

26 JULY 2019


# DISPUTE RESOLUTION ALERT

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### Will the South African High Court's injunction stop the liquidation proceedings of Konkola Copper Mines PLC in Zambia?

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CLIFFE DEKKER HOFMEYR

## Will the South African High Court's injunction stop the liquidation proceedings of Konkola Copper Mines PLC in Zambia?

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Vedanta Resources Holding PLC successfully obtained an injunction order on 23 July 2019 from the South African High Court against ZCCM Investment Holdings PLC, ordering ZCCM to cease from taking any further steps in the winding-up proceedings of Konkola Copper Mines Plc in Zambia, pending the final determination of an arbitration under the terms of a shareholders' agreement between the parties.

Vedanta and ZCCM (Zambian-government owned) are both shareholders in Konkola (a Zambian mine). The shareholders' agreement between Vedanta and ZCCM contemplates that in the event of a dispute between the parties, such dispute shall be resolved by arbitration – with the seat of such arbitration to be Johannesburg. A dispute arose between ZCCM and Vedanta, triggered by an allegation by ZCCM (more so the Zambian government) that Vedanta, amongst others:

- mismanaged Konkola to the detriment of ZCCM;
- refused payment dividends to ZCCM; and
- failed to develop certain mining areas in accordance with applicable Zambian legislation.

As a result of these allegations and increased tension between ZCCM and Vedanta, on 21 May 2019 ZCCM proceeded to bring an *ex parte* application for the winding-up of Konkola and the appointment of a provisional liquidator.

Vedanta issued a "notice of dispute" under the terms of the shareholders' agreement on 31 May 2019, setting in motion the process to commence with arbitration in Johannesburg. In the notice of dispute Vedanta viewed the issues raised by ZCCM in the winding-up proceedings as disputes falling within the contemplation of the arbitration clause.

Vedanta then approached the Johannesburg High Court for an injunction order against the winding-up proceedings, which was opposed by ZCCM on several grounds – some of which were that:

- the matter was *lis pendens* in the Zambian High Court; and
- the winding-up application did not give rise to a dispute as contemplated by the shareholders' agreement.

The Johannesburg High Court provided the following reasons, amongst others, for its final order:

- the issues raised by ZCCM in the winding-up application related to matters flowing from the shareholders' agreement, which issues were disputed by Vedanta and accordingly constituted disputes under the arbitration clause of the shareholders' agreement; and
- although all issues in dispute were based in Zambia, the seat of arbitration was Johannesburg and the court thus had exclusive jurisdiction to entertain the injunction application by virtue of article 17J of the UNICTRAL Model Law on International Commercial Arbitration incorporated in the International Arbitration Act, 2017.

## Will the South African High Court's injunction stop the liquidation proceedings of Konkola Copper Mines PLC in Zambia?...*continued*

As opposed to relying on the injunction order, Vedanta's best bet would be to seek the Zambian courts' recognition and enforcement of the arbitration clause in accordance with the provision of the Zambian Arbitration Act, 2000 and the New York Convention.

ZCCM has publicly stated that it intends to appeal the injunction order of the Johannesburg High Court, however under the International Arbitration Act the decision of the court is not subject to an appeal. So, ZCCM will have to live with the court order pending the resolution of the dispute by arbitration in Johannesburg.

The Johannesburg High Court's injunction order would be effective in South Africa against ZCCM, but as a foreign judgment in Zambia it would not be binding on the provisional liquidator and would probably only have persuasive value in the Zambian Court in the winding-up proceedings. Should ZCCM persist with the winding-up application it will be in contempt of the South African court order, but the effectiveness of the order is doubtful.

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in accordance with the provision of the Zambian Arbitration Act, 2000 and the New York Convention. This would essentially be on the same basis as ventilated in the Johannesburg High Court: That the dispute set out in the winding-up proceedings (ie claims of mismanagement, payments of dividends and so on) flows from the shareholders' agreement and as such must be resolved by arbitration in Johannesburg. Zambia, having acceded to the New York Convention, is obliged to give recognition to the arbitration clause in the shareholders' agreement. It is not for parties (even if state-owned) to circumvent the arbitration by using other domestic measures.

The approach adopted by the Zambian courts in relation to the arbitration clause and shareholders' dispute is important to ensure that the perception that African jurisdictions are not friendly to international arbitration is remedied.

*Jackwell Feris*

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