UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LLC KOMSTROY, as successor in interest to LLC ENERGOALLIANCE, Petitioner, v. **REPUBLIC OF MOLDOVA,** Respondent.	Case No. 14-cv-01921 (CRC)

OPINION AND ORDER

Petitioner LLC Komstroy[1] filed this action in 2014 to confirm an arbitral award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 21 U.S.T. 2517, which has been incorporated into the Federal Arbitration Act ("FAA"), see 9 U.S.C. §§ 201–08. Before the Court are dueling motions, one by petitioner to lift a stay of the case originally entered April 22, 2016 and the other by Respondent Republic of Moldova to extend the stay.

The Court notes at the outset that Moldova has chosen not to enter an appearance in the case through counsel. Instead, it has responded to petitioner's filings with submissions to the Court from the country's Ministry of Justice through diplomatic channels. These materials do not conform to the Federal Rules of Civil Procedure and are generally lacking in legal analysis, including citations to case law. Compounding difficulties, some of the submissions simply

[1] LLC Komstroy has been substituted for the original petitioner in this matter, LLC Energoalliance, as its successor-in-interest. See Mar. 9, 2017 Minute Order (granting motion to substitute party).

renew previous requests of the Court, forcing petitioner to parrot responsive arguments it has already made. The Court has accepted and fully considered Moldova's submissions in the interests of comity and fairness. But it bears mention that the country's approach to the litigation has imposed unnecessary burdens on both petitioner and the Court.

In any case, the Court will press on. For the reasons that follow, the Court will grant petitioner's motion to lift the stay. The Court will, in a subsequent decision, consider the parties' arguments regarding whether to grant the petition and confirm the arbitral award. Pursuant to the Court's November 5, 2018 Minute order, petitioner's response to Moldova's renewed motion to dismiss, see ECF No. 37, shall be due thirty (30) days from the entry of this order. Moldova may file a reply within fourteen (14) days thereafter.

I. Background

This case began on November 14, 2014, when petitioner filed a Petition to Confirm Foreign Arbitral Award pursuant to the New York Convention as implemented by Chapter 2 of the FAA. See Petition, ECF No. 1.

The petition seeks recognition of a final arbitral award issued by an *ad hoc* tribunal in favor of petitioner and against the Republic of Moldova in Paris, France on October 23, 2013. Id. ¶ 1. The arbitration arose under the Energy Charter Treaty ("ECT"), a multilateral treaty to which Moldova is a party, and was conducted under the rules of the United Nations Commission on International Trade Law ("UNCITRAL"). The award obligates Moldova to pay petitioner approximately $50,000,000 as compensation for breaches of obligations under the ECT. Petition ¶¶ 22–23; see also Pet.'s Mem. in Supp. of Motion to Lift Stay ("Motion to Lift Stay"), ECF No. 33-1, at 1.

On November 25, 2013, Moldova made a formal application to the Paris Court of Appeal to set aside the arbitral award based on grounds similar to those advanced in the arbitral proceeding. Id. ¶ 28; Declaration of Viacheslav Lych ("Lych Decl."), ECF No. 1-3, ¶ 18. Moldova argued that the award should be set aside because the tribunal lacked jurisdiction over the claims under the ECT and that the award violated international public order. Pet.'s Notice, Ex. A, Paris Court of Appeal Decision, ECF No. 21-1, at 6. During the pendency of the set-aside proceedings, in June 2014, petitioner requested and received from the High Court of Paris an "*exequatur*"—that is, an enforcement order of the arbitral award. Declaration of Benoit LeBars ("LeBars Decl."), ECF No. 16-2, ¶¶ 9 n.2, 24; Lych Decl. ¶ 16; Lych Decl. Ex. C, Certified Translation of *Exequatur*, ECF No. 8-6 (sealed), 7–8; Code civil art. 1516 (Fr.).

As previously noted, petitioner initiated this case in November 2014 and Moldova—acting through its Ministry of Justice and without entering an appearance by counsel[2]—submitted a document titled "Reference" on July 20, 2015. ECF No. 12. The Court construed this document as a motion to dismiss the petition and directed petitioner to respond, which it did. See ECF Nos. 14, 16, 17.

