

IN RE

SETIEN, S.A. de C.V.

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v.

A PRIVATELY ADMINISTERED
ARBITRATION BEFORE HON.
JOSEPH HART

BALLI STEEL, INC.;
BALLI GROUP PLC; and
BALLI STEEL PLC.

CLAIMANT SETIEN, S.A. de C.V.'s POSTHEARING BRIEF

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INTRODUCTION

Claimant Setien, S.A. de C.V. respectfully submits this posthearing brief in support of its claims against Respondents Balli Steel, Inc. (“Balli Texas”); Balli Steel PLC (“Balli London”); and Balli Group PLC (“Balli Group”) (collectively “Balli” or “Respondents”).

When Enrique Delgado signed a contract with Barry Bernsten on behalf of Balli for the purchase of 10,000 tons of cold rolled steel on November 8, 2007, he believed he had secured a supply of steel for his most valued customer. All seemed well as Balli moved ahead by accepting Setien’s letter of credit (“LC”), placing an order with a steel mill run by Nucor, and opening an LC to buy the steel. Thus it came as a shock when, on December 3, Balli suddenly gave Setien 24 hours to change the steel specification in its LC to something other than what appeared in their contract and implied that the sale was in danger because prices were rising. Delgado pledged to try to make the change but rightly noted that Setien did “not deserve this kind of treatment.” Claimant’s Exhibit (“Cl. Exh.”) 20 at SETIEN00161-62. He “respectfully request[ed] that Balli Steel keep[] their commitment with Setien as per contract.” *Id.*

Delgado’s plea fell on deaf ears, and what followed was even stranger: Bernsten told him Nucor had cancelled Balli’s order, Britt Gustawsson informed Delgado that Bernsten actually did not represent Balli, Balli sued Bernsten for embezzlement, Balli refused to respond to Delgado or clarify the status of the contract for two weeks, Balli rejected its own requested LC amendment, Gustawsson told Delgado Balli was in no position to deliver but would still explore filling Setien’s order, and Balli never got back to Setien but retained its LC anyway. “Setien is expecting Balli to honor their order & deliver,” Bernsten e-mailed Balli, but to no avail. Cl. Exh. 21 at ST0003. In the end, Setien’s funds were tied up and it was left without steel for its critically important customer, who then naturally shunned further dealings with Setien.

Since the advent of this litigation, Balli has made a variety of excuses for its poor treatment of Setien, but none is convincing. Balli claims that its own employee, Bernsten, lacked authority to sign Setien's contract, but it was Balli who gave him all the trappings of authority to sign and never indicated he lacked such power. If Bernsten violated internal Balli policy by signing, Balli is responsible for the result, not Delgado, whom Balli concedes could not have known the scope of Bernsten's true authority. Balli employees like Gustawsson did not observe corporate boundaries between the different entities in their day-to-day work, and Bernsten acted as the agent of all three in arranging the sale and executing Setien's contract. Sloughing responsibility off on Bernsten or the now-defunct Texas entity that nominally employed him represents a transparent attempt to avoid liability by Balli London and Balli Group.

Balli argues that supposed deficiencies relating to Setien's LC excuse its breach, but these issues were waived by Balli at the time. Attempting to rely on them now smacks of *post hoc* litigation strategy and ignores Balli's obligation under the Code to deal in good faith. Indeed, Balli repeatedly sought its own changes to Setien's LC that diverged from the contract. Balli also invokes a clause in its general terms limiting buyers' remedies. The provision does not apply because it was never received by Setien, covers only breach of warranty claims, and would be plainly unconscionable under the Code if used to bar all relief for Balli's breach.

Balli's breach seriously damaged Setien. The parties agree that the steel market was sharply rising in December and January 2007, and the Code entitles Setien to the difference between the contract price and the market price at the time of the breach. Setien also proved it was in the process of filling other orders from its customer when its customer stopped cooperating because Setien could not deliver the 10,000 tons. This outcome was to be expected in light of Balli's non-delivery, and Setien should receive the resulting lost profits.

Throughout this case, Balli has focused on a few of the trees – computer file metadata regarding Vigil’s letter, certain aspects of Setien’s efforts to fulfill the other pedidos, even Delgado’s flight schedule – while it has whistled past the forest: Balli contractually committed to provide the steel Setien needed to satisfy its chief customer, and its failure to deliver predictably harmed Setien, which should now be justly compensated.

