Construction Claims and Disputes and the Business Culture of Construction in Japan

Jun Iwamatsu¹; Tetsukazu Akiyama²; and Kazuyoshi Endo³

Abstract: Increasing attention is today being focused on the issue of dispute resolution in the Japanese construction sector. Disputes were infrequent under the traditional contract agreement system. However, against the background of a shrinking construction market, owners, contractors, builders, engineers, subcontractors, and suppliers are seeking higher profits and are increasingly asserting their rights, resulting in the creation of an adversarial environment in the industry. It is not generally known outside Japan that the term “claim” has traditionally been used in the nation’s construction industry with an entirely different meaning to its use in other countries. This paper discusses unique characteristics of the implementation of construction work in Japan that are representative of this different use of terminology. These unique characteristics are considered as the result of a business culture that has developed through a combination of historical circumstance and the specific characteristics of Japan’s construction market. The paper also examines the mechanism of dispute resolution, and considers specific details and changing trends in construction disputes using relevant statistical data.

DOI: XXXX

CE Database subject headings: Arbitration; Claims; Construction companies; Dispute resolution; Laws; Social factors; Statistics; Japan.

Introduction

Background (Historical Influences on Attitudes in the Japanese Construction Sector)

Japan’s historical development, and the fact that the nation is an island country, has resulted in a legal culture which differs from that of western countries Karel van Wolferen, the author of The Enigma of Japanese Power (1989), refers to Japan’s legal order using the term “the unprotected citizen.” In Japan, attitudes to the legal system differ from those that characterize the western nations, where the sense of order is essentially based on modern laws. The fact that western legal systems were simply “borrowed” and applied to Japan during the Meiji Era (1868–1912) has greatly affected this mindset. As Wolferen points out, “nothing in their history encourages ordinary Japanese citizens to think that the law exists to protect them” (Wolferen 1989, p. 209). It seems that this is one of the established theories regarding the sociology of law in Japan.

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Note. Discussion open until June 1, 2008. Separate discussions must be submitted for individual papers. To extend the closing date by one month, a written request must be filed with the ASCE Managing Editor. The manuscript for this paper was submitted for review and possible publication on September 19, 2006; approved on June 1, 2007. This paper is part of the Journal of Professional Issues in Engineering Education and Practice, Vol. 134, No. 1, January 1, 2008. ©ASCE, ISSN 1052-3928/2008/1-1-XXXX/$25.00.

Contemporary Status

The above-described situation can be indicated as influencing the contemporary behavior of individuals involved in the construction process. This paper discusses the specific characteristics of the modes of relations among the various actors in the construction process and related trends in Japan, via a consideration of specific methods of dispute resolution. The paper will specifically examine the following two points:

• The basic principles observed by actors in the construction sector in Japan, in addition to the modes of communication that they employ, differ fundamentally from those operating in other countries. Their conception of the nature of business also differs, as instanced by collaboration to seek optimal solutions acceptable to all parties. The atmosphere that has characterized the construction sector in Japan is one in which parties avoid conflict with each other.

• In Japan there is no custom of using claim letters during the actual construction period. In addition, in Japan the meaning of the term “claim” is entirely different than its meaning in other countries.

Given these behaviors, construction can in many cases be carried out within the agreed time limits, and without greatly exceeding the expected contract value. However, although these conditions tend to suppress disputes, in reality they do occur, and their number is today increasing. This paper surveys the status of construction disputes arising in Japan and discusses the behavioral characteristics of the actors engaged in contemporary construction. The research on which it is based mainly focused on claims and disputes relating to construction contract agreements between owners and general contractors, and between general contractors and subcontractors. Although the paper mainly covers building work, some aspects of civil work are also considered.
### Present Status of Construction Disputes and Responses in Japan

#### Construction Dispute Resolution Organizations

In general, construction disputes can be classified into (1) “incidents,” in which the courts directly take the initiative, and (2) other disputes, which are left to alternative dispute resolution (ADR) facilities. ADR refers to conciliation procedures undertaken by the courts, or alternatively to various types of arbitration, conciliation, recommendation, and consultation which can be undertaken by various bodies, such as governmental agencies, private enterprises, and bar associations.

