

## ***BSRG in Guinea***

As reported by the [BBC](#), Beny Steinmetz was found guilty, in a Swiss court over the weekend for bribery and corruption in the obtaining of mining rights in Guinea. The corruption was engaged in by the Beny Steinmetz Group (BSRG) which paid \$2m to the Mamadie Touré, wife of the then Guinean President, Lansana Conté to help it secure rights to mineral deposits back in 2007. The corruption was memorialized in contracts which specified the agreements for BSRG to make payments and transfer shares in the mine to Mamadie Touré. As the quid pro quo for these commission payments, Mamadie Touré would take all necessary steps to have BSRG awarded the rights to the Simadou deposit, which had been previously awarded to Rio Tinto. Additionally, a further \$2m would be dispersed among other people to facilitate the acquisition of the rights.

### ***I. Background***

All of this came to light when Frederic Cilnis was arrested on April 14, 2013 in Jacksonville, Florida and charged with obstruction of justice for attempting to persuade Mamadie Touré, to destroy documents which purport to show the bribery scheme engaged in to obtain mining concessions. Unfortunately for Cilnis, Mamadie Touré was a Cooperating Witness (CW) for the US government. At the time, BSG said that it worked with Frederic Cilnis, although Cilnis was never an employee of the company.

The Cilnis Complaint detailed five separate contracts which showed the efforts of BSRG to pay bribes and engage in corruption to obtain the mining concession. Cilnis requested the CW produce original copies of the contracts and that he personally witness their destruction. In addition to the five contracts, Cilnis prepared for and had the CW sign an Attestation denying any involvement with him or helping his company obtain the mining rights in Guinea.

#### ***A. Protocol-1***

This contract was dated June 20, 2007, and was between the CW and the Guinean subsidiary of the Entity. For her assistance in obtaining permits, the Entity's Guinean subsidiary would transfer 5% of its shares to a company controlled by the CW.

#### ***B. Protocol-2***

This contract was dated February 28, 2008 and stated that the Entity "commits to giving 5% of the shares of stock of blocks 1 and 2 of Simadou [the mining concession]" to the CW.

#### ***C. Commission Contract***

This contract is dated February 27, 2008. In this agreement, the CW's company commits to "taking all necessary steps from the authorities the signature for the obtaining of the aforementioned blocks". For this consideration, a \$2MM would be made available for the distribution "among persons of good will who may have contributed to facilitating the granting of the blocks".

#### ***D. Engagement Letter***

This is an undated document. In it the Guinean subsidiary proposed to allow the CW up to a 5% shareholding stake in the Guinean subsidiary. There would be a further transfer of 17.65% of the capital by the Guinean subsidiary as well.

#### ***E. August 3, 2010 Contract***

This is a contract dated August 3, 2010. In it the Entity's holding company agrees to pay to the CW the additional amount of \$5MM, in two tranches. The first payment of \$2.5MM was to be paid at contract execution and the second to be paid 24 months later. Interestingly, the Compliant stated that this contract "required the CW to conceal the CW's relationship with the Holding Company, reciting that the CW and the CW's company 'commit herewith to make no use of the document, in any manner, directly or indirectly, and not to use this document against the [Holding Company] and/or its partner and/or its associates in Guinea or elsewhere.'"

#### ***F. The Attestation***

In addition to the documents that Cilnis sought to have destroyed, he prepared and presented to the CW a document entitled "Attestation". The CW signed this Attestation and copies were made. According to the Complaint, the Attestation was drafted as if it was written and prepared by the CW herself and in it were the following statements:

- a. I have never signed a single contract with the Entity, neither directly or indirectly through anyone else.
- b. I never intervened with Guinean officials in favor of [the Entity]...
- c. I have never received any money from [the Entity], neither directly or indirectly... [The Entity] never gave...any money, neither directly to me nor to anyone else on my behalf. They did not promise to pay me anything, neither to me, nor to anyone else on my behalf.

