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## Briefing the American Negotiator in Japan

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## Briefing the American Negotiator in Japan

To make the American lawyer aware of tactics for negotiating with the Japanese I have chosen to present a typical problem with which an in-house counsel for an American corporation might be confronted. During research on inter-satellite transmission of data, the research and development (R and D) department of CST Systems, a satellite communications firm, perfected an electronics design which enables them to produce stereo speakers which utilize a wireless transmission principle. After further research, the R and D department designed an entire line of audio products based on this wireless transmission principle. The prototypes have been tested and their performance was just slight of astonishing; so good, in fact, that some corporate officials see this concept as revolutionizing the market. A final manufacturing process has been developed on paper.

The November 20, 1981 issue of *Electro Developments* ran a technical article on the wireless transmission principle and its application to satellites. Yosuki Nakamura, a member of the Japanese External Trade Organization (JETRO), read the article and saw the implication for use of the principle in the stereo industry. Without the schematic diagram for the design, however, Nakamura and his company, the Yoshimura Keiretsu, would be unable to use the design.

Attempting to buy the technology for the manufacture of stereos, Yoshimura sent a telegram to the purchasing department of CST Systems informing them of their interest in the wireless transmission process and offering CST Systems \$2 million for the schematic diagrams. CST has delayed answering. Though CST Systems desires to manufacture its own line of stereos, they realize the problems of domestic manufacturing and have entertained the idea of manufacturing the line in Japan. Both logistically and economically manufacture in Japan would be a much smarter plan of action.

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At a board meeting, the directors unanimously agreed that CST Systems could capture a large portion of the world stereo market by manufacturing and marketing its newly designed line of stereo equipment. They decided that Japan would be the ideal spot for manufacturing and that, if amenable, some kind of joint venture with Yoshimura would benefit both companies.

As in-house counsel for CST Systems, you must now determine what type of business entity and procedures would best suit the needs of CST and Yoshimura. As the business must be erected in Japan, you are now faced with negotiating an agreement with a Japanese company which apparently would prefer to buy or license the technology rather than take on a manufacturing partner. You have never been to Japan but you have heard about the proverbially inscrutable mind of the East Asian. Where do you begin?

### Historical—Legal Background

To the same extent that individuals can be said to be a product of their culture, we may say that a culture is the product of its history.<sup>1</sup> Due to its proximity to the Chinese-Russian mainland, we find these cultural influences leaving traces. However, unmistakably there exist specific internal ethnic forces which are the key to the Japanese mind. These specific forces include a close community of thinking traceable back to the relative isolation of the islands. The Japanese people over the years maintained a highly homogeneous ethnic cohesion. Near the end of the fourth century there occurred an invasion of the islands by inhabitants of what is today known as Manchuria. As the Manchurians settled in the south of Japan and moved toward the central region, the native Japanese were driven to the north. Even today, with the high degree of homogeneity notwithstanding, there are discernable differences between a northern and a southern Japanese. The LeSenne School has developed a process of characterological analysis whereby different mentalities within a country are identified. The analysis uses fundamental elements of character as criteria. Of the eight main elements identified by the research Japan possesses three. The native Japanese who preponderate in the North (Honshu and Hokkaido) were characterized as sentimental (EnAS) or emotional, not active and secondary.<sup>2</sup> The southerner's profile was nervous (EnAP): emotional, not active and primary. Finally, the original Manchurians were classified as choleric (EAP): emotional, active and primary. This last group, according to the

<sup>1</sup>To complete the triad I must mention that laws are then the product of the individuals.

<sup>2</sup>The fundamental elements of the LeSenne criteria are Emotionality (E), Activity (A) and Reverberation (R). The final category is the manner in which the subject responds to external stimuli. P or primary describes one who reacts promptly. S or secondary describes one who reacts after pondering the stimuli. The subject can be emotional (E) or not (nE), active (A) or not (nA) and primary (P) or secondary (S). Eight character types result: nervous (EnAP); sentimental (EnAS); choleric (EAP); passionate (EAS); sanguine (nEAP); phlegmatic (nEAS); amorphous (nEnAP); apathetic (nEAS). This synopsis is from *Different Conceptions of the Law*, 2 INT'L ENCYCLOPEDIA COMP. L. 122 (1975).

study were generally found to be the leaders and merchants of the Japanese.

