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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

In Japan, construction contracts and design contracts are typically executed separately, as design contracts usually include supervisory services to ensure that the construction is in compliance with the drawings and specifications. Please see questions 1.3 and 1.4 below for further discussion on the standard forms. In practice, design, construction work, and supervisory services are often conducted by one contractor, but even in these cases, the above types of standard form are used.

A form of design-and-build contract is also used (please see question 1.3 below for the standard form), but the design and construction parts are, in fact, divided. This is because the construction part will not be effective unless the parties agree on the schedule, construction price, supervisory fee, and other conditions after the design is completed, and therefore parties can choose not to proceed with the construction part in accordance with the design-and-build contract.

As for management contracting arrangements, these are rarely used in Japan. It is more common for the employer to place an order for all of the work with one main construction contractor who, in turn, orders work from several sub-contractors who will perform portions of the work. The employer is not usually involved in sub-contracting such work. Some employers also enter into a construction/project management contract with a third-party service provider, who manages the progress of construction work and/or the overall project.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

There are six types of collaborative contract template published by the Ministry of Land, Infrastructure, Transport and Tourism (MLIT). A large number of collaborative construction contracts are based on these templates, depending on the type of construction work.

The MLIT's templates categorise joint ventures into three types: (i) a specific construction joint venture, formed to carry out large-scale and challenging construction projects by combining the expertise of several contractors; (ii) an ordinary construction joint venture, mainly formed by small to medium-sized contractors for continuous collaboration, to enhance their business management and construction capacity; and (iii) a regional maintenance construction joint venture, formed by multiple contractors to continuously carry out construction work indispensable for the maintenance of regional areas.

Each of these types of joint venture has two forms: the Type A (*kou gata*) joint venture; and the Type B (*otsu gata*) joint venture. The Type A (*kou gata*) joint venture is used when the contractors agree to contribute funds, personnel, equipment and other factors, and divide compensation based on an agreed ratio. The Type B (*otsu gata*) joint venture is used when the contractors divide the scope of work, and each contractor is responsible for completing its scope of work and receiving compensation for that work. In both types, the contractors owe a joint obligation to the employer to complete all of the construction work. All joint ventures are considered partnerships under the Civil Code.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

There are some standard forms related to construction in Japan. The features of each form are as follows:

(i) the "General Conditions of Construction Contract" (*minkan (nanakai) rengoukyoutei kouji ukeoi keiyaku yakkan*),

published by the General Conditions of Construction Contract Committee (which is a group of seven associations and organisations) ("Seven Associations GCCC"), is the form of construction-only contract used most commonly by private employers and contractors;

(ii) the "General Conditions of Design and Supervisory Services Contract" (*yonkai rengou kyoutei kenchiku sekkei kannritou gyoumuitaku keiyaku yakkan*), issued by the Research Society for General Conditions of Design and Supervisory Services Contract (which is an industry organisation consisting of four associations and organisations) ("Four Associations GCDS"), is the form of design and supervisory services-only contract used most commonly by private employers, designers and supervisors;

(iii) the "General Conditions of Design/Build Contract", issued by the Japan Federation of Construction Contractors, is a form of design-and-build contract (please see question 1.1 above for its framework); and

(iv) in some cases of domestic power plant construction, the "Model Form for Domestic Plant Construction Work", issued by the Engineering Advancement Association of Japan, is used. However, a customised engineering, procurement and construction contract is often adopted for renewable energy projects.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

The "General Conditions of Public Construction Standard Contract" (*koukyou kouji hyoujyun ukeoi keiyaku yakkan*) is typically used as a standard form for projects involving public works. Aside from government agencies and local governments, private electric power companies, railway companies, and other companies that regularly order construction work also use this form. However, in the case of public-private joint projects procuring project finance, such as public-private partnerships ("PPPs"), private finance initiatives ("PFIs") and concession projects, customised construction contracts are used rather than the above standard contract.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Under the Civil Code, an offer and acceptance create a legally binding contract. However, the Construction Business Act requires that parties to a construction contract agree on certain important matters (such as scope of work, contract price, commencement and completion dates for the construction work, payment method, mechanisms for changes in conditions, delay interest and penalty for breach of contract, and dispute resolution method) in writing, either on paper or by certain electronic means.

