

# Northwestern Journal of International Law & Business

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Volume 6  
Issue 4 *Winter*

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Winter 1985

## Effective Dispute Resolution in United States-Japan Commercial Transactions Perspectives

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# PERSPECTIVE

## Effective Dispute Resolution in United States-Japan Commercial Transactions

*Hoken S. Seki*\*

### PREFACE\*\*

As a lawyer who has for many years represented the interests of Japanese corporations and their subsidiaries in United States legal matters, the author has observed first-hand the difficulties that can arise from the cultural, social and political differences between Japanese and Americans who are engaging in business with each other. Failing to recognize and accept these differences can lead to misunderstandings which, if unresolved, can sometimes develop into serious disputes. When such disputes arise, those same cultural, social and political, as well as legal, differences will also manifest themselves in the dispute resolution process.

This article seeks to acquaint the United States businessman and his legal counsel with the Japanese perspective, providing a greater level of understanding that would permit a more satisfying and effective conclu-

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\*\* The term "American" is used to describe the people, businesses, and interests of the United States of America.

sion to the dispute resolution process. The author's frequent visits to Japan, his years of representing Japanese individuals and corporations and his study of treatises by noted authorities, identified in the footnotes, are sources for the opinions and perspectives presented in this article. It is hoped that this article will be particularly useful in providing an overview to those who have not had extensive previous contact with Japan, its laws, and its enterprises.

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### INTRODUCTION

A continuing series of discrete business dealings between United States and Japanese businessmen provides the foundation for the United States-Japan economic relationship. Those dealings involve a diverse range of business interests which vary widely in magnitude and complexity. Unfortunately, not all of these commercial transactions end happily. Disputes and reported decisions relating to United States-Japan commercial transactions seem to be increasing.<sup>1</sup>

When American legal counsel is initially retained by either the American or Japanese party to a commercial dispute, whether it is at the relatively informal level of face-to-face discussions or on a more formal level of arbitration or litigation, such counsel should benefit by gaining a knowledgeable appreciation of those factors peculiar to the handling and effective resolution of United States-Japan commercial disputes. These factors, to a considerable extent, arise out of the differing legal, commercial and cultural traditions of the United States and Japan, and are further complicated by conflicting perceptions of previous interactions between fundamentally dissimilar systems.

Attention to these factors by all counsel involved may permit a more meaningful procedural and substantive approach to resolving the partic-

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<sup>1</sup> For some of the underlying reasons, see MacEachron, *The United States and Japan—The Bilateral Potential*, FOREIGN AFFAIRS, Winter 1982/83, at 400. Recent litigation, in the public and private sectors, are discussed in *Transnational Litigation: Practical Approaches to Conflicts and Accommodations*, A.B.A. NATIONAL INST. (1984). See also Abbott & Totman, "Black Ships" and Balance Sheets: *The Japanese Market and U.S.-Japan Relations*, 3 NW J. INT'L L. & BUS. 103, 134-44 (1981). For a current history of Japanese investments overseas, including the United States, see OKOCHI & INOUE, *Overseas Business Activities—Proceedings of the Fuji Conference* (1984); Note, N.Y. Times, May 6, 1984, § 3, at 1, col. 2.

ular dispute. To the extent counsel representing other parties to the dispute have a similar appreciation of such factors, the possibility that the dispute in question will become unnecessarily protracted and contentious should be appreciably lessened.

## I. DIFFERING BACKGROUNDS AND PERSPECTIVES

### A. The United States

#### 1. *A Pluralist Society*

The United States has long been known throughout the world as the paradigm of a pluralist society comprised of virtually every ethnic and religious group in the world. Despite the cultural diversity of its people, the United States historically has followed the legal traditions established by its English founding fathers. One of the great heritages of the United States is the establishment of its common law system. The present-day common law tradition of the United States has common roots with the British system of law, but is unique unto itself. The principle of *stare decisis*, the legal tradition of following rules or principles of law laid down in prior judicial decisions, is at the cornerstone of the legal framework in the United States as it is in present-day Great Britain. However, the United States has a written constitution in contrast to England's "unwritten" constitution. Due to the United States federal system in which there are two differing levels of laws, federal and state, there is a need to resolve differences quickly and efficiently. This has created additional principles of law in terms of federal pre-emption and "states' rights." The United States, in terms of the codification of laws and regulations, has come closer to the civil law countries such as Japan in which the principle of *stare decisis* does not appear to play as large a role.

#### 2. *The Role of the Lawyer*

A well-known commentator, Mr. Russell Baker, discussing the Japan-United States trade imbalance, stated that "while Japan was producing automobiles, the United States was producing lawyers."<sup>2</sup> United States "lawyer production has more than doubled since 1960, with the result that there are now 612,000 on the market, or one lawyer for every 390 Americans."<sup>3</sup> Baker contrasted the number of lawyers in the United States with those in Japan and found that in the United States there were "20 times the number of lawyers available in Japan."<sup>4</sup>

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<sup>2</sup> Baker, *Lawyers for Cars*, N.Y. Times, June 8, 1983, § A, at 23, col. 5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Derek C. Bok, President of Harvard University, in a recent annual report to the Harvard Board of Overseers, described the United States legal system as "grossly inequitable and inefficient," paralleling a marked growth in statutes and regulations with the rapid increase in the supply of lawyers.<sup>5</sup> Professor Bok also commented that Japan, with a population half that of the United States, has fewer than 15,000 lawyers nationwide while law schools in the United States graduate 35,000 each year. He attributed the following quotation to the Japanese: "Engineers make the pie grow larger; lawyers only decide how to carve it up."<sup>6</sup>

President Bok called for reforms in the law schools of the United States in order that law students would be instructed to expedite, rather than complicate, the resolution of disputes. Otherwise, the complications arising out of the United States legal system, the so-called "adversary system" of justice, would continue to create havoc with the society's confidence in its legal system and undermine the ability of the United States to provide true justice to all of its peoples.<sup>7</sup>

Lawyers can take an instrumental role in the effective resolution of disputes. Their training and experience can direct the parties to a dispute to a reasonable resolution based on the facts of the particular case. They have it within their power to minimize the expense and time required to achieve a just resolution of a particular dispute, whether informally or through the formal procedures of the courts or arbitration. Traditionally, the legal profession in the United States has wielded great power through the fact that a substantial number of administrators and legislators, not to mention judges, are lawyers.

The common law tradition in the United States is unique in that the legal system reflects the exigencies of the times. One of the most quoted Justices of the United States Supreme Court, Oliver Wendell Holmes, Jr., stated that, "the life of the law has not been logic. It has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, . . . have had a great deal more to do than the syllogism in determining the rules by which men should be governed."<sup>8</sup> It is in this sense that the role of the lawyer in the United States is perhaps unique and different from those of other countries.

Lawyers have the peculiar power in the United States to shape society through changes in the law as effected by the decisions of the courts. This, of course, sometimes results in seemingly irresolvable conflicts be-

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<sup>5</sup> Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38.

<sup>6</sup> *Id.* at 41.

<sup>7</sup> *Id.*

<sup>8</sup> O.W. HOLMES, *THE COMMON LAW* 1 (1963).

tween the legislature and the judiciary. However, the courts act as a kind of escape valve for pressures which sometimes build up within the society and which are not promptly or effectively addressed by the United States Congress and state legislatures.

