

2099-FSM, schedule 3's prohibition of withdrawals from the Loan Account for any local taxes. The withdrawal from the loan account pays the senior project manager's (Basu's) compensation. After that, the senior project manager, Basu, is liable to pay his own taxes (either through employer withholding if his pay is subject to the wage and salary tax or by his own payment if he is subject to the gross revenue tax).

VII. CONCLUSION

ACCORDINGLY, Basu's motion to dismiss the counterclaim because he is an intended third-party beneficiary of the ADB Loan No. 2099-FSM or of the ADB Special Operations Loan Regulations is denied.

VIII. SCHEDULE FOR FURTHER PROCEEDINGS

NOW THEREFORE IT IS HEREBY ORDERED that the following schedule is set for these consolidated cases:

- 1) the parties shall make all their discovery requests no later than August 15, 2022;
- 2) all discovery shall be completed no later than September 5, 2022; and
- 3) all pretrial motions shall be filed and served no later than September 26, 2022.

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FSM SUPREME COURT APPELLATE DIVISION

JOSEPHA (MASUMI) FELIX,	)	APPEAL CASE NO. P7-2020
	)	(Civil Action No. 2020-002)
Appellant,	)	
	)	
vs.	)	
	)	
CHINA RAILWAY CONSTRUCTION COMPANY,	)	
FSM DEPARTMENT OF TRANSPORTATION,	)	
COMMUNICATION, AND INFRASTRUCTURE,	)	
FSM NATIONAL GOVERNMENT, and	)	
ANDONIA MANUEL,	)	
	)	
Appellees.	)	
_____	)	

OPINION

Argued: June 14, 2022  
Decided: July 4, 2022

BEFORE:

Hon. Larry Wentworth, Associate Justice, FSM Supreme Court  
Hon. Dennis L. Belcourt, Associate Justice, FSM Supreme Court  
Hon. Cyprian Manmaw, Specially Assigned Justice, FSM Supreme Court\*

\*Chief Justice, State Court of Yap, Colonia, Yap

APPEARANCE:

For the Appellant: Vincent Kallop, Esq.  
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\* \* \* \*

HEADNOTES

Civil Procedure – Default and Default Judgments – Entry of Default

A return of service is adequate to show that service of process was performed, but it is obviously inadequate to show that the served defendant failed to answer or otherwise defend. An affidavit is usually needed for that. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 600 n.1 (App. 2022).

Appellate Review – Civil Cases – Abuse of Discretion

An abuse of discretion occurs when: 1) the court's decision is clearly unreasonable, arbitrary or fanciful; 2) the decision is based on an erroneous conclusion of law; 3) the court's findings are clearly erroneous; or 4) the record contains no evidence which the court rationally could have based its decision. As such, an appellate court can find an abuse of discretion only when there is a definite and firm conviction, upon weighing all the relevant factors, that the court below committed a clear error of judgment in the conclusion it reached, and such abuses must be unusual and exceptional; an appellate court will not merely substitute its judgment for that of the trial court. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 601 (App. 2022).

Appellate Review – Civil Cases – De Novo; Jurisdiction – Personal

Whether a court has personal jurisdiction over a particular party is a fundamental question of law, but not always a "pure" question of law since a particularized inquiry into facts may be needed. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 601 (App. 2022).

Civil Procedure – Pleadings – Answer; Jurisdiction – Personal

When an answer did not raise as a defense either lack of personal jurisdiction, or insufficiency of service of process, or lack of service of process, the defendants thereby waived those defenses by not including those defenses in their answer, thus voluntarily submitting themselves to the court's personal jurisdiction over them. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 601 (App. 2022).

Civil Procedure – Pleadings; Jurisdiction – Personal

The court acquires personal jurisdiction over a plaintiff when that plaintiff voluntarily files a complaint with the court. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 601 n.2 (App. 2022).

Civil Procedure – Pleadings – Answer; Jurisdiction – Personal

It is an error of law for the trial court to sua sponte strike the defendants' answer for lack of proper service of process because the court acquires personal jurisdiction over the defendants when they file their answer, and those defendants' later motion to dismiss for lack of personal jurisdiction over them cannot overcome the defendants' previous waiver of that defense. The defendants' answer is their operative pleading and will be ordered reinstated. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 602 & n.3 (App. 2022).

