

## Litigation - Japan

### New Act Sets Out Terms of Jurisdictional Immunity for Foreign States

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The Act on the Civil Jurisdiction of Japan over Foreign States (24/2009) was enacted on April 17 2009 and promulgated on April 24 2009. This update explains the background to the act and outlines its key provisions.

#### Background

The principle of jurisdictional immunity, which provides that a state and its property are generally immune from the jurisdiction of the courts of other states, is supported by the principles of customary international law. The principle of absolute immunity, which unconditionally provides a state with total immunity, had been recognized by many countries. However, as economic activities increasingly involve not only private individuals but also states as economic actors, it has become necessary to ensure the enforceability of transactions between states and private parties. Countries have increasingly adopted restrictive immunity, which does not provide jurisdictional immunity for actions involving a state's private law.

In Japan, absolute immunity had been recognized in judicial cases since the decision of the Daishin-in - the predecessor of the Supreme Court - in *Matsuyama v Republic of China* in 1928.<sup>(1)</sup> However, the Supreme Court changed this position in *Tokyo Sanyo Trading Co Ltd v Islamic Republic of Pakistan*<sup>(2)</sup> and adopted restrictive immunity, stating that in the absence of particular conditions, such as impingement on sovereignty, a state is not immune from the jurisdiction of the Japanese courts in respect of activities involving private law or business management.

Even before the promulgation of the act, the courts had found scope for special treatment in cases involving states as parties. In *Re Sultanate of Oman*<sup>(3)</sup> Tokyo High Court referred to the *Pakistan Case* in declining to grant civil jurisdictional immunity and in *Re the United States of America*<sup>(4)</sup> it again referred to the case in holding that the United States enjoyed such immunity because of a particular condition which impinged on the exercise of sovereignty.

The UN Convention on Jurisdictional Immunities of States and their Property was adopted at the plenary meeting of the UN General Assembly on December 2 2004. The convention will enter into force once it has been ratified by 30 countries; only six countries had ratified it as of January 2009.

Japan signed the convention on January 11 2007 - although it has yet to ratify it - and started to lay the foundations for a national law on jurisdictional immunity that would be consistent with the convention. The act includes provisions on the specific scope of jurisdiction in Japan regarding civil suits to which a foreign state is a party and the procedure for temporary restraining orders and civil execution against the property of a foreign state. The act also makes special provision for procedures for civil suits involving foreign states.

#### Key Provisions

Article 2 provides that, in compliance with the convention, the term 'foreign state' includes:

- a foreign state and its various organs of government;
- the constituent units of a federal state or political subdivisions of a foreign state that are entitled to perform acts in the exercise of sovereign authority;
- agencies or instrumentalities of the foreign state or other entities that are entitled to

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- perform and are actually performing acts in the exercise of sovereign authority of the foreign state; and
- representatives of the foreign state acting in that capacity.

The act declares the principle of jurisdictional immunity, providing that foreign states are immune from the civil jurisdiction of the Japanese courts, except as otherwise stated (Article 4). It provides that a foreign state is subject to the jurisdiction of the courts in civil suits if it has expressly consented to the exercise of jurisdiction by a Japanese court or has instituted a proceeding before the court with regard to the matter or the case (Articles 5 to 7). A foreign state is also subject to Japanese court jurisdiction in civil suits regarding:

- commercial transactions (Article 8);
- labour contracts (Article 9);
- pecuniary compensation for the death or injury of a person, or damage to or loss of tangible property (Article 10);
- a right or interest in real estate (Article 11);
- a right or interest in the administration of property which is under the court's control, such as trust property, the estate of a bankrupt or the property of a company being wound up (Article 12);
- intellectual property (Article 13);
- a right or obligation based on membership of a legal entity or other organization of which the state is a member (Article 14);
- the operation of ships (Article 15); or
- the existence, validity or procedure of a written arbitration agreement regarding commercial transactions between a foreign state and a private individual or legal person of another state (Article 16).

Japan has jurisdiction over foreign states regarding the procedure for temporary restraining orders and civil execution against the property of a state if:

- the state has expressly consented to the taking of such measures as indicated or has earmarked specific property or provided such property as security for the satisfaction of the purpose of such measures as indicated (Article 17);
- the procedure relates to civil execution against commercial property held by a foreign state (Article 18); or
- a foreign central bank or other state monetary authority has expressly consented to the taking of such measures as indicated (or the state has earmarked specific property or provided such property as security for the satisfaction of the purpose of such measures as indicated) (Article 19).

The act also sets out special procedures for civil suits involving a foreign state regarding:

- service of process by a complainant and a writ of summons against a foreign state (Article 20);
- exceptions to the Code of Civil Procedure in the event that a representative of the state does not appear on the date for oral argument (Article 21); and
- exemptions regarding subpoenas and non-penal fines against a state (Article 22).

The act will come into effect on a date to be specified by order of the Cabinet within a year of its date of promulgation (ie, no later than April 23 2010).

## Comment

As the act complies with the terms of the convention, it will be collateral to the implementation of the convention when Japan ratifies it and the convention enters into force in future. However, as the act will come into effect irrespective of whether the convention is in force in Japan and will apply to states that have not signed the convention, it is more than a mere reinforcement of Japan's position under the convention.

As a result of the act, private parties and states can better predict whether they will be subject to the civil jurisdiction of the Japanese courts. When negotiating an agreement between a foreign state and a private individual, stipulating provisions on jurisdictional immunity is critical. Private individuals seeking to engage in transactions with a foreign state will be better able to ascertain and avoid potential risks related to this issue.

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## Endnotes

(1) 1128 Minshu 7; Daishin-in, December 28 1928.

(2) 60-6 Minshu 2542, 1231/2003; Supreme Court, July 21 2006.

(3) 251/2007; October 17 2007.

(4) 1997 Hanrei-Jiho 155, 4593/2006; October 4 2006.

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