The following are the four main ADR facilities in Japan (see Table 1):

1. **Civil conciliation by courts**
2. **Construction Disputes Resolution Committees (CDRCs)**
3. **Housing Dispute Resolution Support Center of the Center for Housing Renovation and Disputes Settlement Support (CHORD)**
4. **ADR Centers of the Japan Federation of Bar Associations (JFBA)**

#### Construction Dispute Statistics

According to figures for 2004 compiled by the Construction Relation Lawsuit Committee (CRLC, discussed in the following), the courts were involved in over 2,800 cases; approximately 1,000 resulted in “court decisions;” approximately another 1,000 resulted in “reconciliations;” whereas the rest were “withdrawn,” etc. Three-quarters of the total were cases in which damages were claimed in relation to contracts, often due to construction flaws.

A report on dispute resolution in the U.S. construction sector indicates that around 10% of the more than 250,000 disputes that went before the courts in the United States in 1996 were related to breach of contract, and around 20% of these occurred in the construction sector (Fenn et al. 1998, p. 800). We can therefore assume that some 5,000 contractual disputes related to construction work go to court in the United States per year. Given the fact that the scale of investment in construction in the two nations does not differ significantly, this tends to suggest that disputes occur with less frequency in Japan.

It is only natural that damages for breach of contract should be the focus of disputes in court, given the nature of contract agreements. Specifically, a contract is signed for completion of the relevant project, and there are restrictions on the degree to which the owner can intervene in the details of the construction. If appropriate checks, meaning appropriate supervision, are not conducted during construction, the contract system will fall apart. The issue of such supervision has come into the spotlight in Japan recently with incidents such as a structural collapse in the “Toki Messe” of the Niigata Convention Center, and the Architectural Institute of Japan (AIJ) has taken it up as an issue for serious discussion and study.

The annual consultation statistics published by CHORD show that cases in which ADR was employed doubled from 4,500 in Fiscal Year 2000, when ADR was introduced, to more than 9,000 in Fiscal Year 2003. These were mainly consultations by consumers concerning their residences. This trend reflects social changes, but was probably directly triggered by the passage into law of the Housing Quality Assurance Act in April 2002. The caseload of the ADR center of the JFBA was in excess of 1,000 cases in 2003. These were mainly disputes directly involving users of construction services. The issue of unscrupulous companies performing shoddy renovation work has also become a controversial problem in Japan. These incidents symbolize the basic frailty of the Japa-

<table>
<thead>
<tr>
<th>Organization name</th>
<th>Main contents</th>
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<tbody>
<tr>
<td>Civil conciliation by courts</td>
<td>Although six new conciliation cases were brought before the High Court, 1,545 (219) before District Courts, and 439,173 (7,164) before Summary Courts in Fiscal Year 2004, the details of these construction disputes are unavailable. The figures in parentheses represent conciliation cases concerning housing.</td>
</tr>
<tr>
<td>Construction Disputes Resolution Committees (CDRCs)</td>
<td>Public institutions the aim of which is to achieve simple, quick, and appropriate solution of disputes involving construction work contract agreements (other than disputes involving sales contracts) based on the Construction Industry Act.</td>
</tr>
<tr>
<td>Housing Dispute Resolution Support Center of the Center for Housing Renovation and Disputes Settlement Support (CHORD)</td>
<td>Founded in April, 2000. Offers consultations relating to evaluation of residences under the Housing Quality Assurance Act. It specifically focuses on disputes concerning contract agreements relating to evaluated residences, and sales contracts (it does not deal with disputes among general contractors/subcontractors). It consulted on 4,499 cases in Fiscal Year 2000 and 9,182 in Fiscal Year 2003. It now publishes annual reports of consultation statistics.</td>
</tr>
<tr>
<td>ADR Centers of the Japan Federation of Bar Associations (JFBA)</td>
<td>The ADR Centers do not deal exclusively with disputes regarding construction or housing. Establishment of the Centers commenced in 1997 and there are now 19 branches throughout the country. They dealt with 1,118 cases in Fiscal Year 2003, and 540 of these were resolved. Ninety of these cases involved disputes concerning construction contract agreements. The ADR Centers have published annual reports of arbitration statistics since 2001.</td>
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nese contract system, which is functioning only in a delicate balance. The recent situation even seems to herald the collapse of that system.