Civil Procedure – Parties; Sovereign Immunity

When Congress grants a governmental instrumentality the power "to sue and be sued," it is a general waiver of sovereign immunity leaving that instrumentality as amenable to a civil suit as a private enterprise would be under like circumstances, but that is different from whether a government department can be

named as a party to a lawsuit. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 602 n.4 (App. 2022).

#### Civil Procedure – Service of Process

When suing an FSM national government officer or agency service of process is made by delivering a copy of the summons and of the complaint to the FSM Attorney General and by delivering a copy of the summons and of the complaint to such officer or agency, and a national government agency probably should mean any department, independent establishment, commission, administration, authority, board, or bureau of the government. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 602 n.4 (App. 2022).

#### Civil Procedure – Parties – Official Capacity

Suing a government department or agency or a government officer in his or her official capacity has long been the practice, but this practice does not change the lawsuit's general nature as one against the government. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 602 n.4 (App. 2022).

#### Civil Procedure – Service of Process; Jurisdiction – Personal

When service of process is made on a defendant after the 120-day time limit set by Rule 4(j), or as extended by the court, has passed, but before the court has dismissed that defendant, the court has acquired personal jurisdiction over that defendant, and dismissal of that defendant is improper. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 602 (App. 2022).

#### Business Organizations – Corporations; Civil Procedure – Service of Process

Civil Procedure Rule 4(d)(3) provides that service upon a corporation may be made by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process, and the determination of whether a given individual is a managing or general agent is not made simply on the basis of the person's title, but a factual analysis is needed. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 603 (App. 2022).

#### Civil Procedure – Service of Process

Rule 4(d)(3)'s purpose is to assure that the person served can fairly be expected to know what to do with the papers so that the organization will have notice of the filing of the copy of the action. A person of authority and responsibility in the organization's operation is a managing or general agent for Rule 4(d)(3) purposes. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 603 (App. 2022).

#### Business Organizations – Corporations; Civil Procedure – Service of Process

For effective service of process on a foreign corporation doing business in the jurisdiction, service on the person in charge of the activities that are found to constitute "doing business" within the jurisdiction usually is held to be an agent upon whom process can be served. Yet even a person who is not in charge of the corporation's activities within the jurisdiction may still qualify as a managing or general agent for Rule 4(d)(3) purposes if the individual is in a position of sufficient responsibility so that it is reasonable to assume that the person will transmit notice of the commencement of the action to organizational superiors. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 603 (App. 2022).

#### Civil Procedure – Service of Process

Although the court must first look to FSM sources of law, when an FSM procedural rule which is identical or similar to a U.S. counterpart, the court, if needed, may look to U.S. sources for guidance in interpreting or explaining the rule. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 603 n.5 (App. 2022).

#### Civil Procedure – Service of Process; Foreign Investment Laws

Foreign corporations are often required to appoint an agent for service of process when permitted to do business in the FSM. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 603 (App. 2022).

#### Civil Procedure – Service of Process

To determine whether a person qualifies as a managing or general agent for Rule 4(d)(3) purposes

requires a factual analysis, and generally, appellate courts do not make factual findings since that is the trial court's province because the trial court is better equipped to conduct fact-finding. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 604 (App. 2022).

#### International Law; Sovereign Immunity

When suing a foreign government-owned corporation, a foreign government's sovereign immunity should not cause concern in light of both the generally-recognized restrictive view of foreign sovereign immunity under the separate entity rule and the "commercial activity" exception for foreign government-owned corporations. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 604 (App. 2022).

#### Civil Procedure – Dismissal; Civil Procedure – Service of Process – Time Limits

The court may dismiss without prejudice a defendant on whom the plaintiff has failed to serve the complaint and summons within 120 days if the plaintiff has been given 30 days' notice and if the plaintiff has not already voluntarily dismissed the action or has filed a proof of service on that defendant. Felix v. China Rwy. Constr. Co., 23 FSM R. 596, 604 (App. 2022).