As reflected in the comments of Messrs. Baker and Bok, there is currently a great debate going on in the United States as to the proper function of lawyers. The comments of Baker and Bok are representative of the criticisms presently being leveled at the American lawyer.<sup>9</sup> A recent business article quoted one law school professor as telling his students, "When in doubt sue. Sue everyone in sight. And then settle."<sup>10</sup> This approach imposes social costs, however. Courts are crowded, and companies pass along their legal fees to customers. It is against this United States background that this article examines the proper role of American lawyers in effective dispute resolution in United States-Japan commercial transactions.

## B. The Japanese Tradition

### 1. *A Homogeneous Society*

In terms of its ethnicity, Japan is a considerably more homogeneous society than the United States. Both in terms of ethnic origin and religious preference, the overwhelming majority of Japanese share a common tradition. However, in actual practice, Japan is a more pluralistic society than many realize. The fact is that all Japanese are not the same, indeed, they are not even necessarily alike.

Peter Drucker, in an article appearing in the *Harvard Business Review* some time ago, pointed out that the concept of "Japan, Inc." is a not-so-funny joke to the Japanese.<sup>11</sup> The Japanese,

see only cracks and not, as the foreigner does, a monolith. What they experience in their daily lives are tensions, pressures, conflicts, and not unity. They see intense, if not cutthroat, competition both among the major banks and among the major industrial groups. And the Japanese are themselves involved every day in the bitter factional in-fighting that characterizes their institutions: the unremitting guerilla warfare that each ministry wages against all other ministries and the factional bickering that animates the political parties, the Cabinet, the universities and individual businesses.<sup>12</sup>

This description of Japanese business society sounds quite familiar to

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<sup>9</sup> For a somewhat different perspective, see Taylor, *Lawyers Object to Charges of Litigiousness*, N.Y. Times, Aug. 12, 1984, at 22E, col. 1.

<sup>10</sup> Greene, *The Long, Grabby Arm of the Law*, FORBES, Aug. 1, 1983, at 160.

<sup>11</sup> Drucker, *Behind Japan's Success*, HARV. BUS. REV., Jan.-Feb. 1981, at 83.

<sup>12</sup> *Id.*

Americans. It is an expression of the great diversity which exists in Japanese society, particularly in its economic aspects.

Mr. Drucker goes on to state that Japan has been singularly successful in creating a pluralist society which works. One of the secrets, according to Mr. Drucker, is that "conflict must be embedded in a web of shared interests."<sup>13</sup> This perspective applies to the approach that the Japanese take in dispute resolution. Mr. Drucker concludes that, "Japan—at present alone among the major industrial nations—has addressed herself to defining the rules for a complex, pluralist society of large organizations in a world of rapid changes and increasing interdependence."<sup>14</sup>

One of the reasons for the kind of pluralism which is present in Japan, a pluralism which is based on different approaches and ideas in the political, social and legal worlds, is rooted in the feudalistic society out of which modern Japan arose just over a century ago. Anthropologically, Japan was and is divided into thousands of small, self-contained communities originally fashioned out of feudal territories. The peculiar topography of Japan did not permit large land areas to be farmed, so villages were organized around relatively small spaces of land. The Japanese have more ties to the communities in which they grew up than people in most countries.<sup>15</sup>

## 2. *Japanese Legal Tradition*

The Japanese view of law cannot be segregated from the philosophical and religious traditions of Japan. The ancient Chinese and Korean influences on Japanese political, religious and social thought carries over into the Japanese legal tradition. Japan is considered to be a civil law country, having borrowed extensively from the legal systems of Germany and France. Like other civil law countries, Japan does not have an adversarial system of law, nor is there a jury system. The judges are both fact-finders and interpreters of applicable law. The lawyer's role is to assist the court in understanding the problem and not necessarily trying

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<sup>13</sup> *Id.* at 90.

<sup>14</sup> *Id.*

<sup>15</sup> During the traditional *Obon* festival in August and the New Year's festival, most self-respecting Japanese return to the villages where they were born and raised. During those periods Tokyo is fairly quiet and the traffic moves quite smoothly because most of the people in Tokyo have returned to their "homes." For a discussion of Japan's feudalistic history as it relates to its legal system, see Y. NODA, *INTRODUCTION TO JAPANESE LAW* (1966). According to one authority, Japan's geography dictated the feudalistic separation of the country into small economic groupings, primarily agricultural, which has resulted in certain peculiar cultural characteristics of a pluralistic nature. Kato, *Japanese Cultural Climates in Asia*, in *THE COLLECTION OF PAPERS PREPARED FOR THE 8TH ASIAN ROUNDTABLE HELD IN TOKYO SEPTEMBER 24-25, 1981*, at 22-25 (1981) (The Asian Club).



to outwit his opponent through various legal tactics. The court conducts the fact-finding mission and instructs the lawyers as to what the court wants to know.

Despite its Western European civil law roots, in the application of the laws Japanese courts and lawyers have developed institutions and procedures which are peculiarly Japanese. Some authors contend that the influence of Buddhism as well as Confucian ethics has shaped the Japanese view toward law.<sup>16</sup> Accordingly, it is uncommon for a private dispute, even a commercial one, to end up in a court of law. Legal proceedings are in conflict with the Japanese belief that disputes should be worked out in private. Therefore, disputes are usually concluded through compromise (*wakai*) or conciliation procedures (*chotei*).<sup>17</sup> Although recently the Japanese attitude toward litigation has been undergoing some change, it is still relatively unusual for the courts to be asked to resolve the kinds of commercial disputes which become the subjects of lawsuits in the courts of the United States on a daily basis.<sup>18</sup>

### 3. *The Role of the Lawyer*

There are several cultural as well as practical reasons which account for the relatively small number of Japanese lawyers who are involved in commercial transactions. The Japanese aversion towards settling disputes in public, i.e., in courts of law, is manifested by their view of lawyers as an "unnecessary evil" as opposed to a "necessary evil." This attitude may account for the fact that there are twenty times more practicing lawyers per capita in the United States than in Japan.<sup>19</sup> However, in all fairness, it is also true that Japanese lawyers are primarily members of the trial bar and are not as involved in legal, tax and business counseling as many American lawyers are. Most Americans who have dealt with Japanese businessmen are familiar with the fact that it is still rare for a Japanese lawyer (*bengoshi*) to actually participate in commercial negotiations.<sup>20</sup>

Another factor which limits the participation of Japanese lawyers in commercial transactions is the relative simplicity and availability of Jap-

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<sup>16</sup> NODA, *supra* note 15, at 160. See also Lieberman, *Confucius's Lesson to Litigants*, N.Y. Times, July 9, 1984, § A, at 19, col. 1.

<sup>17</sup> See D. HENDERSON, *CONCILIATION AND JAPANESE LAW—TOKUGAWA AND MODERN* (1965). See generally 7 Z. KITAGAWA, *DOING BUSINESS IN JAPAN* § 1.02 (1984).

<sup>18</sup> See Zaloom, *Dispute Resolution in Japan*, L.A. Daily J., Sept. 9, 1983, at 3, col. 1.

<sup>19</sup> Baker, *supra* note 2.

