

State Immunity from Civil Jurisdiction — Restrictive Immunity Theory —
Explicit Modification of the Case Law — Sales Contracts

1. Supreme Court, Judgment, July 21, 2006; not yet reported.

Trading Corporations in Japan v. The Islamic Republic of Pakistan.

Two Japanese companies asserted claims against the Islamic Republic of Pakistan (hereinafter, "Pakistan"), insisting that each sold computers

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to Pakistan under contracts of quasi loan for consumption subsequently executed by a company affiliated with the Pakistani Ministry of Defense. These two companies demanded payment of unpaid principal and agreed upon interest and delinquency charges, in an amount substantially in excess of two billion yen.

On September 29, 2000, the two companies filed complaints against Pakistan with the Tokyo District Court (the court of first instance). On April 25, 2001, the complaints and summons were served on the Pakistani Ministry of Foreign Affairs, through the Embassy of Japan in Pakistan.

On July 16, 2001, the Embassy of Pakistan in Japan sent a written statement to a staff member of the Southwest Asia Division of the Asian Affairs Bureau (now known as the Asian and Oceanian Affairs Bureau) of the Japanese Ministry of Foreign Affairs. The statement, in essence, said that the Pakistani Government had found no record that proved its involvement in the present case. It asked the Japanese Ministry of Foreign Affairs to forward the statement to the Tokyo District Court. Further, it declared that Pakistani authorities would reply to the summons, through the Japanese Embassy in Pakistan, within a reasonable period of time. Finally, the statement expressed the Pakistani Embassy's hope that the Tokyo District Court would reschedule the hearing. On the morning of the scheduled hearing (July 23, 2001), the staff member of the Ministry of Foreign Affairs transmitted the statement by fax to the Tokyo District Court.

Pakistan submitted no reply to the complaint other than the above-mentioned statement and did not appear at the scheduled hearing.

In its judgment handed down on August 27, 2001, the Tokyo District Court accepted all claims advanced by the two Japanese companies, finding that Pakistan had, by default, admitted all facts asserted by the plaintiffs.

Pakistan appealed to the Tokyo High Court (the court of second instance), contending that it should be afforded immunity from foreign civil jurisdiction based on its status as a sovereign State, and requested that the Court dismiss the two companies' claims. In its judgment of February 5, 2003, the Tokyo High Court, following the order rendered by *Daishin'in* [the Supreme Court] in 1928⁽¹⁾, granted immunity to Pakistan and dismissed the two companies' claims. This appeal followed.

(1) *Matsuyama and San v. Republic of China*, 4 *Annul Digest*, case No. 107, adopting the absolute immunity theory.

Held: "The decision of the second instance shall be quashed.
The present case shall be remanded to the Tokyo High Court."

Upon the grounds stated below:

'1. In the present case, the appellants [the two Japanese companies] claim that each of them entered into contracts for the sale of high-tech computers to Pakistan (hereinafter, "the contracts for sale") with A Corporation (hereinafter, "A Inc."), an affiliated company and agent of the Pakistani Ministry of Defense, which is the appellee in the present proceeding. The appellants further claim that, having delivered the objects of the sale, each of them concluded a contract with A Inc. establishing a quasi loan for consumption that sets forth appellee's payment obligations (hereinafter, "the quasi loans for consumption"). The appellants assert claims against the appellee for the payment of principal, interest, and delinquency charges, as provided for in these agreements.

Against these claims, the appellee, maintaining that it enjoys immunity from Japan's civil jurisdiction as a sovereign State, requests that this appeal be dismissed. Furthermore, the appellee claims that it did not conclude the alleged contracts for sale and contracts establishing the quasi loans for consumption with the appellants because A Inc. lacked authority to represent the appellee with regard to said agreements."

'2. The court of the second instance dismissed the petition based on the grounds set forth below.

A foreign State, due to its sovereignty, in principle, enjoys immunity from Japan's civil jurisdiction except for special cases such as disputes on immovable property situated in Japan. The only exception to this principle occurs when the foreign State voluntarily subjects itself to the civil jurisdiction of Japan. The cases that fall into this sole exception are limited to those in which: (a) the foreign State's submission to Japan's civil jurisdiction is provided in an international treaty, or (b) the foreign State manifests its intention to subject itself to Japan's civil jurisdiction in the course of a judicial proceeding or with respect to a particular category of future litigations. Furthermore, such an intention needs to be manifested by a State to another State. Thus, it follows that, even if a foreign State stipulates in a contract concluded with private parties that it shall subject itself to Japan's civil jurisdiction, such an agreement does not have the immediate effect of subjecting the foreign State to the civil jurisdiction of Japan. (See *Daihin'in*, Order, December 28, 1928, 7 Minshu (12), 1128 [1928])

In the present case, in which the appellant requests payments from the appellee as a foreign State, there is no indication that the appellee has manifested its

intention to Japan to the effect that it shall be subjected to Japan's civil jurisdiction. While the order form executed in the name of A Inc., the agent of the appellee government, provided that the appellee consented to having any dispute arising in relation to the contract be brought before a Japanese tribunal, this manifestation of intention made in the order form was effectuated merely in relation to the other parties to the contracts, i.e., the appellants.

Accordingly, it is appropriate to grant the appellee immunity from Japan's civil jurisdiction and therefore the appellants' claims, being unfounded, shall be dismissed.'