Meanwhile, the Construction Disputes Resolution Committees (CDRC), which are ADR facilities related to the public administration, handled very few cases in 2003, amounting to only slightly more than 200, including disputes among general contractors/subcontractors. These will be discussed in greater detail in the following. Details are unfortunately unclear regarding arbitration in the courts, because only the total number of cases is made public, whereas details of the cases and statistical breakdowns of the number involving construction disputes are withheld.

**Measures Adopted in Construction Disputes in Japan**

A number of measures are being taken in Japan to deal with the rising number of construction disputes and their increasing complexity.

The contemporary global trend toward a focus on the consumer, symbolized by the adoption of product liability laws and an increasing customer satisfaction movement, has also influenced Japan. This has, naturally, resulted in an increase in the occurrence of construction disputes. The Housing Quality Assurance Act of 2002, despite its restriction to the area of private residences, is thought to have had a particular influence in this respect.

Judicial reform initiatives were conducted from the second half of the 1990s, when the Obuchi Cabinet was in office, and as part of these reforms the courts sought mechanisms to resolve disputes in the areas of construction, medical treatment, and intellectual property, which were continuing to increase in volume and complexity. It was recognized that professional expertise and experience in dealing with construction disputes was essential, given that in 2004 the average period for judging a case involving a construction dispute was 17.0 months, against a figure of 8.3 months for other civil cases.

Following a meeting between the AIJ and the Supreme Court in spring 1999, both organizations cooperated in the establishment of the AIJ Council for Judicial Support in December 2000.

The purpose of this council was set out as follows:

To investigate and analyze, from a strictly neutral standpoint, information regarding construction-related lawsuits, such as examples of court decisions, etc., while offering support to the courts and receiving cooperation. Further, through dissemination of the results of these activities, to increase knowledge among AIJ members, advance the science, technology and art of architecture, and increase knowledge among the general public.

One year after the establishment of the Council, the Construction Relation Lawsuit Committee (CRLC) was launched based on a Supreme Court ruling to review consultative inquiries by the Court. Table 2 presents a summary of its activities. Despite an initial aim of achieving results in 2 years, the Committee did not publish its first summary of results until 4 years after its establishment.

**Papers and Case Reports Dealing with Construction Disputes**

Although measures have been adopted to deal with the increase in construction disputes, as discussed earlier, at present the AIJ is presenting very few papers and case reports at an academic level regarding construction disputes. Table 3 shows a list of papers from AIJ collections and relevant conference proceedings, etc., retrieved using a keyword search.

The issues dealt with can generally be characterized as urban issues (a dispute from the 1970s relating to amount of sunlight, etc.) and disputes instituted by end users relating to claims over noise and other problems in the living environment and construction defects, etc. In other words, there is a dearth of papers dealing with larger disputes between general contractors, subcontractors, etc., i.e., disputes between construction producers.

The meaning of the term “claim” as currently accepted in Europe and North America is known to cover immediate issues for solution among the concerned parties in construction, such as monthly interim payments, proposals for design changes, requests for extension of construction time, etc. In Japan, by contrast, the same term tends to be used in a more narrowly focused way, mainly in relation to disputes arising over defects following the completion of construction. Within the Japanese construction culture, therefore, the term “claim” is used with a completely different meaning to its use in other countries. As indicated earlier, there are also very few research papers published dealing with the issues involved in work contracts between construction professionals.

