Fissurization in Japan: Overview and Analysis from a Legal Perspective

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Introduction

In recent years, vast quantities of capital have been concentrated in fund management companies, and the businesses in which they invest are expected to "produce more profit in less time." In response to this, "cutting off divisions not directly related to core competency" has emerged as a corporate strategy. Innovations in methods of communication technology as well as the management and monitoring of workers have made it possible to direct and supervise workers remotely, and a byzantine variety of contractual and relational arrangements have been used between business entities and their workforces within the same workplace. This phenomenon, known as "the fissured workplace," has been comprehensively analyzed from the angles of sociology, legal studies, and economics in David Weil's *The Fissured Workplace*.

In *The Fissured Workplace*, the above-mentioned changes in corporate strategy and innovation in worker management technologies lead to the involvement of multiple business entities as participants in labor relations, which in turn leads to uncertainty vis-à-vis the applicability of labor laws and the identity of actors that must bear responsibility as employers. Such circumstances cover changes not only in the "workplace" or the "establishment" but in the entire organization engaged in business itself, therefore the phenomenon could also be called "the fissured business organization." However, this kind of "fissuring" of the workplace or business organization has been apparent in Japan for many years. This paper first attempts to overview fissured workplace phenomena in Japan by presenting a time sequence-based look at such phenomena identified as problems in labor legislation and judicial precedent. The author then focuses on the judicial and legislative extension of employer's responsibility in the fissured workplace context to ascertain to what extent Japanese labor law has been addressing fissurization phenomena by coping with the boundary of legal entities.

I. Overview of Fissurization Phenomena Dealt with in Legislation and Case Law

Japan's labor legislation after the Second World War is built around the labor contract relationship. In principle, protection provisions in labor laws are applied only to the parties of labor contract relationships. Therefore, in general, the provisions in current labor laws are not applied to parties in a "contracting relationship".

However, historically speaking, whether the parties are connected by a labor contract

relationship or not is not the sole criterion for determining the scope of application of the provisions of labor laws. Under the Factory Act enacted before the Second World War, as long as workers were involved in operations at a "factory," the Factory Act was deemed to be applicable regardless of whether they worked under an "employment relationship" or "contracting relationship."

The following will explain a system under the Factory Act called the "foreman contracting system" to provide a historical background. It will then introduce contract formats such as subcontracting, worker dispatch, and franchising, with their development and legal treatment in Japan, as workplace fissurization phenomena that have occurred under the modern labor law system built around the labor contract relationship.

I-1. The foreman contracting system

Under current labor laws, even if both relationships involve the use of manpower, "employment relationship" and "contracting relationship" are clearly distinguished as a relationship involving the provision of labor under instructions and orders and a relationship that is focused solely on the "results" of labor. However, a look at the actual circumstances of plant labor prior to the Second World War shows that employment and contracting were intertwined under an employment format called the "foreman contracting system." Accordingly, the dichotomy did not have practical viability, as the foremen who undertook work from a factory owner distributed it to factory workers under the control of them. Those workers were all factory workers deployed by the factory owner, and their work was based on contracting relationships rather than employment relationships. In light of such practices, under the Factory Act,[1] Japan's first full-scale labor legislation prior to the Second World War, if a person was engaged in labor at a factory and his operations were, by nature, the work of a factory worker, the worker would be handled as a factory worker employed by the factory owner, regardless of whether a direct employment relationship existed between the factory owner and the factory worker or a foreman (contractor) existed in between the two sides.[2] Thus, restrictions on the employment of minors, restrictions on the working hours of minors and women and obligation on the part of the business operator to provide compensation to workers or survivors with regard to work-related accidents were administered to be applicable regardless of whether workers worked under a contract for labor or under a contracting relationship so long as those workers were involved in operations at a factory[3].

After the Second World War, the Factory Act was fundamentally reformed to a Labor Standards Act to be applied to all industries and all business categories, including manufacturing plants. Under this new legislation, whether or not a person could be described as a "worker" under an employment contract became established as a determining criteria when making judgments concerning the applicability of labor standards.

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[1] Promulgated in 1911 and executed in 1916.

[2] This case is a kind of "fissuring of the workplace phenomenon" because the worker is in an employment relationship with a contractor who has entered into a subcontracting contract with the business operator.

[3] For more on this topic, see Minoru Oka, "*Kōjō Hō Ron*" (Theory of the Factory Act) [3rd Edition] (Yuhikaku, 1917) p.287 and thereafter.

I-2. Multilayered subcontracting relationships in the construction industry, etc.

In the construction industry, even since before the Second World War, several subcontracting businesses had been cooperating with each other by dividing up the work of a single construction site in a multilayered fashion. Thus, the Workers' Compensation Act of 1931 imposed responsibility for workers' accident compensation on the prime contractor, which stood at the top of such multilayered subcontracting framework. This responsibility applied even to industrial accidents suffered by subcontractors' workers when accidents occurred at the prime contractor's construction site. This stipulation was succeeded by Article 87 of the Labor Standards Act after World War II, and continues to be applied to the construction sites.

Also under the industrial safety and health regulation, it has long been the responsibility of the prime contractor of a construction project to take safety measures to prevent industrial accidents when engaging in operations in which the prime contractor and subcontractors work together at the same worksite. Such special regulation will be discussed in II-2.