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### COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This appeal arises from the trial division's October 26, 2020 dismissal of Civil Action No. 2020-002 for lack of service of process, for insufficient service of process, and for lack of personal jurisdiction. We reverse the dismissal of the FSM national government and the FSM Department of Transportation, Communications, and Infrastructure (collectively "the FSM defendants"). We vacate the dismissal of the China Railway Construction Company ("China Railway") and we remand the matter for further proceedings on whether the plaintiff had effected service of process on that defendant. And we affirm the dismissal of Andonia Manuel. Our reasoning follows.

#### I. BACKGROUND

On February 7, 2020, Josepha (Masumi) Felix filed her complaint against China Railway, the FSM Department of Transportation, Communication and Infrastructure ("TC&I"), the FSM national government, and Andonia Manuel, alleging causes of action of trespass, destruction of private property, unlawful use of private roadway, and nuisance. Felix owns Land Parcel No. 054-A-13, located in Kahmar, Nett, Pohnpei. Felix claims that she and her husband built, with their own money, a private road to her Kahmar property.

Felix alleges that this private road was built as part of an agreement between her and her aunt, Andonia Manuel, who owns Land Parcel No. 054-A-15. Felix alleges that Manuel leased that land to China Railway and that China Railway moved onto Manuel's property and has since used Felix's private road without notice to her or her consent. Felix claims that China Railway's use of the private road has caused substantial damage to it. Felix avers that she sought assistance from the FSM national government and TC&I, and that, even though promises were made, help was not forthcoming. Felix claims that she has suffered tremendously from this. She represents that her efforts to seek assistance from the FSM TC&I office at the FSM national government, as well as from China Railway, were futile.

#### II. PROCEDURAL HISTORY

On February 12, 2020, Elwel Ligorio filed a return of service, certifying that he personally served China Railway a copy of the complaint and summons by leaving it with Eric Cho at China Railway's worksite in Kahmar, Nett. On February 26, 2020, Winnona Dison filed a return of service, certifying that she had served a copy of the complaint and summons on FSM TC&I on February 7, 2020. No return of service was

filed for Manuel.

On February 21, 2020, the FSM defendants filed their answer with affirmative defenses of estoppel, waiver, payment, and failure to mitigate damages. The FSM defendants did not assert lack of service, insufficiency of service, or the lack of personal jurisdiction as a defense.

On March 17, 2020, Felix moved, without a supporting affidavit but with an attached return of service on China Railway,<sup>1</sup> for an entry of default against China Railway for its failure to plead or otherwise defend. Felix asserted that China Railway was served with the complaint and summons but had not answered or otherwise defended.

On July 24, 2020, the trial court issued its Notice of Possible Dismissal for Lack of Personal Jurisdiction; Order for Sufficient Service of Pleadings; Order for Briefing (“Notice”). In that order, the trial court denied Felix’s motion for an entry of default against China Railway because it believed that, since the certificate of service was on MLSC stationery, the process server was an MLSC employee, and, relying on Heirs of Jonah v. Department of Transportation and Infrastructure, 20 FSM R. 118, 120 (Kos. 2015), it concluded that the service of process was invalid because an MLSC employee was not a disinterested person. Notice at 3-4.

Presuming that the service of process on the FSM defendants suffered from the same infirmity – that the process server was an MLSC employee, the trial court, sua sponte and without notice to the parties, struck the FSM defendants’ answer from the record, reasoning that the defective service meant that the court did not have personal jurisdiction over the FSM defendants and that their filing an answer did not change the result. *Id.* at 5.

The trial court then directed Felix to properly serve process on all the defendants within 30 days after her receipt of the order, or the case would be dismissed without prejudice for lack of personal jurisdiction. *Id.* at 5 & 6. The court noted that, if any defendant was properly served, the case would remain open for adjudication with respect to that defendant, but the other defendants would be dismissed. The parties were also asked to brief whether the Department of TC&I had capacity to sue or be sued separate and apart from the FSM national government. *Id.* at 5-6.