<sup>20</sup> Hahn, *Negotiating Contracts With the Japanese*, 14 CASE W. RES. J. INT'L L. 377, 381-82 (1982). See also Narcisi, *Advising Japanese Corporations Doing Business With Americans*, 29 BUS. LAW. 835, 838-39 (1974).

anese legal source materials. In the United States, it is difficult for a lay person to assemble and comprehend relevant legal source materials. By contrast, a good number of Japanese executives have on their desks, or somewhere nearby, a copy of the "Collection of Six Codes," (*Roppo Zen-sho*) which contains almost all of the relevant Japanese laws and regulations. This single work, containing about 3,000 pages, is the comprehensive legal source document of Japan. A comparable work in the United States would encompass several thousand volumes, including all of the "United States Statutes," the "Code of Federal Regulations," and the comparable statutes and codes of the fifty states.<sup>21</sup> In addition to the "Collection of Six Codes," there is a summary version known as the *Shoroppo* to make the law even more accessible. In a particular commercial transaction, the Japanese businessman who has studied law as an undergraduate can sometimes himself review the applicable laws and evaluate the proposed course of action. There are, of course, specialized works on specific legal areas such as foreign trade, banking and securities laws. However, for the most part, the Japanese businessman need not bother consulting a lawyer to understand the law in a particular commercial context. In contrast, the American businessman rarely concludes a transaction without consulting either his in-house law department<sup>22</sup> or an outside law firm. These differences in the availability of legal source materials in Japan make it highly unlikely that a Japanese businessman will work closely with a lawyer in a commercial context unless he is forced under extraordinary circumstances to become involved in serious dispute resolution.

The differing roles of a lawyer in Japan and the United States create understandable difficulties when Japanese businessmen must deal with American businessmen in a commercial context. Both in the formation of a deal, i.e., a contract or some other business relationship, as well as in the resolution of a dispute, the Japanese businessman is placed at somewhat of a disadvantage when dealing with his American counterpart because the Japanese businessman usually will not be assisted by Japanese legal counsel. Although the situation has changed considerably during the past decade, most Japanese legal counsel have remained content to concentrate their efforts in the litigation field and have not become overly familiar with multinational transactions requiring more than a superficial understanding of the laws and legal traditions of non-Japanese jurisdic-

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<sup>21</sup> For a clear exposition of the Japanese legal system, see T. FUKUDA, *Japan*, in 2 CAMPBELL, *TRANSNATIONAL LEGAL PRACTICE: A SURVEY OF SELECTED COUNTRIES* 201 (1981).

<sup>22</sup> For a perceptive view of some of the problems arising out of the U.S. practice, see Auerbach, *Can Inside Counsel Wear Two Hats?*, *HARV. BUS. REV.*, Sept.-Oct. 1984, at 80.

tions and how they interact with their own. This has usually caused a need for the Japanese businessman to seek foreign legal counsel to assist him in his dealings with foreigners (*gaijin*). In a substantial number of commercial dispute cases between Americans and Japanese, both the American and Japanese sides, respectively, have been represented by American legal counsel.<sup>23</sup> The Japanese businessman then must deal with his legal advisor, a *gaijin*, who is representing him against his adversary, another *gaijin*.<sup>24</sup>

## II. FORMAL DISPUTE RESOLUTION

### A. Litigation

#### 1. *Jurisdictional Requirements*

A lawsuit arising out of a commercial transaction between United States and Japanese business entities must comply with applicable jurisdictional requirements. If an American company attempts to sue a Japanese company in a United States court, the American company will have to establish that there is personal jurisdiction over the Japanese company and that the court has subject matter jurisdiction over the dispute.<sup>25</sup> The latter jurisdictional requirement is one which is quite complex, but essentially involves the power of the court to adjudicate the particular type of dispute.<sup>26</sup> The other jurisdictional requirement, sometimes referred to as *in personam* jurisdiction, involves the question of whether it is fair and reasonable to require the particular defendant to litigate in the particular court in question. If the Japanese company in question is not doing business in the United States and is not otherwise subject to the various jurisdictional tests which have been established, it is possible that the Japanese company is not capable of being sued in the United States because there is no personal jurisdiction over the Japanese company in an American court.<sup>27</sup> The converse would also be true of an American company which is sued in a Japanese court.<sup>28</sup> One of the non-tax reasons for establishing a wholly-owned United States subsidiary for a Japanese company or, conversely, a Japanese subsidiary for a United States company, is to assist in preventing personal jurisdiction from arising in the other country. So long as the subsidiary company is treated by its parent

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<sup>23</sup> For one view of this phenomenon, see R. CHRISTOPHER, *THE JAPANESE MIND: THE GOLIATH EXPLAINED* 165-69 (1983).

<sup>24</sup> *Id.*

<sup>25</sup> CASAD, *JURISDICTION IN CIVIL ACTIONS* ¶ 1.01 (1983).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> KITAGAWA, *supra* note 17, at § 5.02.

on an arm's length basis as an independent business organization and certain rules are observed, it may be possible that the parent company will not be sueable in a court in the country where its subsidiary is located.<sup>29</sup>

## 2. *Procedural Requirements*

In order to begin a lawsuit, it is traditional to serve what are known as legal process papers. In the United States, these are usually limited to the summons and a complaint. The term "service" indicates that there must be fair notice of the lawsuit provided to the other party with adequate information of what is being complained about by the plaintiff, the party instituting, or bringing, the suit. Within the United States, whether the lawsuit is in the federal or the state courts, there are rules which govern the manner of service of these papers in order to institute or begin a lawsuit.<sup>30</sup> However, when an American company desires to sue a foreign company, such as a Japanese company located in Japan, somewhat more complex rules must be observed in order that such service of process will be effective. Both the United States and Japan are signatories to the Hague Convention which sets forth rules which must be complied with in order that service of process may be effected in either country by a national of the other country.<sup>31</sup> These rules require translation of the summons and complaint into Japanese or English, as the case may be, the filing of these papers with the appropriate government agency and the authorization of a court of the other country.<sup>32</sup> The intent of these requirements is to ensure that the party receives the summons and complaint in a language and form which is intelligible to that party. Also, it provides a means whereby the government is apprised of the fact that one of its nationals is being sued in a foreign court. Sometimes an American company, not present in Japan, will actually go to Japan, retain a Japanese lawyer, and sue a Japanese company in a Japanese court. The same occasionally happens with respect to a Japanese company which is not doing business in the United States but comes to the United States to prosecute its claim against an American company in a United States court. In these latter cases, the Hague Convention would not be applicable since the defendant is being sued in its own country.<sup>33</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *See, e.g.*, Fed. R. Civ. P. 4.

<sup>31</sup> Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163.

<sup>32</sup> *Id.*

<sup>33</sup> *See Droz & Dyer, The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 NW J. INT'L L. & Bus. 1, at 155, 162-65 (1981).

In a case pending in a United States court, after jurisdictional questions have been resolved, and service of process has been duly effected, discovery procedures may be initiated including various requests for information and documents by either party. As indicated earlier, United States legal proceedings involve what has been referred to as the adversary system. It is a system in which lawyers on each side attempt to seek out or discover as much information as possible from the opposing party and to use that information in presenting the other party's position before the judge alone or assisted by the jury. In a Japanese court proceeding, the converse is true. The lawyers do not usually initiate discovery proceedings against each other because the judges of the court are responsible for determining what facts are relevant and for seeking out such facts from the lawyers and their clients. Given this contrast, it is not surprising that there is great resistance when an American lawyer seeks to impose pretrial discovery procedures against foreign defendants. There have been instances in which British<sup>34</sup> and Swiss<sup>35</sup> courts have assisted nationals of their countries in resisting discovery requests of this nature from United States lawyers and United States courts. In fact, several countries have passed legislation prohibiting the production of documents by their nationals even if ordered to do so by a United States court of law.<sup>36</sup> These issues lead to questions of territorial sovereignty and comity among nations. These are real problems which cannot be avoided in litigation between United States and Japanese business entities.