What is the origin of this unique characteristic of the Japanese construction sector? This question will be examined later, but before this, more specific information regarding construction disputes in Japan will be provided.
Content and Trends of Construction Disputes in Japan

Analysis of CDRC Data

Here, we use detailed data compiled and published by Japan’s Construction Disputes Resolution Committees (CDRCs). The CDRCs are “public institutions the aim of which is to achieve simple, quick, and appropriate solutions to disputes involving contract agreements.” They arbitrate on civil disputes involving the interpretation and/or execution of construction contract agreements, such as construction defects and arrearage cases relating to contracted sums, in cases in which one or both parties are construction professionals. The CDRCs do not handle disputes relating to real estate transactions, disputes concerning building design, disputes between neighbors relating to construction, and disputes among general contractors/subsubcontractors which are not directly related to contract issues.

The CDRCs were established on the basis of the 1956 revision of the Construction Business Act as special dispute resolution facilities in response to demands from the construction industry for more efficacious legal mechanisms in this area. The CDRCs deal exclusively with cases involving construction contract agreements, and their jurisdiction is strictly delimited based on the affiliations of the parties concerned in the dispute. Given the long history of the organization, a consideration of the cases dealt with by the CDRCs offers the advantage of access to data spanning from the 1950s to the present. In addition, because the difference between the Central CDRC and the Prefectural CDRCs is merely one of geographical jurisdiction, it is valid to employ statistical data from both.

Table 3. AIJ Summary of an Internet Search of Related Papers

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of papers</th>
<th>Main topics discussed</th>
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<tbody>
<tr>
<td>1974</td>
<td>1</td>
<td>Sunshine disputes</td>
</tr>
<tr>
<td>1976</td>
<td>2</td>
<td>Facts about roof leakage: Claims from colder geographic areas</td>
</tr>
<tr>
<td>1978</td>
<td>1</td>
<td>Sunshine disputes</td>
</tr>
<tr>
<td>1981</td>
<td>1</td>
<td>Disputes about construction work (AIJ Journals)</td>
</tr>
<tr>
<td>1984</td>
<td>1</td>
<td>The status and related claims in wooden home buildings</td>
</tr>
<tr>
<td>1986</td>
<td>1</td>
<td>Disputes caused by school rearrangements (unification and/or close-down)</td>
</tr>
<tr>
<td>1988</td>
<td>2</td>
<td>Construction claims by the residents</td>
</tr>
<tr>
<td>1989</td>
<td>8</td>
<td>Construction disputes regarding the supply of medium and/or high-rise housings; construction disputes regarding the local conditions against construction of medium and/or high-rise housings</td>
</tr>
<tr>
<td>1990</td>
<td>3</td>
<td>Construction disputes regarding the supply of medium and high-rise housings</td>
</tr>
<tr>
<td>1991</td>
<td>5</td>
<td>Construction disputes regarding the supply of medium and high-rise housings; claims related to living environments and construction; noise claims against equipment and facilities</td>
</tr>
<tr>
<td>1992</td>
<td>2</td>
<td>Construction disputes regarding the supply of medium and/or high-rise housings; claims about housing construction conditions and construction work</td>
</tr>
<tr>
<td>1995</td>
<td>1</td>
<td>Evasion of housing development disputes</td>
</tr>
<tr>
<td>1997</td>
<td>1</td>
<td>Local construction claims against building senior people’s homes</td>
</tr>
<tr>
<td>1998</td>
<td>3</td>
<td>Handling of building claims</td>
</tr>
<tr>
<td>1999</td>
<td>5</td>
<td>Issues in classifying construction disputes, and others (AIJ Journal special edition); disputes regarding one-room system apartment houses</td>
</tr>
<tr>
<td>2000</td>
<td>2</td>
<td>Dispute regarding one-room system apartment houses</td>
</tr>
<tr>
<td>2001</td>
<td>2</td>
<td>Deficiencies as subject of construction disputes (international comparison of basic clauses)</td>
</tr>
<tr>
<td>2002</td>
<td>2</td>
<td>Disputes in construction development work</td>
</tr>
</tbody>
</table>

Note: Search results for papers containing the keyword “dispute” and “claim” (based on http://www.aij.or.jp).