In practice, construction contracts are formed either by: (i) the execution of a contract between an employer and a contractor; or (ii) the submission by an employer of a written order, which is accepted in writing by a contractor.

Also, if the construction work falls into the category of "subject construction work" (*taisyou kensetsu kouji*) under article 9 of the Construction Material Recycling Act, the following matters must be agreed in writing on paper, or by certain electronic means, and exchanged between the parties to the construction contract:

(i) the demolition method of the building; and

(ii) the cost for the demolition of the building.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

There is a letter of intent ("LOI") concept in Japan, and an LOI is submitted in some cases, such as government-related requests for proposal, which can be either legally binding or non-legally binding, depending on the parties' intention or negotiation. In addition, a basic agreement is sometimes executed between an employer and contractors. The main purpose of an LOI and basic agreement is to agree on a rough statement of work and the construction price, so that both parties can start preparing plans for the project, schedule, cost, and materials. The parties will subsequently negotiate and make a detailed agreement based on the LOI or basic agreement.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

Companies, including employers and contractors, are required by statute to obtain labour insurance and social insurance for their employees. There is no statutory insurance specifically required for contractors to carry out construction work, or design and supervisory services.

Contractors usually purchase and maintain fire insurance or contractors' all-risk insurance for the executed portion of the construction work, materials and/or building equipment delivered to the construction site.

Contractors also purchase guarantee insurance to cover liability for non-conformity and non-performance of obligations when they construct new residences, to address the requirement under the Act on the Assurance of Performance of Specified Housing Defect Warranty.

Regarding design and supervisory services contracts, if the designers and supervisors are from an architectural firm, the founders of the architectural firm have a duty to make efforts to purchase and maintain business insurance that covers losses in connection with their design and supervisory services.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

The following are the relevant statutory requirements in Japan:

(a) **Labour**

With the exception of foreign workers illegally working in Japan, there is no statutory requirement regarding the legal status of those working on site. However, contractors are required to comply with the Labour Standard Act.

(b) **Tax**

(i) For construction contracts, the stamp duty is between JPY 200 and JPY 600,000 per original contract, depending on the contract price.

(ii) Real estate acquisition tax is imposed on persons acquiring land or buildings, except for certain cases of acquiring newly constructed buildings.

(iii) Registration and licence tax is imposed upon the registration of the ownership of land or buildings to perfect the transfer or acquisition of titles. Fixed asset tax is imposed on owners of real estate.

(c) **Health and Safety**

Although it is not necessary to stipulate this in any contract, all companies (not just contractors) must comply with labour laws, which require employers to protect their employees' interests in terms of health and safety. For example, the Industrial Safety and Health Act requires companies, including construction companies, to: (i) provide a system for health and safety management by appointing a general health-and-safety manager to manage overall health and safety operations; (ii) take necessary measures to prevent employees from facing dangerous circumstances; (iii) educate workers in health and safety matters; and (iv) ensure that workers undergo medical check-ups, and endeavour to provide employees with access to medical advice.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

In relation to building construction, contractors are legally required to undergo a building certification, completion inspection, mid-term inspection (for certain types of construction), fire station inspection, and public health centre inspection under the Building Standards Act, Fire Service Act and Medical Care Act, to confirm whether the building conforms to these acts. In addition, each local government enacts its own ordinances to impose additional regulations on the construction of buildings, reflecting the character of the area.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

With regard to (a), in principle, unless otherwise agreed under the construction contract, the delivery of the construction work by the contractor and payment of the construction price by the employer must be performed concurrently. Thus, employers are legally permitted to retain the full construction fee/purchase price until the full completion and delivery of the works. Under the Seven Associations GCCC, as a general rule, the employer must pay the full or any unpaid portion of the construction fee/purchase price at the same time as the delivery of the completed works.

Regarding point (b), although it is legally permissible, parties do not usually agree to the retention of the construction fee until the lapse of the defects liability period. It is common for the defects liability period to commence at the same time as the delivery of completed works, and full or final payment of the construction fee/purchase price is usually made at that time.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bonds may be used (although it is rare), with the exception of public works, where the government requires that the contractor provide a guarantee for the performance of certain construction work or other obligations. The terms and conditions of the performance bonds are determined by the government office in charge of the project, and it is usually difficult to negotiate for any change.

