

Litigation - Japan

Sovereign immunity, international jurisdiction and courts' powers in labour disputes

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[Sovereign immunity](#)
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When a labour dispute is litigated in the Japanese courts, jurisdiction may be restricted by virtue of the sovereign immunity of one of the parties or by the lack of a basis on which to accept international jurisdiction. Recent legislative and case law developments in both areas will have a significant impact on the power of the Japanese courts to resolve labour disputes.

Sovereign immunity

During the 19th century, under the conventions and principles of international law, a sovereign state's actions were considered immune from the jurisdiction of the courts of any other state - a position termed 'absolute immunity'. Only in limited circumstances, such as when a state voluntarily submitted to jurisdiction or a case involved real property in another state, would a foreign court have jurisdiction over a sovereign state. However, in the 20th century the concept of restrictive immunity became the norm. Restrictive immunity divides state conduct into two types: sovereign actions with primarily domestic effect and commercial actions that have a corporate, private-law character. Jurisdictional immunity applies only to sovereign actions.

The UN Convention on Jurisdictional Immunities of States and their Property endorses restrictive immunity. Judicial precedent in Japan previously supported absolute immunity, but now favours restrictive immunity.⁽¹⁾

In light of this, the Act on the Civil Jurisdiction of Japan over Foreign States was enacted in April 2009 and took effect on April 1 2010. The act enshrines the concept of restrictive immunity and denies jurisdictional immunity to foreign states (including federal states) in respect of commercial dealings, among other matters.

On October 16 2009, before the act came into force, the Supreme Court held that where a cause of action arises from an employment agreement between an individual and a foreign state, the foreign state may not benefit from sovereign immunity except in special circumstances.⁽²⁾ This was despite the court's acknowledgement that the state involved in the case - the federal state of Georgia in the United States - could independently enjoy sovereign immunity and might have been entitled to do so in other, special circumstances (eg, in the event of a potential violation of its sovereignty).

The court also referred to Article 9 of the act, which provides that foreign states have no jurisdictional immunity in civil suits relating to labour contracts under which work is carried out in Japan. The judgment therefore has value as a precedent under the new act, despite having been issued before the act came into force.

International jurisdiction

No statute or international treaty defines the scope of the Japanese courts' international jurisdiction. Therefore, judicial practice follows the precedent set by the court's November 11 1997 judgment,⁽³⁾ in which it held that:

"if one ground exists on which to accept jurisdiction within Japan as prescribed by the Code of Civil Procedure, then in general it is appropriate to make the defendant submit to the jurisdiction of the Japanese courts. This is subject to the caveat that should special circumstances exist which would mean that to accept jurisdiction would go against the principle of fairness between parties or of prompt and proper judgment, the courts must refuse jurisdiction."

Since October 2008 the Ministry of Justice has been preparing a new statute defining

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the international jurisdiction of the Japanese courts, and in March 2010 a bill was submitted to Parliament to amend the Code of Civil Procedure. With regard to labour disputes, the bill aims to establish new rules to ensure better protection for employees. Once the code has been amended, employees will be able to file suit in a Japanese court against an employer if their labour was provided in Japan.⁽⁴⁾ This will be the case even if there are no other grounds on which to claim jurisdiction in Japan. In contrast, an employer will be able to file suit against an employee in a Japanese court only if the employee is resident in Japan at the time of filing.⁽⁵⁾ In general, the bill is intended to broaden the authority of the Japanese courts in relation to lawsuits filed by employees, and to narrow it in the case of lawsuits filed by employers.

The bill also aims to restrict the effect of jurisdiction clauses in employment contracts. The Japanese courts typically give effect to jurisdiction clauses within employment contracts, unless it would be against public policy to do so.⁽⁶⁾ However, the bill⁽⁷⁾ would limit the validity of such clauses to situations where:

- the jurisdiction clause is agreed at the time of termination of the contract and specifies the courts of the jurisdiction in which the work is provided - for the purposes of this part of the act, 'exclusive jurisdiction' clauses are not regarded as exclusive, but as identifying additional jurisdictions in which a suit may be brought;
- the employee files a suit within the jurisdiction specified in the contract; or
- the employee chooses to invoke the jurisdiction clause in his or her contract in the event of the employer filing suit in another state.

The bill is expected to be enacted in April 2010. Once in effect, the amendments to the code will have a significant impact on the treatment of cross-border labour disputes in the Japanese courts.

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Endnotes

(1) For examples of the two positions in practice, see *Matsuyama v Republic of China* (1128 Minshu 7-12, Daishin-in, 1928) and *Tokyo Sanyo Trading Co Ltd v Islamic Republic of Pakistan* (2542 Minshu 60-6, Supreme Court, 2006), respectively.

(2) 293 Saibansho-jihō 1493 (Supreme Court, October 16 2009).

(3) 4055 Minshu 51-10 (Supreme Court, November 11 1997).

(4) Article 3(4)(2) of the draft revised code.

(5) *Id.*, Article 3(4)(3).

(6) 137 Hanrei-jihō 1743 (Tokyo High Court, November 28 2000).

(7) Article 3(7)(6) of the draft revised code.

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