'3. However, this Court rejects the decision of the court of second instance for the following reasons:

(1) With regard to the immunity of a foreign State from civil jurisdiction, there previously existed customary international rules based on the so-called absolute immunity theory. According to this former widely-accepted theory, a foreign State, in principle, enjoyed immunity from the civil jurisdiction of the forum State, except for special cases such as those involving immovable property situated in the forum State or situations where the foreign State had agreed to subject itself to the civil jurisdiction of the forum State. However, due to the expansion of the scope of State activities, the so-called restrictive theory gradually gained support. This restrictive theory provides that immunity from civil jurisdiction of the forum State shall not be extended to acts *jure privatorum* or *gestionis* as distinguished from acts *jure imperii*. Today, a large number of States have come to restrict the scope of foreign States' immunity from civil jurisdiction based on the restrictive theory. In addition, the "United Nations Convention on Jurisdictional Immunities of States and Their Property", adopted by the 59th General Assembly of the United Nations on December 2, 2004, adopts the restrictive theory. Under such circumstances, while it is still permissible to acknowledge that customary international law grants a foreign State immunity from the civil jurisdiction of the forum State with regard to acts *jure imperii* (See Supreme Court, P.B.II, Judgment, April 12, 2002, 56 Minshu(4), 729 [2002]⁽²⁾), it is to be concluded today that there no longer exist customary international rules which would grant a foreign State immunity from the civil jurisdiction of the forum State with regard to acts *jure privatorum* or *gestionis*.

As to whether Japan may exercise civil jurisdiction over a foreign State in relation to acts *jure privatorum* or *gestionis*, consideration must be given to the fact that immunity of a foreign State from civil jurisdiction arises from the mutual respect of the sovereignty of all States (i.e., they are independent and sovereign and are equal to each other). Based on this consideration, we hold that there is no

(2) *The Japanese Annual of International Law*, No. 46 (2003), p. 161.

reasonable justification for granting immunity from civil jurisdiction to a foreign State with regard to acts *jure privatorum* or *gestionis* because Japan's exercise of civil jurisdiction in such cases normally will not infringe on the sovereignty of a foreign State. Granting immunity from civil jurisdiction to a foreign State, in a case where the exercise of civil jurisdiction does not infringe on the foreign State's sovereignty, will entail inequitable consequences as recourse to judicial remedy will then be unreasonably denied to private individuals who enter into commercial relationships with a foreign State where the transactions constitute acts *jure privatorum* or *gestionis*. For these reasons, we hold that a foreign State does not enjoy immunity from Japan's civil jurisdiction in relation to its acts *jure privatorum* or *gestionis*, except under special circumstances such as those in which the exercise of civil jurisdiction by Japan is likely to infringe on the sovereignty of the foreign State.¹

'(2) Irrespective of whether a foreign State's act qualifies as acts *jure privatorum* or *gestionis*, it is evident that a foreign State does not enjoy immunity from Japan's civil jurisdiction in cases: (a) where it has agreed, by way of an international agreement (such as a treaty concluded with Japan), to subject itself to Japan's civil jurisdiction, or (b) where it manifests its intention to subject itself to Japan's civil jurisdiction with regard to a particular case by, for example, filing a lawsuit with a Japanese court. Moreover, it is appropriate to understand that a foreign State shall not, in principle, be immune from Japan's civil jurisdiction in cases where the foreign State has manifested its intention to be subjected to Japan's civil jurisdiction by expressly consenting to such jurisdiction in a written contract concluded with private parties. The exercise of civil jurisdiction by a Japanese court over a foreign State in such a case normally involves no risk of infringing the latter's sovereignty. Further, it is noted that the foreign State's invocation of immunity from Japan's civil jurisdiction in such a case goes against the equality of parties to a contract and the principle of good faith.'

'(3) The order rendered by *Daishin'in* on December 28, 1928, referred to by the court of second instance, shall be modified to the extent of conflict with the above holdings.'

'(4) In the present case, if, as the appellants assert, the appellee concluded contracts for sale of high-tech computers with the appellants, received the objects of the sales, and then concluded contracts with the appellants establishing quasi loans for consumption (the purpose of which being to finance payments of the purchase price), then such acts of the appellee qualify as commercial transactions that can be carried out by private persons and thus are acts *jure privatorum* or *gestionis*, irrespective of the objectives thereof. It follows that the appellee shall not be granted

immunity from the civil jurisdiction of Japan barring the special circumstances referred to above.

Furthermore, the evidence clearly indicates that the order forms made in the name of A Inc., agent of the appellee government, included a provision in which the appellee agreed that any dispute arising in relation to the contract shall be brought before a Japanese court. It also appears that the clause in question is incorporated into the contracts for the quasi loans for consumption concluded by A Inc. with the appellants and made applicable *mutatis mutandis* to the quasi loans for consumption. Therefore, if A Inc. was an agent of the appellee as the appellants assert, it is possible to conclude that the appellee has clearly manifested its intention to be subjected to the civil jurisdiction of Japan because the clause in question is an explicit disposition in a written contract that stipulates that the appellee consents to subject itself to Japan's civil jurisdiction with regard to disputes arising from the contract.

Accordingly, the legal determinations made by the court of the second instance in (following the aforementioned order of *Daishin'in*) recognizing the appellee's immunity from the civil jurisdiction of Japan and dismissing the appeal without examining the facts asserted by the appellants, contained violations of laws that have inevitably affected the decision. The appellant's argument is well-grounded in this respect.'

Justice Isao Imai (presiding)
Justice Shigeo Takii
Justice Osamu Tsuno
Justice Ryoji Nakagawa
Justice Yuki Furuta