INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

EDMOND KHUDYAN

Applicant,

v.

THE REPUBLIC OF ARMENIA,

Respondent.

ICSID Case No. ARB/17/36

OPPOSITION TO MR. KHUDYAN'S APPLICATION FOR STAY OF ENFORCEMENT OF THE AWARD

17 August 2022

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The Republic of Armenia (the '**Republic**') submits this *Opposition to Mr. Khudyan's Application for a Stay of Enforcement of the Award* in accordance with Annex B of the *ad hoc* Committee's Procedural Order No. 1, dated July 27, 2022.

I. INTRODUCTION

1. The gravamen of any request for a stay of an award, judgment, or order (in any legal system of which we are aware) is a demonstration of harm to the applicant/petitioner. In other words, a stay is sought because allowing the order or judgment to proceed would cause harm that cannot be undone. Seeking a stay in the ICSID framework, naturally, follows this same rationale. The Applicant, Mr. Khudyan, therefore has to show that harm would result if the stay is not granted in order for the Committee to then decide whether to grant a stay.

2. The Applicant makes only two assertions of purported harm that would occur if the award is not stayed. The first assertion of purported harm is that enforcement would affect the Applicant's business operations, as they were. The sole paragraph making this assertion, **which contains no citation or evidence of any kind**, is reproduced in full below:

> "In addition, Mr. Khudyan is an individual businessman. The cost award of USD 737,466.34 constitutes a substantial percentage of his remaining net worth. Paying this amount today would effectively shutter portions of his business operations because it would require him to liquidate revenue-generating assets, the loss of which would have a cascading effect on his operations by reducing his available cash flows."[1]

3. This bald assertion made by counsel for the Applicant is proof of nothing. There is no statement as to what "percentage" this Award would be of the Applicant's assets. The word "effectively" does a lot of work in the Applicant's assertion above, allowing counsel for the Applicant to make an empty and meaningless assertion. (Would enforcement shutter portions of his business operations or effectively do so?) The Applicant provides no details or information with respect to the size of the "portions" of his business operations that would allegedly be shut

[1] Mr. Khudyan's Application for a Stay of Enforcement of the Award (27 July 2022) (the '**Stay Application**'), at para. 36.

which Mr. Khudyan obfuscated his dealings in Armenia in the arbitration, as confirmed in portions of the Award not subject to annulment.

112. It is also interesting in this context to note an interesting tactic in the *Stay Application* in which "Mr. Khudyan commits to paying the Award if his Application for Annulment is unsuccessful. However, as explained below, he would need to liquidate assets in order to obtain the funds to do so."[158] The relevant passage "below" then states "[p]aying this amount today would effectively shutter portions of his business operations because it would require him to liquidate revenue-generating assets, the loss of which would have a cascading effect on his operations by reducing his available cash flows."[159]

113. As the Republic expected, there is no supporting documentation with regard to this statement (and thus no risk of disclosing private financial information if a stay order were made public as intimated by Mr. Boykin at the first session). The Republic did not expect that information as Mr. Khudyan would of course be loath to tell the Republic where his assets are for when the Republic is allowed to enforce the Award. But if Mr. Khudyan is unwilling to talk about his business operations or his assets, that would suggest that he is indeed a recalcitrant Award debtor. The *ad hoc* Committee should read his application with this in mind.

IV. MR. KHUDYAN FILED A DILATORY AND VEXATIOUS ANNULMENT APPLICATION

114. This is not the time to decide the merits of Mr. Khudyan's annulment application.[160] The *ad hoc* Committee has ordered a procedural schedule to test the merits of that application.[161] This question, therefore, will be decided at a later point in time.

115. Mr. Khudyan nevertheless has placed this *ad hoc* Committee in the uncomfortable position of having to assess whether there exist circumstances that would warrant a stay ahead of having learned the substance of the annulment case. This as a matter of basic common sense will

158 Stay Application, ¶ 33.

159 Stay Application, ¶ 36.

160 *Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, order on stay (30 November 2004), ¶ 26, **ALA-0041**.

161 Procedural Order No. 1 (27 July 2022), at annex B.

require the *ad hoc* Committee to look not at the merits or substance of the annulment application but at its cogency. That is, does the annulment application in fact raise a matter that sounds in annulment, at all?[162]

116. Mr. Khudyan's *Annulment Application/ Memorial* should cause the *ad hoc* Committee significant doubts. In the first place, Mr. Khudyan's requested stay can only apply to the portion of the Award he challenges, meaning that his company Arin Capital is already delinquent in satisfying the Award.