By letter docketed April 4, 2016, Moldova requested a stay pending resolution of the set-aside proceeding before the Paris Court of Appeal. ECF No. 20. Before the Court could rule on that request, petitioner informed the Court that the Paris Court of Appeal had, on April 12, 2016, vacated the 2013 arbitral award for lack of jurisdiction. Pet.'s Notice, ECF No. 21, at 1. The Paris Court of Appeal did not reach Moldova's second argument, that the arbitral award was

[2] In response to an order from the Court, Moldova submitted a letter informing the Court that it did not intend to secure legal representation in this matter. See Letter, ECF No. 19.

contrary to international public order. See Paris Court of Appeal Decision at 6–8. Petitioner explained that it intended to appeal the adverse decision to the *Court de Cassation*, a court of last resort in France, and requested a stay of this matter pending resolution of that appeal. Notice at 1. The Court then stayed the case. See Apr. 22, 2016 Minute Order.[3]

Fast forward a few years. On August 15, 2018, petitioner informed the Court that in March 2018, the *Cour de Cassation* issued a decision in its favor, reversing and rendering void the 2016 Paris Court of Appeal decision that had set aside the arbitral award. Pet.'s Notice, ECF No. 32, at 2; see also Mot. to Lift Stay Ex. A, *Cour de Cassation* Decision, ECF No. 33-2, at 2–3. The *Cour de Cassation* remanded the case to be reconsidered by a different panel of the Paris Court of Appeal. *Cour de Cassation* Decision at 3. Under separate cover the same day, petitioner moved to lift the stay and reopen this case. See Mot. to Lift Stay.

At first, Moldova did not respond. After the Court issued an order requiring Moldova to do so, see ECF No. 34, Moldova submitted a letter renewing its motion to dismiss the petition to confirm the arbitral award and requesting an extension of the stay pending proceedings in the Paris Court of Appeal. See ECF No. 37, at 2. Petitioner then responded to Moldova's request. See ECF No. 39. And here we are, left with the question whether to extend the stay, as Moldova requests, or lift it, as petitioner hopes, pending proceedings in the Paris Court of Appeal.

II. Analysis

As the Court sees it, there are two questions that must be answered to determine whether to extend or lift the stay. First, what is the status of the 2013 arbitral award? And second, if the

[3] The Court extended the stay by minute order on July 22, 2016 and July 5, 2017.

arbitral award is presently enforceable, are there reasons under the New York Convention why the Court should nonetheless extend the stay?

A. The arbitral award is presently enforceable

Article III of the New York Convention provides that the contracting states "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles." 21 U.S.T. at 2519. The relevant territory here is France, where the arbitral award was issued.

Under the French civil procedure rules, "[a]n arbitral award may only be enforced by virtue of an enforcement order" or *exequatur*. Code civil art. 1516 (Fr.). As explained above, petitioner obtained an *exequatur* in 2014. See Certified Translation of *Exequatur* at 7–8. Critically, "[n]either an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award." Code civil art. 1526 (Fr.); see also LeBars Decl. ¶¶ 17 & 17 n.9. And while a party may seek a stay of the *exequatur* "where enforcement could severely prejudice the[ir] rights," Code civil art. 1526 (Fr.); see also LeBars Decl. ¶¶ 17 & 17 n.9, Moldova has not presented any evidence that it sought such a stay, see Petition ¶ 28; Lych Decl. ¶ 18; Pet.'s Resp., ECF No. 39, at 1. Thus, the set-aside proceedings have no effect on the 2013 arbitral award, which was immediately enforceable as soon as petitioner obtained the *exequatur*.

B. The *Europcar* factors weigh in favor of lifting the stay

Notwithstanding that the arbitral award is presently enforceable under France's civil procedure rules, the New York Convention provides for limited circumstances in which the Court may impose a stay. Under the Convention, "district courts do have discretion to stay

proceedings where 'a parallel proceeding is ongoing in the originating country and there is a possibility that the award will be set aside.'" Chevron Corp. v. Rep. of Ecuador, 949 F. Supp. 2d 57, 71 (D.D.C. 2013) (quoting Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 317 (2d Cir. 1998)), aff'd 795 F.3d 200 (D.C. Cir. 2015); New York Convention, art. VI ("If an application for the setting aside of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award.").

Because granting a stay "impedes the goals of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation"—and in "many countries, an arbitration award is final, binding, and enforceable even if subject to further appeal in court," "a stay of confirmation should not be lightly granted." Europcar, 156 F.3d at 317. The Second Circuit has enumerated six factors to consider when evaluating a request for a stay of proceedings:

> (1) the general objectives of arbitration . . . ;
>
> (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;
>
> (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;
>
> (4) the characteristics of the foreign proceedings including (i) whether they were brought . . . to set the award aside (which would tend to weigh in favor of enforcement), (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute;
>
> (5) a balance of the possible hardships to the parties . . . ; and
>
> (6) any other circumstance that could tend to shift the balance in favor of or against adjournment . . . .