### 3. *Cultural Factors*

Some of the aversion the Japanese have to lawyers and the law in general has been discussed above. A noted Japanese legal scholar,<sup>37</sup> has stated:

To never use the law, or be involved with the law, is a normal hope of honorable people. To take someone to court to guarantee the protection of one's own interests, or to be mentioned in court, even in a civil matter, is a shameful thing; and the idea of shame, as will be seen, is the keystone to the system of Japanese civilization. In a word, Japanese do not like law. There is no wish at all to be involved with justice in the European sense of the word.<sup>38</sup>

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<sup>34</sup> *Transnational Litigation: Practical Approaches to Conflicts and Accommodations*, *supra* note 1, at 645.

<sup>35</sup> *Id.* at 1555.

<sup>36</sup> *Id.* at 638. See also Droz & Dyer, *supra* note 33, at 165-70.

<sup>37</sup> Professor Yoshiyuki Noda's scholarly work has contributed to a better understanding of both legal and nonlegal factors differentiating Japanese law from the legal systems of Europe and the United States. See *supra* note 15.

<sup>38</sup> NODA, *supra* note 15, at 159-60.

Professor Noda goes on to state that this natural aversion to law has arisen from both Confucian and Buddhist ideals.<sup>39</sup> According to Professor Noda, Confucius believed that the structure of a given society was natural and absolute and could not be changed. Confucius advocated that all citizens observe their obligations as members of a particular society.<sup>40</sup> Accordingly, "willing obedience is the principal human virtue."<sup>41</sup> At the same time, Buddhism encouraged passivity to external surroundings.<sup>42</sup> According to Professor Noda, these two traditions of Japanese thought created a very difficult environment for the assertion of subjective legal rights.

The concept of *giri*, the traditional rules of interpersonal conduct, is given more emphasis than legal rights as such.<sup>43</sup> There is a certain emotive content to the concept of *giri*, according to cross-cultural commentators.<sup>44</sup> *Giri*, in essence, is a concept which reflects the need for mutual and anticipatory sincerity between fellow human beings. The Japanese rely more on the articulation of mutual sincerity for resolving conflicts than on either the assertion or protection of legal rights. According to Robert C. Christopher who recently wrote the best-selling *The Japanese Mind: The Goliath Explained*,

For Japanese, the law is not as it is for many American lawyers, an intellectual chess game, nor is the concept of justice a kind of Platonic ideal independent of the practical concerns of the moment. Indeed, the word Japanese most commonly use where Americans would use 'justice' is *seigi*—a Chinese compound which means 'right principles' and has no necessary reference to legal matters at all. For better or for worse, in short, Japanese come far closer than contemporary Americans to living by the precept of Henry Thoreau: 'it is not desirable to cultivate a respect for law so much as a respect for right.'<sup>45</sup>

Given this background, any litigation involving a Japanese company and a United States company is bound to create certain, predictable problems arising out of these differing cultural factors. In addition to the cross-cultural conflicts which have been alluded to, there are two other areas of complexity in United States-Japan litigation, language and linguistics. Obviously, there are going to be tremendous language problems in any complex litigation between Americans and Japanese. The utilization of interpreters (simultaneous or sequential oral interpretation from

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<sup>39</sup> *Id.* See also note 17.

<sup>40</sup> NODA, *supra* note 15, at 159-60.

<sup>41</sup> *Id.* at 172.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 174-83.

<sup>44</sup> *Id.*

<sup>45</sup> CHRISTOPHER, *supra* note 23, at 169.

one language to the other) or translators (the preparation of written translations from one language to the other) does not necessarily resolve the language barriers. Most international commercial agreements are in the English language. Written English is more easily understood by most Japanese businessmen than spoken English. United States legal counsel representing a Japanese party to a lawsuit in the United States should be certain that the Japanese client clearly understands the meanings of the various legal terms in English being used in the proceedings. A legal glossary in English and Japanese should be developed specifically for the dispute in question.

In addition to the language difference, there are linguistic differences as well. Linguistics involves the study of the patterns and structure of conversation.<sup>46</sup> Words, vocabulary and sentence patterns of the various speakers in a conversation can be studied in order to determine, among other things, how a particular speaker introduces a topic or how a speaker expresses assent or dissent. These patterns differ between cultures such as the United States and Japan. For example, the Japanese custom to acknowledge statements being made is sometimes mistakenly taken by Americans as assent to the proposition being asserted.<sup>47</sup>

Use of linguistics may help to disclose to one of the parties that what was being spoken was not clearly understood or agreed upon. As a result, it can be an invaluable tool to the attorney in order to determine whether a particular transaction should be interpreted in the way the opposing party states it should be interpreted or in some other way. In United States-Japan commercial negotiations, linguistics provides an additional factor to be weighed in determining mutual comprehension.

#### 4. *Applicable Legal Standards*

When a Japanese company is subjected to United States legal proceedings, the legal standards are usually those of the United States. The converse would be true if an American company were subjected to litigation in a Japanese court of law. To the extent, however, that a United States court of law may be required to apply Japanese legal standards to a transaction, the Japanese legal standards would become very important. In many cases, an agreement between an American company and a Japanese company will often provide that the law of a particular state will be controlling. In other cases, the agreement may refer to Japanese legal standards.

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<sup>46</sup> J. Levi, *Linguistics, Language, and Law: A Topical Bibliography* (1982). This bibliography contains an extensive listing of materials relating to linguistics as applied to law.

<sup>47</sup> See J. CONDON & M. SAITO, *INTERCULTURAL ENCOUNTERS WITH JAPAN* 185-92 (1972).

Legal concepts which exist in one country may not exist in the other country. For example, the so-called "reasonable man" standard is not the same in Japan as it is in the United States.<sup>48</sup> The legal concept of "conspiracy," as constituting a criminal offense, also does not exist under Japanese legal standards.<sup>49</sup> These are only two illustrations of the many differences in legal concepts between Japan and the United States.

### 5. *Treaty Obligations*

Bilateral and multilateral treaty obligations govern, to a limited extent, the legal relationships between American and Japanese companies in their commercial transactions with each other. The Treaty of Friendship, Commerce and Navigation between Japan and the United States is of great significance in determining the respective legal rights of Japanese and Americans in each other's country.<sup>50</sup> Recently, the United States Supreme Court interpreted the Treaty with respect to the applicability of anti-discrimination legislation in the employment field in connection with the activities of United States subsidiaries of Japanese companies.<sup>51</sup> The Treaty was held not to interfere with the duties of such companies to comply with the fair employment requirements of Title VII.<sup>52</sup> The Hague Convention which regulates service of legal process has previously been discussed. In addition, there are a number of other treaties or informal arrangements between the United States and Japan on the subjects of tax,<sup>53</sup> antitrust<sup>54</sup> and other matters of mutual concern affecting private enterprises in the United States and Japan.