#### ***G. Destruction of Documents***

Unfortunately for Cilnis he told Mamadie Touré several times that the documents need to be destroyed, rather urgently. Moreover, "they need to find a place to burn all of them, adding that they cannot do it at your house." When Mamadie Touré suggested that she could destroy the documents, Cilnis repeated that he had been instructed to see it happen in person and that Cilnis could not lie to his employer asked whether he saw the papers burn. For the destruction of the documents, the Complaint notes that Cilnis offered the CW \$1MM. \$200,000 of this total would be paid now and "\$800,000 at a later date."

## ***II. The Trial***

### ***A. Allegations***

According to the New York Times (NYT), the allegations “centered on alleged payouts of millions of dollars to a former wife of an ex-president of Guinea, Lansana Conté, who died in 2008. The trial exposed the shady and complex world of deal-making and cutthroat competition in the lucrative mining business.” The corruption was engaged in by the Beny Steinmetz Group (BSRG) which paid \$8.5 million to Mamadie Touré, wife of the then Guinean President, Lansana Conté to help it secure rights to mineral deposits back in 2007.

The corruption was memorialized in contracts which specified the agreements for BSRG to make payments and transfer shares in the mine to Mamadie Touré. As the quid pro quo for these commission payments, Mamadie Touré would take all necessary steps to have BSRG awarded the rights to Blocks 1 and 2 of the Simadou deposit, which had been previously awarded to Rio Tinto. Additionally, a further \$2m would be dispersed among other people to facilitate the acquisition of the rights. Unfortunately for Steinmetz, President Conté died shortly after the bribes were paid.

### ***B. Defenses***

If this trial had been a comedy, you could not have a more laughable defense. Steinmetz lawyers put on what is affectionately referred to as the “*Dog Bite Defense*”. It is:

1. My dog didn’t bite you.
2. Even if my dog did bite you, it’s because you provoked him.
3. Even if my dog did bite you, you really aren’t injured.
4. My dog didn’t bite you because *I don’t have a dog*.

So how does the Dog Bite defense come into play here? According to the BBC, Steinmetz “insisted he had only been an “adviser” or a “spokesperson” for the company that bears his name. When confronted with details of the alleged bribery, as well as transcripts of conversations, his frequent response was: “I don’t know. I wasn’t involved and I don’t know the details.”

When confronted with the contracts agreeing to pay Mamadie Touré, Steinmetz claimed in a 2013 [New Yorker](#) article that “the documents that were discussed in Jacksonville did not prove anything, he said—they were forgeries”. When presented with a photograph of a signature BSGR representative, Asher Avidan on the contracts, Steinmetz said the signature “was identical but dismissed it as “a simple Photoshop.”” The problem with this defense is that you do have to admit that (1) the contracts exist and (2) the payments were made or promised. Indeed, when the prosecutors “produced details of a conversation (recorded by the FBI in 2013) in which one of Steinmetz’s co-defendants appeared to try to persuade Ms Touré to get rid of evidence of corruption, mentioning a certain person “up there” at BSGR who made all the decisions. “Who’s ‘up there?’” asked the prosecution.” Steinmetz replied, “I don’t know who is up there, may be God, but not me.”

Their next set of *I don’t have a dog* defense was that President Conté died shortly after the bribes were paid. Of course, President Conté, who died shortly after the bribes were paid, had awarded BSRG the mining concession *before* he died. (“How do you bribe a ghost?” a defense lawyer asked

the court.) The final defense was that Mamadie Touré was not married to President Conté. Here Steinmetz's lawyers claimed Steinmetz had never "paid a cent:" to Ms. Touré, and even if he had, she was never actually legally married to President Conté, and therefore under Swiss law did not qualify as a bribable public official. Not even sleeping with him. They added, "She is a lobbyist. Like a thousand others."

### ***C. Court Ruling***

The Court made short shrift of Steinmetz defenses. According to an FT article, Judge Alexandra Banna rejected that Steinmetz's arguments, the article stated, "Each defendant had a specific role to play. Benjamin Steinmetz, in his capacity as the effective head of BSGR, was the main beneficiary of the operation," the Geneva Criminal Court said in a statement. "All important decisions were taken with his agreement and he personally intervened in several stages of the bribery operation." [Mining Weekly](#) quoted the ruling judge for the following, "'The fact that Steinmetz wasn't aware of all details doesn't change a thing," the judge said in a ruling that took two hours to read out. "Steinmetz had his hand on the payments and was able to oversee the bribery process.'"