ARGUMENT

I. Does Claimant's Exhibit 1 Constitute a Binding Contract Between Claimant and Any Respondent?¹

The contract signed by Enrique Delgado and Barry Bernsten on November 8, 2007 is binding on each of the Respondents because Bernsten acted as their agent when he executed it. *See* Cl. Exh. 1. Alternately, Respondents are bound to the contract through ratification.

A. Bernsten Acted as Respondents’ Agent When He Executed the Contract

“An ‘agent’ is one who is authorized by another to transact business or manage some affair.” *Grace Community Church v. Gonzales*, 853 S.W.2d 678 (Tex. App. – Houston [14th Dist] 1993). The principal has the right to control the agent, who, in turn, must act with the principal’s actual or apparent authority in order to bind the principal. *See Walker Ins. Serv. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 549 (Tex. App. – Houston [14th Dist] 2003). Agents who sign contracts on behalf of non-signatory principals bind their principals to the agreements.

¹ At the close of the hearing, the parties pledged to agree to a common list of questions to be answered by the Arbitrator. Each side then drafted and exchanged two sets of proposed questions and spoke by phone, but unfortunately no agreement was reached. Respondents contended that Setien’s questions did not fully cover the issues the Arbitrator mentioned at the end of the hearing, while Setien believed Respondents’ questions improperly dictated instructions to the Arbitrator, akin to improperly commenting on a charge, and were not in broad form. After receiving Setien’s second set of proposed questions, Respondents e-mailed that the questions were “unworkable for us,” that their “patience is exhausted,” that they would use their own questions, and that Setien should “feel free” to use its version. Consequently, the parties have briefed differently formulated questions, though Setien believes the parties’ briefs will cover the same substantive ground and all issues necessary to decide this case. Setien’s questions are separately attached as Attachment A hereto.

See Tr. 3-19, 572/7-16 (DeMott testimony);² *Restatement (Third) of Agency* § 6.01 (2006) and cmt. I, at 7-8 (principal not named or identified in contract bound where other party has notice of his identity); *In re Credit Suisse First Boston Mortgage Cap., L.L.C.*, 273 S.W.3d. 843, 847-48 (Tex. App. – Houston [14th Dist] 2008) (non-signatory agents bound by contracts signed by principals); *Nettech Solutions LLC v. Zippark.com*, 2001 WL 1111966 at * 11 n. 9 (S.D.N.Y. 2001) (“a contract can bind a non-signatory where it was signed by the non-signatory’s agent”). Both elements essential to agency status – right of control and authority – are present here.

1. Respondents Had the Right to Control Bernsten

Each of the Respondents had the right to control Bernsten. Balli Texas was Bernsten’s direct employer. *See* Cl. Exh. 2. His employment contract with Balli Texas provided that he would “act exclusively for” it and work full time on its behalf. *Id.* at ¶¶ 4.1, 4.4; Schedule ¶¶ 8.1, 8.4. Bernsten could “enter[] into new sales/purchases” for Balli Texas, but Balli Texas claimed the right of final approval over contracts such as the sale of steel to Setien. *See id.*, Schedule, ¶¶ 10.1-10.2. Balli Texas CEO Jeff McCarthy controlled Bernsten’s office’s expenses, overhead and tax compliance. *See* Tr. 3-16, 78/9-18. The Balli officials who directly supervised Bernsten were Gustawsson and Alaghband. *See* Cl. Exh. 3 at 4; Tr. 3-16, 73/24. These officials, in turn, had the right to and did control Balli Texas. Gustawsson signed contracts on behalf of Balli Texas that bound that company, such as Bernsten’s employment agreement. *See* Cl. Exh. 2. And Gustawsson and Alaghband had the ultimate authority to and did approve the trades made by Balli Texas employees. *See* Tr. 3-16, 17/20-19/5 (describing process of approval), 74/17-19 (“All deals that are going through are being approved by me and Nasser”), 75/11-14 (same); Cl.

² “Tr.” refers to the hearing transcript. “3-19” refers to the date of the hearing. “572/7-16” refers to the page (572) and lines (7-16) where the cited or quoted testimony appears. This form is followed throughout the brief.