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<sup>48</sup> KITAGAWA, *supra* note 17, at Part 13, § 105(2).

<sup>49</sup> *Id.* at § 5.03(5).

<sup>50</sup> Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, Japan-United States, 4 U.S.T. 2063, T.I.A.S. No. 2863 stipulates that each party to the Treaty is required to grant nationals and companies of each country "national treatment" in connection with commercial activities in the other state.

<sup>51</sup> *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982). The United States Supreme Court held that the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan did not exempt Sumitomo Shoji American, Inc., a U.S. subsidiary of a Japanese parent corporation, from the fair employment provisions of Title VII.

<sup>52</sup> *Id.*

<sup>53</sup> Double Taxation Convention, Mar. 8, 1971, United States-Japan, 23 U.S.T. 967, T.I.A.S. No. 7365.

<sup>54</sup> In recent years, there has been an informal arrangement between the United States and Japan for the exchange of non-confidential information and experiences in antitrust developments between the two countries. This exchange takes place at annual meetings which alternate between the United States and Japan. However, the arrangement is extremely informal and is not provided for or set out in any written agreement or other document. *See also* Guide to Legislation on Restrictive Business Practices (3d ed. 1976) for the work of the Organization for Economic Cooperation and Development Restrictive Business Practice Committee.



## B. Arbitration

### 1. *Negotiation of Arbitration Agreements*

Arbitration provisions are contained in many commercial agreements between Americans and Japanese. The reason for resorting to arbitration as a favored means of resolving disputes between American and Japanese businessmen is the relative simplicity of such proceedings. Arbitration usually does not involve the complexity and expense of litigation, nor the procedural and discovery burdens in United States court proceedings. The development of a standard referral provision, which is contained in the Japan-American Trade Arbitration Agreement of September 16, 1952 and may be used in United States-Japan commercial transactions, is indicative of the frequency of including arbitration provisions in such agreements.<sup>55</sup> This Agreement brings into play the Japanese Commercial Arbitration Association and the American Arbitration Association. In the event the arbitration provision is invoked by either party, the Agreement provides for certain rules as to the selection of arbitrators and the location of the arbitration proceedings. Of course, it is possible to design an arbitration provision which would be more specific and provide for greater certainty as to the details of the arbitration proceedings.

Most experienced practitioners believe that it is preferable to have three arbitrators, one arbitrator to be selected by the Japanese party, the other by the American party and then the two arbitrators to select the third arbitrator. This creates a condition for greater objectivity as perceived by the parties. The *situs* of the arbitration proceedings may be stipulated to be the United States if arbitration is instituted by the Japanese party and Japan if instituted by the American party. These provisions, sometimes overlooked in the haste to conclude an agreement, deserve considerable attention by both the Japanese and American parties to a proposed commercial transaction because the parties are more likely to agree upon procedural matters at the formative stages rather than when a dispute has actually arisen.<sup>56</sup>

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<sup>55</sup> The Agreement Between the Japan Commercial Arbitration Association and the American Arbitration Association of September 16, 1952 provides for arbitration between citizens of the two countries. It is a private agreement between the two arbitration associations and has been used extensively in U.S.-Japan commercial transactions. Japanese concerns prefer arbitration in general because of a preference to argue "equitable" positions as opposed to purely legal technicalities. Also, the Japanese concerns prefer to avoid extensive discovery proceedings which they believe merely exacerbate the conflict. Finally, the ability to maintain confidentiality with respect to arbitration proceedings is a highly desirable matter for most Japanese concerns. According to Japanese ethical considerations, private disputes should not be aired in public.

<sup>56</sup> R. Fisher, Remarks at the CPR Legal Program Proceedings 27 (June 1983).

## 2. *Appropriate Arbitration Rules*

In addition to the Japanese Commercial Arbitration Association and the American Arbitration Association, there are also the Rules of Conciliation and Arbitration of the International Chamber of Commerce<sup>57</sup> located at Paris. The Japan Commercial Arbitration Association has extensive experience in international arbitration and has entered into cooperative agreements with arbitration associations in many other countries.<sup>58</sup> This is also true of the American Arbitration Association. In 1976, a detailed set of arbitration rules was drafted by the United Nations Commission on International Trade Law (UNCITRAL) to be applied in arbitration proceedings administered by the International Council for Commercial Arbitration.<sup>59</sup> The UNICITRAL rules have become a model for such proceedings. There are some instances in which the parties have not stipulated as to the applicability of any particular set of arbitration rules. In such cases, the arbitrator is forced to develop his own arbitration rules for the occasion. This could create problems because the parties cannot predict which rules the arbitrator will select, lending uncertainty to the proceedings. Therefore, it is highly recommended that a recognized set of arbitration rules be referred to in any agreement providing for arbitration.

## 3. *Procedural Requirements*

An arbitration provision in a contractual arrangement may be enforced by either party to the agreement under applicable federal and state laws. Accordingly, an arbitration provision can be of value to contracting parties who wish to avoid litigation altogether.<sup>60</sup> There are some circumstances, however, in which litigation may be required even if there is an arbitration clause. Allegations involving antitrust or patent issues are sometimes not considered to be arbitrable and United States federal courts are likely to entertain a request to hear the matter notwithstanding an arbitration clause. Since antitrust and patent issues may affect public policy, the courts have in the past held that antitrust and patent

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<sup>57</sup> INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION AND CONCILIATION (renewed 1975).

<sup>58</sup> See Kawakami & Henderson, *Arbitration and U.S./Japanese Sales Disputes*, 42 WASH. L. REV. 541 (1967).

<sup>59</sup> Report of the United Nations Commission on International Trade Law, 31 U.N. GAOR Supp. (No. 17) at 34-50, U.N. Doc. A/31/17, reprinted in [1976] 7 Y.B. U.N. COMM. INT'L TRADE L. 157, U.N. Doc. A/CN.9/112.

<sup>60</sup> See 9 U.S.C. § 2 (1982).

disputes should not be left to private arbitration.<sup>61</sup> That is not true in the international context, however, where it has been held that antitrust claims are subject to arbitration under an arbitration provision.<sup>62</sup>

Arbitration panels conduct their proceedings more informally than would be the case in litigation. In this sense, an arbitration proceeding is similar to a lawsuit in Japan where the judges basically direct the attorneys as to what they are to do. Arbitrators, similar to judges of the Tokyo District Court, do not usually permit the attorneys to seek out every possible advantage from the opposing attorney, but attempt to direct the course of the proceedings to obtain as much relevant information as possible in order to decide the dispute in a reasonable, abbreviated and expeditious manner. Likewise, in arbitration, the initiative frequently is taken by the arbitration panel.

The applicable rules of arbitration will set forth most of the procedural requirements needed to institute arbitration proceedings, including what constitutes proper notice to the other party. These procedural requirements are usually not as strictly applied by the arbitrators as they might be by a court of law in either the United States or in Japan.

In keeping with the greater informality of arbitration, the legal standards applied by arbitrators are more flexible than those required in a United States or Japanese court. The arbitrators are authorized to fashion a resolution of the dispute, which is probably more concerned with fundamental fairness, as opposed to the technical principles of law which would be binding on a court of law in either country.

