

**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES**

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EDMOND KHUDYAN

*Applicant,*

ICSID Case No. ARB/17/36

v.

THE REPUBLIC OF ARMENIA,

*Respondent.*

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**THE REPUBLIC OF ARMENIA'S REJOINDER TO MR. KHUDYAN'S  
APPLICATION FOR STAY OF ENFORCEMENT OF THE AWARD**

6 September 2022

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Yeghishe Kirakosyan  
Representative of the Republic  
of Armenia on International  
Legal Matters  
Republic of Armenia

Teddy Baldwin  
Steptoe & Johnson LLP

Prof. Dr. Frédéric Sourgens

Liparit Drmeyan  
Kristine Khanazadyan  
Mariam Tarverdyan  
Parandzem Mikayelyan  
Office of the Representative of the  
Republic of Armenia on  
International Legal Matters  
Republic of Armenia

Counsel for Respondent

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credibility is squarely before the Committee in determining whether or not Mr. Khudyan has proved the existence of circumstances requiring a stay of enforcement of the Award.

### III. ARIN CAPITAL & INVESTMENT CORP. HAS FAILED TO PAY THE AWARD

31. It is a somewhat trite observation that Mr. Khudyan cannot seek annulment of the Award as it relates to Arin Capital & Investment Corp. Similarly, he cannot seek a stay for the portion of the Award against Arin Capital & Investment Corp., particularly not with respect to the orders against Arin Capital & Investment Corp.<sup>42</sup> Arin Capital & Investment Corp. did not seek annulment of the Award.<sup>43</sup> Mr. Khudyan has not challenged the portions of the Award addressing the jurisdictional dismissal of Arin Capital & Investment Corp., even if he could have done so.<sup>44</sup>

32. Mr. Khudyan's *Stay Reply* charitably offers a two sentence answer the Republic's argument that Mr. Khudyan cannot seek a stay with regard to an Award made against Arin Capital & Investment Corp.<sup>45</sup> These sentences are not offered to address the Republic's argument in chief. They are rather included to explain why Arin Capital & Investment Corp. has not yet paid the Award.

33. In the first sentence, Mr. Khudyan submits that "[i]t is entirely speculative whether the Tribunal would have issued the same costs decision if it had" ruled differently on jurisdiction against Mr. Khudyan.<sup>46</sup> That is of course precisely the point. Mr. Khudyan does not show, because he cannot show, what would have happened under those circumstances. To use his own words, his submission on this point is "speculative."<sup>47</sup> A speculative submission simply does not carry a burden of proof.

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<sup>42</sup> Stay Opposition, ¶¶ 114-124.

<sup>43</sup> Stay Opposition, ¶ 119.

<sup>44</sup> Stay Opposition, ¶ 120.

<sup>45</sup> Stay Reply, ¶ 16.

<sup>46</sup> Stay Reply, ¶ 16.

<sup>47</sup> Stay Reply, ¶ 16.

34. The second sentence in the *Stay Reply* regarding this issue again confirms the Republic's point. Mr. Khudyan argues that if he were to win on his annulment application, it would entail that the committee "would necessarily annul the reasoning underlying the cost award."<sup>48</sup> The necessity might well follow for his own claim. But such a ruling by the Committee would not annul an order against a party not seeking annulment.<sup>49</sup> Had Arin Capital & Investment Corp. wished to benefit from a potential annulment of the cost award, Arin Capital & Investment Corp. would have had to file an annulment application. It did not do so.

35. There is nothing necessary about exercising a power one does not possess. And for the avoidance of doubt, Mr. Khudyan submits no authorities for the proposition that such an annulment of an Award against Arin Capital & Investment Corp. would in fact be within the Committee's power laid down in the ICSID Convention.

36. Even if Mr. Khudyan actually believes that a stay would apply to a non-party, he is wrong. Ignorance of the law is no defense to a failure to comply with a legal obligation. Mr. Khudyan has no justification for preventing Arin Capital & Investment Corp. from paying the Award against it. The Republic notes that Mr. Khudyan testifies in a statement submitted with the *Reply* that he has "\$124,010 in cash in Arin Capital & Investment Corp.'s cash account."<sup>50</sup>

37. Even if Mr. Khudyan mistakenly believes that the provisional stay applies to Arin Capital & Investment Corp., he does not explain why he did not cause it pay the Award before the stay applied. This point is non-trivial in two respects. First, Arin Capital & Investment Corp. was not itself in receipt of any notice from ICSID that it was the beneficiary of a stay of enforcement in this period.<sup>51</sup> That is, the Secretary General did not

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<sup>48</sup> Stay Reply, ¶ 16.

