

Award in Guinean bribery dispute made public

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Beny Steinmetz

An LCIA award worth US\$2 billion that made findings of corruption in a dispute over an iron-ore mining project in Guinea has become public after being submitted to the US courts for enforcement.

Brazilian mining company Vale filed a [petition](#) on 23 April in the Southern District of New York to enforce the award against BSG Resources, the Guernsey mining company founded by Israeli billionaire Beny Steinmetz. The [281-page award](#) has been filed as an exhibit.

As [reported](#) by GAR, an LCIA tribunal issued the award on 4 April, finding that BSGR made fraudulent misrepresentations on which Vale relied when it entered into a joint venture to develop an iron-ore mining concession in the Simandou region in eastern Guinea.

The tribunal found BSGR had made numerous false statements during the due diligence process for the deal, including telling Vale it had not engaged in bribery or corruption in procuring the mining rights.

Vale was awarded just under US\$1.25 billion in damages, as well as pre-award interest worth more than US\$773 million. BSGR was also ordered to pay US\$16 million towards Vale's legal and expert fees and more than £1 million towards Vale's arbitration costs. Vale says more than US\$5 million in post-award interest has already accrued on the damages.

The tribunal was chaired by Belgian arbitrator **Filip de Ly** and included **Michael Hwang SC** and [David AR Williams QC](#) as co-arbitrators.

De Ly replaced the original chair of the tribunal, [Charles N Brower](#) of the US, who was removed following a challenge by BSGR in 2016.

Cleary Gottlieb Steen & Hamilton acted for Vale in the arbitration and is also advising in the US court action. BSGR is yet to appoint counsel for the US action. The company was represented by Mishcon de Reya in the arbitration but refused to take part in the merits hearing in the case in 2017.

The largest iron ore deposit in the world

The dispute relates to mining concessions for blocks 1 and 2 of Simandou, believed to be part of the largest untapped deposit of iron ore in the world. The government of the late President Lansana Conté awarded the rights to BSGR in 2008 after revoking concessions previously held by Rio Tinto for the same areas.

Two years later, Vale agreed to pay BSGR US\$2.5 billion for a 51% stake in the project. The Brazilian company made a US\$500 million payment upfront and invested a further US\$750 million in developing the concessions.

However, a new administration under President Alpha Condé revoked the Simandou rights in 2014 after a government committee concluded that BSGR had obtained them through payment of bribes to individuals including Conté's fourth wife Mamadie Touré. The committee relied on an affidavit by Touré among other evidence.

Vale, which says it was cleared of wrongdoing by Guinea, brought its LCIA claim in 2014, saying it had been fraudulently induced into investing in the project.

The bribery allegations also spawned criminal investigations in the US, Switzerland and Israel. Alleged BSGR agent Frédéric Cilins received a two-year prison sentence in the US for obstruction of justice in 2014 after the FBI recorded meetings in which he offered Touré money to destroy certain documents, saying the money was coming from “Beny”.

The LCIA award also reveals that the US Department of Justice subpoenaed Vale to produce all documents and records relating to the LCIA arbitration for use in a grand jury proceeding, which the tribunal allowed in a procedural order in 2015.

BSGR denies paying any bribes and has alleged the revocation of the concessions was politically motivated. It launched an ICSID claim against Guinea in 2014 that may soon be withdrawn following reports of a settlement agreement earlier this year.

The ICSID and LCIA arbitrations were subject to an information-sharing arrangement, but the LCIA tribunal refused to admit the transcript of the ICSID merits hearing into the record, observing that BSGR had not been sufficiently precise as to which material from the ICSID case was relevant and why. It also said the reported settlement of the ICSID case had no bearing on its findings.

Corruption claims only partly upheld

In the award, the LCIA tribunal found that BSGR’s misrepresentations to Vale included failing to disclose consultants and agents it had used in obtaining the mining rights – among them Cilins and a British Virgin Islands entity called Pentler that made payments to Touré and offered her shares in a BSGR subsidiary.

