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Facts

In November 2004, the Government of the Republic of Zambia had concluded an agreement to in which Vedanta Resources Holdings Limited ("Vedanta"), acquired a majority shareholding interest in Konkola Copper Mines ("KCM"). Following this acquisition, ZCCM Investment Holdings Plc ("ZCCM-IH") negotiated and executed a Shareholders Agreement and Articles of Association. Among other things, the aforementioned agreements provided that Vedanta would be responsible for appointing the Chief Executive Officer, who in turn was responsible for appointing a Chief Operating Officer, Chief Financial Officer and other senior management.

On 21st May 2019, the ZCCM-IH commenced winding up proceedings by way of a petition in the High Court of the Republic of Zambia with the view to wind up KCM based on the allegation that the mine was being mismanaged by Vedanta contrary to the provisions of the Shareholders Agreement that was executed between the Appellants and the Respondents. That at the same time that the winding up proceedings where commenced, the ZCCM-IH obtained an ex-parte order appointing a Provisional Liquidator over Konkola Copper Mines and the order of appointment gave the Provisional Liquidator very wide powers over and above the requirement to preserve the assets of the company.

Vedanta applied for a stay of execution in these liquidation proceedings because the Shareholders Agreement between the Government of Zambia and Vedanta, contained an arbitration clause. Under this arbitration clause, all disputes arising out of the Shareholders Agreement were to be settled by arbitration. The term 'dispute' was defined quite broadly in the Shareholders Agreement. Vedanta contended that since ZCCM-IH felt that KCM was being managed in a manner that was detrimental, there was a dispute between the parties as per the Shareholders Agreement, and therefore it should be referred to arbitration.

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The High Court disagreed. In their view this was not a proper case to refer the parties to arbitration. As far as the High Court was concerned, the arbitration agreement was "null and void, inoperative or incapable of being performed". The court acknowledged that section 10 was couched in mandatory terms. However, it noted that this same section also provided that the Court should refuse to stay proceedings in the event that it finds that the arbitration clause is null and void, inoperative or incapable of being performed. Dissatisfied with the decision of the High Court, Vedanta launched an appeal before the Court of Appeal.

Holding

The Court of Appeal held that Vedanta had substantially succeeded in its appeal against the High Court's refusal to stay proceedings and refer the matter to arbitration. This was owing to the fact that *inter alia* that there was indeed a dispute between the parties as defined in the Shareholders Agreement. In addition to this, the Court of Appeal held that Vedanta possessed the requisite *locus standi* to apply for a stay of the winding up petition and refer the matter to arbitration. Moreover, the Court of Appeal opined that the disputes between the parties were referable to arbitration. As such, the arbitration agreement between the parties was indeed arbitrable.

Significance

Although the Zambian Government has genuine grievances against Konkola Copper Mines Limited, the liquidation route (initiated by a shareholder and not a creditor) pursued by the Government is legally unsound and indefensible. The dispute between ZCCM and Konkola Mines Limited is without question a shareholder dispute. The proper approach to dealing with the Government grievances against Konkola Copper Mines Ltd. would have been through the Mines and Minerals Development Act of 2011. This Act provides for a process to be invoked when a mining company is not mining in breach of its Mining Development Agreement. Allegations by ZCCM contained in their petition for the liquidation of Konkola Copper Mines Ltd. relate to mining operations. They include the following: failing to develop mining areas in Chingola and Chililabombwe contrary to the mining plan formulated pursuant to section 35 (1) (6) of the Mines and Minerals Development Act of 2011; failing to carry out mining operations with due diligence; failing to pay debts; and failing to operate in a manner that is environmentally friendly and sustainable.