On September 22, 2020, Felix filed a certificate of service stating that MC Ioanis, a Pohnpei state police officer, had served the complaint and summons on both the FSM national government and FSM TC&I by leaving copies at the FSM Department of Justice with one of its secretaries on September 14, 2020. MC Ioanis also served the complaint and summons on China Railway “by leaving a copy of the complaint and summons with Shi Shou Liu, CRCC Projecting [sic] Manager at Lukop, Madolenihmw on September 15, 2020.” Certificate of Service at 2 (Sept. 22, 2020). Felix also filed a brief on FSM TC&I’s capacity to sue or be sued apart and separate from the FSM national government.

On September 30, 2020, the FSM defendants moved to dismiss based upon Felix’s failure to properly serve them before the court-ordered 30 days had expired, thereby, in their view, depriving the court of personal jurisdiction over them. Felix opposed, arguing that she was personally served with the order on August 31, 2020 (and therefore effected service within 30 days’ receipt) and that the FSM defendants’ motion to dismiss was defective because there was no reasonable effort to contact her counsel in compliance with Rule 6(d).

On October 26, 2020, the trial court dismissed the case against all defendants because of Felix’s failure to accomplish service of process on each of the four defendants within the 120 days set by Civil

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<sup>1</sup> A return of service is adequate to show that service of process was performed, but it is obviously inadequate to show that the served defendant failed to answer or otherwise defend. An affidavit is usually needed for that. See Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 653, 659 (Pon. 2013).

Procedure Rule 4(j), and the court's 30-day time extension. Notice of Dismissal for Lack of Personal Jurisdiction for All Defendants at 8 (Oct. 26, 2020) ("Dismissal"). The trial court concluded that this meant it lacked personal jurisdiction over the defendants so dismissal without prejudice was warranted. *Id.* at 3, 7-8. Felix timely appealed.

### III. ISSUES PRESENTED

Felix argues two issues on appeal. First, she contends that the trial court abused its discretion by dismissing her complaint for lack of personal jurisdiction over all defendants based on supposed defective or late service.

Second, she contends that the trial court erred in law or fact by dismissing her complaint, because the complaint and summons were properly served on the defendants by a Pohnpei state police officer and by an MLSC office employee.

### IV. STANDARD OF REVIEW

An abuse of discretion occurs when: 1) the court's decision is clearly unreasonable, arbitrary or fanciful; 2) the decision is based on an erroneous conclusion of law; 3) the court's findings are clearly erroneous; or 4) the record contains no evidence which the court rationally could have based its decision. Heirs of Alokoa v. Heirs of Preston, 21 FSM R. 94, 98 (App. 2016). As such, there is an abuse of discretion only when there is a definite and firm conviction, upon weighing all the relevant factors, that the court below committed a clear error of judgment in the conclusion it reached. *Id.*

A lower court's decision to dismiss a case will be scrutinized, with an eye toward determining whether it is an abuse of discretion on the trial judge's part. Lonno v. Heirs of Palik, 21 FSM R. 103, 106 (App. 2016). Such abuses must be unusual and exceptional; we will not merely substitute its judgment for that of the trial court. *Id.*

Whether a court has personal jurisdiction over a particular party is a fundamental question of law, but not always a "pure" question of law since a particularized inquiry into facts may be needed. People of Eauripik ex rel. Sarongelfeg v. Osprey Underwriting Agency, Ltd., 21 FSM R. 214, 234 (App. 2017).

### V. ANALYSIS

#### A. *The FSM and the Department of Transportation, Communication and Infrastructure*

The FSM defendants' February 21, 2020 answer did not raise as a defense either lack of personal jurisdiction, or insufficiency of service of process, or lack of service of process. The FSM defendants thereby waived those defenses by not including those defenses in their answer. FSM Civ. R. 12(h)(1)(B). They thus voluntarily submitted themselves to the court's personal jurisdiction over them.<sup>2</sup> See Nena v. Saimon, 19 FSM R. 317, 325 & n.1 (App. 2014) (court that lacked personal jurisdiction over a person because the complaint and summons were not properly served on him later acquired personal jurisdiction over that person when he filed an answer in which he did not challenge personal jurisdiction); Yap v. M/V Cecilia I, 13 FSM R. 403, 407 (Yap 2005) (defense of lack of personal jurisdiction is waived when the defendant fails to raise it in a Rule 12(b) motion, in his answer, or in an amendment to the answer allowed under Rule 15(a); it cannot be raised in an amendment that requires leave of court); *cf.* People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM R. 284, 287-88 (Yap 2012) (defendant, who has asserted in its answer the court's lack of personal jurisdiction over it as a defense, has preserved that defense for determination before trial).