Steinmetz was sentenced to five years in jail and fined ordered to pay a 50 million Swiss franc (\$56.5 million) penalty.

### ***D. Reaction***

According to the BBC, Agathe Duparc of Swiss NGO Public Eye, which focuses on big Swiss businesses and multinationals based in Switzerland, said the case had "starkly revealed the inner workings of international corruption, against the backdrop of one of the poorest countries in the world". Moreover, "While the trial had sent a strong signal to the commodities sector, it also showed that Switzerland should tackle legal loopholes that allowed such "predatory practices." The FT further quoted the NGO, saying "The verdict must not, however, eclipse how difficult it remains for both Swiss and foreign prosecutors to investigate such complex cases," it said. "Although Switzerland has not served as a haven of impunity today, it must take the necessary proactive measures to avoid being one tomorrow.'"

In a [Press Release](#) Public Eye stated, "The court case, which Public Eye has been closely following, has starkly revealed the inner workings of international corruption, against the backdrop of one of the poorest countries in the world. It has illustrated how the abusive use of tax havens facilitates the concealment of illegal activities in countries where governance and regulations are weak." It went on to state, "Public Eye commends the determination of the Geneva court, which refused to be fooled by the smokes and mirrors and evasion tactics of the defence team, no matter how slick. This verdict sends a strong signal to the entire commodities' industry, a sector which is highly exposed to corruption risks."

## ***III. The Vale JV***

The mining rights were valued at over \$100 billion, if the concession was fully developed. Interestingly, BSRG never bothered to develop the property but instead quickly sold a 51% interest in the concession to the Brazilian mining giant Vale SA with whom it then entered into a joint venture (JV) to develop the concession.

I thought about that truism when I read an article in the Financial Times (FT) reporter Tom Burgis wrote detailing this in a piece entitled “[Steinmetz unit won Guinea mining riches corruptly, inquiry says](#)”. The FT article reported, “After spending \$160m on preliminary development of its Guinea assets, BSGR in April 2010 struck its \$2.5bn deal with Vale, of which \$500m was payable immediately. The balance was to be paid if targets were met but Vale halted payments last year, [2013] after the corruption allegations surfaced. The inquiry concluded that, although payments to Ms Touré allegedly continued following the Vale transaction, it was “likely” that the Brazilian group “has not participated in corrupt practices”. Nonetheless, it said the Vale-BSGR joint venture – which BSGR says has spent \$1bn at Simandou – should be stripped of its rights to that and other prospects.”

According to [Seeking Alpha](#), in March 2014, a technical committee recommended the Guinean government strip BSGR, and its partner Vale, of the rights to exploit an iron ore deposit in northern part of Simandou mountains. This recommendation was made on the basis that BSGR obtained the project through corrupt practices in 2008. Vale had originally sought to purchase the BSRG interest because the iron ore found in the mine was of such high quality.

Vale filed an international arbitration claim against BSRG. A [tribunal](#) in London awarded Vale over \$2 billion in compensation. According to another FT article, entitled [Steinmetz fails to overturn \\$1.25bn arbitration award](#), “BSG Resources, the mining group owned by the family of Israeli diamond trader Beny Steinmetz, has failed in its attempt to overturn an arbitration award on the grounds of apparent bias.”

All of this litigation may have been forestalled if Vale had engaged in adequate due diligence when it originally entered its JV with BSRG. What did Vale say at the time?

Vale’s response was that it “*conducts appropriate due diligence prior to its investments.*”?

The matter points up for the need for robust due diligence in the investigation of all business relationships. While the life cycle of a third-party relationship is a good starting point and those same concepts apply to JV’s, there is another level of management when there is a relationship such as a JV. One JV partner must have transparency into the actions of its partner and there must be as much assurance as can be possible that there is no corruption going on.

Did Vale subject itself to FCPA liability by joining into a JV with BSGR? It certainly is an interesting question because in the FCPA world, when it comes to JV’s, you are known by the company you keep.