BSGR said it had relied on advice from its then external counsel, Skadden Arps Slate Meagher & Flom, that it was unnecessary to disclose its agreements with Pentler. However, the tribunal said BSGR had produced no written record of such advice, and no witness from Skadden was willing to provide evidence on its behalf.

The tribunal also found BSGR failed to disclose relevant documents and information relating to the group's shareholder structure; and had misleadingly described its role in the Conté government's decision to revoke Rio Tinto's mining rights.

BSGR was also found to have falsely stated that it had no financial relationships with government officials or their spouses and that it had not made any payments to government officials in connection with obtaining the rights.

Finally, the tribunal found that BSGR falsely represented it had not engaged in bribery or corruption, including in due diligence questionnaires and a written anti-bribery certification from Steinmetz himself. The tribunal found that BSGR had intentionally interposed Pentler as an "intermediary" to effect payments to Touré in accordance with BSGR's wishes, and that BSGR knew the offer of shares to Touré was for the purpose of securing her assistance in influencing President Conté.

However, the tribunal declined to make a similar finding with respect to other alleged episodes of bribery. Notably, the tribunal said it was unable to determine the authenticity of a pair of contracts in which BSGR purportedly promised payments to Touré over Simandou, which BSGR has alleged are forgeries.

The tribunal also found that BSGR had made payments to Mahmoud Thiam, Guinea's then minister of mines, that enabled him to buy a property in New York in 2010. However, it said there was insufficient evidence that these amounted to bribes. The fact that Thiam has been convicted in the US on unrelated corruption and money laundering charges in relation to mining rights granted to Chinese interests did not alter this conclusion, it said.

Vale also failed to make out its claim that BSGR had bribed President Conté through gifts including a gold watch and two miniature cars.

Limited inquiry

In a coda to the award, the tribunal acknowledged that Vale's claims for fraudulent misrepresentation were not dependent on proving corruption and that it could have decided the case "without making inquiries and findings on bribery".

The tribunal said it chose to make such inquiries and findings “to give justice to the case” in view of the parties’ competing narratives of the dispute. It noted that a “central plank” of BSGR’s case was that it had not engaged in bribery in procuring its mining rights and this therefore “needed to be addressed”.

While it was not the task of arbitral tribunals “to be engaged in fights against corruption”, they should also not “accept bribery as a fact of life in some countries and keep eyes shut when faced with allegations of corruption”, it said. The tribunal favoured a “middle course” in view of the “limited evidentiary and coercive powers in private commercial arbitration and the uphill task of establishing corruption”.

The tribunal said its findings of bribery in the case “are limited to those individuals and companies where [it] felt comfortable that it could make such findings.” While there may be more individuals and companies that were involved in corrupt practices regarding BSGR procuring its mining rights, the tribunal said it was not its task to “investigate private corruption by local businessmen” or inquire whether certain payments were genuine compensation for consulting services or monies to bribe Guinean government officials.

Nor was it the tribunal’s duty to look further into BSGR companies “to identify which entity or individual had knowledge or participated in bribing schemes” or to look “upstream of BSGR” to determine whether its parent entities, Steinmetz or anyone else should be accountable for bribery. Such findings were not possible or necessary for the disposition of the case, it said.

Chair removed but attempts to dislodge co-arbitrators fail

The award also details the protracted nature of the proceedings, which included BSGR’s successful application to disqualify Brower as tribunal chair and repeated failed attempts to remove the co-arbitrators. The first challenge was prompted by a misdirected e-mail from Brower to tribunal secretary **Michael Daly** (now of Jones Day), which led BSGR to allege the entire tribunal had improperly delegated its duties to the tribunal secretary. An LCIA division made up of **Peter Rees QC** as chair, **Inka Hanefeld** and **Luca Radicati di Brozolo** rejected the improper delegation

arguments but ruled that Brower should be disqualified on the basis of comments he made about the BSGR-Vale dispute at the ITA-ASIL conference in Washington, DC, in 2016. Brower was also found to have breached confidentiality by disclosing his involvement in the LCIA case but the division held this was not on its own a basis to disqualify him.