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<sup>2</sup> The court, of course, acquires personal jurisdiction over a plaintiff when that plaintiff voluntarily files a complaint with the court. John v. Chuuk Public Utility Corp., 15 FSM R. 169, 171 (Chk. 2007).

It was therefore an error of law for the trial court to strike the FSM defendants' answer.<sup>3</sup> It had no legal basis to do so. The court had acquired personal jurisdiction over the FSM defendants when they filed their answer. The FSM defendants' later September 30, 2020 motion to dismiss for lack of personal jurisdiction over them (which, in any event, was directed at Felix's September 14, 2020 service) could not overcome the FSM defendants' previous waiver of that defense. See M/V Cecilia I, 13 FSM R. at 407.

The trial court has personal jurisdiction over the FSM national government and the Department of TC&I.<sup>4</sup> The trial court's dismissal of the FSM defendants is therefore reversed. The FSM defendants' February 21, 2020 answer is their operative pleading. It is hereby ordered reinstated.

B. *China Railway Construction Company*

1. *120-day Time Limit as Extended*

The trial court dismissed the defendants, and the case, because the defendants had not been properly served within the Rule 4(j) 120-day time limit or the 30-day extension set by the court. Dismissal at 8. Specifically, the trial court dismissed China Railway because Felix's September 15, 2020 process service was outside those two time frames. We conclude that this ground is baseless.

Felix's September 15, 2020 service of process on China Railway occurred before the court actually dismissed the case. When service of process is made on a defendant after the 120-day time limit set by Rule 4(j), or as extended by the court, has passed, but before the court has dismissed that defendant, the court has acquired personal jurisdiction over that defendant, and dismissal of that defendant is improper. Alik v. Moses, 8 FSM R. 148, 151 (Pon. 1997) (service of process made after 120 days but before a motion or court initiative to dismiss, is good service and dismissal will not be granted on a later motion or court initiative).

2. *Service on "Projecting Manager" Shi Shou Liu*

The trial court further doubted whether the person served, "Projecting [sic] Manager" Shi Shou Liu, was a person on whom service could effectively be made in order to acquire personal jurisdiction over the corporation that employed him. The trial court, citing Luda v. Maeda Road Construction Co., 2 FSM R. 107, 109 (Pon. 1985), concluded that service on Shi Shou Liu did not appear to comply with Civil Procedure Rule 4(d)(3)'s requirements for service of process on a foreign or domestic corporation. Dismissal at 7-8. It does not seem that it can be reasonably questioned that the China Railway Construction Company is a foreign corporation engaged in commercial activity in the FSM.

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<sup>3</sup> It was also an error of law to strike the answer without prior notice to the parties.

<sup>4</sup> Whether the Department of TC&I can "sue and be sued" apart from the FSM national government appears to be irrelevant. When Congress grants a governmental instrumentality the power "to sue and be sued," it is a general waiver of sovereign immunity leaving that instrumentality as amenable to a civil suit as a private enterprise would be under like circumstances. Rudolph v. Louis Family, Inc., 13 FSM R. 118, 126 (Chk. 2005). That is different from whether TC&I can be named as a party to a lawsuit. The Civil Procedure Rules require that when suing "an officer or agency of the National Government of the Federated States of Micronesia," service of process is made "by serving the National Government of the Federated States of Micronesia and by delivering a copy of the summons and of the complaint to such officer or agency." FSM Civ. R. 4(d)(5). Service on the FSM national government is by delivery to the FSM Attorney General. FSM Civ. R. 4(d)(4). A national government agency probably "should be taken to mean any department, independent establishment, commission, administration, authority, board, or bureau" of the government. 4B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1107, at 24 n.2 (4th ed. 2015). Suing a government department or agency or a government officer in his or her official capacity has long been the practice, but this practice does not change the lawsuit's general nature as one against the government. See, e.g., Marsolo v. Esa, 18 FSM R. 59, 66 (Chk. 2011); Herman v. Bisalen, 16 FSM R. 293, 295-96 (Chk. 2009).

