

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ACF RENEWABLE ENERGY LIMITED,

Plaintiff,

v.

THE REPUBLIC OF BULGARIA,

Defendant.

No. 24 Civ. 1715

PLAINTIFF’S RESPONSE TO THE COURT’S RULE 4(m) ORDER

On August 14, 2024, the Court ordered Plaintiff, ACF Renewable Energy Limited (“ACF”), on or before September 11, 2024, to either effectuate service of process on Defendant the Republic of Bulgaria (“Bulgaria”) and file proof of service or establish good cause for the failure to do so, in accordance with Fed. R. Civ. P. 4(m). *See* Minute Order issued on Aug. 14, 2024. As explained below, Rule 4(m) provides that its 90-day rule does not apply to cases like this where service is required by Rule 4(j)(1) to be made on the defendant under the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1608. In any event, ACF has taken all reasonable steps within its power to serve Bulgaria pursuant to the Federal Rules of Civil Procedure, the FSIA, and the applicable international service convention. Accordingly, ACF files this Response to the Court’s Rule 4(m) Order and requests that the case be maintained on the Court’s docket to allow time for service on Bulgaria.

BACKGROUND

This case is a proceeding under 22 U.S.C. § 1650a and Article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”) to recognize and enforce an arbitration award (the “ICSID Award”) arising out of a

dispute between ACF and Bulgaria over Bulgaria's violations of the Energy Charter Treaty (the "ECT") with respect to ACF's investment in a photovoltaic facility located in Bulgaria.¹ After an arbitration where it received extensive evidence and expert testimony, the arbitral tribunal issued the ICSID Award on January 5, 2024.² The ICSID Award in ACF's favor found that Bulgaria breached the ECT and ordered Bulgaria, *inter alia*, to pay ACF EUR 61,040,000 in damages.³ After Bulgaria refused to pay the amount ordered in the ICSID Award, ACF filed this action against Bulgaria to recognize and enforce the ICSID Award. Since filing the action, ACF has attempted service under 28 U.S.C. § 1608 of the FSIA.

ARGUMENT

I. BECAUSE THE FSIA IS THE EXCLUSIVE METHOD TO EFFECT SERVICE ON BULGARIA, ACF HAS ATTEMPTED SERVICE IN BULGARIA.

A. Fed. R. Civ. P. 4 requires service be made on Defendant under the FSIA in Bulgaria.

Bulgaria is a foreign state under the FSIA. 28 U.S.C. § 1603. Rule 4(j)(1) provides that "[a] foreign state . . . must be served in accordance with 28 U.S.C. § 1608." That statutory section is the FSIA's provision regulating service of process on foreign states. Foreign states must be served through a four-step, hierarchical method. *See* 28 U.S.C. § 1608(a)(1)–(4).⁴ Under Section 1608(a), service "shall be made upon a foreign state" using the following four methods:

- (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
- (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable

¹ *See* Complaint, ECF No. 3-1, ¶ 8.

² *Id.* ¶ 40.

³ *Id.* ¶ 45.

⁴ Those four steps are the *exclusive* method for effecting service on a foreign state. *See* 28 U.S.C. § 1608(a). The House Report describing the purpose of the FSIA confirms this: "Section 1608 sets forth the exclusive procedures with respect to service . . . against a foreign state or its political subdivisions, agencies or instrumentalities." H.R. Rep. No. 94-1487, at 23 (1976).

international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

28 U.S.C. § 1608(a). These steps must be attempted in order such that if service cannot be made in accordance with Section 1608(a)(1), then service must next be attempted pursuant to (a)(2), and so forth until the four methods are exhausted.

B. Plaintiff has initiated service in accordance with 28 U.S.C. § 1608 and taken reasonable steps to notify Bulgaria of this action.

Plaintiff moved to initiate service in accordance with 28 U.S.C. § 1608. The first step of Section 1608(a)(1), which provides for service via a “special arrangement between the plaintiff and the foreign state,” is unavailable in this case because no special arrangement exists between the Parties.

