

given a practical solution that aimed to coordinate employers and employees based on total considerations by recognition of implicit consent that both parties had agreed for survivors to obtain a certain portion of the insurance payment. However, based on the decision made by this court case, insurance agreements without consent would be invalid even if such insurance agreements are group insurance (for example, *X vs. Toei Shikaku*, April 26, 1996, Hirosaki branch of Aomori District Court, 703 Rodo Hanrei 65, *X vs. Akita Unyu*, May 31, 1999, 764 Rodo Hanrei 20).

Secondly, this court case gives a challenge to how employers get consent. When life insurance agreement insures another person, Commercial Law requires consent since such agreement without consent could cause unethical incidents. In group insurance agreement after revision (Total Beneficial Fixed Term Group Insurance), consent must be obtained and notice of agreement must be informed thoroughly. By this court decision, fictional consent on completion of an agreement is not sufficient and consent in accordance with an explicit and clear procedure would be required. On the other hand, as for the allocation of insurance payments that employers receive, to what extent a firmed agreement is requested will be a challenge in the future.

9. International Law and Organizations

X et al.v. Japan

Tokyo District Court, May 25, 2006

Case No. (*wa*) 13581 of 2001, 13244 of 2003 and 2598 of 2005

1931 HANREI JIHO 70

Summary:

Claims for withdrawal of notification of Korean nationals who were conscripted during the Second World War and were notified to the Yasukuni Shrine as war dead by the Government of Japan and for compensation from the Government are denied.

Reference:

Agreement Between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation (Japan-ROK Claims Agreement) ; Act on Measures Concerning the Property Rights of the Republic of Korea in connection with the Implementation of Article II of the Agreement Between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation (Act on Measures); Constitution of Japan.

Facts:

The plaintiffs are ROK nationals who were conscripted by Japan during the Second World War, and their relatives. They claimed for the withdrawal of the notification by the Government of Japan, by which their relatives had been reported to the Yasukuni Shrine as war dead, as well as compensation for injuries suffered from that notification. They also claimed for compensation and letters of apology from the Government and Japan Post, the successor to the Ministry in charge of postal services, for, *inter alia*, their relatives' forced military actions and death and injuries during the war.

Opinion:

All claims dismissed.

1. Validity of the Japan-ROK Claims Agreement

The plaintiffs argue that the Japan-ROK Claims Agreement is null and void under Articles 48 (error), 49 (fraud), and 52 (coercion of a State by the threat or use of force) of the Vienna Convention on the Law of Treaties because the Government of ROK was coerced to conclude the Agreement by fraudulent conduct or pressure disguised in the name of economic assistance. So, they also argue, is, the Act on Measures, which was enacted on the basis of the Agreement.

The Vienna Convention, however, provides (in Article 4) for the non-retroactivity of the Convention *vis-à-vis* other treaties. Since the date of entry into force of the Convention for Japan was August 1, 1981, which was after the entry into force of the Claims Agreement for Japan, the

Court cannot conclude that the Claims Agreement and the Act on Measures are null and void under the Vienna Convention.

The plaintiffs further argue that the Claims Agreement is null and void since it goes against the rule of reason, considering the fact that the Government of Japan concluded the Agreement by intentionally hiding the materials relevant to the claims concerned.

The Court cannot accept this argument, either, because no sufficient evidence is found to substantiate the alleged hiding of such materials.

2. The contents of the Japan-ROK Claims Agreement

The plaintiffs contend that the Claims Agreement only provides for the scope and the matters to be covered by diplomatic protection, and thus the Act on Measures cannot let ROK nationals' substantive claims against Japan disappear.

However, the Court cannot accept such an interpretation of the Agreement because it is clear from the drafting process and contents of the Agreement and the Act on Measures that the purpose of paragraph 1 of the Act is to cause all kinds of substantive legal claims for ROK nationals against the Japanese Government or nationals to lapse.

3. Alleged unconstitutionality of the Act on Measures

The plaintiffs argue that the Act on Measures is unconstitutional and hence null and void since, by unilaterally eliminating the ROK nationals' claims relating to the injuries they had suffered, it contravenes the object and purpose of the Constitution of Japan which upholds the principle of international cooperation and the pacifist policy, as well as the constitutionally guaranteed rights of individual persons like the plaintiffs and their property rights.