One of the primary influences on the Japanese character can be traced to the influx of Chinese culture in the fifth century A.D. As Confucianism was the philosophical mainstay of the time, laws initiated then have a clear Confucian basis. In 604 A.D. the *Jushichi Kempo* or the Seventeenth Maxim were given to the people by the royal prince-regent Umaydo. The maxims were a short code of political and social morality. To illustrate, the fourth maxim counseled ministers and functionaries to always act with decorum. Acting in a proprietous manner showed the clear distinctions of rank and in this way vassals were not confused. This same principle, a cornerstone of the Confucian philosophy, still influences the Japanese today and is a critical factor in decision-making and negotiating.

Not surprisingly, the period from 600 A.D. to 1868 looks much like the development of the European feudal system. Power began to concentrate in the hands of a few families. In 1603 the first permanent state of political equilibrium emerged. Tokugawa Iyeyasu organized a central, federalized government with a controlling military class. He also closed the islands to foreign intercourse. For some 250 years Japan remained isolated, trading exclusively with the Dutch and Chinese. Under this feudal system the Tokugawa gave the land barons (*daimyos*) power to administer justice within their fiefdoms. This began the positive law system in Japan. Justice during this period was marked by the:

. . . tendency (of Japanese justice) to consider all the circumstances of individual cases, to confide the relaxation of principles to judicial discretion, to balance the benefits and disadvantages of a given course, not for all time in a fixed rule, but anew in each instance . . . to make justice personal.<sup>3</sup>

In 1853 Admiral Perry of the United States steamed into Japan, guns loaded, and forcefully broke Japan's long isolation. By 1868 Japan was forced to either be the whipping boy in their international trade agreements or adopt a Western *modus operandi*. Soon what had begun with Western coercion to trade became a massive occidentalizing movement.<sup>4</sup>

As the Japanese admired the authoritarianism of the German codes of the time, they adopted a Civil, Commercial and Criminal Code drawn by German legal scholars invited to Japan. Probably the greatest change, legally, since these codes were drawn (1907) was the American occupation following World War II. During this time an American-style (democratic)

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<sup>3</sup>Johnson, *The Japanese Legal Milieu and Its Relationship to Business*, 13 AM. BUS. L.J. 337 (1976) quoting 1 J. WIGMORE, LAW AND JUSTICE IN TOKUGAWA JAPAN 40, 43 (1969).

<sup>4</sup>Japan, due to many factors, was being blackmailed into adopting a Western system. The Japanese found themselves constantly the subservient party in adhesion contracts for trade. Most well known of the legal problems which motivated the Japanese to accept Western culture was the extraterritoriality clauses in treaties which made a foreigner in Japan immune from prosecution by Japanese authorities for crimes committed while in Japan.

constitution with separation of powers principles was drawn and adopted and sweeping reforms of the judiciary undertaken.

In spite of the recent avalanche of Western style accoutrements, Japanese philosophical roots have not been substantially affected. As these codes (i.e., the Western mentality) were premised upon individual rights and the individual as the primary social unit, the fundamental element from the Japanese perspective was the community and the unwritten laws of social interaction. Modern Japan shows this schizophrenia. Though it has codes specifying rules for varying situations, a curious compromise occurs when the propensity to follow the unspoken law meets the written law.

### Philosophical Underpinning

The two fundamental processes, which integrated, appear to explain the modern Japanese mind are the national ethnic cohesion and the Confucian conception of the world as an organic whole following certain immutable laws (*Dao*) which men must work to follow. As the elements of nature act together, thus men too must act together as an organic whole.

Early on, Confucianism emphasized *jen* as a basic virtue. *Jen* can be translated as compassion, human-heartedness or man-to-man-ness. "Man achieves *jen* through the *relationship* (italics mine) which he has with other members of the society."<sup>5</sup> The practical effect of this principle was to emphasize intuitive understanding of men and phenomena and to deemphasize logical and abstract rules. For the Japanese the concrete world was the foremost concern.

The spirit of harmony and concord was expressed in the virtue of *wa*. If people abided by *wa*, disputes would not arise. *It is one's duty to avoid discord*. *En* is the principle of social tie. The net effect of these two principles gives the Japanese mind a very different perspective than the Westerner. Maintaining the relationship bound together by these two forces is the paramount concern. As the existence of personal rights is a frontal assault on maintaining this delicate balance, to insist or demand one's rights or even a duty owed to one violates tacit rules of relationship etiquette. For centuries, from the Confucian philosophy of paternal law, the Japanese have characterized their duties and obligations among one another as dependent upon relative social status. *Giri* is the term denoting the manner of behavior required of one person to another in consequence of his social status. *Ninjo* is the human affection which each person must exercise toward others. Frequently, the Japanese will refer to *giri-ninjo*. This is the natural dignity with which one encounters another without according him any particular set of rights. It implies love and benevolence. *Ho* (from *horitsu*) is the law or the body of legal rules. Even within this concept of the body of legal rules there is no connotation of person rights. *One must*