The Luda court, in determining whether service of process on a foreign corporation's project manager on Truk was good service, analyzed Rule 4(d)(3) as follows:

Rule 4(d)(3) of this Court's Rules of Civil Procedure provides that service upon a corporation may be made by delivering a copy of the summons and complaint to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . . ." The determination of whether a given individual is a managing or general agent is not made simply on the basis of the person's title. A factual analysis is needed. The purpose of the rule is to assure that the person served can fairly be expected to know what to do with the papers so that the organization will have notice of the filing of the copy of the action. A person of authority and responsibility in the organization's operation is a managing or general agent for purposes of the rule.

Luda v. Maeda Road Constr. Co., 2 FSM R. 107, 109 (Pon. 1985) (quoting FSM Civ. R. 4(d)(3)).

The trial court seemed to question whether Shi Shou Liu was a person who could fairly be expected to know what to do with the papers so that the organization will have notice of the action's filing. But it did not make a factual analysis. And it did not consider whether he was a person of authority and responsibility in the organization's operation. Nor did it ask Felix to produce further evidence from which it could make a factual analysis.

For effective service of process on a foreign corporation doing business in the jurisdiction, service on "the person in charge of the activities that are found to constitute 'doing business' within the [jurisdiction] usually is held to be an agent upon whom process can be served." 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1103, at 572 (3d ed. 2002).<sup>5</sup> This reasoning was echoed by the Luda court. It concluded that the defendant's project manager, who "apparently [wa]s in charge of all of their business activities in Truk" was therefore the defendant's managing or general agent "within the meaning of Rule 4(d)(3)." Luda, 2 FSM R. at 110 (service of process on "project manager" was good service).

Yet even a person who is not in charge of the corporation's activities within the [jurisdiction] still may qualify as a managing or general agent for purposes of Rule [4(d)(3)] if the individual is in a position of sufficient responsibility so that it is reasonable to assume that the person will transmit notice of the commencement of the action to organizational superiors.

4A WRIGHT & MILLER, *supra*, § 1103, at 573. But "the title of a particular agent does not have critical significance" for Rule 4(d)(3) purposes. *Id.* at 583; see Luda, 2 FSM R. at 109.

Thus, if Shi Shou Liu is actually the project manager of China Railway's Pohnpei commercial activity, he may well qualify as a managing or general agent for Rule 4(d)(3) purposes, particularly if there are no China Railway organizational superiors resident on Pohnpei. Shi Shou Liu could also qualify as a proper person to serve if he is an "agent authorized by appointment or by law to receive service of process." FSM Civ. R. 4(d)(3). This is theoretically possible since foreign corporations are often required to appoint an agent for service of process when permitted to do business in the FSM. See Fabian v. Ting Hong Oceanic Enterprises, 8 FSM R. 93, 94-95 (Chk. 1997). But there is no evidence in the record concerning that possibility.

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<sup>5</sup> Although the court must first look to FSM sources of law, FSM Const. art. XI, § 11, when an FSM procedural rule which is identical or similar to a U.S. counterpart, the court, if needed, may look to U.S. sources for guidance in interpreting or explaining the rule. See, e.g., George v. Albert, 17 FSM R. 25, 31 n.1 (App. 2010); Berman v. College of Micronesia-FSM, 15 FSM R. 582, 589 n.1 (App. 2008); Tom v. Pohnpei Utilities Corp., 9 FSM R. 82, 87 n.2 (App. 1999).



To determine whether Shi Shou Liu qualifies as a managing or general agent for Rule 4(d)(3) purposes requires a factual analysis. *Luda*, 2 FSM R. at 109. Generally, appellate courts do not make factual findings. *Edmond v. FSM Dev. Bank*, 22 FSM R. 77, 80 (App. 2018); *Goya v. Ramp*, 14 FSM R. 305, 307 n.1 (App. 2006). That is the trial court's province. It is better equipped to conduct fact-finding. But the trial court never undertook a factual analysis. Instead, it dismissed China Railway because the service of process was beyond the 120-day time limit as extended by the court.

