at such a pace was a strong indication that they were very keen on the prospect and wanted to get the deal completed. As I say above, it is possible that in reality it was just an option for Vale, who wanted access to the world's largest untapped iron ore source and, crucially, to keep it out of the hands of its competitors. The money required to do the deal was not insignificant, but would not have been a major hurdle for Vale.

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



David Joel Barry Barnett

25 June 2015