117. Nevertheless, Mr. Khudyan in his *Annulment Application/ Memorial* asked that the Tribunal's decision that "ORDERS the Claimant***s*** to pay the Respondent the sum of USD 337,466.34 for the expected portion of the Respondent's advances to ICSID and USD 400,000 towards the Respondent's legal fees and expenses" be stayed.[163] He now reiterates this request – that is the request that "Pursuant to Article 52(5) of the ICSID Convention, enforcement of the Award rendered on 15 December 2021 in ICSID Case No. ARB/17/36 be stayed until a ruling on the Application for Annulment."[164]

118. The Tribunal unmistakably ordered Claimants, plural, to make the payment in question.[165] The Award defines 'Claimants' (plural) as "Mr. Edmond Khudyan ('Mr. Khudyan' or 'Claimant 1'), a natural person having the nationality of United States of America, and Arin Capital & Investment Corp. ('Arin US' or 'Claimant 2'), a company incorporated under the laws of California, United States of America (***together, the 'Claimants'***)."[166]

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[162] *Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, order on stay (30 November 2004), ¶ 26, **ALA-0041**; *MTD Equity Sdn Bhd v. Chile*, ICSID Case No. ARB/01/7, order on stay (1 June 2005), ¶ 28, **RALA-0011**; *Libananco Holdings Co. Ltd. v. Turkey*, ICSID Case no. ARB/06/8, order on stay (7 May 2012), ¶ 48, **ALA-0031**; *Tidewater Investment SRL v. Venezuela*, ICSID Case No. ARB/10/5, order on stay (29 February 2016), ¶ 35, **RALA-0008**; *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, order on stay (31 August 2017), ¶ 77, **RALA-0001**; *Casado v. Chile*, ICSID Case No ARB/98/2, order on stay (15 March 2018), ¶ 72**, RALA-0012**.

[163] Award, at ¶ 452(5)(emphasis added); Application/ Memorial, at ¶ 66.1.

[164] Stay Application, at ¶ 54.1.

[165] Award, at ¶ 452(5).

[166] Award, at ¶ 2.

119. Arin Capital & Investment Corp. did not seek to annul the Award.[167] The timeframe in which Arin Capital & Investment Corp. could have sought to annul the Award has since elapsed on 14 April 2022.[168]

120. Mr. Khudyan does not arrogate the power to annul the substantive portions of the Award regarding Arin Capital & Investment. He only seeks to annul "paragraphs 203- 267, and 452(1), (4), (5) of the Award."[169] Paragraph 203-267 of the Award fall under the section "Claimant 1 – Mr. Edmond Khudyan."[170]

121. Article 52, paragraph (1) of the ICSID Convention states that "[e]ither party may request annulment of the award."[171] The French makes clear that the English "either" means "each" or "any:" "*chacune des parties peut demander* ..."[172] The French "*chacune*" in English means "each" or "everyone."[173] The Spanish agrees with the French: "***cualquiera de las partes podrá solicitor la anulación*** …"[174] The Spanish "*cualquiera*" means "anyone."[175]

122. The *ad hoc* Committee only has authority to annul "the award or any part thereof on any of the grounds set forth in paragraph (1)."[176] The Convention here limits annulment authority to the entire *chapeau* and not the specific grounds listed in paragraph (1)(a)-(e).[177] Consequently, the *ad hoc* Committee may only act upon request of the relevant party.

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167 Application/ Memorial, at ¶ 1.

168 ICSID Convention, art. 52(2).

169 Application/ Memorial, at ¶ 66.2.

170 Award, at ¶¶ 203-267.

171 ICSID Convention, art. 52(1).

172 ICSID Convention, art. 52(1)(French version).

173 Chacun, Collins French Dictionary, available at https://www.collinsdictionary.com/dictionary/french-english/chacun, **RALA-0013**.

174 ICSID Convention, art. 52(1)(Spanish version).

175 Cualquiera, Cambridge Dictionary, available at https://dictionary.cambridge.org/dictionary/spanish-english/cualquiera, **RALA-0014**.

176 ICSID Convention, art. 52(3).

177 ICSID Convention, art. 52(3).

123. As pled by Mr. Khudyan and as required by the ICSID Convention, the *ad hoc* Committee only has authority with regard to his own application portion of the case. The *ad hoc* Committee, of course cannot stay the Award for a non-party to the current proceedings – Arin Capital & Investment Corp. For that party – a party which did not seek to the annul the Award – the obligation in Article 53 of the ICSID Convention applies: "[t]he award shall be binding on the parties" and "[e]ach party shall abide by and comply with the terms of the award."[178]

124. Consequently, the annulment application with regard to paragraph 452(5) of the Award is dilatory as it concerns Arin Capital & Investment Corp. A stay cannot be issued with respect to Arin Capital as it is not seeking annulment and the dispositif with respect to Arin Capital is not at issue. Note that the Republic does not even request to remove a stay for Arin Capital as no such stay could exist.