I-3. Business process contracting in the workplaces of ordering companies (in-house subcontracting)

The practice by which a company, in order to execute its business, contracts another business operator to handle a portion of its processes (i.e., outsourcing) has been commonly used for many years. In such business process contracting, the contractor itself frequently supplies the labor; however, it is also often the case that the contractor hires employees to engage in the performance of the work. Thus "business process contracting"—whereby ordering companies and contracting companies enter into a business process contracting agreement and then workers employed by the contracting company execute the contracted process under the instructions and orders of the contracting company at the work site of the ordering company—falls under a typical contract of "subcontracting" on the Civil Code. So long as business process contracting is practiced in line with the manner stated in the agreement, responsibility as the employer rests solely with the contracting company in terms of the labor contract as well as the Labor Standards Act. In principal, no employer obligations are attributed to the ordering company.

However, in Japan, labor supply undertakings that have workers engage in labor under the instructions and orders of another person based on a supply contract had been strictly regulated under the Employment Placement Act from before the Second World War. Later it became completely prohibited by the newly enacted Employment Security Act of 1947 amid reforms for democratization following the war.[4] Accordingly, business process contracting became subject to Article 4 of the Ordinance for the Enforcement of the Employment Security Act, which stipulates that a person who supplies a worker to work for another person based on a contracting-out agreement is regarded as being engaged in a labor supply undertaking prohibited by the Act, unless all of the following four

4 Article 44 or the Employment Security Act. It should be noted that worker dispatch was established as being outside the scope of labor supply when worker dispatch was made legal by the 1985 act to be mentioned later.

requirements are satisfied.

1) The person assumes all responsibilities and liabilities, both financially and legally as a business operator;
2) The person gives directions to and provides supervision of the worker;
3) The person bears all employer's responsibilities provided by law; and
4) The work contracted out does not merely involve the execution of physical labor.

If the business process contracting meets all four of these requirements, no employer obligations were attributed to the ordering company. However, even in such cases, if the contracting company exclusively undertakes work for a particular ordering company, and if all wages of workers employed by the contracting company are covered by contract fees provided by the ordering company, the contracting company and its employees are, in actuality, placed in an extremely weak position in their negotiations with the ordering company, and it is particularly so in the case of in-house subcontracting, where contracted work is executed in the workplace of the ordering company. In this case, the ordering company may lower the subcontract price and even cancel its order with the subcontracting company, when another business that will accept work at a lower price exists. If such a case occurs, the workers of the subcontracting company (or their union) may request negotiations with the ordering company asking for consideration vis-à-vis the subcontract price or continuation of the order. In such cases, the question arises whether or not ordering companies cannot be deemed as an employer which is obligated to engage in collective bargaining under Article 7 of the Labor Union Act with the union of subcontracted workers. Such a question has frequently been discussed in Labour Relations Commission (LRC) orders and judicial precedents. This will be discussed in II-5.

I-4. Worker dispatch

Until the Worker Dispatching Act was enacted in 1985, worker dispatching by temporary employment agencies was uniformly prohibited under Article 44 the Employment Security Act as one form of labor supply business prohibited by the Article. In practice, however, there was a sharp increase in worker dispatch businesses from the mid-1970s into the 1980s after the first Oil Crisis of 1973. This increase occurred in the operation of information equipment, cleaning and maintenance of buildings and other services requiring special skills, amid increasing demands, on the part of companies, to enhance outsourcing to reduce payroll costs and, on the part of female workers, to seek employment opportunities compatible with their family responsibilities.

Although worker dispatching before the 1985 Act was mostly conducted in the form of business process subcontracting, ordering companies which received dispatched workers in their undertakings tended to make certain directions or supervisions on those workers in the execution of subcontracted work. Thus, questions arose frequently regarding whether or not such worker dispatching practices violated the ban on labor supply businesses. Moreover, there was the problem of uncertainty regarding where legal responsibility under labor protective laws should rest, since the receiving companies that actually used the labor were not employers in terms of labor contracts.

The Worker Dispatching Act of 1985 was enacted, accordingly, under the principle of revising the policy of uniformly banning labor supply business and of permitting worker dispatch businesses for limited types of work (jobs) while at the same time placing those newly permitted businesses under appropriate regulation. On the one hand, the Act placed strict regulations on "temporary employment-type" dispatch businesses whereby each time

a business operator dispatches workers who are registered as desiring dispatch employment, the operator hires those workers for the required dispatch period only and then dispatches them to other companies. In light of the instability of dispatch employment under this type, the Act required such type of dispatch businesses to obtain a "license" from the Minister of Labour (currently the Minister of Health, Labour and Welfare) enumerating reasons for disqualification of business operators (Article 6 of the Worker Dispatching Act). On the other hand, in the case of "stable employment type" dispatching whereby only workers employed under non-fixed-term contracts or for periods in excess of one year are dispatched, dispatch business operators are merely obligated to notify the Minister of Health, Labour and Welfare to engage in such type of dispatch business.

Thus, although worker dispatch is, in terms of its characteristics, the supply of workers to another, it was expressly excluded from "labor supply," which is banned by the Employment Security Act, in terms of its definition. On the other hand, purposefully, repeatedly, and continuously having a person under one's own control provide manpower for a third party under the instructions and orders of that party in a form that does not fall under the definition of "worker dispatch" and, therefore, continued to be prohibited as "labor supply business."