The Court recalls that the Act was enacted as part of the settlement of particularly post-War claims, which had been considered the subject of special bilateral agreements under the Treaty of Peace with Japan (the San Francisco Treaty), concluded under the exceptional circumstances where, after the defeat, Japan was still completely under the control of the General Headquarters of the Supreme Commander for the Allied Powers, and the recovery of Japan's sovereignty depended on the Treaty. In the light of these circumstances, the Act, which relates to the subjects concerning the settlement of property rights between the two States resulting from the defeat, is outside the scope envisaged by the articles in the

Constitution of Japan. Therefore, the Court cannot accept the argument that the Act is unconstitutional, and null and void.

4. Claims for compensation concerning the enshrining as war dead at the Yasukuni Shrine

The plaintiffs argue that together with the Yasukuni Shrine, the Government of Japan has collectively enshrined their relatives at the Shrine by reporting them as war dead, and that this violates the pacifist principle and the principle of the separation of politics and religion under the Constitution of Japan, and infringes the plaintiffs' rights of national and religious persons, freedom of thought and conscience, and rights to privacy, thus, constituting also a defamation.

These alleged rights of national or religious persons, however, are conceptually ambiguous and obscure, and thus, cannot be considered as definitive rights in terms of their subject, specific contents and legal implications. Therefore, it is doubtful whether these rights are of a legal character.

There was indeed a time when the Government of Japan was cooperative with the Yasukuni Shrine. However, the Government's notification of war dead was done within the limits of its administrative research and reply, and it was the Shrine itself that did the enshrinement by its own judgment and decision. It cannot therefore be concluded that the Government enshrined war dead jointly with the Shrine through their notification. Besides, the notification of war dead was done only in the form of a reply containing their names, which is not considered to impose coercion or a specific disadvantage on the plaintiffs. Therefore, it cannot be recognized that the notification of the names of war dead by the Government to the Shrine infringes the various rights alleged by the plaintiffs.

Editorial Note:

The present case, which involves the claims for injuries suffered by the Korean nationals who were conscripted by Japan during the Second World War and their relatives and the notification by Japan of their names to the Yasukuni Shrine as war dead, is one type of post-war compensation case. Until the present one, the main issue of these cases related to the contents of claims covered by Article II, paragraph 3, of the Claims

Agreement or the interpretation of that provision in relation to diplomatic protection. The present case is notable for the plaintiffs' focus on the negotiating process of the Claims Agreement, arguing that it is null and void under the Vienna Convention on the Law of Treaties, particularly, Articles 48, 49 and 52. The Court rejected such argument on the basis of the non-retroactivity of the Vienna Convention *vis-à-vis* other treaties as provided for in Article 4 of that Convention.

On September 8, 1951, the Treaty of Peace with Japan (the San Francisco Treaty) was concluded between Japan and the Allied Powers to settle problems resulting from the war. Under Article 2 of the Treaty, Japan, recognizing the independence of Korea, renounced all right, title and claim to Korea. Article 4 provides that the disposition in Japan of the property of the authorities which were administering Korea (at the time of the signing of the Treaty) and of the residents, and of claims of such authorities and residents against Japan and its nationals shall be the subject of special arrangements between Japan and such authorities. In order to settle such claims, Japan and ROK concluded the Claims Agreement on June 22, 1965, after more than 13 years of negotiations, in the form of economic cooperation agreement. The choice of such a form was unavoidable given the fact that it would take a great amount of time to verify the existence of the materials to be submitted in support of claims. Thus, it is difficult to consider the Agreement as having been concluded through error, fraud or coercion on the part of one of its Parties. It was in a similar manner that the Pyongyang Declaration was adopted by Japan and the Democratic People's Republic of Korea. The present judgment can therefore be considered to reflect properly the actual negotiations between Japan and ROK.