125. Second, Mr. Khudyan's application for a stay is vexatious on its face even with regard to himself. Mr. Khudyan only seeks to annul "paragraphs 203-267 and 452(1), (4), (5) of the Award."[179] He does not seek to annul paragraphs 446 to 451 of the Award. Paragraphs 446 to 451 of the Award represent the Tribunal's decision on costs.[180] Mr. Khudyan therefore does not challenge the cost decision as such. Given that Mr. Khudyan does not challenge the cost decision, he cannot seek to annul it either. He has raised no argument whatsoever sounding in annulment why that decision ought to be disturbed. It therefore remains *res judicata*. As such his request for annulment and for a stay is dilatory as there is no basis within the ICSID Convention on which it could be granted.

126. This point is not a matter of accident. The annulment application contains absolutely no argument why the cost award ought to be annulled. As such, Mr. Khudyan is precluded from seeking a stay with regard to portions of the Award he does not substantively challenge.

127. Mr. Khudyan's application in any event is not cogent even as to what it does contain. Here, it is central for the *ad hoc* Committee to understand that Mr. Khudyan is gravely in

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178 ICSID Convention, art. 53(1).

179 Application/ Memorial, at ¶ 66.2.

180 Award, at ¶¶ 446-451.

"a cascading effect on his operations by reducing his cashflow."[211] As Arin Capital & Investment Corp. is obligated to pay the cost decision awarded against it, and as Arin Capital & Investment Corp. (through Mr. Khudyan) has chosen not to seek annulment of the Award, this effect is simply inevitable.[212]

148. Mr. Khudyan does not suffer any hardship to the extent he is obligated to from one pocket what he is already compelled to pay from another. His cashflow, and the cashflow of his "business operations" are no less affected by an enforcement of the Award against Arin Capital & Investment Corp. than they are against him personally. The notion of a hardship arising out of an enforcement against him personally therefore is puzzling –and in any event is not explained in the *Stay Application*.

149. For avoidance of doubt, Mr. Khudyan also does not carry his burden that there has been an abuse of right. This accusation has been addressed in previous sections of this pleading. Given his own procedural conduct, including his submission of multiple incorrect sworn statements as to the date of his US naturalization and his own sense of his Armenian nationality, Mr. Khudyan would do well to advance more modest submissions in this stage of the proceedings or the annulment-in-chief.

150. Mr. Khudyan further has not met his burden of proof with regard to any allegations of a risk of non-recoupment. This issue will be dealt with below in the next section.

VI. IN ANY EVENT, THERE IS IN FACT NO RISK OF NON-RECOUPMENT TO MR. KHUDYAN FROM ENFORCEMENT OF THE AWARD

151. Although there is a risk for Armenia arising from a stay of enforcement, there is no such reciprocal risk on the part of Mr. Khudyan. The jurisprudence is clear that the financial hardship at issue in a stay application cannot be the hardship of the Award itself. Annulment is an exceptional remedy. As a matter of simple statistics, it faces significant hurdles. An annulment applicant therefore can hardly expect to be successful at the outset of the proceedings even if it believes itself to have a good and varied case (something that cannot be the case here as discussed above).

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211 Stay Application, at ¶ 36.

212 ICSID Convention, art. 53.

152. If one considers hardship as a reason for a stay of enforcement of an award, therefore, that hardship must be related to the issuance *vel non* of the stay itself. Specifically, there must be a reason to suspect that an award once enforced would be dissipated and not subject to recoupment. Alternatively, there must be a similarly precise reason to do with the stay of enforcement itself.

153. In this case, Mr. Khudyan cannot claim such a risk, harm, or hardship. Assuming that the Republic enforces the Award, and assuming that Mr. Khudyan is successful in his annulment application, the *ad hoc* Committee could order that the whole or part of the enforcement amount be returned to Mr. Khudyan. The Republic complies with the judgments, orders, and decisions of international courts and tribunals. The Applicant has submitted no evidence to assert that the Republic has failed or refused to pay an actual award issued by an international arbitration tribunal, much less an award rendered under the ICSID rules.