The Worker Dispatching Act initially adopted a "positive list" method, whereby the types of work for which dispatch is permitted were specifically listed. However, the types of work were in principle liberalized with progressing deregulation in the 1990s, and a 1999 revision of the act shifted to a "negative list method" whereby only prohibited types were listed. Moreover, manufacturing industries, which had been suffering from competition with their Asian counterparts using less expensive manpower, demanded that manufacturing dispatching, a practice that had been banned, be allowed. Their demand became reality in 2003. Such deregulation led to a dramatic increase in the use of dispatching; however, it was those dispatched workers who were hit first by employment adjustment in the wake of the global recession that was sparked by Lehman Brothers' collapse in the autumn of 2008. At that time, enterprises using dispatched workers first cancelled their worker dispatch contracts with dispatching firms and removed dispatched workers from their production sites. Many dispatched workers were then dismissed by the dispatching firms and became unemployed, even though their labor contracts with those firms had not yet concluded. Such actions—known as *haken-giri* ("Cutting off dispatched workers")—were widely reported in the media. Coupled with the criticism against the increase in the practice of day worker dispatching, claims that deregulation had gone too far mounted in the media. As a result, the Worker Dispatching Act was revised in 2012 to tighten regulation in the following respects:

- Dispatches on a daily basis or for periods of less than two months (so-called "day worker dispatching") are prohibited.
- Dispatching of workers inside group enterprise shall not exceed 80% of dispatches performed by a particular dispatch operator.
- In cases of illegal dispatch, it shall be deemed that the firm receiving the dispatched worker offered direct employment to the dispatched worker under the labor conditions having been provided by the dispatching firm.[5]

[5] The regulation concerning the deeming of illegal dispatch as an offer of direct employment was executed on October 1, 2015; the other revisions were executed on October 1, 2012.

A further revision of the Worker Dispatching Act was made on September 30, 2015 to strengthen protection of dispatched workers in the following respects:

- All worker dispatching undertakings are placed under the license system, regardless if they engage in temporary employment-type or stable employment-type dispatching.
- The period during which a worker can be dispatched to the same establishment is redefined to three years, in principle.
- Dispatching firms must see to it that dispatched workers are directly employed by the recipient firm or continue employment with the dispatching firm as a dispatched worker after the dispatch to the firm concludes due to the expiration of the three year limitation stated above ("employment security measures").
- Dispatching firms are obligated to execute career development measures, such as provision of education and training and career consulting, to the dispatched workers they employ.
- Dispatching firms and firms receiving dispatched workers must see to it that dispatched workers receive working conditions in balance with those of workers who engage in similar work at the receiving firm.

As will be discussed in II-5(2), it should be noted that several judicial precedents and Central Labour Relations Commission (CLRC) orders of recent years have recognized employer status under the Labor Union Act for firms that receive dispatched workers.

I-5. Individual contracting

Since the Labor Standards Act was enacted in 1947, it has always been contested whether workers such as foremen individually participating in construction projects or truck drivers engaged in transport operations for a specific company using his or her own truck fall under "workers" to be protected by the Act since they tended to be under the arrangements of independent contractors. Labor inspection offices and the court have been dealing with the cases by examining the substance of work relationships, and there are two Supreme Court precedents both of which denied worker status for a truck driver[6] and a foreman carpenter[7] in the context of the cases.

In recent years, use of individual contractors has increased for services associated with companies' core competencies, giving rise to the cases in Labour Relations Commissions regarding the refusal of collective bargaining by an ordering firm vis à vis a union organizing such contractors. Disputed were the status of "worker" under the Trade Union Act in regard to technicians that engage in repair work on household water-use equipment in kitchens, bathrooms and toilets;[8] workers that provide express courier service by bicycle or motorbike;[9] and technicians that visit sites to repair audio equipment.[10]

Three rulings by the Supreme Court in 2011 and 2012[11] may be cited to provide a

[6] Chief of Yokohama Minami Labor Standards Office Case, First Petty Bench 11/28/1996, *Rohan* No. 714, p. 14.
[7] Chief of Fujisawa Labor Standards Office Case, First Petty Bench 6/28/2007, *Rohan* No. 940, p. 11.
[8] The State and CLRC (INAX Maintenance) Case, Third Petty Bench 4/12/2011, *Rohan* No. 1026, p. 27.
[9] Sokuhai Case, Tokyo District Court 4/28/2010, *Rohan* No. 1010, p. 25.
[10] The State and CLRC (Victor) Case, Third Petty Bench 2/21/2012, *Minshu* Vol. 66 No. 3, p. 955.
[11] The State and CLRC (New National Theatre Foundation) Case, Third Petty Bench 4/12/2011, *Minshū* Vol.65 No.3 p.943; the State and CLRC (INAX Maintenance) Case, Third Petty Bench 4/12/2011, *Rōdō*

framework for the actual scope of workers under the Labor Union Act. According to these rulings, basic elements for judgment are (1) whether the persons are incorporated, as a labor force, in a business organization of the enterprise for which they are supplying labor; (2) whether they are subject to unilateral and routine decisions on the contents of contractual relations; and (3) whether remuneration for their services has the aspect of compensation for their labor. Supplementary elements for judgment are (4) whether they are in practice obligated to respond to work requests, and (5) whether they provide labor under direction and supervision in the broad sense, and whether and to what extent they are under constraints in the location and time of work. A final element that works negatively on worker status is (6) the existence of entrepreneurship aspects such as the ownership of machines and other equipment, and the discretion to make profits or losses of their own[12]. In the cases of individual contractors mentioned above, the "worker" status was recognized by the Labour Relations Commissions, of which decisions were supported by the Supreme Court in the above stated rulings.

Contracting has been used for many years mainly as a means to avoid employer's responsibilities under protective labor law and social security systems. However, the active use of individual contractors for services that concern companies' core competencies appears to be a very recent phenomenon which may be understood in the following context.