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<sup>5</sup>Kim and Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L COMP. L.Q. 494 (1979).

understand that this mutual dignity is the critical factor when negotiating with a Japanese businessman and pervades most transactions.<sup>6</sup> For an obligee to insist on duties another owes him, whether these duties resulted from long-standing tradition or from a formal contract, is an insult to the obligor of the duty. By doing so, the obligee would violate his own *giri*.<sup>7</sup>

When a dispute arises the *relationship* functions as the *dispute-settling mechanism*. A dispute represents a straying from the proper conduct which the two should maintain toward one another. The solution lies within themselves, as relative to one another they must understand what their duties are and seek to replace the conflict with the peace they have disturbed. This requires that the two actively participate in molding a solution which answers the peculiar needs of their relationship. Just as life is infinitely varied, so too are people and their problems. To apply a code of rules which arose from individual minds under a particular set of circumstances to solve an unforeseeable dispute is ridiculous. The two parties know the situation best and they are most capable of hewing out a compromise. Introducing a third party arbitrator, unless he is familiar with the circumstances, is almost as absurd. Hence, resorting to outside arbiters throws the dispute into a subject-object realm, reducing the degree of subjectivity on which the solution is based. For the Japanese:

Dispute resolutions techniques must be flexible enough to embrace the detail and the uniqueness of any of life's infinitely varied relationships.<sup>8</sup>

For these reasons Japanese are reluctant to sue in court. As the dispute stems from a lost harmony it is the parties' responsibility to revitalize it. The petitioner is shouting to the world that his adversary is violating natural harmony so severely that he is beyond reaching a solution by mutual discussion. The adversary of the petitioner is thus an unworthy or perhaps even abnormal person.

It is precisely to this aversion to objectivity that the Japanese antipathy towards logic can be traced.

Life is an organic whole to be accepted and lived as it is; it is not to be cut by logic into analytically neat pieces, for to do so is artificial and removed from the natural state of things.<sup>9</sup>

## The Japanese Conception of Contract and Conciliation

Prior to walking into the negotiating room it is imperative that the American negotiator realize the modern result of the foregoing cultural factors. The relationship is the ultimate arbiter of the success or failure of the trans-

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<sup>6</sup>In light of this one can easily understand the reason for the custom of bowing.

<sup>7</sup>A feeling of dishonor and loss of face is the punishment for violating one's own *giri*.

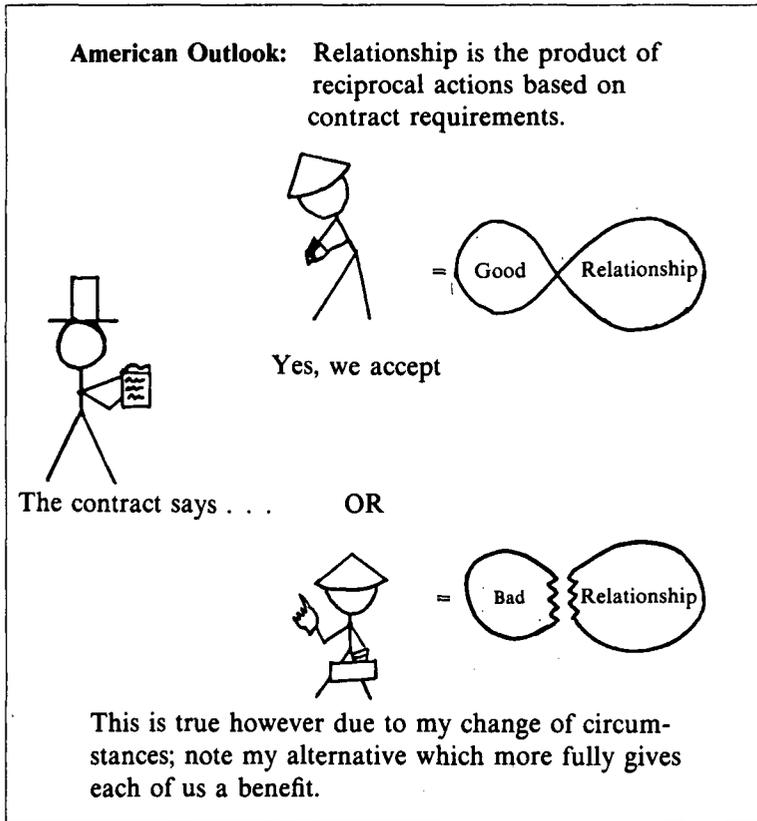
<sup>8</sup>Kim and Lawson *supra* note 5 at 507.