#### ***IV. Lessons Learned***

I conclude with some lessons learned for the compliance professional in this sordid tale.

##### ***A. Joint Ventures***

Initially, every compliance professional should understand the risks inherent in every joint venture. They are beyond those in the typical third-party sales relationship. This difference requires extra vigilance from the compliance perspective. [Mike Volkov](#) has noted that when you create a JV, there are a number of difficult issues to analyze. Initially, is the requirement of adequate due diligence. This is more difficult than in a traditional merger. Next is the set of governance issues surrounding control of the JV. If your JV partner is a state-owned enterprise, the issues become even more complex. The interactions between the company and a state-owned enterprise within the JV itself should be regulated so that they are not perceived as intended to improperly influence the state-owned enterprise, “either directly or in other areas of interaction.”

Even if the JV involves a private, as opposed to state-owned partner, the compliance issue then becomes the controlling the actions of the JV salespeople, JV staff responsible for regulatory interactions, and JV-retained third-party agents and distributors. In the JV context, a company has, by definition, less control. As a result, these issues need to be addressed in the formation of the JV. The issue becomes even more difficult when the company entering the JV has less than 50 percent control.

### ***B. Swiss Prosecution***

This is one of the first Swiss criminal trials involving monies paid through Swiss banks which went to fund bribery and corruption outside Switzerland; particularly with a non-Swiss national involved. This is of no small amount of significance. BSRG has long been under investigation by US authorities for potential violations of the Foreign Corrupt Practices Act (FCPA). Indeed, to Mamadie Touré, wife of the then Guinean President, Lansana Conté who received the bribe payments immigrated to the US after her husband died and was identified in the Indictment against Frederick Cilnis as a “Cooperating Witness”. She was scheduled to testify at Steinmetz trial but never appeared.

Although jurisdiction was clearly established in Switzerland, it was not clear why this criminal trial occurred in Switzerland. Yet it portends a greater willingness of Swiss officials and prosecutors to bring such criminal charges when Swiss interests are involved. It also means greater cooperation between Switzerland and other countries’ prosecutorial services on anti-corruption investigations.

### ***C. Regime Change***

This is not a reference to Saddam Hussein-style regime change but democratically elected regime change. When this occurs every compliance professional needs to take a look at the business in all high-risk countries where regime change occurs. You should begin with risk assessment to evaluate the contacts that they may have had with the prior administration or the prior regime. From there an organization should consider the risks associated with that change because if there is a local content requirement, you have partnered that was connected to the old regime but are on the outs with the new regime.

Every CCO should also review a wide variety of actions outside the US from the compliance perspective, even if the actions do not at first blush appear to directly impact compliance. With regime change, you can quickly find yourself on the opposite end of an administration and fairly or unfairly have your company linked to the prior administration and scrutinized simply on that basis. This is whether or not corruption led to the contract.

Additionally, doing business in a transparent manner is one of the most important things a company can do. A company should take clear steps to ensure they conduct business in an above-board manner. Transparency is the light that clears out the darkness in securing any governmental contracts or government interactions so that when they are reviewed, they will pass the light of day muster.

***D. Compliance is the Key***

In the Volkswagen (VW) emissions-testing scandal, VW went from one of the most trusted car manufacturers in the world to an organization that did not seem to know not only its left hand from its right hand but to even where either hand resided. This was much worse than a death of a thousand cuts where information dribbled out on a daily basis. Yet as bad as things were for VW, consider the entire German auto industry that, through no fault of their own, were put under a regulatory and reputational scrutiny.

In the face of all this, Ulrich Grillo, BDI then president of the German global industry association, insisted that the German national brand would not be damaged by “the unacceptable behavior of one company”. He added “I don’t think that this single case, however big, significant and unacceptable as it is, is damaging the whole image of the brand Made in Germany.” Grillo recognized that compliance is the answer. He urged companies to check their “management processes, including compliance and control systems.” He suggested the question to ask should be “Are we doing everything right?” When you have the President of a national industrial association saying compliance is the answer, compliance as the answer has arrived. In the context of regime change, you need to sit up and take notice.