When a task in which a labor is to be engaged is closer to a company's core operations, that labor must possess a higher work standard and maintain tighter collaboration with the company. However, because providing direction and supervision in the contractor's execution of the work from a remote location in real time was difficult, which thus also made it difficult to ensure a high work standard, entrusting core tasks to contractors was virtually impossible. However, recent advancements in information and communication technologies and the preparation of detailed work processing manuals have made it possible to control workers in remote locations in real time and, by extension, to utilize contractors for core tasks.

I-6. Franchising

In Japan, the franchise industry has largely shown continuous strong growth as a new form of business since the 1990s. The growth of convenience stores is receiving particular attention within this trend.

In the case of the United States, inferiority of the labor conditions of workers employed by franchisees to those of workers in directly managed stores is seen as a problem. On the other hand, in Japan, those that are hired based on the authority of the store manager are ordinarily part-time workers, regardless of whether the store is a directly-managed store or franchisee operating one. Given this, the problem of lower labor conditions for peripheral workers under the organizational format of "franchising" is largely seen as a problem of part-time workers. Additionally, because regulations that guarantee labor conditions, including the minimum wages, extend to workers who are

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Hanrei No.1026 p.27; and the State and CLRC (Victor) Case, Third Petty Bench 2/21/2012, *Minshū* Vol. 66 No.3 p.955.

[12] See Ministry of Health, Labour and Welfare, "Labor Relations Research Group Report (On the Criteria for Judging Worker Status under the Labor Union Act)" (http://www.mhlw.go.jp/stf/houdou/2r9852000001juuf-att/2r9852000001jx2l.pdf), p.10 ff.

employed by franchisees, the problem of lower labor conditions based on the specific circumstance of "franchising" has not been viewed as one of great importance.

However, the labor conditions of convenience store managers who are given contractual status of "franchisees" have recently come into the spotlight. The reason for this is that convenience store managers are told by their companies that they are not "workers" because they signed a service agreement, despite the fact that in reality they work in the same way as ordinary workers. As a result, there are many cases in which managers are made to work under harsh conditions. Against this backdrop, there has been a trend whereby such convenience store managers join small local unions in their regions to demand better conditions. On March 20, 2014, a Labour Relations Commission order was issued stating that convenience store managers are workers in terms of the Labor Union Act.[13] Relying on the criteria established by the Central Labour Relations Commission and Supreme Court, specifically, the Commission studied the following elements individually and in detail, and ruled that despite being business operators in a location separate from the company, member store managers have weak bargaining power that should be protected under collective bargaining laws and accordingly correspond to "workers" under the Labor Union Act.

Incorporation into a business organization

(1) Standardized content of contractual relations unilaterally decided by the franchiser (inequality in bargaining power)
(2) Nature of remuneration as compensation for labor
(3) Obligation to respond to work requests
(4) Provision of labor under direction and supervision in the broad sense, and the existence of certain constraints in the location and time of work
(5) The lack of clear entrepreneurship aspects

Compared to individual and multilayered subcontracting, franchising appears to be a relatively new form of business. The reason for this is that maintaining a brand's overall image makes it necessary to maintain a working standard among workers who work under franchisees. The creation of detailed work training manuals to achieve this as well as the preparation of agreements that spell out responsibilities if a problem occurs require a high level of technical capability. Meeting such requirements has only become possible recently.

In relation to franchising, in Japan, there is another type of commercial arrangements by which multiple retail stores do business within the same store building. Such a facility is called a "cooperative department store." Maintaining brand image is an important consideration in the franchise industry; however, in the case of a cooperative department store, the companies that open stores have their brands and the department store providing the place and facilities also has its own brand. In such cases, the workers who work at the stores are obligated to abide by the regulations of both the company that operates the store and the department store, and there are times when the assignment of worker status and employer's responsibility becomes problematic. To illustrate as an example, say Brand C store opens stores in Brand A department store and Brand B department store. However, the Brand A department store declares that it will open for business on January 1, while the Brand B department store says it will begin sales on January 3. In this case, despite

[13] Okayama Prefecture Labour Relations Commission 2010 (*Fu*) No. 2 Unfair Labor Practice Relief Petition Case Order
http://www.pref.okayama.jp/uploaded/attachment/182426.pdf.

working for the same Brand C store, workers assigned to the Brand A department will be obligated to work beginning on January 1, while those assigned to the Brand B department store will begin work on January 3. In this sense, cooperative department stores can decide, even if only partially, the labor conditions of workers who are employed by the stores that do business in them.

I-7. Subcontracting alliance ("*Keiretsu*") and offshoring

As was mentioned previously, subcontracting has been used in Japan since before the Second World War, and it has served as a buffer during a great number of international economic fluctuations. Particularly in the case of manufacturing, it has been pointed out that an important characteristic of Japan's manufacturing industry is the lowness of its ratio of in-house production compared to that of the United States.[14]

In a number of manufacturing sectors, of which the automobile manufacturing industry is representative, a division of labor-based approach through subcontracting relationships extending over multiple stages and levels was used for the production and processing of components and fittings that are not made in-house. Specifically, production and processing tasks are divided up among subcontractors at the primary, secondary, tertiary, and even quaternary levels. The large enterprise standing at the top of this subcontracting system mainly devotes itself to final assembly.

Within this kind of subcontracting system, some large enterprises standing at the top of the division of labor have become oligopolistic. They engage in long-term business with a number of small and medium-sized subcontractors (exclusive subcontractors) that mainly make their parts, thus creating a relationship resembling a "one-to-many" pyramid. While doing business with several subcontractors that make the same parts, lead companies have constantly reorganized their subcontracting in order to reinforce their own competitiveness. Among other steps, this has involved strengthening their relationship (building an alliance) with prominent subcontractors and cutting ties with subcontractors that have difficulty with responding.