<sup>9</sup>*Id.* at page 496 quoting from Kawashima, *The Status of the Individual in the Notion of Law, Right and Social Order in Japan* in *THE STATUS OF THE INDIVIDUAL IN EAST AND WEST* (C. Moore, ed., 1968) at p. 432.

action. For an American the regulations and contingency mechanisms in the contract are the guide by which the parties deal throughout the transaction. The American characterizes the quality of the relationship as good or bad relative to the other party's adherence to the contract's requirements. (See Figure 1.) The Japanese, however, see their actions as being based on

... a pre-existing relationship so that agreed upon directions or rules reflect what the parties expect to occur as a result of the relationship.<sup>10</sup> (See Figure 2.)

Figure 1

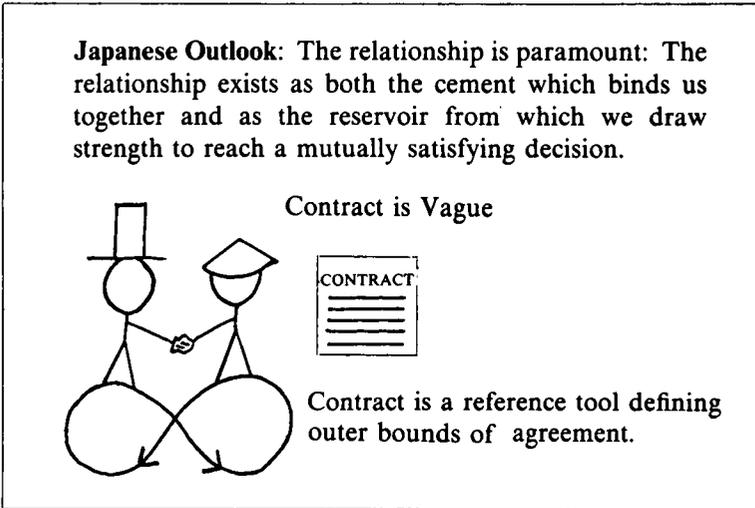


One author has even suggested that placing such importance on the relationship can be traced back to the Buddhist originated concept of *en*.<sup>11</sup> *En* is the principle that social relationships are predestined by the past lives of individuals. Persons who thus are contracting parties were predestined to their relationship and the meeting is not a coincidental occurrence. Con-

<sup>10</sup>Guittard, *Negotiating and Administering an International Sales Contract with the Japanese*, 8 INT'L LAW. 822 (1974).

<sup>11</sup>Kim and Lawson *supra* note 9 at 502, quoting from Kawashima.

Figure 2



sidering *en, giri-ninjo*<sup>12</sup> and the community orientation, it is not hard to see why the relationship operates as the vivifying principle in any intercourse. To negotiate with a Japanese requires that one consider the Japanese ethnology as the frame of reference. Approaching the negotiations with this in mind will enable one to avoid serious misinterpretation and insult which could doom the discussion before it commences.

To streamline a successful transaction one's emphasis, too, must shift to the relationship. If you as an American nourish the relationship, a healthy transaction should result. As might be expected the vital nutrients are mutuality and sincerity. The Japanese person, in the initial encounter, will take an inventory of his potential business associate. He will be acquainting himself with attitudes and personalities. Jun Mori in his article "The Practitioner's Perspective on Negotiations and Communications with Japanese Businessmen" states that at this stage the Japanese businessman wants to

forge a relatively durable and enduring relationship with the other party, tying their companies together with informal understandings and agreements.

Ultimately the Japanese party would like to cultivate

a commercial loyalty strong enough to survive the types of disputes common to commercial transactions; yet resilient enough to enable the parties to settle such disputes by mutual agreement and compromise without resorting to litigation.<sup>13</sup>

<sup>12</sup>As mentioned *giri* defines the relative social status of each person and *ninjo* operates to inject all relations with human affection.

<sup>13</sup>Muri, *The Practitioner's Perspective on Negotiations and Communications with Japanese Businessmen* 47, 48 in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA (1978).

As the Japanese party's thinking begins to sculpt the relationship toward this goal, the American party should not do anything which might inhibit this or put his veracity or sincerity in question.