Changes in the Number of Construction Disputes

The fact that Japan, with the European Union and the United States, is one of the three major construction markets in the world gives some idea of the number of construction projects being undertaken every year in the country. Although the total annual volume of construction investment has sharply declined in recent years, it still exceeds 50 trillion yen. According to Ministry of Land, Infrastructure and Transport construction statistics, in Fiscal Year 2003, the total value of completed projects undertaken by more than 272,000 contractors was 57 trillion yen. Although no statistics are available regarding the estimated number of construction sites throughout Japan, a considerable number can be assumed if projects of all sizes are considered. However, the number of construction disputes has leveled out in recent years, and amounts to only around 200–300 cases per year. The number of disputes can therefore be seen to be low in relation to the scale of the construction industry.

Fig. 1 shows the change in the number of applications to CDRCs over a 34-year period. Each bar is divided into the number of applications to the Central CDRC and the number of applications to the Prefectural CDRCs. The former category covers cases that extend beyond the borders of individual prefectures, involving comparatively large companies, whereas the latter category covers cases handled within individual prefectures, involving comparatively small companies. The number of cases involving smaller companies has clearly increased at a faster rate, a trend that is closely related to trends in construction investment. However, whereas construction investment grew rapidly during the period of the “bubble economy” in the early 1990s, there was no concomitant growth in the number of construction disputes. There was, however, an increase in the number of disputes around
1996–1998, the period when the bubble burst and construction investment decreased. This seems to be an example of conflict increasing in a period of reduced opportunity.

**Parties Involved in Dispute Cases**

Approximately three-quarters of the disputes brought before the CDRCs were disputes between owners (individuals and corporate clients) and contractors. Of these, two-thirds were disputes between individual owners and contractors. The remaining one-quarter of cases involved disputes between general contractors and subcontractors, but very few of these represented cases brought by general contractors against subcontractors. (Fig. 2).

With regard to the types of construction work that the disputes involved, the majority were disputes involving the construction of buildings. Recently, however, there has been something of a change, and there is now a tendency toward an increase in the number of disputes involving public works and miscellaneous construction projects (Fig. 3).

**Methods Used in Dispute Resolution**

The specific methods used in dispute resolution are *assen* (mediation), *chotei* (conciliation), and *chusai* (arbitration). *Assen* and *chotei* are nonbinding dispute settlement methods. In *chusai*, the settlement is left up to the committee based on an agreement between the concerned parties that they will accept the committee’s decision even if it is not to their satisfaction. Therefore, the plaintiff can ask the committee to reject an appeal made against a verdict on an item concerning which an arbitration agreement had been made. Cases that go to arbitration represent one-quarter of the total.

Over 60% of cases are resolved by *chotei*. When conciliation is employed as a method of resolving disputes, three conciliators selected from the Legal Committee and the Technical Committee of the relevant CDRC promote talks between the concerned parties to seek a resolution. More details regarding each method of dispute resolution can be found in Appendix I.

**Solution of Public-Private Contractual Disputes**

In Japan, the Ministry of Land, Infrastructure and Transport stipulates “standard public works contract terms and conditions” to be employed in public works contracts. A variety of options are available in the private sector, but “private sector association agreement terms and conditions” are most generally employed.

The methods employed to resolve public-private disputes are similar to those used in the case of disputes within the private sector. Either mediation or conciliation can be employed, and these can be undertaken either by an impartial third party selected by agreement between the parties to the dispute, or by the CDRC, based on the Construction Business Act. If neither party agrees to mediation or conciliation, or if both parties wish to discontinue mediation and conciliation, the case can be put to arbitration by the CDRC, based on an Arbitration Agreement between both par-
ties. These regulations were initially put in place because Paragraph 19, Article 1, Item 11 of the Construction Business Act stipulates that “methods of resolution of contract disputes” should be specifically documented.

The reason why these regulations have not been employed in civil court actions or civil conciliation cases is that civil construction disputes are considered to require technically specialized judgment, and should therefore be conducted by individuals with considerable professional knowledge and experience in the area of construction work to enable simple and quick solutions. However, this does not mean that these regulations can never be applied in civil suits and civil conciliation cases.