Article II, paragraph 1, of the Claims Agreement provides that "the ... Parties confirm that the problems concerning property, rights, and interests of the two ... parties and their peoples (including judicial persons) and the claims between the ... Parties and between their peoples, ... have been settled completely and finally." Further, Article II, paragraph 3, provides that "... no claims shall be made with respect to the measures relating to the property, rights, and interests of either ... Party and its people which were brought under the control of the other ... Party on the date of the signing of the present Agreement..." According to the Agreed Minutes to

the Agreement, the term “measures” in Article II means national measures taken by each Party, and for Japan this is the Act on Measures. Paragraph 1 of the Act provides that “the property, rights, and interests in the Article II, paragraph 3, of the Agreement shall become extinct on June 22, 1965.” This means that the Parties have agreed that they would have no objection against each other even if one of them took national measures which cause the substantive rights recognized legally as having value of property and under the control of the other Party to become extinct. In other words, both Parties have agreed that one of them would not object to the other even if the latter took measures to let the rights of nationals of the former become extinct, and to otherwise deny such rights.

Meanwhile, the subjects of the provisions of the Claims Agreement are “the High Contracting Parties,” and this has been understood to mean that both Parties would not exercise the right of diplomatic protection. In 1991, a representative of the Government stated before the Japanese Diet that Japan and ROK mutually waived the right to exercise diplomatic protection belonging to them as States, and that this does not entail the extinction of claims of nationals under domestic law. This statement has led to the interpretation that the waiver of claims in such agreements as peace treaties covers only the right of diplomatic protection. Such a view appears to lie behind the plaintiffs’ argument in the present case that the Claims Agreement only provided for the scope or object of diplomatic protection and, accordingly, the Act on Measures could not let the substantive rights of the ROK nationals disappear. The Court, however, denied such an interpretation of the Agreement on the ground that paragraph 1 of the Act on Measures is definitely intended to cause all categories of substantive claims legally recognized for ROK nationals against the Japanese Government or nationals to lapse, and this is clear in the light of the drafting process and the contents of both the Agreement and the Act on Measures. In 2001, the Government of Japan, in relation to the Treaty of Peace with Japan, stated that the legal obligation to meet the claims or credit obligations of the nationals of the Allied Powers has ceased to exist under Article 14 (b) of the Treaty, thus resulting in the denial of remedies. It appears that the real meaning of these provisions concerning war claims still remains to be further clarified in the future.

Xs v. Islamic Republic of Pakistan

Supreme Court, July 21, 2006

Case No. (*ju*) 1231 of 2003

60 MINSHU 2542, 1228 HANREI TAIMUZU 119, 1259 KINYU SHOJI HANREI 56

Summary:

The jurisdictional immunity of a State is not recognized in a case where the foreign State and a private party have entered into private law or business transactions and both parties have agreed that differences regarding the transaction shall be resolved in a Japanese court.

Reference:

Code of Civil Procedure, Part 1, Chapter 2

Facts:

According to Xs, who are Japanese private corporations, they have respectively concluded contracts with a company (hereinafter, “the Company”) affiliated with the Ministry of Defense of the Islamic Republic of Pakistan (hereinafter, “the State”) and acting as an agent for the State, to sell high-performance computer systems to the State. After the delivery of the computer systems, Xs have also concluded contracts of quasi-loan for consumption with the Company for the payment due from that sales transaction. However, the loan debt was not paid by the due date. On September 29, 1990, Xs filed a suit against the State, demanding the payment of the principal of the debt, together with interest and delinquent charges, on the basis of the provisions of the contracts and the order forms, which stipulated that any differences between the contracting parties shall be resolved before a court of Japan.

At the first trial, on July 23, 2001, the Tokyo District Court recognized all the claims of Xs because the defendant did not appear at the oral proceedings. The defendant State appealed to the Tokyo High Court, where it argued that as a sovereign State it enjoyed immunity from civil proceedings before a court of another State. On February 5, 2003, following the 1928 decision of the Great Court of Cassation (Matsuyama Case, 7 *Minsyu*

1128), the High Court decided that, even if the contracts between the parties had provided that their differences shall be resolved before a court of Japan, it did not mean that the State renounced jurisdictional immunity in relation to the Government of Japan. The High Court thus held that the State did enjoy immunity and dismissed Xs' claims. Xs then appealed the Case to the Supreme Court.

Opinion:

The original judgment is reversed and the Case is remanded to the Tokyo High Court, which should examine whether the Company had been duly authorized to act as an agent for the State regarding the contracts in question.