There is one crucial ramification for constructing a contract which arises from this relationship-dependent approach. Domestic American contracts function because a person feels bound to perform that which the law requires. This concept is the principle of *vinculum juris*, the Roman definition of a legal obligation.<sup>14</sup> The Japanese have no equivalent. In Japan it would be a serious moral violation if one were to insist that another must perform a duty owed to the person. The person insisting would violate his own *giri-ninjo*. There is no need for the person to whom the duty is owed to insist on its execution. A person who owes the duty to another is under a strict moral obligation to fulfill it (pursuant to his *giri-ninjo*).<sup>15</sup>

The upshot of this is that including lengthy clauses in a contract regulating performance and covering innumerable contingencies is both ridiculous and insulting. It is ridiculous in that no person can possibly make a solution in the present for a problem which has not yet arisen. The circumstances and possible combinations of variables are too indeterminate and numerous to predict and a solution should be found only at the time of dispute. The clauses are insulting in that the party does not have enough confidence and belief in the relationship to count on the goodwill of the other and the strength of the relationship to achieve a compromise. Having faith in the relationship and a respectful dignity for your associate will enable both parties to fashion a mutually satisfying solution. As a matter of course the Japanese include in their contracts what is known as the Round Solution Clause:

If in the future a dispute arises between the parties with regard to the rights and duties provided in this contract, *the parties will confer in good faith* (italics mine). (sei-i o motte kyōgi suru);

or, in a similar situation:

. . . will settle the dispute harmoniously by consultation. (kyōgi ni yori enman ni kaiketsu suru).<sup>16</sup>

A written contract to the Japanese is a statement of the perimeter of the transaction. Typically the contents are very vague and amorphous. The day of signing is probably the last time the Japanese party will look at it. The main purpose of the contract to the Japanese party is to establish the relationship between him and his business associate. Thus, it is of no practical worth in solving disputes. The strength of the relationship and good will and mutual concern of the parties will solve these.

<sup>14</sup>BLACK'S LAW DICTIONARY (4th ed.).

<sup>15</sup>Though at first glance, to the Westerner, this manner of internal enforcement must seem quite tenuous, it could be successfully contended that it is not that different from a religious belief by which many Westerners regulate their lives and perform duties owed to one another.

<sup>16</sup>Kim and Lawson *supra* note 5 at 510 quoting Kawashima, *The Legal Consciousness of Contract in Japan*, (1974) 7 LAW IN JAPAN: AN ANNUAL 1 at pp. 6-7.

## Across the Negotiating Table

The following are some guidelines for discussion, agreement and disagreement.

1. Before negotiations, greet every person of the party and chat with them. The first hour should be spent by chatting with the others, sharing ideas and trivia. Sharing food and drink is also advisable. This helps to dissolve adversarial feelings and builds an atmosphere of trust and mutual concern.

2. Do not hurry negotiations. You should hasten slowly. It will be exasperating for you and unnerving for your Japanese counterpart if you are trying to engineer an agreement according to a schedule. Plan to spend a lot of time discussing and clarifying.

3. Japanese are suspicious of a negotiating lawyer. The Japanese have the same opinion of foreign lawyers as they do of their own lawyers, that is, that lawyers are single-minded advocates who are only interested in gaining for their clients. This of course excludes the mutual trust and willingness of a party to accommodate. The persons you will be dealing with almost certainly will not be lawyers. Keep a low legal profile.

4. Clarify the official position and authority possessed by your counterpart. Chances are your counterpart will be an older man as they are the most experienced at solving problems. Normally negotiators will *not* have authority to finalize contract terms. Discover their authority early on. This may be done by an exchange of business cards and polite inquiry as to authority.<sup>17</sup>

5. Clarify your authority to the Japanese negotiator. Normally as a lawyer you will have power to finalize a contract. It will help negotiations if the Japanese negotiator understands this.

6. Be prepared for a tough negotiation. Japanese negotiators are usually well prepared and experienced. Expect sessions to continue well into the night and on weekends. You may find that fatigue is more difficult to deal with than the problem at hand.

7. Do not sour the atmosphere. It is most important that the Japanese feel that you can be trusted. Encourage candor. Talk about motives and long-term intentions.

8. Do not dominate negotiations. Remember that mutuality and accommodation are to be stressed and you cannot possibly know what your counterpart would like if you do all the talking. It may be wise to isolate points and explain them very slowly to guarantee that they are understood.

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<sup>17</sup>Your counterpart may be a representative director. Japanese law requires that a company appoint one or more of these directors to represent the company to third parties. The representative director *can bind* the Japanese company in contracts. The director's authority to bind the company is verifiable by checking the corporation's registration. Article 262 of the Japanese Commercial Code permits a third party to assume that any officer with the title of president, vice president or managing director is a representative director.

You should then be silent and await the response. This should assure mutual exchange.