Therefore, ACF proceeded to attempt service under the second step, Section 1608(a)(2), “in accordance with an applicable international convention.” 28 U.S.C. § 1608(a)(2). The applicable convention is the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Hague Convention”), since

both the United States and Bulgaria are contracting states to the Hague Convention.⁵ ACF was therefore required to attempt service through this method.

The Hague Convention requires “the authority or judicial officer competent under the law of the State in which the documents originate” to send two copies of the documents—the summons and complaint⁶—to the Central Authority of the State where service is sought (*i.e.*, to the foreign country where the defendant may be served), accompanied by a request form. *See id.* at art. III. The Central Authority is responsible for serving the documents or arranging to have them served. *Id.* at art. V.

Accordingly, ACF initiated service under the Hague Convention by sending two original and translated copies of the summons, civil cover sheet, complaint, exhibits to the complaint, Rule 26.1 corporate disclosure statement, notice of right to consent to trial before a United States magistrate judge, and USM-94 or Hague Convention Model Request Form to the Bulgarian Central Authority. On July 26, 2024, the Bulgarian Central Authority, the Ministry of Justice,⁷ received the request and documents.⁸ The Central Authority must now effectuate service on Bulgaria by delivering the papers to Bulgaria’s Ministry of Finance. From the date the Central Authority receives the documents, it will typically take two to three months to execute service,

⁵ For the Hague Convention to apply, both the country of the court requesting service and the receiving party must be contracting states to the convention. *See Koch Minerals Sarl v. Bolivarian Republic of Venezuela*, 514 F. Supp. 3d 20, 32 (D.D.C. 2020) (noting that the Hague Convention applied as both states were contracting states); *see also* Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, art. II, 20 U.S.T. 361, 658 U.N.T.S. 163. *See HCCH Convention: Signatures, Ratifications, Approvals and Accensions*, HCCH 2 (Aug. 1, 2023), <https://assets.hcch.net/docs/ccf77ba4-af95-4e9c-84a3-e94dc8a3c4ec.pdf>.

⁶ 28 U.S.C. § 1608(a)(2).

⁷ *See Bulgaria - Central Authority & practical information*, HCCH (April 23, 2024), <https://www.hcch.net/en/states/authorities/details3/?aid=36>.

⁸ *See* Exhibit A, DHL Proof of Delivery to Ministry of Justice.

according to information provided by Bulgaria’s Central Authority.⁹ The Central Authority has yet to confirm the execution of service.

II. FED. R. CIV. P. 4(m) DOES NOT APPLY TO SERVICE REQUIRED TO BE MADE UNDER 28 U.S.C. § 1608, MAKING IT INAPPLICABLE IN THIS CASE.

Rule 4(m) states that the 90-day time limit for service in its rule does not apply to “service in a foreign country.” Fed. R. Civ. P. 4(m) (“This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).”); *see also, e.g., Gosain v. Republic of India*, No. CV 18-2427 (TJK), 2019 WL 13128610, at *1 (D.D.C. Dec. 3, 2019) (“... Rule 4(m)’s 90-day time limit for service of process does not apply to the FSIA[.]”).

Further, “there is no statutory deadline for service under the Foreign Sovereign Immunities Act, unlike the presumptive [90]-day time limit in Rule 4(m) of the Federal Rules of Civil Procedure.” *Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 29 (D.C. Cir. 2015). Because Fed. R. Civ. P. 4(j)(1) requires that the Defendant be served under 28 U.S.C. § 1608(a), Rule 4(m) and its ninety-day time limit do not apply in this case.

CONCLUSION

For the foregoing reasons, ACF respectfully requests relief from the Court’s Order imposing a 90-day requirement on service under Fed. R. Civ. P. 4(m), and requests that it be allowed to continue attempting service on Bulgaria under 28 U.S.C. § 1608. Plaintiff has made a good faith effort to serve Bulgaria in this matter, and is required by law to exhaust all applicable service methods under 28 U.S.C. § 1608.

⁹ *See Bulgaria - Central Authority & practical information*, HCCH (April 23, 2024), <https://www.hcch.net/en/states/authorities/details3/?aid=36>.

Dated: New York, New York
September 11, 2024

Respectfully submitted,

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