Incidentally similar rules are being applied to the terms and conditions of subcontracting contracts as established by contractors. An example is shown in Appendix II.

Japanese Understanding of Construction Disputes

An Epochal “Case” in the Development of the Japanese Concept of Construction Work Disputes

One almost legendary dispute regarding the construction of an army barracks in Nagoya in the 1870s is famous as an early construction dispute in Japan (Nagoya 1878). During this early period of the nation’s modernization from feudalism, there were few disputes, because the contract concept was not widespread. Takenaka, one of today’s major construction companies, was actually a party to this dispute, which has been termed the “Nagoya chindai (military barracks) construction work incident.” The case is so famous that even now it is regarded as a precedent-setting example for the handling of construction disputes in modern Japan. With the Imperial Japanese Army of that time acting as the owner, the construction work was commenced in 1873 (the sixth year of the Meiji Period) and was completed in the following year. The work involved a total of 30 buildings, including eight Western-style two-story barracks with tile roofing and 16 attached houses, covering a total area of 16,529 m². The value of the Western-style two-story barracks with tile roofing and 16 attached year. The work involved a total of 30 buildings, including eight and resulted in increases in costs for materials and in wages for

workmen. When construction was completed, the deficit amounted to a figure equivalent to 60% of the entire value of the contract. Takenaka continued with the construction believing that the owner (the Japanese army) would make up the deficit, but this was not the case. Takenaka took legal action, but the verdict went against the company after a series of trials that proceeded from the lower courts to the Supreme Court. While admitting that “Takenaka’s complaint is fully reasonable,” the Supreme Court of the day ruled that “Takenaka’s impolite attitude against the organization of the Imperial government over whom His Majesty the Emperor reigns cannot be allowed.”

Professor Yasuaki Kobayashi of the Ashikaga Institute of Technology indicates that “Whenever I present this story to government study groups today, it never fails to cause a stir. They find the story hard to believe. Of course, these feudalistic ideas are alien to present-day officials who initiate construction projects.”

As a result of the verdict, Takenaka had to bear a significant financial loss by itself. According to Professor Kikuoka, the former head of the Construction Industry Library, Takenaka Toemon, who was still in infancy in those days, felt that “a devil hides in a contract” (Kikuoka 1993, p. 83).

Having had to accept the judgment of the court, Takenaka decided to abandon “any public work for government organizations if the legal authorities maintain such a stance.” It was only some 70 years later (after the Second World War) that Takenaka again undertook public contract work.

The memory of this historical incident has long been imprinted on the consciousness of Japan’s construction industry. The writers consider that this incident was one of the causes of the slow pace which has been displayed in taking up the issue of construction disputes and their judicial resolution in modern Japan.

Background of Contemporary ADR in Japan and Trends in Construction Disputes

A variety of theories concerning the reason for the low number of construction disputes in Japan have been proposed by postwar researchers in the sociology of law. There have been three major types of theory (Hayakawa et al. ed., 2004, p. 43): (1) theories that consider the thinking patterns of the concerned parties including the parties to the dispute and the lawyers to be the most important factor; (2) closely related to the above, theories that consider unique characteristics of the social structure to be the most important factor; and (3) theories that consider institutional
design or the design and implementation of government policy as the most important factor. The combination of these multiple factors can in fact be indicated as having generated the above-described situation.

In western countries, with their socially and politically well-established judicial systems, ADR can be used to replace court actions, which are increasing in number; Japan, by contrast, is at a stage in which the Judicial Reform Council is attempting to ensure that the concept of resolution of disputes by law becomes widespread in Japanese society, in order to establish “rule by law” in the future. In addition to the pursuit of greater efficiency in dispute resolution, another factor behind the recent increased interest in ADR is the increased discussion of individual autonomy which has been indicated as a result of the deregulation policy of the 1990s, producing a trend in which the individuals concerned would seek solutions rather than relying on the courts to maintain order and regulate society.

