UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LLC SPC STILEKS ***Petitioner,*** **v.** **THE REPUBLIC OF MOLDOVA,** ***Respondent.***	**Case No. 1:14-cv-01921 (CRC)**

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO STAY

Moldova's motion to stay is, unfortunately, a thinly disguised attempt to avert the execution of the inevitable judgment to be issued by this Court without posting a bond as required by the Fed R. Civ. P. Rule 62. This case has already effectively ended. This Court recognized the Award, and the Court of Appeals affirmed the recognition. There is nothing left to do for the Court but to determine the amount and issue the judgment. Instead, under pretenses of saving efforts of the parties and of this Court, Moldova is seeking a stay that is unwarranted and unjust. Notably, the Court has already held in November 2018 that Moldova is not entitled to stay pending French court proceedings. And yet, Moldova decided to waste parties' resources and this Court's time raising the same issue again. Moldova erroneously argues that the *Europcar* factors should apply, however, because this case is way beyond the recognition stage, and is constructively in the post-judgment phase, a general stay of judgment standard under *Hilton* applies. In sum, Moldova's attempt to subvert the jurisdiction of this Court should be denied.

A. Moldova's Request to Stay is a Thinly Disguised Attempt to Avoid Posting a Bond

Fed. R. Civ. P. Rule 62(b) permits staying proceedings to enforce a judgment execution subject to posting a bond. See *Owens v. Republic of Sudan*, 141 F. Supp. 3d 1, 11 (D.D.C. 2015) ("The district court may only stay execution of the judgment pending the disposition of certain post-trial motions or appeal if the court provides for the security of the judgment creditor.") (quoting *Peacock v. Thomas*, 516 U.S. 349, 359 n.8 (1996)). This Court has recently demonstrated that it would not hesitate to impose the requirement to issue a bond on a sovereign that flouts its obligations. *See*, *e.g.*, *Tatneft v. Ukraine*, Civil Action No. 17-582 (CKK), 2021 U.S. Dist. LEXIS 102179 (D.D.C. June 1, 2021).

Moldova's intent to avoid Rule 62(b) bond requirement by engaging in tactical gamesmanship is clear. At the time when the parties submitted their Joint Status Report on May 28, 2021, ECF No. 83, Moldova was well aware of the pending Court of Justice of the European Union ("CJEU") proceeding and its procedural posture. Yet, it failed to appraise the Court and the Petitioner that it intended to file a motion to stay. Instead, Moldova waited over a month after July 12, 2021, when briefing on the Petitioner's Motion to Determine Prejudgment Interest Rates, ECF No. 86, was completed and only now filed its motion. Moldova's motion is a tactical ploy that should not be condoned.

B. *Hulley* Does Not Apply to This Case

Moldova erroneously argues that *Hulley* is the most analogous example that this Court must follow. That is incorrect. Moldova omits a crucial fact that makes this case fundamentally distinguishable from *Hulley*. In *Hulley*, the U.S. court never reached the stage where the arbitral award was recognized and the judgment was issued. The district court there faced the issue whether to stay the case at the time when Russian Federation's motions seeking to dismiss the

petition for lack of jurisdiction and to deny confirmation of the award were still unresolved. *Hulley Enters. v. Russian Fed'n*, 502 F. Supp. 3d 144, 149 (D.D.C. 2020).

Here, unlike the stage of proceedings in *Hulley*, the Award has already been confirmed. Moreover, this Court has already issued a judgment on the Award over two years ago, in October 2019, ECF No. 66, and the Court of Appeals expressly affirmed this Court's confirmation of the Award. *See LLC SPC Stileks v. Republic of Mold.*, 985 F.3d 871 (2021). This distinction is not just procedural but is substantive. The Court here has already resolved issues of subject matter jurisdiction and merits of the case. Moreover, the Court of Appeals has already reviewed Molodova's challenges and rejected them.

This case is similar to *Micula v. Gov't of Rom.*, 404 F. Supp. 3d 265 (D.D.C. 2019), *aff'd*, 805 F. App'x 1 (D.C. Cir. 2020), where the court granted the petition to confirm despite pending CJEU proceeding. *See Micula*, 404 F. Supp. 3d at 275. Importantly, in *Micula*, the Court of Appeals denied the respondent foreign state's motion to stay district court proceedings and motion to waive supersedeas bond. *See Micula v. Gov't of Rom.*, No. 19-7127, 2020 U.S. App. LEXIS 16603 (D.C. Cir. Apr. 22, 2020). Accordingly, Moldova's attempt to stay enforcement of the impending judgment without posting the bond should not be allowed.