In cases where they are required by the government, performance bonds are typically in the form of a demand guarantee under the Uniform Rules for Demand Guarantees, published by the International Chamber of Commerce.

Private companies prefer to choose financially stable contractors, or require contractors to form a joint venture to strengthen their credibility, rather than request performance bonds.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

It is permissible, but not common, for employers to require a parent company guarantee, except for public works led by the government, for the same reason as stated in question 1.11. The terms and conditions of any such guarantees are determined by the government office in charge of the project, when required.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

If the goods and supplies are deemed to be movables separate from real estate, they belong to the supplier. Therefore, contractors can retain or remove the goods and supplies when they are suppliers, but cannot do so when employers provide those goods and supplies. On the other hand, if the goods and supplies are attached to, and difficult to separate from real estate, the goods and supplies become a part of such real estate. In this case, contractors can claim to retain the entire real estate, including the attached goods and supplies until they are paid, unless otherwise agreed.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

It is common for the designer of the building also to provide supervisory services for construction work. Under the Architect Act, only licensed architects are permitted to provide a certain type of supervisory service for construction work. Supervisors have a contractual obligation to perform the supervisory services with the due care of a prudent manager, and they must act for the benefit of the employer. If the supervisor breaches its duty of the due care of a prudent manager, then the supervisor is required to compensate the employer for losses or damages arising from the breach.

On the other hand, there is usually no contractual relationship between the supervisor and the construction contractor; hence, the construction contractor cannot claim for loss and damage against the supervisor directly. In principle, the construction contractor may claim for loss and damage in accordance with the construction contract, and then the employer may claim for compensation against the supervisor.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

As a general rule, the payment timing is determined by the parties. Thus, it is possible to have a "pay when paid" clause. However, general contractors must pay sub-contractors within a certain period of time in order to comply with the Construction Business Act (e.g., within one month after the general contractor receives payment from the employer or a higher-tier contractor or, in certain cases, within 50 days after the completion of work and the sub-contractors' request for payment).

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Parties are free to provide for the payment of liquidated damages, including cases of late completion, and can agree to an amount of compensation that is unrelated to any expected financial loss by, for example, making arrangements for the payment of a certain rate of the construction price as a penalty. In limited situations, such as a case when payment of liquidated damages is unreasonably expensive (e.g., liquidated damages of 0.33% per day/120.45% per year were deemed to be unreasonably high under a Japanese court precedent), then against public policy (Article 90 of the Civil Code), courts may revise an agreed rate or amount of liquidated damages.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Generally, the employer has the right to make changes to the works to be performed under the construction contract ("change order"). However, change orders are usually subject to the right of the contractor to demand an adjustment of the construction price and extension of the construction period, and contractors usually claim for compensation for loss or damage suffered due to the change order. The scope of the employer's right to a change order and the contractor's right to demand a price and period adjustment depend on the case, and these points tend to be intensely negotiated between the employer and the contractor.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Construction contracts rarely allow the contractor to omit any construction work. If the contractor omits any work without the employer's consent, the employer could bring a claim against the contractor and/or cancel all or part of the construction contract as a breach thereof, and may have a third-party contractor complete the remaining work.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

A contractor is obligated to complete and deliver the work to the employer in accordance with the construction contract. If the work delivered to the employer does not conform to the construction contract with respect to the kind or quality of the work, under the Civil Code, the employer may: (i) rectify the non-conformity by repairing or substituting the work; (ii) demand a reduction of the construction price; (iii) demand compensation for loss or damage; or (iv) terminate the construction contract. The statutory liability of the contractor for the foregoing is known as "Non-Conformity Liability". In practice, this Non-Conformity Liability is usually also stipulated in the construction contract.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

As a general rule, under the Civil Code, if a delay occurs and the contractor and employer are concurrently at fault, the contractor has no right to an extension of time, or to claim for expenses due to the delay. However, in many construction contracts, including under the Seven Associations GCCC, if construction is delayed for a reasonable cause, the contractor may claim for the necessary extension of time and an adjustment to the construction price.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

The statute of limitations under the Civil Code provides that, as a general rule, a claim will be extinguished by prescription if the creditor does not exercise their right within: (i) five years from the creditor's knowledge of the cause of action; or (ii) 10 years from the time the cause of action arose.