The Court of Appeal held that these allegations are in the nature of a shareholder dispute between ZCCM and Konkola Copper Mines Ltd. and must be resolved through the dispute resolution mechanism agreed upon between the parties in the Shareholders Agreement. The Agreement provided for arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. ZCCM is required to follow the contractually agreed upon dispute settlement resolution processes in the Shareholders Agreement. The Minister of Mines has criticized the Court of Appeal's decision and decided to appeal the matter to the Supreme Court. He also states that he has asked (who it is not clear) that the arbitration be resolved by October 2021. The Minister of Mines further asserts that there are companies waiting to buy Konkola Copper Mines Ltd. All these statements are demonstrably false. The decision to go to arbitration will prove to be a costly mistake for the country. The Government is well advised to engage Konkola Copper Mines Ltd and come to an amicable settlement of the dispute.

Arbitration will not only be a prolonged process, it will also be a very expensive one for Zambia. It will cost the country millions of dollars in arbitration fees, legal fees and the award. The Zambian law clearly states in section 10 of the Zambia Arbitration Act that: "[a] court before which legal proceedings are brought in a matter which is subject to an arbitration agreement shall, if a party so requests at any stage of the proceedings and not withstanding any written law, stay the proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or is incapable of being performed." This language tracks the language of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[2] to which Zambia is a party. The Convention, like the Zambia provision, states very clearly that where an action is brought before a court and one of the parties challenges the institution of legal proceedings on the grounds that there is an agreement to arbitrate, the convention requires courts in contracting states to enforce the arbitration agreement.[3] In *McCreary Tire Rubber Company,* a US Court of Appeals ruled, "there is nothing discretionary about article II. It required the courts at the request of one of the parties to refer the parties to arbitration where there is an arbitration agreement."[4] Courts in other jurisdictions have ruled similarly. Another matter for Zambia to realize is that should Vedanta and Konkola Copper Mines Ltd obtain an award, it will be able to enforce it in all states that

[2] Adopted in 1958
[3] article II
[4] Article III

are party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is practically all countries in the world. More than 145 states are party to this multilateral treaty for enforcement of arbitral awards, under which an arbitral award is final and binding with no appeal to any court in the world.[5]

Arbitration proceedings will be very expensive for Zambia. An ACERIS LAW report found that an average arbitration case lasted 3 to 4 years.[6] Contrary to the Minister of Mines statement, Zambia cannot dictate the speed of the proceedings. An arbitrator, like an ordinary court, is completely in charge of their arbitration and cannot be dictated to. This is a court process and arbitration will involve all the stages that are necessary to conduct litigation in a trial. These include: the claimant filing a brief; the Zambia Government filing a brief in response; the filing of rejoinders; and production of documents. Then the hearing and finally the writing of the award. Each of these stages will take months to accomplish. An arbitration process is very expensive. You have to pay for everything including lawyers, judges, expert witnesses and administrative costs. A recent study by Global Arbitration Review reveals that since 2013, average costs were a massive $7.41 million for claimants and $5.19 million for respondents. These fees include tribunal costs, administrative costs, tribunal secretary costs, legal fees both of which are calculated per hour. It has to be remembered that this arbitration is going to be under the UNCITRAL Arbitration Rules. Article 42 of the UNCITRAL Arbitration Rules states that "costs shall be borne by the unsuccessful party". Additionally, there is the possible award of damages for loss of business to Vedanta. An established principle in international practice and in particular by decisions of arbitral tribunals is that reparation must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability, have existed if that act had not been committed.[7] The Global Arbitration Review study reveals that since 2012, the average amount claimed in investment arbitrations has risen to $2.38 billion. This means the Zambian Government is engaged in a very dangerous gamble with serious financial implications for the country. We could very well be talking about a $1 billion plus award.

Sound legal counsel would suggest that the Government abandon this legally unsound endeavour and approach Vedanta to settle the matter out of court. As to the story that there are

[5] article III
[6] 2017
[7] Charzow Factory Case, PCIK

investors waiting to buy Konkola Copper Mines Ltd., that is highly doubtful. No sound investor would seek to buy an asset whose title is in dispute and no bank would lend millions of dollars to buy such an asset. As Confucius so aptly puts it "the hardest thing of all is to find a black cat in a dark room, especially if there is no cat."