Id. at 317–18. The Second Circuit has counseled that the first and second factors should be given more weight in this analysis. Id. at 318. While the D.C. Circuit has yet to explicitly adopt the Europcar factors, fellow courts in this district have used these factors when determining whether to grant a stay of arbitral enforcement proceedings. See, e.g., Chevron Corp., 949 F. Supp. 2d at 71–73. This Court will do the same.

The first factor, regarding the general objectives of arbitration, weighs in favor of lifting the stay and reaching the merits of whether to confirm the arbitral award. Petitioner initiated this case four years ago in November 2014 and submitted its Notices of Arbitration to Moldova more than eight years ago. Mot. to Lift Stay at 5; Petition ¶ 18 (notices sent July 8, 2010 and August 18, 2010). This is hardly an "expeditious resolution" of the dispute, which dates back to the late 1990s. See Hardy Exploration & Prod. (India), Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas, 314 F. Supp. 3d 95, 106 (D.D.C. 2018).

The second factor, the status of the foreign proceedings, also weighs in favor of lifting the stay. Under French civil procedure rules, the 2013 arbitral award is immediately enforceable based on the 2014 *exequatur* regardless of the set-aside proceedings. The *Cour de Cassation* has remanded the set-aside proceedings to the Paris Court of Appeal to consider the arguments not reached in its 2016 decision—that is, whether the arbitral award violates international public order—before a different panel. Last time, the Paris Court of Appeal took two years and four months to determine whether to set aside the arbitral award. Add to that nearly two years to receive a decision on appeal from the *Cour de Cassation*. Given how long it is likely to take to resolve the set-aside proceedings, this factor weighs in favor of lifting the stay. See id. at 106 ("[T]he fact that the underlying arbitral award was rendered five years ago and the fact that there is no clear end to the Indian set-aside proceedings in sight counsels against granting India a

stay.”); see also Gold Reserve Inc. v. Bolivarian Rep. of Venezuela, 146 F. Supp. 3d 112, 135 (D.D.C. 2015) (denying stay in part because “[w]hile the Paris Court of Appeal is currently considering Venezuela’s petition to set aside the Award, that appeal is not likely to be resolved soon”).

The third factor, the comparative level of scrutiny that the arbitral award will receive in the French system, weighs slightly in favor of lifting the stay. The Paris Court of Appeal will review the *ad hoc* tribunal’s decision *de novo*, which is more exacting than this Court’s deferential examination. See Gold Reserve Inc., 146 F. Supp. 3d at 135. At the same time, the Paris Court of Appeal may set aside the arbitral award only on grounds narrower than those of Article V of the New York Convention, the applicable standard in this case. Id.; see also LeBars Decl. ¶ 5 (counsel for petitioner in French proceedings conceding that the grounds for set aside under French law “are more restrictive than the grounds provided for by the [New York] Convention”). Moreover, the *Cour de Cassation* has already concluded that one of Moldova’s arguments for setting aside the award—that the *ad hoc* tribunal lacked jurisdiction—is without merit, leaving just the argument that the arbitral award is contrary to public policy for consideration. This reduces the likelihood that the arbitral award will be set aside and thus counsels in favor of lifting the stay.

The fourth factor involves multiple considerations and comes out a wash. Comity considerations weigh slightly in favor of extending the stay because Moldova initiated the set-aside proceedings in 2013 before petitioner commenced this suit in 2014. The other considerations, however, weigh in favor of lifting the stay: *Moldova*, not the party seeking to enforce the award, commenced the proceedings in France to set aside the arbitral award. See Gold Reserve, Inc., 146 F. Supp. 3d at 136 (explaining that facts that petitioner brought federal

suit to enforce arbitral award while foreign-state respondent initiated set-aside process in Paris "weigh in favor of the Court's enforcing the award" and denying request for stay).

The fifth factor, the balance of hardship, counsels against continuing the stay. The underlying dispute originated in the late 1990s, and the arbitral award was issued in 2013. Although petitioner would continue to accrue prejudgment interest in the event of a continued stay, the Court has no doubt that, given the length of time that petitioner has waited and the amount of money at stake, petitioner would be burdened should the Court delay much longer.

Petitioner has not presented any other significant circumstances that the Court should weigh. Moldova has not addressed the Europcar factors at all. Because the balance of the Europcar factors favors immediate confirmation and disfavors a continued stay, the Court will grant petitioner's request to lift the stay and deny Moldova's request to extend it. As explained above, the Court will address the parties' arguments regarding the petition itself by separate order.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Petitioner's [33] Motion to Lift Stay is GRANTED. It is further

ORDERED that Respondent's [35] Motion to Extend Stay is DENIED.

SO ORDERED.

CHRISTOPHER R. COOPER
United States District Judge

Date: November 13, 2018