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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RALLY, INC. a Japanese corporation, and
KENJI YOSHIDA,

Plaintiffs,

v.

JOHN HYCENKO, T.M.S. SAIPAN, LTD.,
aka TMS CORPORATION SAIPAN, a CNMI
corporation, JOHN HYCENKO PTY LTD.
aka TMS, an Australian Corporation, CEE
CO., LTD, a Japanese corporation, CHIYOMI
KAWABATA and AKIRA ARADONO

Defendants.

Civil Action No. 96-895

ORDER DENYING MOTION TO DISMISS,
AND GRANTING MOTION TO QUASH
SERVICE OF PROCESS AS TO DEFENDANTS
CEE CO LTD., CHIYOMI KAWABATA,
AND AKIRA ARADONO

I. INTRODUCTION

On October 23, 1996, Defendants Cee Co., Ltd, Chiyomi Kawabata and Akira Aradono's Motion to Dismiss or in the Alternative, Motion to Quash Service of Process came before this Court on regularly scheduled hearing. Richard Pierce Esq., of White Pierce, Mailman & Nutting appeared on behalf of Defendants. William M. Fitzgerald Esq. appeared on behalf of Plaintiffs.

II. FACTS

Plaintiff Rally, Inc. is a Japanese corporation; Plaintiff Yoshida is a Japanese citizen. Moving Defendant, Cee Co. Ltd. is a Japanese corporation, and moving Defendants Chiyomi Kawabata and Akira

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1 Aradono are both Japanese citizens. Both Kawabata and Aradono are principal members of Cee Co.
2 Ltd.

3 Plaintiffs filed suit in the CNMI over a dispute arising from the sale of a CNMI governmen
4 sanctioned lottery shop in Garapan, Saipan. Plaintiffs served all three moving Defendants in Japan by
5 United States registered mail with untranslated (in English) versions of the summons and complaint.

6 Japan and the United States are both parties to the Hague Convention, which governs
7 international service of judicial and extrajudicial documents in civil or commercial matters. The purpose
8 of the Convention is to simplify and expedite international service of process, as well as to ensure that
9 service of process is timely. Hague Convention on the Service Abroad of Judicial and Extrajudicial
10 Documents in Civil or Commercial Matters, Preamble, 20 U.S.T. 361, 362, T.I.A.S. No. 6638, reprinted
11 in Martindale Hubbell International Law Digest at IC-1 (the "Hague Convention" or "Convention.")
12 Article 3 of the Convention states that each nation shall designate a Central Authority through which
13 service may be effected. International Law Digest at IC-1. Japan has designated the Ministry of Foreign
14 Affairs in Tokyo. International Law Digest at IC-6 note 9. The Ministry of Foreign Affairs first requires
15 that the complaint and all documents pertaining to the service of the complaint be translated into Japanese
16 and that the documents be served in accordance with Japan's internal laws. *Id.* Japanese law DOES
17 NOT recognize service by registered mail as a means of effecting service in lawsuits commenced within
18 the country. *Id.* See also Bankston v. Toyota Motor Corp. 889 F.2d 172, 174 (8th Cir. 1989).

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III. ISSUES

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The issue before this Court is whether it will interpret Article 10(a) of the Hague Convention to
allow service by registered mail in Japan under the Hague Convention, even though such service is not
permitted under Japanese law.

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IV. ANALYSIS

A. Defendants' Motion to Quash.^{1/}

Commonwealth Rule of Civil Procedure 4(f) governs service of process on individuals in a Foreign Country, and provides:

Unless otherwise provided by Commonwealth law, service upon an individual from whom a waiver has not been obtained and filed . . . may be effected in a place not within any jurisdiction of the United States:

- (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.

Article 10 of the Hague Convention states:

Provided the State of destination does not object, the present convention shall not interfere with:

- a) the freedom to send judicial documents, by postal channels, directly to persons abroad;
- b) the freedom of judicial officers, officials and other competent persons of the State of origin to effect service by judicial documents directly through the judicial officers, officials or other competent persons to the State of destination;
- c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

International Law Digest at IC-1 (Emphasis added)

Japan has specifically objected to provisions (b) and (c), but has not objected to provision (a). Plaintiffs argue that the law is split (citing five cases) and asks this Court to conclude that Japan's failure to specifically object to provision (a) means that service by registered mail is acceptable. The cases that Plaintiffs rely upon have found that since the purpose of the Hague Convention is to facilitate service in foreign countries, the phrase "the freedom to send judicial documents by postal channels, directly to

^{1/} Although Defendants' moved for a Dismissal of the Complaint, they did not argue, nor did they cite any authority, as to why the Complaint should be dismissed because of ineffective service of process. Defendants' Motion to Dismiss is unsubstantiated and without merit.

1 persons abroad' would be superfluous unless it was related to the sending of such documents for the
2 purpose of service." Ackerman v. Levine, 788 F.2d 830, 839 (2d Cir.1986); See also Smith v. Dainichi
3 Kinzoku Koggo Co., 860 F.Supp. 847, 850 (W.D.Tex. 1988); Newport Components Inc. V. NEC Home
4 Electronics, Inc., 671 F.Supp. 1525, 1541 (C.D.Cal.1987). These courts have also attributed the
5 Convention's use of the word "send" rather than "service" in Article 10(a) to "careless drafting."
6 Ackerman v. Levine, *supra*, 788 F.2d at 839.