The opinion also exists in Japan that the ADR concept has been firmly rooted in the country since before the Second World War, in the form of conciliation and reconciliation in lawsuits. In other words, diverse forms of public administration-focused and private sector-focused ADR already exist outside the courts. Although the western concept of ADR may have seemed alien to Japanese society, ADR in a more universal sense may be said to have reigned as a basic form of dispute resolution in Japan. These arguments probably fit most readily into the category “sociology of law,” but can also reasonably be applied to dispute resolution in the construction sector.

For a certain period, the Japanese government designated large construction projects as MPA (major projects arrangements) projects, and encouraged the involvement of foreign companies in them. This was an official measure designed to promote joint ventures and enable foreign companies to become familiar with the unique environment of construction sites in Japan. The fact that such a formal measure even existed probably indicates the uniqueness of the situation of dispute resolution and claims problems in Japan.

Careful observation of construction disputes in Japan makes the following facts clear:

1. All owners represent the private sector.
2. These owners do not issue construction orders frequently.

Accordingly, there have been few cases of disputes occurring specifically in the public works sector. In addition, in the private sector, there are few cases in which contractors have brought up disputes against client companies who favor them with repeat construction orders.

However, even in the public works sector, contractors tend to be less reticent with respect to owners when future orders are not positively expected from them. The tendency of contractors to refrain from making complaints about government authorities that institute construction projects is not because the partner is a government office, but because it is an organization which frequently awards contracts. The position of these contractors is that, given the fact that they expect further orders, deficits for which they would otherwise have raised disputes can be compensated in the next contract. It has probably been inevitable that Japanese contractors have learned to behave in a way that makes them favored by order-repeating clients. A strategy of valuing repeat public sector clients enables them to reduce risk in a market in which most work is offered on a one-time basis.

It should be noted that some Japanese public institutions issue frequent orders for large-scale construction work, and therefore represent a significant presence to the private sector construction industry. There are, in fact, too many contractors who are dependent on public works. Despite the prevailing criticism that the strongly rooted selective bid system promotes bid rigging (dango), many public sector owners are reluctant to abandon their right to nominate contractors. Contractors therefore seek to avoid falling out of favor with public sector clients. Such behavior may maintain their position with these clients, but in many cases also produces a certain feeling of friction.

The above-presented discussion has provided a broad overview of the mechanism by which disputes are suppressed in Japan, a mechanism that originates in the distortions of the public sector construction contract system. A review of the statistics regarding dispute resolution by the CDRCs, presented in the preceding sections, provides supporting evidence for the action of this mechanism.

Future Prospects

Numerous commentators in Japan believe that legal action and ADR should be employed more actively in the future to address these asymmetrical relationships generated by the imbalances of power between players in the construction sector. In this view, the structures of concealment should be eliminated, and disputes handled objectively and openly.

The Japanese construction environment is changing, in that competition is intensifying in a shrinking market, and increased profit-seeking and an increased tendency toward the assertion of rights is promoting a more adversarial relationship between all the players in projects—owners, contractors, builders, engineers, subcontractors, and suppliers. In addition, it is possible that with the enhancement of antitrust laws and the ongoing reform of the contract bid system in government institutions, the cooperative relationships that have existed in the sector and the system of governance that it has employed will break down. If this happens, we may see a situation in which ADR and court actions become more common, as previously submerged disputes between general contractors and subcontractors come to light (Fig. 4).
Even today there is an absolute shortage of lawyers who are well versed in the handling of construction contracts, and this will present an even more serious difficulty if the above-described situation should eventuate. In addition, ADR is predicated on the existence of neutral third parties who can act as facilitators, mediators, fact-finders, and arbitrators. This will also represent a problem in Japan, where the functions of construction managers, consultants and engineers, and quantity surveyors are not established to the extent that they are in Europe and the United States.

Appendix I. Detailed Definitions of Mediation, Conciliation, and Arbitration as Practiced in Japan

ASSEN (Mediation)
Mediation is a method that attempts to bring disputes to a conclusion (reconciliation) by offering the opposing parties opportunities to talk, providing a third party to confirm the points being made by both sides, and clearing up mutual misunderstandings.