De Ly was appointed by the LCIA in Brower's place after BSGR objected to the co-arbitrators' selection of **William W Park** of the US as a replacement chair. BSGR then brought a second challenge against Hwang and Williams, alleging they lacked impartiality on the basis of their selection of Park and other grounds, which was also rejected by the LCIA division in 2016.

BSGR then applied to the High Court in London to remove Hwang and Williams from the case and obtain disclosure of the tribunal's correspondence, which was refused in early 2017. It also applied to the US courts for discovery from Brower and Daly but withdrew the request after losing its case in the English courts.

A year after it failed to appear at the merits hearings, BSGR announced in March 2018 that it had been placed in voluntary administration by order of the Royal Court of Guernsey, and asserted that the LCIA proceedings could not continue without the consent of the administrators or the court. The tribunal declined to stay the arbitration, finding that the Guernsey court's order did not automatically suspend the proceedings seated in London.

Repercussions for ICSID settlement?

The [Financial Times](#) suggests Vale's enforcement efforts have "plunged into doubt" a deal that BSGR has helped to broker between Guinea and Niron Metals, a company chaired by UK Conservative Party chief executive Mick Davis, to exploit another iron ore deposit in Guinea known as Zagota. The deal was part of a wider settlement between BSGR and Guinea to resolve the ICSID case, which would supposedly allow BSGR to resume operating in the country alongside other investors.

In a [statement](#) yesterday, Vale says it is investigating recent reports about the settlement agreement and says that, to the extent it gives BSGR any rights over Zogota, they would be "assets subject to enforcement". Vale also says it has brought and will be bringing proceedings in other countries to enforce the award against BSGR and "persons connected with it".

BSGR's sole shareholder, BVI entity Nysco Management Corp, told the [FT yesterday](#) that the company would be challenging the award in the High Court in London.

"The LCIA award and the desire by Vale to make a very public noise about the misconceived judgment is simply part of its own campaign to cover up the significant issues of their own," Nysco said.

Nysco is owned by the Balda Foundation, a Liechtenstein trust and ultimate holding company for BSGR, of which Steinmetz and his family are the sole beneficiaries.

Vale v BSGR (LCIA arbitration)

Tribunal

- **Filip de Ly*** (Belgium) (chair) (appointed by the LCIA)
- **David AR Williams QC** (New Zealand) (appointed by Vale)
- **Michael Hwang SC** (Singapore) (appointed by BSGR)

* *appointed following the disqualification of [Charles N Brower](#)*

Counsel to Vale

- Cleary Gottlieb Steen & Hamilton

Partners **Jonathan Blackman** and **Jeffrey Rosenthal** and associates **Joaquin Terceno***, **Esti Tambay**, **Emily Balter**, **Matthew Karlan****, **Samuel Levander** and **Michael Frenkel** in New York, partner **Jonathan Kelly**, counsel **Milo Molfa** and associate **Rikki Stern** in London and partner **Jean-Yves Garaud** in Paris

**left for Freshfields Bruckhaus Deringer in 2017*

** *left for Cadwalader Wickersham & Taft in 2018*

Counsel to BSGR

- Mishcon de Reya

Partners **Karel Daele** and **James Lisbon** and associate **Heidrun Walsh** in London

- **David Wolfson QC** of One Essex Court
- Asserson Law Offices (from May 2016 to January 2017)

Trevor Asserson and **Baruch Baigel** in London

Expert witnesses for Vale

- **Min Shi** of Oxera Consulting in Oxford

Expert witnesses for BSGR

- **Francois Ferreira**