C. The *Hilton* Four-Factor Test Does Not Warrant a Stay

From the outset, this Court has already analyzed the *Europcar* factors and decided that the enforcement of the Award should proceed. *See* ECF No. 42. The decision to lift stay was affirmed on appeal. *See Stileks*, 985 F.3d at 881. Therefore, given the stage of this proceedings—the Award has already been recognized—*Europcar* factors do not apply. Because all of the challenges to the recognition have been resolved, this case is constructively in the post-judgment

stage. As such, the traditional *Hilton* test should apply, which balances four equitable considerations:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Tatneft, 2021 U.S. Dist. LEXIS 102179, at *13-14 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Here, the first factor—a "strong showing" of the likelihood of success—requires the presentation of a "serious legal question" raising "a fair ground for litigation." *Wash. Metro. Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). Moldova failed to proffer any arguments whatsoever showing existence of serious legal questions that forestalls enforcement of the impending judgment. Likewise, with respect to the second factor, Moldova fails to demonstrate any irreparable injury. The third factor favors Stileks. After seven years of legal proceedings in this Court, Stileks is entitled to a judgment on the recognized Award and is entitled to enforce it. In fact, a stay would substantially impair Stileks's ability to further enforce the Award by judicial means. Indeed, given its obstruction of enforcement worldwide, Moldova has demonstrated no intention to voluntarily comply with the Award. Lastly, "it is in the public interest to support a timely and efficient process for recognition and execution of foreign arbitral awards." *Tatneft*, at *19.

D. Moldova Did Not Meet Its Burden Under The *Europcar* Factors

However, even if this Court decides to review the issue of stay again, which Petitioner strongly objects to, Moldova did not meet its burden to demonstrate that a stay is appropriate. District courts are under an "unflagging obligation" to exercise the jurisdiction conferred, which

is especially strong in cases such as this, in light of the corresponding policy considerations favoring prompt resolution of international disputes referred to arbitration. *See Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 733 (D.C. Cir. 2012) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 615, 665 (1985)); *see also Landis v. N. Am. Co.*, 299 U.S. 248 (1936); *Hoai v. Sun Ref. & Mktg. Co.*, 866 F.2d 1515, 1519 (D.C. Cir. 1989) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983)); *Gold Reserve Inc. v. Bolivarian Republic of Venez.*, 146 F. Supp. 3d 112, 120, 134 (D.D.C. 2015); *Comm'ns Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 330 (D.C. Cir. 2014). The law is clear that because a stay constitutes a deliberate forbearance by the Court from exercising its jurisdiction, it is not Petitioner's burden to demonstrate the inappropriateness of a stay, but rather the Respondent's burden to justify its appropriateness in a given case. *Belize*, 668 F.3d at 733.

Importantly, out of six *Europcar* factors, only the first and the second ones are controlling. As the D.C. Circuit explained, "[w]e agree with the *Europcar* court that a district court would abuse its discretion if it failed to consider the first and second factors." *Stileks*, 985 F.3d at 880. This is because these two factors "directly implicate the court's responsibility to 'balance the Convention's policy favoring confirmation of arbitral awards against the principle of international comity embraced by the Convention.'" *Id*. (quoting *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1172 (11th Cir. 2004)).

The first factor, the general objective of the arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation is even stronger now than it was almost three years ago when the Court issued its first order lifting the stay. It has already been almost eight years since the Award was issued. Moldova's complaints that the delay was allegedly of Petitioner's own making is just a smoke and mirrors attempt to distract the Court

from Moldova's continuing pattern of obstruction of Petitioner's efforts to enforce the Award in jurisdictions all over the world. As detailed in the attached Seventh Declaration of Viacheslav Lych, Energoalliance and its successors concomitantly with this enforcement action pursued enforcement in Russia, Moldova, Romania, Ukraine, and Belgium. *See* Lych Declaration at 2-3; *see also* ECF No. 18 at 7 (discussing proceedings in Belgium and Russia). The Ukrainian proceedings are presently pending. *See* Lych Declaration at 4. Notably, as Mr. Lych states, Moldova's French counsel, Mr. Naud's, statement that "Komstroy and its predecessor, LLC Energoalliance, have made no attempt to enforce the award" is simply "false." *See* Lych Declaration at ¶ 9-10. In any event, Naud Declaration should be disregarded because it was not executed under penalty of perjury under the laws of the United States of America as required by Local Civil Rule 5.1(f) and 28 U.S.C. § 1746.

Moreover, because of the devastating consequences of Moldtranselectro's[1] breach of its contractual obligations, Energoalliance lost its business and was declared bankrupt. *See* Lych Declaration at 4. Unfortunately, Energoalliance's successor, Komstroy, also succumbed under a load of mounting debts, including the cost of the enforcement of the Award, and was declared bankrupt. *Id*. Its successor, Stileks, acquired its rights to the Award through a bankruptcy auction. *Id*. Importantly, the auction was public, *id*., and Moldova had the right to participate in it along with any other bidder. If it did, it would be able to extinguish the debt, which it chose not to do. Moldova now laments that the face value of the rights acquired by Stileks through the bankruptcy auction was low compared to the amount of the Award. However, Moldova cannot blame Stileks for its own choice to invest in spending the legal fees to obstruct the enforcement

[1] As the Court may recall, Moldtranselectro was Moldova's state-owned utility to which Energoalliance exported electricity from Ukraine. ECF No. 60 at 3.

of the Award worldwide rather than acquiring the Award and extinguishing the debt altogether. Moldova had the opportunity to stop this matter a long time ago and did not do. It cannot now blame Stileks for its own actions.