This "*Keiretsu*" or subcontracting alliance system has advantages for parent companies in that it conserves fixed capital and labor, makes it possible to procure parts below the external labor market price, and allows flexible adjustment of the internal-external manufacturing ratio. For subcontractors, however, it exposes them to fierce competition with other subcontractors, and pressure from the parent company to engage in in-house production, and it requires that they be as flexible as possible in responding to various demands from the parent company so that they may continue doing business with the parent company. Consequently, companies nearer to the bottom of this layered subcontracted production structure pay lower wages. This produces a structure of hierarchal wage disparities.

The mechanism that moderated wage disparities between large enterprises and subcontractors had been the spring wage negotiations ("*Shunto*") that take place between March and April of each year. Although actual wage negations themselves take place at the employer-company union level, these negotiations have been coordinated and linked across industries through the setting of wage increase targets within an industry or throughout all industries by industrial union federations or trade union national centers as well as the

[14] Solow, M. and John C. Scott, Made in America, Cambridge, Mass., MIT Press. 1989.

setting of negotiation schedules within or among industries on the union side, and through the coordinated setting of negotiation schedules between or among industries on the management side. Additionally, the wages paid by major enterprises within each industry made their influence felt in company wage negotiations through the industry hierarchy. The *Shunto* wage-increase patterns thus spread to small and medium-sized enterprises to a significant extent coupled with the assistance of shortage of labor in overall national economy.

The *Shunto* system was extremely successful as a mechanism for extending wage increases across industries and firms during Japan's period of high economic growth. However, following the collapse of the "bubble economy" and the intensified globalized competition, the mechanism's effectiveness to spread wage increases across firms and industries weakened significantly due to the differences between winning and losing firms as well as deterioration of the labor market for job-seekers.

In recent years, much of the production and processing of components and fittings that traditionally took place in Japan has moved to overseas manufacturing bases as Japanese manufacturing expands internationally. As a result, the supply chain for Japan's industry now crosses international borders. Many subcontractors that became exposed to fierce competition with overseas rivals as a result now do business with multiple parent companies to secure the volume of orders they need. Consequently, rather than manufacturing narrowly defined parts mainly for a single company, they now provide specialized technical assistance to end-product manufacturers to meet a variety of purposes. Subcontracting companies that successfully made this switch in roles have become "specialized processing companies" possessing a number of clients and gained the ability to do business with large enterprises on an equal footing. At the same time, the corporate relationship between specialized processing companies and client companies has also shifted from a pyramid-type relationship with large enterprises at the top to a network-type industrial organization with horizontal and equal links. As a result, the subordinate relationships that subcontracting companies had with large enterprises are weakening and new interdependent relationships as equal business partners are emerging.[15]

As companies move low-added-value parts manufacturing and assembly offshore to low-wage developing countries, the labor conditions of workers working at overseas production sites that are now part of the supply chain have also become a matter of concern. However, unless there are exceptional circumstances, Japanese labor laws are not applicable to labor issues in foreign countries. As an example, there was a case in which the union of an overseas local subsidiary of a Japanese company joined an industrial union in Japan in connection with a labor dispute in the office of that subsidiary. The industrial union then approached the Japanese headquarter company with a request to engage in collective bargaining to settle the dispute but was refused. The industrial union responded by filing a complaint against the Japanese company claiming that its refusal to engage in collective bargaining constituted an unfair labor practice. However, the Central Labour Relations Commission ruled that the case essentially concerned labor relations in a foreign country in which Japan's Labor Union Act did not apply and, therefore, that the case was

[15] For more on this topic, see Gendai Kigyo Kenkyukai (ed.), "*Nihon no Kigyo-kan Kankei: Sono Riron to Jittai*" (inter-corporate relations in Japan: theory and reality) (Chuokeizai-sha, 1994) p. 175 and thereafter; and Kenichi Imai and Ryutaro Komiya, "*Nihon no Kigyo*" (Japanese enterprises) (University of Tokyo Press, 1989) p. 163 and thereafter.

outside of the CLRC's jurisdiction.[16] The ruling was subsequently endorsed by the court in its judicial review.[17]

II. Extension of Employer's Responsibility in the Fissured Workplace Context

As described above, the main problems within the fissuring of workplaces phenomenon in Japan were the concept of "worker," the concept of "employer," and the extension of employer's responsibilities in the area of industrial health and safety. Leaving explanation of the problems concerning extension of employer's responsibilities in the area of industrial health and safety and the concept of "worker" to that provided above, the following will present the concept of "employer" in terms of labor contracts and in terms of the Labor Union Act, with emphasis on the concept and its extension in line with the problems and concerns addressed by this seminar. It will then present legal principles for expanding employer's responsibilities beyond the scope of judicial personality.

II-1. The issue of extending employer's responsibility under individual labor relations

The most basic concept of the "employer" under individual labor relations law is that of the employer under a labor contract. The definition given in Article 2 paragraph 2 of the Labor Contract Act is that "The term 'employer' as used in this Act means a person who pays wages to the workers he/she employs."

In this regard, the employer status of someone who is not formally one of the parties to a contract sometimes causes problems. Specifically, these include cases of tripartite labor relationships such as the acceptance of dispatched workers or subcontracting relationships, in which a third party to the labor contract appears to be exhibiting employer-like functions but escaping from employer's responsibilities. Similarly, there are cases where, as in a parent-subsidiary relationship, the subsidiary company as a direct contractual employer is controlled by another corporation, thus influencing the subsidiary's labor relations.