In addition, Article 637 of the Civil Code provides a special time limit for Non-Conformity Liability: the employer must notify the contractor of the non-conformity within one year from discovery; otherwise, the employer cannot request that the contractor cure the non-conformity. This period is usually extended in construction contracts (please see question 3.6 below). Furthermore, the Law Concerning the Promotion of Securing Housing Quality stipulates that contractors and sellers of new residences are liable for defects in the main structural components of a residence for 10 years after delivery (please see question 3.22 below).

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

It is common to provide a time limit and a procedure for claims for Non-Conformity Liability in the construction contract. For example, the employer is usually permitted to make a claim against the contractor within two years after the delivery of the work by giving written notice to the contractor that clearly and expressly states the intention of the employer to pursue a claim for Non-Conformity Liability, together with the specific details of the non-conformity and the basis for calculating the amount of damages.

Notwithstanding the above, regarding the non-conformity of equipment, interior finishing or decoration, furniture, or other similar items, the construction contract usually provides that the employer may not claim against the contractor unless the employer requires the contractor to cure the non-conformity immediately after inspection upon delivery. Furthermore, the employer is allowed to claim for any non-conformity which could not be discovered with due care upon inspection within one year after the delivery. Such provisions supersede Article 637 of the Civil Code. The Japanese courts generally uphold such provisions, unless there are special circumstances, such as a violation of public policy.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Construction contracts usually provide that the employer must secure the construction site, and the contractor usually has the right to demand an adjustment of the construction price and an extension of the construction period if unforeseen ground conditions affect its work. Given this practice, in principle, the employer bears the risk of unforeseen ground conditions that are not attributable to any party.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

Usually, there is no clear provision in a construction contract as to who should bear the risk of a change in law, and this is a matter of interpretation of the construction contract. In this regard, if the construction contract allows the contractor to request necessary extensions or necessary adjustments to the work or the construction price without any particular restrictions, the risk of a change in law is allocated to the employer. On the other hand, if the reasons to allow necessary extensions and necessary adjustments of the work or the construction price are limited and exclude change in law, then the risk of a change in law is allocated to the contractor.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

The designer usually insists on owning the intellectual property; for example, the Four Associations GCDS provides that the intellectual property relating to the design of the property belongs to the designer. In practice, however, intellectual property relating to the design of the property belongs to the employer or the designer on a case-by-case basis, depending on the negotiations between the employer and the designer.

On the other hand, intellectual property relating to the operation of the property is usually vested in the person who operates the property, unless otherwise provided in the relevant contract.

3.10 Is the contractor ever entitled to suspend works?

The contractor usually has the right to suspend work under certain grounds, such as a delay in payment under the construction contract by the employer, or a *force majeure* event which prevents the contractor from performing the work.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Construction contracts usually grant the right to terminate the contract, either with notice (e.g., any party may terminate the contract, provided that such party has required the breaching party to cure the breach within a reasonable period), or without notice (e.g., any party may terminate the contract immediately for certain grounds). The procedure for termination is also set out in the construction contract (including any requirement for a termination notice).

The typical grounds for termination of the contract with notice from the employer to the contractor include:

(i) the contractor failing to commence the work;
(ii) the work being materially behind the construction schedule; or
(iii) the contractor's breach of the contract.

Likewise, the employer's breach of contract is a typical ground for termination of the contract with notice to the employer from the contractor.

In addition, the grounds for termination of the contract by the employer without notice to the contractor include:

(i) if it is clear that the contractor will be unable to complete the work;
(ii) if the contractor's licence is revoked or becomes invalid;
(iii) if the contractor breaches the construction contract and the breach is not cured within a certain reasonable period of time;
(iv) if bankruptcy proceedings are commenced against the contractor; or
(v) the violation of "anti-social forces" clauses.