The second factor, the status of foreign proceedings, does not help Moldova either. As Moldova concedes, the Award is presently in full force and effect despite pending proceedings in France and the CJEU. ECF No. 89-1 at 4. Importantly, regardless of the CJEU's opinion, the case will be remanded back to the Paris Court of Appeal. Although the CJEU opinion is binding on the national court on the issue of law, it will be the Paris Court of Appeal and not the CJEU, who will decide how the law applies to the facts of the case at hand. As the CJEU explained, "[w]hen ruling on the interpretation or validity of EU law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but *it is for the referring court or tribunal to draw case-specific conclusions* …." Court of Justice of the European Union, *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, ¶ 11, 2019 O.J. (C 380) 4 (available at thttp://eur-lex.europa.eu/en/index.htm) (emphasis added).

Moreover, because neither Moldova nor Ukraine is a member of the European Union, there is a serious issue whether this Court should afford comity to the CJEU's opinion on the interpretation of EU law with respect to the ECT, which is not EU internal law. Notably, commentators even raised questions whether the CJEU has subject matter jurisdiction to interpret provisions of the ECT because by becoming members of the ECT, countries of the European Union have specifically agreed to resolve disputes with respect to the ECT based on the dispute resolution provisions of the ECT, rather by referring cases to the CJEU, which is an internal EU court. *See* Aleksandra Zanowska*, Energy Charter Treaty and EU law – the Advocate General's*

opinion calling for broadening the reasoning from Achmea Judgment to ECT and CJEU's jurisdiction over a case concerning non-EU Members, Global Arbitration News (BakerMcKenzie, April 14, 2021) (https://globalarbitrationnews.com/energy-charter-treaty-and-eu-law-the-advocate-generals-opinion-calling-for-broadening-the-reasoning-from-achmea-judgment-to-ect-and-cjeus-jurisdiction-over-a-case-concerning-non-eu-members/). *Cf. Stileks*, 985 F.3d at 878 ("If an agreement assigns the arbitrability determinations to an arbitrator, 'a court possesses no power to decide the arbitrability issue,' even if it thinks the argument for arbitrability is 'wholly groundless.'") (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019)). Additionally, because the ECT is an international treaty and not EU law, it is unclear whether the CJEU opinion on the issue of non-European law would be binding on the French court. Accordingly, an argument can be made that in case such as this, involving non-EU parties, the ECT should be interpreted in accordance with the principles of customary international law including Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980), reprinted in 8 I.L.M. 679 (1969), rather by the law of the EU as interpreted by the CJEU.

In sum, numerous factual and legal arguments could be raised before the Paris Court of Appeal after the CJEU decision is issued. Furthermore, the decision of the Paris Court of Appeal decision is, in turn, subject to appeal at the *Cour de cassation*. As this Court is aware, court proceedings in France may take years, which warrants the denial of the motion to stay. See ECF No. 42 at 7-8 (quoting *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")). In fact, as Moldova concedes, the French proceedings pre-date this case and are still

nowhere close to conclusion. ECF No. 89-1 at 9. Accordingly, the second *Europcar* factor strongly favors the denial of the stay. It would be in the interest of justice and in accordance with the Court's "unflagging obligation" to exercise the jurisdiction conferred and proceed to issue the judgment forthwith.

The remaining *Europcar* factors are either irrelevant or do not favor the stay. Because the Court has already recognized the Award, and the Circuit Court affirmed the recognition, the anticipated standard of review in the CJEU and French courts has no bearing on the case here. Likewise, because the proceeding here is already completed, the characteristics of foreign proceedings are inconsequential. Further, the hardship factor plays against the stay. As discussed above, Energoalliance and its successor Komstroy went through two bankruptcies due to Moldova's breach of its obligations under an international treaty. Staying this case when the Award is confirmed and the judgment is about to be issued would cause undue hardship to Stileks. Moreover, once the judgment is issued, Moldova would no longer need to spend funds on international lawyers since it would be obligated to pay the judgment. Further, lamentations by Moldova about its lack of funding are irrelevant. Moldova should have thought twice before breaching its obligations under the treaties it signed. Moreover, Moldova had the opportunity to extinguish its debt by buying it in Ukrainian bankruptcy but chose not to pursue it. Moldova cannot expect now that its violation of international law will go without consequences.

II. CONCLUSION

Based on the foregoing, Moldova's motion to stay should be denied, and the judgment should be entered forthwith.

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