<sup>49</sup> ICSID Convention, Art. 52(2).

<sup>50</sup> Statement of Edmond Khudyan (Stay Proceedings) (26 August 2022), ¶ 2.

<sup>51</sup> Letter from ICSID Secretary General re: Notice of Registration of Application for Annulment in Edmond Khudyan v. Republic of Armenia (12 April 2022).

inform Arin Capital & Investment Corp. of the existence of a stay.<sup>52</sup> That exclusion of Arin Capital & Investment Corp. from the distribution of the letter would have given rise to justifiable doubts in Arin Capital & Investment Corp. that it was indeed a beneficiary of the stay. In this period, Arin Capital & Investment Corp. did not inquire with the Republic as to the status of its payment obligations under the Award.

38. An annulment applicant is entitled to a provisional stay of an award as matter of ICSID Convention Article 52(5).<sup>53</sup> ICSID Convention Article 52(5) has two consequences. First, it shields a beneficiary from enforcement action by an ICSID Award creditor. Second, Article 52(5) also creates an exception to the obligation of a party to comply with an award voluntarily under Article 53(1).<sup>54</sup> A non-party to an annulment proceeding does not benefit from this Article 53(1) carve out. Consequently, Arin Capital & Investment Corp. has an obligation to comply with the Award even if the Republic might be precluded from seeking enforcement of the Award against Mr. Khudyan.<sup>55</sup>

39. The point is of relevance for two separate reasons. *First*, Mr. Khudyan in his Annulment Witness Statement implies that he is in full control of Arin Capital & Investment Corp.<sup>56</sup> He testifies that Arin Capital & Investment Corp. has assets.<sup>57</sup> He thus implicitly concedes that he could cause Arin Capital & Investment Corp. to pay at least part of the Award against it.<sup>58</sup> He chooses not to do so. There is no good faith basis whatsoever for him to refuse to do so given his counsel's *Reply* pleading.

40. To be blunt: Arin Capital & Investment Corp. affirmatively chooses to refuse to pay an award against it. It does so despite the fact that it has assets. It does so despite the fact that it is on notice that it has no basis whatsoever to refuse to pay the Award.

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<sup>52</sup> Letter from ICSID Secretary General re: Notice of Registration of Application for Annulment in Edmond Khudyan v. Republic of Armenia (12 April 2022).

<sup>53</sup> ICSID Convention, Art. 52(5).

<sup>54</sup> ICSID Convention, Art. 53(1).

<sup>55</sup> ICSID Convention, Art. 53.

<sup>56</sup> Statement of Edmond Khudyan (Stay Proceedings) (26 August 2022), ¶ 2.

<sup>57</sup> Statement of Edmond Khudyan (Stay Proceedings) (26 August 2022), ¶ 2.

<sup>58</sup> Statement of Edmond Khudyan (Stay Proceedings) (26 August 2022), ¶ 2.

keeping practices.<sup>92</sup> All Mr. Khudyan has to say in response is that the Republic's point is "egregious."<sup>93</sup> He provides no alternative explanation as to how the financial flows are to be put together. More importantly, he does not submit any alternative reading of the Award to support a contention that the wiring of money and exchanges of title could at all be reconstructed in the manner of an ordinary transaction. The specific factual allegations advanced by the Republic therefore are un rebutted. The Republic therefore is not in any position to respond to further arguments by Mr. Khudyan on these points.

56. At heart, the Republic invites the Committee to read the portions of the Award not subject to annulment carefully. As outlined in the *Stay Opposition*, there is only one conclusion to draw from those passages: the Republic is at grave risk that Mr. Khudyan will make himself judgment proof if a stay is granted. Mr. Khudyan's application for stay therefore must be rejected.

## **VI. THE ARGUMENTS IN THE STAY REPLY DO NOT SUPPORT A STAY IN THIS CASE**

57. This section joins issue with the arguments raised by Mr. Khudyan in section II of his Stay Reply. For the Committee's ease of reference, it will do so *seriatim*.