#### 4. *Treaty Obligations*

As indicated, under United States federal and state law, the decision of an arbitrator or arbitration panel is enforceable in either a United States or a Japanese court of law. By treaty, a judgment of a court based on an arbitration ruling in either country may be enforced in either country.<sup>63</sup>

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<sup>61</sup> J. VON KALINOWSKI, ANTITRUST COUNSELING AND LITIGATION TECHNIQUES § 21.01(2)(e). *But see infra*, note 62.

<sup>62</sup> Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985).

<sup>63</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *approved*, Sept. 1, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997. *See also* Treaty on Friendship, Commerce and Navigation, *supra* note 50, at 2067-68.

### III. MEDIATION AND CONCILIATION

#### A. Japanese Mediation Techniques

##### 1. *Statutory Conciliation Procedures*

Given the Japanese legal background, it is not surprising that there is a well developed body of law in Japan which formalizes mediation techniques. Under the procedure known as *chotei*, as provided for in the Civil Conciliation Law of 1951, parties to a civil dispute may invoke a conciliation procedure.<sup>64</sup> The applicable court will then designate a *chotei* committee which is composed of a judge and two or more conciliators appointed by the court. The court itself may require the conciliation procedure to be invoked during a pending lawsuit where the court deems it appropriate to do so.<sup>65</sup> The conciliation proceedings take the form of hearings and may extend over a period of several months. The *chotei* proceedings are intended to determine the relative merits of each side's position and then recommend a reasonable and non-binding means of settling the dispute. The essence of the procedure is to reestablish a minimal level of goodwill between the disputants in order that a mutually acceptable compromise may be concluded.<sup>66</sup>

If there is no resolution after completing the *chotei* or civil conciliation procedure, the parties may file or continue the lawsuit. Most minor disputes in Japan, particularly those relating to property and domestic relations, are resolved during the *chotei* proceedings.<sup>67</sup> However, it appears that the *chotei* proceeding is also being utilized, from time to time, in a commercial context with larger business entities. The *chotei* proceedings are relatively private and do not involve the notoriety and publicity of a public trial.

##### 2. *Non-Statutory Mediation*

In addition to statutory conciliation procedures, there is a long-standing tradition in Japan for informal mediation techniques.<sup>68</sup> In the

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<sup>64</sup> HENDERSON, *supra* note 17, at 207-34.

<sup>65</sup> *Id.* at 218.

<sup>66</sup> *Id.* at 220-22. For example, the commentator states that "Sincerity is encouraged instead of wit." The following example is given: "One case is said to have been settled because the conciliators personally climbed all over a hillside to survey the land in dispute, which so impressed the parties that they could not bear to let the committee down." *Id.* at 221, note 46.

<sup>67</sup> *Id.* at 207.

<sup>68</sup> *Id.* at 221. The relative novelty of formal dispute resolution procedures is described in H. TANAKA & N. SMITH, *THE JAPANESE LEGAL SYSTEM* 254-352 (1976). An interesting contrast is indicated by the authors in the fact that in 1970, the total number of cases filed in the entire country of Japan amounted to 492,198 cases. For the same year, in merely one state of the United States, California, there were 5,431,763 cases filed. *Id.* at 256.

public sector, "administrative guidance" or *gyosei shido* is a form of governmental persuasion which is based on "voluntary" business cooperation.<sup>69</sup> The equivalent in the United States is sometimes referred to as "jaw-boning." One of the great advantages of the Japanese system is the ability of this particular pluralistic society to work smoothly in reaching goals.<sup>70</sup> Much of this is attributable to "administrative guidance."<sup>71</sup>

In the private sector, informal mediation of disputes is comparable to *gyosei shido*. Private parties sometimes mediate their disputes by calling in a mutually trusted associate or a senior business advisor. Such a mediator may sometimes act, at least in name only, as a consultant to one of the parties. The person may or may not be a lawyer. In any event, the obligation of this person is to point out and emphasize those areas which are not in dispute in order that both parties realize there is more to be gained by working out their differences harmoniously than to continue harping on the shortcomings of the other party's position.<sup>72</sup>

## B. United States Mediation Techniques

### 1. Alternative Dispute Resolution

The United States is not without mediation and conciliation techniques; however, they are not as institutionalized in the U.S. as they are in Japan. Recently, there has been much written in the United States about what is referred to as "corporate dispute management."<sup>73</sup> In fact, various organizations are encouraging mediation and conciliation techniques.<sup>74</sup> However, for the most part, these have not been implemented by statute or required by the courts.<sup>75</sup>

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<sup>69</sup> *Id.* at 353-404.

<sup>70</sup> Drucker, *supra* note 11, at 83.

<sup>71</sup> "Administrative guidance" is a method by which Japanese governmental agencies utilize persuasion, advice and inducement in order to influence individuals and enterprises to adhere to policies or practices which the government deems advisable. Though not legally binding, failure to comply may result in the denial of "inducements" such as special loans, subsidies and tax credits. 1 KODANSHA ENCYCLOPEDIA OF JAPAN *Administrative Guidance* 12 (1983).

<sup>72</sup> In a more personal, but analogous, aspect, there is also the practice of the *nakōdo* which is comparable to that of a "matchmaker." The *nakōdo* is a trusted family friend or a person who is held in high esteem by both the bride's family as well as the groom's family. This person literally "arranges" a marriage, although in modern Japan the situation may be changing somewhat. In the event of a subsequent matrimonial dispute between the husband and the wife, the same *nakōdo* is usually invited to return to mediate the dispute.

<sup>73</sup> CORPORATE DISPUTE MANAGEMENT, 1982, CENTER FOR PUBLIC RESOURCES (1982).

<sup>74</sup> *Id.* Various types of organizations, both in the public and private sectors, are described in the manual as applying the principles of corporate dispute management.

<sup>75</sup> *Id.* at xvi-xvii. Some courts, e.g., the Second Circuit's Special Master Program, have implemented a limited dispute resolution procedure. *Id.* Some states have adopted mandatory court-annexed arbitration, with the right to a trial de novo on appeal, for cases below certain dollar limits.

One of the means by which American parties informally resolve their disputes in the United States is to utilize what has been referred to as a "mini-trial."<sup>76</sup> This is similar to a conciliation proceeding whereby the parties to a dispute agree to have a mutually esteemed and trusted person act as a mediator and listen to both sides. The mini-trial mediator then provides his opinion as to the relative merits of each side's position, and based on the mediator's recommendations, the parties are expected to settle their differences in an amicable manner out of court.<sup>77</sup> The resulting settlement, if any, may be legally binding either as a contract or if so provided by statute.

The United States has also borrowed from the Ombudsman concept in Europe. The Ombudsman is a form of mediation in which a permanent office of Ombudsman is created to settle disputes between the parties, typically between government agencies and private citizens.<sup>78</sup> Hawaii, for example, has utilized this concept by enacting legislation to establish the office of Ombudsman.<sup>79</sup>

Professor Roger Fisher of the Harvard Law School, author of a best-selling book entitled *Getting to Yes - Negotiating Agreement Without Giving In*,<sup>80</sup> has made the following observations concerning the need for greater utilization of mediation techniques in dispute resolution:<sup>81</sup>

1. One reason disputes so often end up in court is that we make, and are operating on, wrong assumptions. One assumption which Professor Fisher challenges is the American belief that "the natural way to deal with the problem is to go to court." Professor Fisher wants to develop an alternative to litigation, i.e., problem-solving. He also points out that Americans believe in the assumption that "to compromise" is to compromise one's principles. Or that "to mediate" is to meddle. Many American corporations, according to Professor Fisher, do not want to engage in mediation to resolve disputes because it is to ask a third party for assistance which is thought somehow to indicate weakness on the part of the corporation.