II-2. Statutory extension of employer's responsibility under individual labor relations

It should first be mentioned that there have been a few statutory responses to the need to extend employer's responsibility under the labor contract to the employer-like third party.

The first is the imposition of quasi-employer responsibilities under the Industrial Safety and Health Act. The Labor Standards Act originally included provisions in Chapter 5 "Safety and Health," imposing several obligations and systems of safety and health management on employers. In the process of high-level economic growth from 1955 onwards, however, major changes occurred in the labor environment, in terms of the innovation of machinery and equipment, intensification of work, and handling of new

[16] Toyota Philippines Case, CLRC 12/6/2006, *Meireishu* 136, p. 1258.
[17] Tokyo High Court 12/26/2007, *Rokeisoku* No. 2063, p. 3.

hazardous substances. This led to an increase in both the risk of industrial accidents and accident victims. To address this situation, the Industrial Safety and Health Act was enacted in 1972 as a comprehensive law aimed at preventing work-related accidents. Characteristic among the provisions of the new Act is that the obligation to take certain measures to prevent accidents or health impairment from occurring in the workplace is imposed not only on employers under labor contracts, but also on the manufacturers, orderers and leasers of hazardous machines or equipment, or harmful materials. Especially remarkable in the fissured workplace context is the special regulation to prevent hazards in the workplace involving multilayered subcontracting. Namely, the prime contractor must give necessary guidance so that related subcontractors do not violate the Industrial Health and Safety Act. The prime contractor in construction and shipbuilding projects, in particular, must take various measures to prevent industrial accidents from occurring as a result of workers of the prime contractor and subcontractors working together in the same workplace (Articles 29 to 34 of said Act). [18]

The second is the special arrangement concerning the employer's responsibility for industrial accident compensation in construction projects. Article 87 of the Labor Standards Act prescribes that, in construction projects executed with multilayered subcontracting, the prime contractor shall be deemed to be the employer responsible for compensating for work-related accidents occurring during a project. The Act further states that the prime contractor may conclude a written agreement with one of the subcontractors to assume responsibility for compensation. In such a case, the Act stipulates that both the prime contractor and the subcontractor assume joint responsibility for compensation.

The third is a partial extension of the employer's responsibilities under protective labor legislation to recipient firms in a worker dispatch setting. As previously explained, under the Worker Dispatch Act, the dispatching firm in principle assumes the employer's responsibilities under the Labor Standards Act, the Industrial Safety and Health Act, and others in relation to the dispatched workers. The reason is, of course, that it is not the recipient firm but the dispatching firm that is the employer under the labor contract with dispatched workers. Nevertheless, the Act imposes certain regulations in the Labor Standards Act and others solely or cumulatively on the accepting firm, as responsibilities in actually using the manpower of dispatched workers under its direction and supervision. For example, the employer's responsibilities to abide by the limit of daily and weekly working hours and to provide daily rest periods and weekly rest days are imposed solely on the recipient enterprise. The responsibilities to give equal treatment to workers in terms of working conditions, irrespective of their nationality, religion, creed and social origin, and to men and women in terms of wages are imposed on both the dispatching and recipient enterprises.

II-3. Extension of employer's responsibility under the doctrine of denying the legal entity of the direct employer

In the triangular settings of business process contracting or parent-subsidiary relationships, there are cases in which the business management and labor relations of the

[18] Such measures include the establishment and administration of consultative organization carrying out liaison and adjustment between related operations, conducting inspection tours of places of operation, and providing guidance and assistance regarding education conducted by related subcontractors for the safety and health of workers.

contractor or subsidiary company are so greatly dominated by the client or parent company that the contractor or subsidiary company appears to be part of the corporate organization of the client or parent company. In such a situation, one can argue for the doctrine of denying the legal entity of the contractor or subsidiary company vis-à-vis the client or parent company, thereby deeming workers employed by the former company to be those employed by the latter company.

More concretely, in parent-subsidiary relationships, there are cases in which the parent company completely dominates the decisions of the subsidiary company and comprehensively controls its operations. In this context, the employment relationships and working conditions of workers in the subsidiary would be completely dominated by the parent company. In such a situation, if the workers of the subsidiary find that the subsidiary, as their direct employer, has been dissolved by the parent company, that wages for work already done are not yet paid and workers are subjected to economic dismissal, they may wish to pursue liability for unpaid wages or unfair dismissal against the parent company.

According to established case law of the Supreme Court, the status of a corporation as an independent legal entity can be denied when the substance of the corporate organization is a mere shell as a legal entity, or when the corporate organization is abusing the legal entity for unlawful purposes. Applying this general doctrine, where a subsidiary corporation is placed under the parent corporation's comprehensive and complete control through the latter's holding all of the subsidiary's shares, dispatching of officers to run the subsidiary, and exclusive business relationship with the subsidiary, and the parent exercises tight control over the subsidiary's decisions on wages, working conditions and other personnel matters, the employees may argue that the legal entity of the subsidiary company is a mere shell vis-à-vis the parent company, and, therefore, that the subsidiary company should be deemed to be a business branch of the parent company. By so arguing, they can contend that they should legally be deemed to be in a labor contract relationship with the parent company. They may thus be able to claim unpaid wages against or employment relations with the parent corporation.