Similarly, the following events are usually specified in construction contracts as grounds for termination of the contract by the contractor without notice to the employer:

(i) suspension of payment by the employer;
(ii) bankruptcy proceedings being commenced against the employer; or
(iii) the violation of "anti-social forces" clauses.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

Construction contracts usually provide that the employer may terminate the construction contract at any time and for any reason, provided that the employer compensates the contractor for any loss or damage arising out of, or in connection with, such termination. The scope of the compensable loss or damage depends on

the details of the contract as well as specific circumstances, but if the contractor succeeds in proving to the court that the contract price for the unperformed work should be paid, the contractor will be entitled to compensation for such loss or damage.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Japan has a concept of *force majeure*, but its scope is usually limited to natural disasters and other natural or artificial causes for which neither party is responsible. It would be unusual for a contract to provide that there is *force majeure* merely because the contract has become uneconomic. In the Japanese market, the risk of *force majeure* is usually allocated to the employer under the construction contract – i.e., loss or damage to the work due to *force majeure* would entitle the contractor to the necessary extension of time and necessary adjustment of the contract price.

3.14 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

In general, only the employer, who is a party to the construction contract, has the right to claim against the contractor under the construction contract, and the right to claim under the construction contract does not automatically transfer with the transfer of the building. However, in practice, when the employer (including its subsequent building owner) ("transferor") transfers the building to a transferee, and the transferor has a right to claim against the contractor under the construction contract, the transferor will usually transfer its contractual rights to the transferee, including the right to claim against the contractor. This allows the subsequent building owner to make a claim against the contractor directly under the original construction contract.

3.15 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

For real estate transactions, the use of direct agreements or collateral warranties is not common in practice. Interested parties other than the employer (e.g., lenders of the employer in a construction loan project) may include covenants in their contracts with the employer that would allow such interested parties to indirectly control the construction contract.

On the other hand, in project finance practice, it is common for lenders to enter into direct agreements with the relevant main parties, including the construction contractor, to enhance the lenders' security. These direct agreements usually provide that: (i) the contractor cannot amend the construction contract without the prior consent of the lender; (ii) the lender has a right to cure the breach of the employer (i.e., borrower) if the employer fails to perform its obligations under the construction contract; and (iii) the contractor must cooperate with the lender if the lender requires the creation or enforcement of a security interest.

3.16 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

In general, P1 can set off the sums owed to P2 against the sums owed by P2 to P1, unless P1 acquires the sums owed to P2 after an attachment has been made on the sums owed by P2 to P1.

3.17 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Under Japanese law, the nature of the contractor's obligation under a construction contract is to complete the work and deliver it to the employer in accordance with said construction contract. In practice, however, since the construction contract may include non-construction obligations, such as reporting and consultation obligations, the construction contract may impose a duty of care on the contractor, in addition to the other contractual obligations and liabilities of the contractor.

3.18 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

The general principle of contract interpretation adopted by courts is that ambiguous language must be interpreted objectively, taking into account: (i) other provisions of the contract; (ii) market practice for that type of contract; (iii) the background and discussions prior to the execution of the contract; and (iv) the economic and social purposes that the parties to the contract want to achieve.

3.19 Are there any terms which, if included in a construction contract, would be unenforceable?

For commercial construction contracts, there are no typical terms that would be unenforceable. If specific terms are considered offensive to public order, such terms are unenforceable on an *ad hoc* basis due to the principle of public policy.

3.20 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

In general, the designer is liable to the employer under the design contract, regardless of whether the design contract is included in the construction contract or executed independently, for two types of obligations: (i) general default liability arising from the designer's breach of the design contract; and (ii) Non-Conformity Liability. The designer may request certain limitations (e.g., a capped amount and/or time period) with respect to general default liability, but whether the employer will agree to this depends on the employer. On the other hand, for Non-Conformity Liability, the usual limitation is that the employer can make a claim within two years from the delivery of the work (please see question 3.6 above).