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*See, e.g.,* Pennsylvania, 42 PA. CONS. STAT. ANN. § 7361, *et. seq.* (Purdon 1982), and PHILADELPHIA CIV. R. 180 (cases up to \$20,000.00), and California, CAL. CIV. PROC. CODE § 1141.10-32 (West 1982) (maximum of \$15,000-\$25,000, depending upon the county). For the most part, the United States does not have a formal conciliation or mediation procedure for civil litigants.

<sup>76</sup> CORPORATE DISPUTE MANAGEMENT, *supra* note 73, at xvi-xvii.

<sup>77</sup> *Id.*

<sup>78</sup> *See* HAWAII REV. STAT., Ch. 96 (1976) ("The Ombudsman").

<sup>79</sup> *Id.*

<sup>80</sup> R. FISHER & W. URY, *GETTING TO YES* (1981).

<sup>81</sup> CPR Legal Program Proceedings, *supra* note 56, at 23-26.

2. The Harvard Negotiation Project, under Professor Fisher, lists the following six points toward more effective negotiation and mediation:

- (a) Develop better skills in listening and communication as well as analysis and knowledge. To know more about your opponent is to have more power.
- (b) Develop good relationships and develop trust between adversaries. One way is to keep promises meticulously once made. An easy way to keep promises is to make fewer promises.
- (c) Develop an alternative in the event the first choice does not work out.
- (d) Develop a good option which is not necessarily a win or lose position.
- (e) Develop legitimate arguments based on objective standards which appeal to both sides in terms of fairness and equity.
- (f) Don't start out with a negative commitment which means "take it or leave it." Start out with a positive commitment which is to say "make me an offer."

Professor Fisher concludes by stating that "every litigated case, almost without exception, is a mistake. Why do people make this mistake? Because they are emotional and irrational and because lawyers give them bad advice."<sup>82</sup>

#### IV. PURPOSEFUL NEGOTIATIONS

##### A. The Role of United States Counsel

We have thus far discussed the inclination of American lawyers to handle disputes through litigation rather than mediation. In spite of this, American legal counsel plays a particularly vital role in United States-Japan commercial transactions because the American party requires the assistance of United States legal counsel. Japanese companies, whether they utilize Japanese legal counsel or not, may also require assistance from United States legal counsel in order to understand and evaluate what the American party is saying and doing, particularly with respect to the interpretation of transnational contractual documents.

The myriad of laws and regulations which govern every aspect of American corporate and commercial life is difficult for most foreign businessmen to understand and act upon. There are what appear to be quite esoteric reporting requirements under United States laws, especially for foreign businessmen.<sup>83</sup> There are also the sometimes conflicting requirements of state and federal authorities and courts.<sup>84</sup> All of these factors

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<sup>82</sup> *Id.*

<sup>83</sup> See generally Vila, *Legal Aspects of Foreign Direct Investments in the United States*, 16 INT'L LAW. 1, at 1 (1982).

<sup>84</sup> For a foreign businessman, the conflicts are not always limited to those between state and federal authorities and courts. See Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW J. INT'L L. & BUS. 1, 1 (1979).

play a part in heightening the importance of American legal counsel's role in connection with United States-Japan commercial transactions.

When a dispute has occurred, American lawyers play a critical role in determining whether the dispute escalates to a point of no return or whether a constructive *rapprochement* can be engineered. This latter approach is what is meant by purposeful negotiations in a dispute context.

### B. The Role of Japanese Counsel

Japanese lawyers, as previously stated, have been more reluctant than American lawyers to become directly involved in the negotiation process as well as in the dispute resolution phase short of actual litigation in Japanese courts. This reluctance stems principally from the infrequency with which Japanese multinationals ask their lawyers for such legal advice.<sup>85</sup> There are, nevertheless, Japanese lawyers who are quite skilled in handling multinational transactions in English. Many of these attorneys have received postgraduate legal education in either the United States or Europe. They are very sophisticated and highly talented individuals who can help to bridge the differences between the American and Japanese approaches to dispute resolution. Many of these Japanese legal counsel who are assisting some of the major multinational companies of Japan have formed close working relationships with legal counsel in the United States. Together, these groups of attorneys provide a formidable source of imaginative and creative approaches to resolving disputes short of litigation. Of course, if litigation does ensue, these same persons are quite capable of defending the rights of the Japanese multinationals as well as taking the offensive if necessary.<sup>86</sup>

From a European perspective, Dr. Glossner of Kronberg recently stated that:

Lawyers can be a great help to bring the parties to a reasonable solution without going to arbitration, or, to a settlement with or without the arbitrator's intervention. It can also be just the contrary. Lawyers can be obstacles to practical solutions for many reasons: As employees of one of the parties they may have been involved in the contract making and, therefore, be biased. Naturally, a generalization is not appropriate. *Personal integrity and practical experience on the background of sound legal knowledge* are likely to guarantee the confidence which is essential between lawyers, the

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<sup>85</sup> HENDERSON, *supra* note 17, at 192-94.

<sup>86</sup> Part of the Fourth Annual Meeting of the CPR Legal Program held in 1983 at the Aspen Institute concentrated on dispute resolution in the United States-Japan context and the role of lawyers. This discussion is quite helpful in terms of understanding the kinds of problems described herein. CPR Legal Program Proceedings, *supra* note 56.



parties and the arbitrators.<sup>87</sup>

Dr. Glossner's comments are highly appropriate for both American and Japanese legal counsel in a pre-litigation or pre-arbitration dispute resolution situation.

To the extent mutual goodwill may be lacking between the parties involved in any dispute, the lawyers' initial contribution should be to bring an element of goodwill to the situation based on a detached view of the dispute. Such goodwill may be an influencing factor in bringing the parties to a better understanding if the lawyer also demonstrates "personal integrity" and "practical experience on the background of sound legal knowledge."<sup>88</sup> "Personal integrity" could very well consist of the six factors listed by Professor Fisher as enhancing one's negotiation and mediation abilities.<sup>89</sup> "Practical experience" would probably reflect many of the factors previously discussed concerning the legal and non-legal aspects of United States-Japan commercial transactions and disputes arising therefrom.<sup>90</sup> To the extent opposing legal counsel follow these precepts, it will be an unusual dispute resolution situation in which the parties will not be inspired to reestablish mutual goodwill in order to avoid resorting to formal legal proceedings. The "practical experience" will be reflected in the degree to which the lawyer in a United States-Japanese dispute resolution situation is cognizant of the kinds of factors discussed herein.

### C. Economic Factors

The tremendous cost of litigation in the United States is another factor favoring alternative methods of dispute resolution. The Chief Justice of the United States Supreme Court and other leading members of the legal establishment are attempting to find a way out of this morass in order that justice will be served without committing the litigants to penury.<sup>91</sup> It appears that the so-called adversary system of American justice is largely to blame for the high cost of litigation.<sup>92</sup> Of course, the cost of litigation in Japan is also quite substantial, although there is a relatively smaller number of commercial cases which are litigated in the Japanese courts.<sup>93</sup>

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<sup>87</sup> Glossner, *Sociological Aspects of International Commercial Arbitration*, 10 INT'L BUS. LAW. 311, 313 (1982) (emphasis added).