154. The Applicant uses its own failure of not being able to research judgments and awards against the Republic to assert that no such evidence exists of the Republic paying awards. The Republic has paid judgments when rendered against it, and the Applicant should not be allowed to assert that the Republic will not pay absence actual evidence. Although the Republic has prevailed in its international arbitration cases, not therefore requiring any payment, the Republic has voluntarily complied with judgments/awards rendered by the European Court of Human Rights.[213] This information is available by the ECHR had the Applicant troubled himself to check. In addition, as is documented, the Republic has paid the costs and fees required in the international arbitration proceedings. The evidence shows that the Republic, unlike Mr. Khudyan as discussed below, complies with awards and judgments.

155. The assertion made by Applicant regarding Armenian law is likewise misplaced and duplicitous. Applicant asserts that "Armenian law pointedly does **not** provide that the State will pay out international awards rendered against it."[214] As an initial matter, the Republic accords the highest weight to its international obligations. The Applicant has provided no evidence to the contrary. In addition, the Republic has a provision by which an arbitration award creditor receives

[213] Armenia ECHR Facts, https://www.echr.coe.int/Documents/Facts_Figures_Armenia_ENG.pdf, **RA-0007**.

[214] Stay Application, at para. 17.

a "promissory note" that is paid 12 months after issuance. The Applicant wrongly asserts that the Republic "may" issue such a note. This is not correct. Article 15(13) of the Law "On the Budget System of the Republic of Armenia" provides for Armenia's obligation to pay out arbitral awards by issuing a transferrable promissory note.[215] Article 156 of Armenia's Civil Code states that a

> "promissory note shall be considered as the security certifying the unconditional obligation of the maker of the promissory note (a simple bill of exchange) or other payer indicated in the promissory note (a transfer bill of exchange) to pay upon the expiration of the term provided for in the promissory note a certain amount to the holder of the promissory note (promissory note holder)."[216]

156. Furthermore, Government Decree N 436, dated 7 August 2003, sets forth the relevant procedure for issuing promissory notes, which further demonstrates the mandatory nature of this obligation of the government.[217] These laws and procedures demonstrate that the government has an obligation to pay an arbitration award. It should further be noted that this same procedure applies mutatis mutandis to court judgments against the Republic, meaning that court judgment debtors are subject to the procedures and law regarding the promissory note and the one-year time period.

157. With regard to the one-year time provision, this is both not uncommon and necessary. Many states have provisions that provide the state time to pay an outstanding judgment or award. In the U.S., for example, the law requires that a certain time period pass following a court judgment against a sovereign before execution of the judgment can be pursued.[218] .

158. In addition, allowing for a year for payment is not unreasonable. The Republic must deal with budget issues and ensure that a large payment would not disrupt the government's operations.

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[215] Law on the Budget System of the Republic of Armenia, **RALA-0017**.

[216] Civil Code of Armenia, art. 156, **RALA-0018**.

[217] Government Decree N 436, dated 7 August 2003, **RALA-0019**.

[218] US Foreign Sovereign Immunities Act and Related Statutes, **RALA-0020**. Although the time period is not a defined period, the Court must wait a reasonable time, and notice must be given to the sovereign state, before any attachments or garnishments can be executed.

169. The Republic therefore requests that Mr. Khudyan provide adequate security in the amount of $737,466.34. The Republic accepts that this security can be adequate even if it is not posted in cash, or bond, or in an escrow account.

170. In this context, the Republic would be content if it received senior liens with regard to the US "revenue-generating assets" intimated by Mr. Khudyan in paragraph 36 (apparently rental properties). For example, the Republic would be content to receive senior perfected security interests and liens against Mr. Khudyan's property, rental income accounts, and other assets in the requisite amount. This would allow Mr. Khudyan continued use of the assets in question while also securing the Republic's rights as Award creditor.

171. For the reasons outlined already, the Republic does not consider the Armenian assets of Mr. Khudyan adequate security. These assets are already encumbered on the face of the arbitration record and the Award (again in sections not subject to annulment).[229]

VIII. PRAYER FOR RELIEF

172. For the reasons set forth above, the Republic respectfully requests that the Committee:

> With regard to Mr. Edmond Khudyan, lift the stay of enforcement of the Award of 15 December 2021 in ICSID Case No. ARB/17/36 pursuant to Article 52 (5) of the ICSID Convention and ICSID Arbitration Rule 54; or
>
> Alternatively, with regard to Mr. Khudyan, maintain the stay against the posting of adequate security in the amount of $737,466.34 in a two-week period.
>
> Order Mr. Khudyan to pay all costs and expenses in connection with the application for a stay of enforcement of the Award.

[229] Award, at ¶ 319.

Deny all of Mr. Khudyan's requests for relief.

Respectfully submitted, 17 August 2022

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