In the setting of business process contracting, on the other hand, there are also cases in which a contractor company is wholly dependent on the client company as its exclusive contractor. The contractor company is doing nothing but the businesses contracted out by the client company, solely within the facilities of the latter company. Contractual conditions are unilaterally decided by the client company, which frequently puts pressure on the contractor company to reduce its workers' wages and thus save the cost of contracting. The client company can also make contracting workers perform their work together with its own employees, and can issue directions to the contracting workers. In such a situation, if the client company decides to replace the contractor company with another firm proposing less expensive and more efficient contracting, the workers may lose their jobs due to the termination of business process contracting. The workers of the contractor company may claim labor contract relations with the client company by relying on the doctrine of denying legal entity. Generally speaking, however, it is difficult to apply the doctrine to contractual relations unless the client company is at the same time the parent company of the contractor company.

II-4. Extension of employer's responsibility under the theory of the implied labor contract

The next theory that is useful for extending the employer's responsibility under a

labor contract is the theory of implied labor contracts. According to case law, implied labor contract relations can be recognized between an enterprise and a worker who are not in an explicit labor contract relationship, but are in fact in a relationship in which the worker is providing labor for the enterprise and the enterprise is paying wages to the worker as remuneration to that labor. To ascertain an implied labor contract relationship, it is not sufficient that a worker is providing labor under the direction and supervision of an enterprise, according to case law. The worker has to identify the enterprise directing and supervising his or her labor as the employer who is paying wages in return for that labor.

In parent-subsidiary relations, for example, this theory can be workable in cases when there is almost no independence of the subsidiary in business operations as well as in personnel management, and, accordingly, the subsidiary could be recognized merely as a part of the parent's business organization. In such cases, the workers of the subsidiary may consider that they are actually working for the parent company and that the wages they are receiving are paid by the parent company as remuneration for their work for the parent company. These are also cases in which one can rely on the doctrine of denying the legal entity of the subsidiary company. In the parent-subsidiary setting, workers of the subsidiary more often resort to the doctrine of denying legal entity than the theory of implied labor contract relations.

The theory of implied labor contract relations is also referred to in cases of worker dispatch and business process contracting. Namely, when dispatched workers lose their jobs due to the termination of worker dispatch agreements between dispatching and recipient enterprises, they may criticize the callous attitude of the recipient enterprise and may even claim the existence of labor contract relations with the recipient company. Such an attempt will not be successful unless the dispatching company can be regarded in fact not as an independent business entity but as a mere manpower office of the recipient company performing recruitment of workers on its behalf.

The above-mentioned workers of a contractor company who lose their jobs due to the termination of an exclusive contractual relationship between the client (recipient) company and the contractor company may also contend that real labor contract relations can be found between them and the client company, in accordance with the theory of implied labor contract. Here again, such a contention will not be persuasive unless the contractor company could be recognized not as an independent business entity but as a mere client company's branch office performing personnel management on its behalf.

II-5. Extension of employer's responsibilities under the Labor Union Act

II-5-1. Extension in the cases of parent-subsidiary and subcontracting relations

Article 7 of the Labor Union Act prohibits certain acts by employers which are not permissible in collective labor relations institutionalized by the Act; these acts are known as unfair labor practices. When a violation occurs, an administrative committee called a Labour Relations Commission issues an administrative relief order, the aim being to restore and secure proper order in collective labor relations.

Article 7 mentioned above prescribes that the "employer shall not commit" the listed unfair labor practices. Here, the problem lies in what "the employer" refers to as the actor of unfair labor practices. It goes without saying that the employer should be identified with one party to a labor contract who receives the labor of and pays wages to the other party,

but here, we shall question whether some legal entity other than this employer based on a labor contract could be regarded as an employer.

The combined efforts of labor law academics and the courts have established a doctrine of extending employer status to the third party in a labor contract who dominates and controls the working conditions of workers in the labor contract. This doctrine has been formed with regard to cases of parent-subsidiary relations and subcontracting relations in the following way.

If a parent company controls a subsidiary company's operations and the treatment of the latter's workers, this could work toward affirming the employer status of the parent company pursuant to Article 7 of the Labor Union Act. Thus, if the parent company, through its stock ownership, dispatch of officials, subcontracting relations and the like, places the subsidiary company under its control, and has actual and concrete managerial authority with respect to the working conditions of the latter's employees, the parent will have employer status in collective bargaining, along with the subsidiary, with regard to those employees' working conditions.[19]

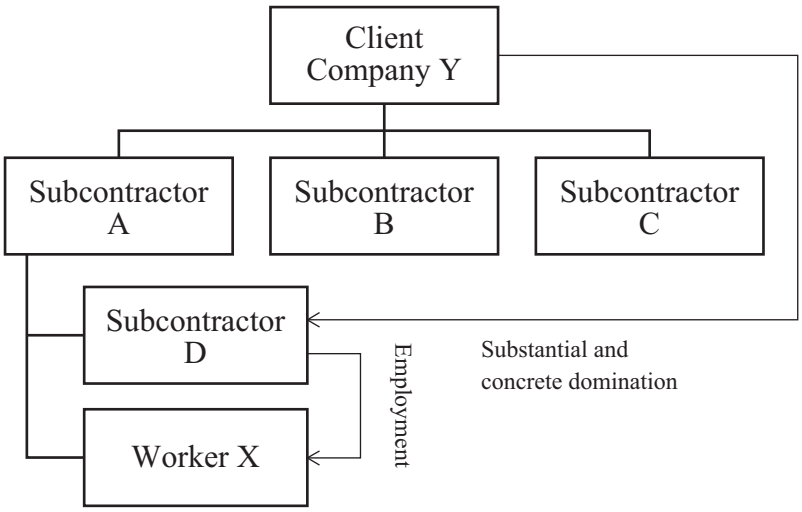
Also, when an enterprise subcontracts some of its work to another enterprise and provides its own employees to that other enterprise, the recipient enterprise may acquire the status of an "employer" for purposes of Article 7 toward those employees of the subcontractor enterprise. Thus, where the recipient company has actual and concrete control over the working conditions and treatment of such workers working in its place of business, it is deemed to possess the status of the employer towards the workers. According to a Supreme Court precedent[20], even where the recipient company does not control working conditions in the contractor company comprehensively, it should still be deemed "a partial employer" if it has "substantial and concrete domination" over partial but significant working conditions in the latter company.[21]