9. Do not press a point with too much force. Always maintain a respect for the negotiator. You are trying to reach a mutually constructed solution, not force feed him one. You will appear to be pursuing a selfish course of action if you do.

10. Do not flatly reject a suggested proposal. You cannot categorically reject a proposition and maintain an atmosphere of mutuality, sincerity and a willingness to compromise. You will be labeled as an unworthy person to do business with over any length of time. The Japanese do not like winners and losers. The concept is antithetical to their culture. When you flatly reject a proposal you have shifted the discussion into the realm of winning and losing. From your perspective it may seem expeditious to lay your cards on the table. By doing so however you will have failed to treat your counterpart with the respect due him which should flow from your mutual concern. Rarely will the Japanese negotiator give a direct answer. He will say no to your proposal in several indirect ways: (a) prolonged inactivity; (b) a discussion of deficiencies in the proposal; (c) a suggestion that there are better alternatives; (d) mere failure to follow up on a proposal.<sup>18</sup> Learn from these examples.

11. Do not expect immediate answers to proposals you suggest. You will be answered with noncommittal acknowledgments expressing neither encouragement nor acquiescence. The negotiator probably does not have the power to make final decisions. The final decisions will be collective ones. This is known as the *Ringoshi* System. It is the:

Japanese method of decision-making whereby decisions are formulated at middle- or lower-management levels and through a series of discussions and placing of seals. The discussions find their way up the ladder right to the top where they are given the final go ahead and implemented.<sup>19</sup>

During the process the Japanese will delay and give you broad noncommittal agreements. These are good signs. By a group decision errors are reduced. If one occurs no one in particular will be to blame. You can assuage yourself while you are waiting that once a proposal is accepted it can be initiated rather rapidly as the Japanese were also considering implementation problems.

12. Designate a contact. Designate one position (e.g., General Counsel) to whom all correspondence is to be addressed. This will limit the risk of lost correspondence and expedite communication.

13. "We note your point." You will frequently hear this sentence from the Japanese. It means that they are planning to present a written response

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<sup>18</sup>These four responses are mentioned by Mori, *supra* note 13 at 50.

<sup>19</sup>Vaughn, *Introduction to Joint Venturing in Japan*, 6 CASE W. RES. J. INT'L L. 189 (1974).

at the next negotiating session and it would be pointless to discuss the matter until then.<sup>20</sup>

14. Finalize all specific agreements in writing. The Japanese will scrutinize the wording of the agreement. The document will be changed repeatedly and be subject to clarification and alteration up until the moment of signature. Expect any proposed boilerplate language to be revised to death. Sometimes a Japanese negotiator will fail to include a certain matter in the contract even though it is very important to him. You must ferret out this sentiment. He believes that these points will be solved to his satisfaction later by conciliation and compromise.<sup>21</sup>

15. Let the Japanese handle negotiations with their government. Government approval will always be necessary. The relations among business, banks and government is different from those in the United States. The Japanese company will understand this and will be familiar with the various ministries which require any domestic enterprise anticipating a joint venture or importation of foreign capital to report to the government. In Japan the government regulates industry more stringently than in the United States and it is primarily done through indirect intimidation and appeals to national good. In Japan it is known as *gyosei shido* (administrative guidance).

16. When dispute arises—conciliate. When a dispute arises, chances are that the contract over which you gruelingly negotiated will be lying in the bottom drawer of the counterpart's file cabinet. Now is the critical time when the strength of the relationship will be tested. You must adjust and accommodate. Exercise mutual reasonableness and compromise. Do not start talking about rights and obligations. Keep emphasizing the objective that you both want to reach and how you both want to reach it. Remember that you want to maintain an atmosphere of conciliation and respect. If you have provisions covering this dispute and they will work a hardship on the other party, you should not strictly enforce them. You will be considered morally deficient if you do. Your most valuable business asset when dealing with the Japanese is a reputation for reasonableness and fairness. Leave Machiavelli in the sixteenth century. Otherwise you may win the battle but lose the war.

17. Keep records of correspondence. A record of all correspondence, memoranda, telephone calls and minutes of meetings, etc., should be kept in chronological order. This is essential when certifying any extracontractual commitments.

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<sup>20</sup>Guittard, *Negotiating and Administering an International Sales Contract with the Japanese*, 8 INT'L LAW. at 822, 829 (1974).