7 Defendants ask this Court to adopt "the emerging majority view," which maintains that the word
8 "send" in Article 10(a) is not equivalent to the word "service" which is used in provisions (b) and (c).
9 Defendants, citing numerous cases which support their position, argue that the word "send" in Article
10 10(a) is not the equivalent of "service of process." Thus, Article 10(a) does not authorize *service* by mail
11 on a defendant in Japan, but merely the *transmission* of other judicial documents. Accordingly,
12 Defendants argue that Plaintiffs must serve Defendants through Japan's Ministry of Foreign Affairs in
13 Tokyo. See Bankston v. Toyota Motor Corp., *supra*, 889 F.2d 172; Hantover, Inc. v. Omet, 688 F.Supp.
14 1377, 1385 (W.D.Mo. 1988); Prost v. Honda Motor Co., 122 F.R.D. 215, 216 (E.D.Mo.1987); Pochop
15 v. Toyota Motor Co., 111 F.R.D. 444, 446 (S.D.Iowa 1985); Mommsen v. Toro Co., 108 F.R.D. 444,
16 446 (S.D. Iowa 1985); Suzuki Motor Co. v. Superior Court, 200 Cal.App.3d 1476, 249 Cal.Rptr. 376
17 (1988).

18 This Court adopts the reasoning expressed in Bankston and the line of cases following its
19 interpretation. It seems implausible to this Court that the distinction between "send" in Article 10(a) and
20 "service of process" in Articles 10(b)(c) is the result of careless drafting on part of the Convention. It
21 seems even more implausible to this Court that Japan would allow non-Japanese citizens to serve
22 Japanese citizens in Japan through a service of process method which is not permitted under Japanese
23 law. Consequently, because Plaintiffs served Defendants by registered U.S. mail without translating the
24 documents into Japanese, this Court finds that the service was in violation of the Hague Convention and
25 is therefore Quashed.

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1 **B. Defendants' Potential Obligations Under Commonwealth Rules of Civil Procedure 4(d).**

2 This Court notes that Plaintiffs have argued, and the evidence suggests, that Defendan
3 Kawabata is currently conducting business in Saipan. There is also evidence indicating tha
4 Kawabata's company Cee Co. Ltd. is also currently conducting business in Saipan.^{2'} Furthermore.
5 although not specifically mentioned, it appears to this Court that there may be evidence linking
6 defendant Aradono to continuous business activities in Saipan.

7 Rule 4(d)(2) of the Commonwealth Rules of Civil Procedure mandates that:

8 an individual, corporation, or association that is subject to service under
9 subdivision (e),(f) or (h) and that receives notice of an action in the
10 manner provided in this paragraph has a **duty to avoid unnecessary**
11 **costs of serving the summons.** . . . If a defendant located within the
Commonwealth fails to comply with a request for waiver, the court
shall impose the costs subsequently incurred in effecting service on the
defendant unless good cause for the failure be shown.

12 Com. R. Civ. Pro. 4(d)(2) (Emphasis added.)

13 In light of Plaintiffs' allegations concerning Defendants' business activities in the CNMI, this
14 Court is concerned that moving Defendants have taken advantage of business opportunities (legitimate
15 or otherwise) presented by the CNMI Lottery, but have quickly seized upon their foreign status as
16 Japanese citizens to delay effective service of process when asked to become legally accountable for
17 these business activities. This Court will not sanction such tactics.

18 For these reasons, the Court deems Plaintiffs' original service of the Complaint to be a
19 Request for Waiver served on Defendants, pursuant to Rule 4(d)(2). If Plaintiffs are able to establish
20 that moving Defendants are "located within the Commonwealth" for purposes of Rule 4(d)(2), this
21 Court will award costs to Plaintiffs pursuant to Rule 4(d)(5), incurred by Plaintiffs after 15 days from
22 the date of this Order, in seeking to serve summons upon moving Defendants subject to the Hague

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25 ^{2'} For example, in support of co-defendant John Hycenko, et al.'s motion to Dismiss brought
26 before this Court on November 6, 1996, defendant John Hycenko's filed an affidavit. Attached as
27 exhibit B to the affidavit is a letter to Plaintiff from Hycenko, in which he states: "We have engaged
Mrs. Chiyomi Kawabata and her Company to exclusively handle the sale of the CNMI Lottery
products to the tourist market in Saipan."

1 Convention.^{3/4/} This award will include costs of service, including reasonable attorneys' fees, and will
2 be made subject to Defendants' opportunity to demonstrate good cause for failure to honor the request
3 for waiver.

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5 **V. CONCLUSION**

6 **ACCORDINGLY, IT IS HEREBY ORDERED THAT:**

7 1. Moving Defendants' Motion to Quash Service is **GRANTED**.

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9 **IT IS FURTHER ORDERED THAT:**

10 2. Moving Defendants have 15 days from the date of this Order to respond to Plaintiffs'
11 Request for Waiver of Service of Summons. If moving Defendants decline Plaintiffs' Request for
12 Waiver and Plaintiffs are able to establish that any or all moving Defendants are "located within the
13 Commonwealth" this Court will award costs and attorneys fees to Plaintiffs incurred in serving
14 moving Defendants in accordance with the Hague Convention and this Order.

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16 So ORDERED this 13 day of November, 1995.

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20 **ALEXANDRO C. CASTRO, Presiding Judge**

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22 ^{3/} The Court notes that if Plaintiffs had followed the requirements for request for waiver as set forth
23 in Rule 4(d) from the onset, Defendants could also be held liable for all costs relating to the defense of
24 the present motion, if it is established that Defendants are located in the Commonwealth for purposes of
Rule 4(d).

25 ^{4/} The Court recognizes that Rule 4(d)(2)(F) provides Defendants 60 days to respond to Plaintiffs'
26 request for waiver, but finds that Defendants have had more than 60 days notice in this case in that
27 they were served with the Complaint on August 14, 1996. The Court further finds that Defendants
will suffer no prejudice by this Court's Order requiring them to respond within 15 days in that they
have notice of this action, they have retained local counsel to represent their interests in this action,
and through this motion, have made a special appearance before this Court.