II-5-2. Extension of the employer in the fissured workplace context

Applying the theories explained above, a typical legal issue arising in multilayered subcontracting relationships is whether a client company that contracts out part of its work to a subcontractor should be viewed as an employer under the Labor Union Law, vis-à-vis the workers employed by the bottom level subcontractor and received in the place of business of the contracting-out company. According to the theory of extending employer status mentioned above, the basic criterion is the extent to which the client (recipient) company has "substantial and concrete domination" over the working conditions of the subcontractor's workers.

[19] Kazuo Sugeno, Japanese Employment and Labor Law, North Carolina Academic Press 2002, p.699.
[20] Asahi Hōsō Case, Supreme Court 3rd Petty Bench Decision, February 28, 1995.
[21] Sugeno 2002, p.700.

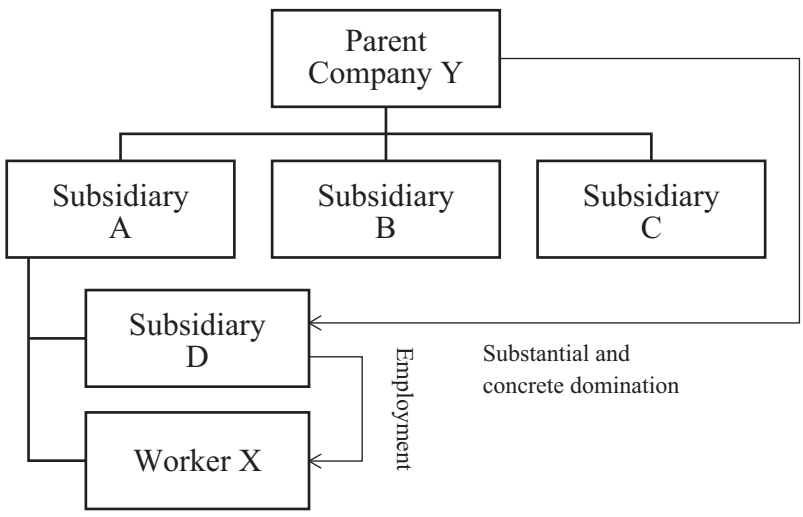
Fig. 1



As shown in Fig. 1, let us assume that Company D is one of Company A's subcontractor companies, and that Company A is a subcontractor company of Company Y. If Company Y has substantial and concrete domination over Company D not only in its business operation but also in partial yet substantial working conditions of Company D's Worker X, who is engaged in the subcontracted work, Company Y would be viewed as the employer of Worker X, even though the worker is directly employed by Subcontractor D.

The same approach is used when the Labour Relations Commissions ascertain the existence or non-existence of employer status on the part of firms which receive workers dispatched by temporary agencies within their establishments and, in practice, direct and supervise them.

Fig. 2



A similar extension of employer status could be applied to the multilayered parent-subsidiary relationship. For example, as shown in Fig. 2, let us assume that Company D is a subsidiary company of Company A, and Company A is a subsidiary company of Company Y. If Company Y has substantial and concrete domination over Company D not only in its business operation but also in the management of partial yet significant working conditions, Company Y would be viewed as the employer of Worker X, even though the worker is directly employed by Subsidiary D. The point is that the doctrine of extending employer status under the Labor Union Act can be applied to tripartite business relations such as the parent, subsidiary and subsidiary's employees, or the subcontractor, subcontractor's employees and recipient, whether these be simple tripartite relations or more complex multilayered tripartite relations. It should be added that the doctrine would be usable even for other tripartite relations such as that of the franchiser, franchisee and franchisee's employees, or the dispatcher, dispatcher's employees and recipient, whether these be simple or a multilayered relations.

Conclusion

The "fissured workplace" in the USA is described by David Weil as a new form of fundamental restructuring of business organizations which is making work so bad for so many. Being such a new phenomenon proceeding against the backgrounds of globalization and new information technology, there seems yet to be no definite answer on the question of what can be done from the viewpoint of legal studies. One finds the significance of comparative studies, which started in the Amsterdam Conference and the Fall 2015 issue of Comparative Labor Law and Policy Issue Journal under the leadership of Matthew Finkin. One could at least confirm that it is also a phenomenon occurring across national borders generating similar policy issues in labor relations.

The author found in this paper that Japan had rather been experiencing several components of "fissured workplace" in its modern history, and that labor law had been making certain responses against the problems arising therein. On the other hand, there are certainly new phenomena such as franchising, offshoring and active use of individual contractors under globalization and new information technology, but legal responses are made by using conventional tools of labor law having been developed in relation to conventional phenomena of fissurization. For example, recent advancements in information and communication technologies and the preparation of detailed work processing manuals have made it possible to control workers in remote locations in real time, without any limitations placed on the workplace, and to receive the results of labor of a certain level of quality simply by having workers get in compliance with a work training manual, without having to provide supervision in the labor provision process. With these changes, people who do not correspond to the traditional employer concept are able to make use of the manpower of workers. Therefore, whether or not we need to modify the current concept of employer and whether we should introduce a fundamental reform of labor law are issues we are starting to discuss in this international seminar.