<sup>21</sup>If your company is importing/exporting products to or from a Japanese company which deals with other Japanese companies with which you are in competition there is one clause in your contract on which you should insist. Insert in your contract a provision entitling you to the same flexibility due to changes and unforeseen circumstances that the Japanese companies have. The clause provides that should a change in circumstances occur such that performance

### The Business Entity

Now aware of the delicate cultural differences and utilizing the negotiating suggestions let us assume that you, as CST Systems' negotiator, and two representative directors from Yoshimura have signed the following:

#### AGREEMENT

1. Both CST Systems and Yoshimura will be organizers of a company to be located in Japan;
2. The business will be a joint venture, ordinary stock corporation or *kabushiki kaisha*;
3. The corporation's name will be The Japamafon Corporation;
4. The purpose of Japamafon will be to manufacture audio components utilizing the wireless transmission principle;
5. Both CST Systems and Yoshimura will provide capitalization as follows: 50 percent Yoshimura and 50 percent CST Systems; Initial Capitalization: ¥444.4 million or \$2 million (U.S.) dollars, ¥222.2 million (cash), ¥111.1 million (cash) or \$500,000 (U.S.) dollars; Licensing Agreement to Japamafon for Wireless Design; Net worth: ¥111.1 million;
6. Five thousand shares of Class A stock are to be authorized and 3,500 issued; 5,000 shares of Class B stock are to be authorized and 3,500 issued;
7. Both classes of stock are to have the same par value (\$10.00 (U.S.): ¥2222) per share; Class A stock will elect a total of two directors; Class B stock will elect a total of four directors;
8. CST Systems is to have the right of first refusal to purchase any share of Class A stock to be issued; Yoshimura is to have the right of first refusal to purchase any share of Class B stock to be issued. Transfer of shares may only proceed with approval of a majority of the Board of Directors. Cumulative voting unless specifically authorized is prohibited;
9. Deposit of initial capitalization funds is to be made on March 25, 1982 at the Bank of Japan, 1 Chase Manhattan Plaza, New York City, New York, in an account in the name of Japamafon Corporation to be opened on that day. The licensing agreement for the transmission technology will also be transferred to Japamafon that same day;
10. In the event of future dispute between Yoshimura and CST Systems with regard to the rights and duties provided in this agreement the parties will confer in good faith.<sup>22</sup>

### Basis of U.S.-Japanese Commercial Relations

The U.S.-Japanese Treaty of Friendship, Commerce and Navigation of 1953 serves as the framework of U.S.-Japanese commercial relations. The portion of the treaty covering the circumstances here is article VII par. 1:<sup>23</sup>

Nationals and companies of either party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party. . . . Accordingly such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, their business; (b) *to organize companies under the general company laws of such other Party, and to acquire majority inter-*

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of the obligation would result in a significant deterioration of your financial position you may refuse to perform while giving the Japanese company no recourse. *Id.* at 825.

<sup>22</sup>Exchange Rate: ¥222.2 = \$1.00 (U.S.) dollar.

<sup>23</sup>Treaty of Friendship, Commerce and Navigation, April 2, 1953, Japan—U.S., art. VII par. 1, 4 U.S.T. 2063, T.I.A.S. No. 2863.

*ests in companies of such other Party*; and (c) to conduct and manage enterprises which they have established or acquired (*italics mine*).

Legally each nation must only minimally interfere in the investment by one party in the business of the nationals of the other party. However, this is not actually the case. One must understand the fragility of the Japanese business environment. Historically the government of Japan has subsidized industrial growth. The result is the Japanese version of the American conglomerate or the *keiretsu* (formerly *zaibatsu*). Presently the government through its ministries and councils and its influences over the Bank of Japan oversees industrial development. Being a relatively small country, Japan has had to keep a careful watch over the expansion of monstrous Western industries and prevent them from overrunning domestic business and usurping the government's control.

### Administrative Guidance and Foreign Exchange

The objective of the Japanese business/government duo is to control the flow of foreign funds into and out of Japan. As mentioned the Japanese government influences business by way of *gyosei shido* or administrative guidance. As would be expected *gyosei shido* is the indirect means that the government, through its administrative agencies, uses to enforce its national trade, monetary and investment policy. It has many nuances and is successful due to the Japanese' respect for their government. One author defined it to be:<sup>24</sup>

The action of an administrative organ, in respect to matters within a certain administrative field, in executing statutes by applying them and in ordering strong measures against and otherwise compelling specific individuals, juristic persons and associations; where there is voluntary compliance and a statutory basis of action, in guiding, suggesting and advising; *and where there is voluntary compliance but no statutory basis of action, in influencing the parties voluntary cooperation and consensual performance by expressing, as an administrative organ, the expectation and wish that something should exist or be done in a certain way* (*italics mine*).