Like conciliation, mediation aims at the resolution of disputes through reconciliation, but it is suitable to cases in which there are not a significant number of legal and/or technical issues. In addition, mediation is essentially a means of encouraging talks between the persons concerned, and “mediation plans” are therefore not necessarily proposed in the mediation process.

If a dispute is resolved as a result of mediation by a Dispute Review Committee, both parties concerned agree to sign a statement of reconciliation. The validity of such reconciliation contracts is equivalent to that of reconciliation under the Civil Code (Articles 695 and 696 of the Civil Code). The statement of reconciliation is therefore not considered a title of obligations under the Civil Enforcement Act, and its provisions are not enforceable.

If either party fails to act on the statement of reconciliation, a lawsuit can be brought before the courts, and a judgment obtained in accordance with the provisions of the statement of reconciliation, which will be enforceable as a title of obligations. Another method of obtaining a title of obligations is to have a notarized document with approval for enforcement formulated by a notary public.

As in the case of conciliation, no interruption of limitations applies for mediation. Therefore, claims against contractors (non-payment of debt, etc.) will be extinguished in three years, despite the fact that an application for mediation has been made. Caution must therefore be exercised.

CHOTEI (Conciliation)
Conciliation is a method that attempts to resolve disputes by offering the opposing parties the opportunity to talk, encouraging their efforts toward settlement of the dispute and, depending on the specific situation, proposing a conciliation plan for their acceptance. Conciliation differs from mediation in not only promoting talks between the two parties, but also providing the opportunity for resolution through acceptance of a conciliation plan (Article 25, Paragraph 13, Item 4 of the Construction Business Act). Like agreements reached through mediation, the validity of agreements reached through conciliation is equivalent to that of reconciliation under the Civil Code.

The second point of difference between mediation and conciliation is the number of appointed committee members. While in principle one member of the Law Committee or the Technical Committee deals with mediation, conciliation is undertaken by three committee members, and is managed in principle by either a selected team of one member of the Law Committee and two members of the Technical Committee or a team of one member of the Law Committee, one member of the Technical Committee, and one member of the Regular Committee. Mediation can therefore be indicated as being suitable for cases involving relatively fewer legal or technical issues, and conciliation for cases involving a greater amount of these.

In addition, no interruption of limitations applies for mediation in the case of conciliation, and caution must therefore be exercised.

CHUSAI (Arbitration)
Unlike mediation or conciliation, arbitration is not a method of seeking reconciliation, but involves an award made by a third party in lieu of the courts. (However, in many cases reconciliation is achieved as a result of undertaking arbitration procedures.)

Arbitration by the CDRC is the subject of stipulations in Article 25 of the Construction Industry Act to enable it to be more directly and flexibly applied while maintaining the essential characteristics of arbitration based on the ancient Code of Civil Procedure (Meiji 23, Act No. 29). The number of arbitrators is set at three (Construction Industry Act, Article 25, Paragraph 16). The right of both parties to independent selection of arbitrators based on mutual agreement is respected, but if the parties fail to reach an agreement, arbitrators will be selected by the Chairperson of the CDRC in order to expedite proceedings. Unlike mediation and conciliation, interruption of limitations applies in the case of arbitration.

[Note: Translation of information available on the CDRC homepage: (http://www.mlit.go.jp/sogoseisaku/const/funcho/funcho.htm).]

Appendix II. Standard Example of the Construction Contract Clause Which Defines the Dispute Settlement Method to Be Employed between General Contractors and Their Subcontractors

Method of solution of disputes as defined by the construction subcontract agreement clause (Example for Company A)

Article 48: (Resolution of Disputes)
If an agreement has not been reached following deliberation between the parties to this contract, or if a dispute regarding this contract has occurred between the parties, a resolution is to be sought by means of mediation or conciliation by a third party selected on the basis of agreement between the two parties, or by the CDRC based on the Construction Industry Act.

(2) When one or both parties recognize that there is no chance of resolving the dispute by means of mediation or conciliation as indicated in the preceding clause, the CDRC will arbitrate the dispute based on the agreement of both parties.

References