The State argued that since it had not renounced jurisdictional immunity vis-a-vis the Government of Japan, it enjoyed immunity from civil proceedings before a Japanese court even if it had agreed with a private party that the differences relating to the contracts between them shall be resolved before such a court. The Court cannot accept this argument because of the following reasons.

First, traditionally customary international law supported the doctrine of absolute immunity, according to which a State is not subject to civil proceedings of another State except under such special circumstances as where the case concerns real estate located in the latter State. The doctrine is based on the principle that States are all equal and one State has no right to govern another (*Par in parem non habet imperium*). However, as the fields of State activities expanded, two types of State acts have become distinguished: an act with sovereign character (*jure imperii*) and a private law or business act (*jure gestionis*). It has been increasingly recognized that States do not enjoy jurisdictional immunity with respect to the latter types of acts because such acts are not of a sovereign character and State sovereignty would not be impaired even if immunity is not recognized. This new approach, called the restrictive immunity doctrine, has now been accepted by many countries, including the United States, the United Kingdom, EC countries and Commonwealth countries like Pakistan. Moreover, in 2004, the United Nations Convention on Jurisdictional Immunities of States and Their Property, which embodies the doctrine, was adopted. In the light of these international trends, the

absolute immunity doctrine can no longer be considered acceptable under customary international law. In the present case, the sales and quasi-loan contracts involve those private law or business acts in which any private entity can be engaged. Besides, there are no special circumstances that are likely to impair sovereignty if jurisdictional immunity is not recognized.

Second, a State can renounce its jurisdictional immunity through agreement with another State. Such renouncement is generally made through an intergovernmental agreement. It should be recognized, however, that renouncement of immunity concerning private law or business transactions can be made in an agreement with private parties, since sovereignty of a State is not likely to be impaired by such a renouncement. Otherwise, fairness would not be ensured between the contracting parties and the principle of good faith would not be respected. In the present case, since the relevant contracts and order forms provide specifically that the differences between the parties shall be resolved before a court of Japan, the State cannot invoke immunity from civil proceedings.

In sum, the original judgment is wrongful because it recognized the jurisdictional immunity of the State on the ground that it is a sovereign state and thus did not examine the facts of the Case. The present case shall be remanded to the Tokyo High Court, which should examine whether the Company had been duly authorized to act as an agent for the State with respect to the transactions.

Editorial Note:

Concerning the jurisdictional immunity of a State, for some time, it has not been clear whether Japan maintains the absolute immunity doctrine pursuant to the 1928 decision by the Great Court of Cassation or it follows the restrictive immunity doctrine in accordance with the recent international trends. In the recent cases at lower courts, while some courts adopted the restrictive immunity doctrine (e.g. the decision by the Tokyo District Court on July 31, 2003), others upheld the absolute immunity doctrine (e.g. the decision by the Tokyo High Court on March 29, 2002). On April 12, 2002, in a civil case involving claims for compensation for injuries suffered from night and early morning flights by US military aircraft near the Yokota Air Base, the Supreme Court, while referring to the trends

among many countries and international organizations toward the restrictive immunity doctrine, recognized the jurisdictional immunity of the United States because the activities in question were related to its military exercises (56 *Minsyu* 729). In the present case, the Supreme Court has brought to an end the judicial instability by unequivocally declaring that it adopts the restrictive doctrine.

The present case, which involves the sales contracts of computer systems and the contracts of quasi-loan for consumption, is a typical case where immunity should be denied for commercial activities. In deciding whether or not an act is considered a private law or business act, two alternative criteria have been advanced in State practice and by scholars: one which focuses on the sovereignty nature of the act, and the other on the purpose of the act. In some cases where an act is somehow related to sovereignty of a State, it would be difficult to judge whether the act is purely private law or a business act or not (e.g., a case involving employment contracts between a foreign State and a private person. See, the above-mentioned UN Convention, Article 11, and Waseda Bulletin of Comparative Law, Vol. 25, pp. 142–146). Contracts between a State and a private entity as private law or business activities are increasing in the present globalized markets. Moreover, a private entity could be brought into an unexpected lawsuit for tort by a foreign State before a Japanese court. In order to ensure the legal stability and predictability in private law or business transactions between a State and a Japanese private entity in Japan, it is hoped that a new law, like the State Immunity Act of the United Kingdom, will be enacted as soon as possible.