3.21 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

Although there is no concept in Japan that precisely corresponds to decennial liability, the Law Concerning the Promotion of Securing Housing Quality stipulates that contractors and sellers of new residences are liable for defects in the main structural components of a residence for 10 years after delivery thereof. This statutory liability is imposed only on contractors and sellers of new residences for the purpose of improving the quality of residences.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

In Japan, parties to a construction dispute usually attempt to resolve disputes by settlement. However, if it is difficult for them to reach a settlement, the parties then: (i) apply for alternative dispute resolution ("ADR"), including mediation proceedings before the court; or (ii) file a lawsuit with the court. Even after filing a lawsuit, some disputes are referred to mediation at the discretion of the judge. According to the report on expediting trials issued by the Japanese courts in July 2021 (the "Japanese Court Report"), approximately 40% of disputes filed with the courts were resolved through judicial settlement.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

There are two ADR institutions that typically resolve construction disputes: (i) the Committee for Adjustment of Construction Work Disputes, for resolving disputes concerning construction contracts (Article 25 of the Construction Business Act); and (ii) the Designated Housing Dispute Resolution Body (Chapter 6, Section 1 of the Housing Quality Assurance Act), for resolving disputes concerning contracts for the construction or sale of residences that are covered by a performance evaluation report, issued pursuant to the Housing Quality Assurance Act.

In general, either party to a dispute may apply to the competent ADR institution for dispute resolution, and the ADR institution has the authority to conduct mediation, conciliation or arbitration procedures, which are closed to the public.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

In practice, construction contracts do not have arbitration clauses where the parties agree to resolve disputes only by arbitration, or specify which arbitration institutions and arbitration rules to follow; instead, construction contracts generally provide that the parties may submit disputes to arbitration if a separate "Arbitration Agreement" is executed by the parties. An "Arbitration Agreement" is an agreement to refer the resolution of the dispute to one or more arbitrators, and to accept any arbitration award (Article 2, paragraph 1 of the Arbitration Act). Once the arbitration agreement is in place, the parties may no longer file an action in court for the resolution of the dispute (Article 14, paragraph 1 of the Arbitration Act).

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Japan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), and Article 45, paragraph 1 of the Arbitration Act provides that an arbitral award (regardless of whether the place of arbitration is Japan or not) will have the same effect as a final and binding judgment, save for certain grounds (e.g., the arbitral award is contrary to public policy in Japan).

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

In Japan, court litigation is one of the typical dispute resolution mechanisms for construction contracts. When a lawsuit is filed, the court clarifies the issues through the complaint, answer and brief, etc., and examines evidence regarding disputed facts. Since construction-related litigation is complex and requires a high level of expertise, dispute resolution procedures, expert witnesses, or expert opinions may be utilised. The parties may appeal the judgment of the court of first instance and seek a further decision of the court by filing an appeal, and in some cases the parties may also appeal the decision of the court of second instance by filing a final appeal.

According to the Japanese Court Report, construction-related litigation is among the longest types of litigation, requiring, on average, around 20 months or more of trial time in district courts, due to the specialised expertise required and extreme difficulty of resolving the issues involved. The Japanese Court Report also indicates a high rate of appeals in construction-related litigation.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

Article 118 of the Code of Civil Procedure provides that a final and binding judgment rendered by a foreign court is valid only if all of the following requirements are satisfied:

(i) the jurisdiction of the foreign court is recognised pursuant to laws and regulations, conventions, or treaties;
(ii) the losing defendant has been served (excluding service by publication or any other service similar thereto) with the requisite summons or order for the commencement of litigation, or has appeared without being so served;
(iii) the contents of the judgment and the litigation proceedings are not contrary to public policy in Japan; and
(iv) there is a guarantee of reciprocity.

The judgment of a foreign court may, in principle, be enforced by a Japanese court as long as the above requirements are satisfied (Articles 22 and 24 of the Civil Execution Act).

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Mori Hamada & Matsumoto's construction practice extends from traditional construction transactions to complex ones involving fund structures with a special-purpose vehicle or a trust, including investment structures for overseas investors, backed by significant experience of real estate transactions. The team's work in this practice primarily includes the following: acquisition of land for construction; advising on construction-related agreements; structuring and fund formation for construction projects; and financing for construction. Recent highlights include advising an US-based data centre developer on the formation of a joint venture for hyperscale data centres, advising on hotel construction and conversion projects in Okinawa, Kyoto and Niseko, and advising on many other construction projects, including Urban Redevelopment Projects.

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