The ministries which will review Yoshimura's application for a joint venture would be: (1) the Foreign Investment Council (FIC); (2) the Ministry of International Trade and Investment (MITI); (3) the Ministry of Finance (MOF); (4) the Ministry of Foreign Affairs (MFA); and possibly (5) the Bank of Japan (BOJ).<sup>25</sup>

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<sup>24</sup>Johnson, *The Japanese Legal Milieu and Its Relation to Business*, 13 AM. BUS. L.J. 342 (1976) quoting from Narita, *Administrative Guidance*, 2 L. JAPAN 45 (1968).

<sup>25</sup>As most Japanese commercial banks are in debt to the Bank of Japan, ultimately BOJ has the final word on lending. The BOJ is closely allied with the government. The money supply (Ms) in Japan is tight. One reason is that Japanese banks maintain a low loan:deposit ratio. Because money is difficult to get and the securities markets are relatively inactive, it is not uncommon for the debt:equity ratio of main Japanese businesses to be greater than 3:1. Hence with money difficult to get and the main source (BOJ) being a close government ally, the government via its ministries controls investments.

**Validation**

Article VII of the 1953 treaty notwithstanding, the Japanese government has adopted a national policy to prevent foreign business from overrunning Japan. Under pressure from foreign governments to be more lenient in permitting foreign investment, the Japanese implemented a policy of liberalized foreign investment. The government categorized industries and listed rules dictating the permissible amount of foreign investment and ownership in these industries. Thus, when a foreign company wishes to export capital to Japan to invest, the ministries use these criteria to make their judgment. The two main laws which, combined, cover the majority of situations are the Foreign Investment Law (the Law Concerning Foreign Investment)<sup>26</sup> and the Foreign Exchange Law. The specific percentages of ownership permitted are set out in the industry's category and vary from 0-100 percent foreign ownership. However, it would be rare when a foreign investor would receive permission to hold a majority interest in a domestic company. This is the reason for the provisions in CST's agreement with Yoshimura giving Yoshimura control of Japamafon via the board of directors. If a request for validation falls within one of the liberalized categories and is within the percentage ownership requirements, an affirmative answer from the government would be received within a month. This is known as automatic validation. If the proposal fell within a more strictly regulated category, the decision would be drawn out over a much longer period with recurrent negotiations. If the industry was restricted, the proposal would be rejected. One familiar rationale for rejecting investment proposals is that ". . . the investment would have an exceptionally detrimental effect on the interests of Japan."<sup>27</sup> This in effect would delay the issuance of a foreign exchange license which is necessary to import capitalization funds and export dividends or income. The Japanese in the past have repeatedly resorted to using a balance of payments argument as their overt rationale to refuse a license. The argument proceeds along these lines: At the time of application for the license the Japanese government refused issuance because it was necessary

. . . to prevent its monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves.<sup>28</sup>

However, when Japan joined the Organization for Economic Cooperation and Development (OECD) in 1963, the International Monetary Fund (IMF) became the watchdog for foreign investors and presently, unless

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<sup>26</sup>This is Article II of the Japanese Uniform Commercial Code. It gives the Japanese government authority to permit or prevent, by validation, acquisition of shares in a Japanese company or a joint venture by foreign investor.

<sup>27</sup>Birmingham, *The Japanese Corporation as a Business Vehicle for Foreign Business* from CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 52 (1978).

<sup>28</sup>Japan-U.S. Treaty of 1953 *supra* note 23 at art. XII, par. II.

Japan convinces the IMF that a monetary crisis exists, Japan may not impose controls on direct inward investment.<sup>29</sup>

When the government ministries review the Yoshimura/CST Systems proposal, it will probably find the critical criteria met: (1) the industry permits foreign investment and (2) the Japanese company Yoshimura maintains control though stock ownership is equally divided.

### **Conclusion**

When a Westerner deals with a Westerner, though negotiation can be exasperating and trying, both parties share the same primary underlying assumptions of profit motive, past negotiation experience and attitude toward litigation. However, when dealing with the East Asians, those assumptions are different. Using occidental assumptions to negotiate with Orientals is not unlike playing poker with an opponent who is using the rules of blackjack. Misunderstanding will be a foregone conclusion and agreement as likely as a woolly mammoth. Hence it is necessary to familiarize oneself with cultural idiosyncrasies before attempting to hammer out intricate and sensitive issues. In the hypothetical agreement just reviewed familiarization with the Japanese attitude toward aggressive bargaining, indirect refusal and the requirement that disputes be settled through conciliation are prerequisites to successful business and legal negotiations.

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<sup>29</sup>See Pearl, *Liberalization of Capital in Japan: Parts I and II*, 13 HARV. INT'L L.J. 59 and 245 (1972).

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