We therefore vacate the dismissal of China Railway and remand the matter to the trial court for it to conduct a factual analysis. Felix should be given an opportunity to show the court a factual basis for her belief that Shi Shou Liu is a person that qualifies as a managing or general agent for Rule 4(d)(3) purposes or that Shi Shou Liu was a person authorized by appointment or law to receive service of process on China Railway's behalf. The trial court may need to hold an evidentiary hearing.

### 3. *Commercial Activity*

Lastly, the trial court also seemed concerned that China Railway "may be an entity of a foreign government." Dismissal at 8. The trial court's apparent worry was that sovereign immunity may be an issue. If so, that is an affirmative defense that China Railway may assert when the time comes. But, for now, it should not cause concern in light of both the generally-recognized restrictive view of foreign sovereign immunity under the separate entity rule<sup>6</sup> and the "commercial activity" exception for foreign government-owned corporations.<sup>7</sup>

### C. *Andonia Manuel*

The trial court dismissed Andonia Manuel for lack of personal jurisdiction over her since she had not been served with process within the prescribed time limits. The court's usual practice, when dismissing a complaint for the failure to serve a defendant, is for the clerk to send the plaintiff a notice, anytime after at least 90 days have passed, that the complaint against that defendant is subject to dismissal under Rule 4(j) for lack of service if the complaint and summons are not served on that defendant within 30 days. Once that 30 days has passed, the court may then dismiss that defendant under Rule 4(j) if the plaintiff has not already voluntarily dismissed the action or has filed a proof of service on that defendant.

The trial court's July 24, 2020 Notice served as that 30-day notice to the plaintiff for service on Manuel. Manuel was never served. The trial court then dismissed her without prejudice under Rule 4(j) on October 26, 2020. Since Felix was given notice of that possible dismissal and never served Manuel, we affirm the trial court's dismissal of Manuel.

## VI. CONCLUSION

Accordingly, we hereby restore Civil Action No. 2020-002 to the trial court's docket. We reinstate the

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<sup>6</sup> See William C. Hoffman, *the Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 TUL. L. REV. 535, 551-65 (1991) (is general worldwide principle that separate legal entities of a foreign state enjoy no immunity).

<sup>7</sup> "The United States is the only country in the world that has adopted state ownership of an entity as a basis for conferring sovereign immunity." Sunil R. Harjani, *Litigating Claims over Foreign Government-Owned Corporations under the Commercial Activities Exception to the Foreign Sovereign Immunities Act*, 20 NW. J. INT'L L. & BUS. 181, 184 (1999). The United States instead has a statutory exception that a foreign state entity is not immune from court jurisdiction in an action based on commercial activity carried out in the U.S. (and sometimes elsewhere) by a foreign state. *Id.* at 188; see also George K. Chamberlin, Annotation, *Exceptions to Jurisdictional Immunity of Foreign States and Their Property under the Foreign Sovereign Immunities Act of 1976 (28 USCS §§1602 et seq.)*, 59 A.L.R. FED. 99, 114-33 (1982).

February 21, 2020 answer by the FSM national government and the Department of TC&I. The case shall proceed against those defendants. We vacate the dismissal of the China Railway Construction Company. The trial court may hold a hearing at which Felix can offer evidence that her service of process on the China Railway Construction Company was good service under Civil Procedure Rule 4(d)(3). The trial court shall make a factual analysis of whether it was. The trial court may then take such further action as is consistent with this opinion.

\* \* \* \*

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,	)	CRIMINAL CASE NO. 2021-503
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
BENETT EDMUND,	)	
	)	
Defendant.	)	
_____	)	

ORDER GRANTING MOTION TO ACQUIT

Dennis L. Belcourt  
Associate Justice

Trial: April 18-20, 2022  
Decided: July 8, 2022

APPEARANCES:

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HEADNOTES

Criminal Law and Procedure – Motions for Acquittal; Evidence – Burden of Proof

The test on a Rule 29 motion is whether, taking the view most favorable to the government, a reasonably-minded trier of fact could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant’s guilt beyond a reasonable doubt. This test applies to the specific element of the perpetrator’s identification. FSM v. Edmund, 23 FSM R. 605, 608 (Pon. 2022).