### **A. Mr. Khudyan Has Not Demonstrated a Non-Recoupment Risk**

58. The Republic has submitted in its *Stay Opposition* that stay applicants must meet a burden of proof to show that circumstances require a stay of enforcement under Article 52(5) of the ICSID Convention.<sup>94</sup> The *Stay Reply* does not join issue on this point. Consequently, the Republic cannot further engage on this point.

59. In this case, the burden of proof doubly applies to Mr. Khudyan. It is a matter of trite law that ICSID "[c]ontracting parties are always assumed to be acting honestly and in good faith."<sup>95</sup> The obligation to comply with an ICSID award is a treaty

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<sup>92</sup> Stay Opposition, ¶¶ 81-109.

<sup>93</sup> Stay Reply, ¶ 13.

<sup>94</sup> Stay Opposition, ¶ 29-30.

<sup>95</sup> Lighthouses Case (France/ Greece) (1934) A/B 62, Separate Opinion by M. Séfériadès at 47, **RALA-0021**; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953) 106, **RALA-0022**; Frederic G. Sourgens et al., *Evidence in International Investment Arbitration* (Oxford University Press, 2018) 117-119,

obligation owed by the Republic by application of Article 53 of the ICSID Convention.<sup>96</sup> As states are presumed to act in good faith, the Republic is a beneficiary of a presumption that it will in fact comply with its treaty obligations and not violate the principle of *pacta sunt servanda* over a \$737,466.34 award.

60. Obviously, presumptions can be overcome. But overcoming presumptions requires concrete proof. It requires a showing that a party would indeed not act in accordance with its obligations.

61. Instead of submitting such proof, Mr. Khudyan simply wishes to flip presumptions. He wishes to submit that unless it can demonstrate otherwise, the Committee should assume that the Republic will not comply with an international treaty obligation.<sup>97</sup> This submission is simply wrong.

62. First, the submission on Armenian law by Mr. Khudyan is incorrect. Armenian law does require the Republic to pay ICSID awards. In addition to what the Republic stated in paragraphs 155-157 of the Opposition regarding the promissory note, the Republic stresses that the execution of judicial acts and arbitration awards through a transferrable promissory note *is a measure of last resort* rather than a standard form of enforcement. The state will resort to that measure only in the event other means of enforcement cannot be applied pursuant to the Government decree #436 on “*Issuance of transferrable promissory notes for the payment of amounts from State budget on the basis of judicial acts*”, dated 7 August 2000.<sup>98</sup> In its Article 5, the Decree states that “*A promissory note shall not be issued if at least one of the following conditions is met:*

*(a) the amount payable from the state budget of the Republic of Armenia is directly set forth in the law of the state budget of the given year (the year of submission of the writ of execution by the enforcement agent) as a budgetary expenditure (...);*

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**RALA-0023.** We note that the relevant pages of Bin Cheng on this point have not been exhibited by Mr. Khudyan as part of **ALA-0046**. The Republic therefore submits the relevant materials in **RALA-0022**.

<sup>96</sup> ICSID Convention, Art. 53.

<sup>97</sup> Stay Reply, ¶¶ 20-21.

<sup>98</sup> Government decree #436 on “Issuance of transferrable promissory notes for the payment of amounts from State budget on the basis of judicial acts”, dated 7 August 2000, **RA-0017-ARM**.

117. The Republic does not understand why Mr. Khudyan or his counsel did not make such an offer. The failure to make such an offer suggests to the Republic a lack of credibility of Mr. Khudyan's offers and entreaties. It again provides evidence that Mr. Khudyan will not encumber his assets willingly and only will make cheap representations of future action. This is concerning to the Republic.

118. To be clear, the Republic's offer continues to stand should the Committee wish to proceed on such a basis.

### **VIII. REQUEST FOR RELIEF**

119. 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 within two weeks of the Committee's decision on the Stay Application, which security could include placing sufficient properties in escrow pending the resolution of this Annulment proceeding.

Order Mr. Khudyan to pay all costs and expenses in connection with the application for a stay of enforcement of the Award.

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

Respectfully submitted,

6 September 2022



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Teddy Baldwin  
Steptoe & Johnson LLC  
1330 Connecticut Avenue, NW  
Washington, DC 20036