<sup>88</sup> *Id.*

<sup>89</sup> FISHER & URY, *supra* note 80 and accompanying text.

<sup>90</sup> *See, e.g., supra* notes 37-47 and accompanying text.

<sup>91</sup> Bok, *supra* note 5, at 44.

<sup>92</sup> *Id.*

<sup>93</sup> HENDERSON, *supra* note 17, at 244.

Many times, the total costs of litigation in the United States far surpass the amount of money or economic value which is in dispute between the parties. This is perhaps what President Bok of Harvard was talking about when he said that "Engineers make the pie grow larger; lawyers only decide how to carve it up."<sup>94</sup> Unfortunately, once the pie is carved up, little may be left for the litigants.

In all fairness to American lawyers, it is not necessarily true that American lawyers litigate just for the sake of litigating or in order to increase fees. Just as in any other service profession, lawyers must serve their clients well if they are to survive. In Japan as well as in the United States, it is the clients who must make the final decision as to whether to litigate and how hard to litigate. Many times, in the heat of battle, the clients themselves may lose sight of just what is happening. Again, the American adversary system adds fuel to the fire in such cases because of the concentrated manner in which such litigation is conducted.<sup>95</sup>

Both American and Japanese legal counsel may perform a salutary service to their clients by continually reminding them of the economic costs involved in litigation. It is at this point that effective dispute resolution can be practiced in developing reasonable settlement proposals acceptable to both sides. Obviously, the sooner the dispute is resolved, the sooner the companies can get back to work and concentrate their efforts on doing business, not arguing or litigating. There are hidden costs to litigation which go beyond attorney's fees. This is the "downtime" which is occasioned by the need to have senior staff as well as senior management involved in litigation strategy and in the pretrial discovery process in those cases in which the dispute is being litigated in United States courts. Those executives who are working with attorneys for long periods of time are diverted from engaging in new or continuing productive activities for their respective companies.

#### D. Public Relations Factors

Due to the adverse view of litigation held by Japanese society, most Japanese companies are very reluctant to enter into or be involved in litigation of any kind, whether in the United States or in Japan.<sup>96</sup> Most

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<sup>94</sup> Bok, *supra* note 5, at 41.

<sup>95</sup> R. Fisher, *What About Negotiation as a Specialty?* 83 A.B.A. J. 1220, 1221. Professor Fisher states: "Like warfare, litigation should be avoided. Let's candidly admit that from the client's point of view virtually every litigated case is a mistake. Unless one client or both had made a mistake, the case could have been settled and both would have been better off. They might have been able to craft an outcome reconciling their differing interests far better than the court could later. At the worst, they could have saved and divided between them the impressive legal fees that litigators earn." *Id.*

<sup>96</sup> Zaloom, *Dispute Resolution in Japan*, *supra* note 18.

experienced American lawyers realize this fact and sometimes attempt to use it to their advantage when they are representing American companies against Japanese companies. The mere threat of litigation to some Japanese companies may create a tremendous sense of frustration and embarrassment.<sup>97</sup> However, this attitude is changing somewhat and many Japanese companies today are not necessarily placed at a disadvantage because of their fear of being involved in litigation.<sup>98</sup>

Both American and Japanese legal counsel should consider public relations factors in assisting the parties to resolve their differences amicably and without resort to formal proceedings. For example, in the case of a United States-Japan joint venture, there is usually more to be gained, from a public relations standpoint, in reminding both parties to try to settle their differences quietly and effectively. A joint venture represents a marriage of sorts. Many of these joint ventures have continued for between fifteen and twenty-five years. A sudden breakup which ends up in either a Japanese or a United States court is a disservice to the close and long-standing personal relationships which have been established between the personnel of both companies in most of these cases. It would be far better for the public image of the parties to break up, if they must, in a quiet and dignified manner and not in a contested divorce-style proceeding in court. They would thus be more likely to avoid an appearance of failure, disharmony, shame, or being odd or troublesome.<sup>99</sup> These kinds of public relations factors should be pointed out by American and Japanese legal counsel to their respective clients since management, in the heat of battle and distrust, sometimes cannot appreciate these factors.

#### E. Linguistics, Language and Cultural Factors

We have already discussed, in a very simplified sense, linguistics, language difficulties and cross-cultural factors which may tend to impede understanding between Americans and Japanese in a commercial dispute. Both American and Japanese legal counsel should caution their respective clients in a United States-Japan commercial dispute concerning these problems and point out how they might be ameliorated.

English has become, without question, the established language of international trade and commerce. Therefore, in order to survive in international trade and commerce, it is important to be able to speak, read

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<sup>97</sup> See Kim & Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L & COMP. L.Q. 491, 503 (1979).

<sup>98</sup> CPR Legal Program Proceedings, *supra* note 56.

<sup>99</sup> See Lansing & Wechselblatt, *Doing Business in Japan: The Importance of the Unwritten Law*, 17 INT'L LAW. 647, 653 (1983). See also Kim & Lawson, *supra* note 97, at 502-03.

and write in fluent English. This creates a real language problem for many Japanese. As indicated earlier, Japanese executives have confidence in their English ability so long as it is in the written form. However, due to apparently inadequate oral training in English, most Japanese have great difficulty in listening and speaking in English.

From a linguistic standpoint, it is important for legal counsel to point out that Americans and Japanese structure their speech patterns differently. However, it is important not to over-generalize as there are varying degrees of differences even within Japan or in the United States. Accordingly, there are many Japanese who are able to express themselves in English quite freely and candidly. The younger generation of Japanese executives is overcoming this problem because of the improved standards of English oral education in Japan as well as the greater mobility of younger Japanese executives and contacts they have had during their formative years with English-speaking peoples, not necessarily American, but Australian, British and others.

For Americans, it is convenient that English has become the language of international trade and commerce, but this has resulted in the United States being one of the least language-conscious nations in the world. Most Americans do not have the initiative or the economic incentive to learn Japanese.<sup>100</sup>

## V. PREPARATION REQUIREMENTS FOR EFFECTIVE DISPUTE RESOLUTION

### A. Developing the Historical Context of the Transaction

#### 1. *The Written Record of the Commercial Transaction in Issue*

One of the first things which should be done by legal counsel, either American or Japanese, when entering a situation which has already deteriorated to a point where the parties are barely communicating with each other, is to review the entire written record of the commercial relationship between the parties as it relates to the particular dispute. This means, in some cases, going back to the files of the client and creating a mental image of the relationship from its inception to its present status. In doing so, the attorney will inevitably come across correspondence, telexes, memoranda and other documents which will indicate those areas

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<sup>100</sup> There are some notable exceptions, and some American executives are fairly fluent in the spoken form of Japanese. It is very interesting that many Americans who study Japanese seriously are able to gain considerable fluency in the spoken form, but not in the written form. This is the converse of the Japanese problem with the English language where the Japanese have problems with the spoken form, but not the written form. See generally R. MILLER, *THE JAPANESE LANGUAGE IN CONTEMPORARY JAPAN - SOME SOCIOLINGUISTIC OBSERVATIONS* (1977).

in which the two parties were at one time working closely and effectively together for their common good. It should also show how the dispute eventually arose and how it came to its present sorry state. Staff members and executives of the client company who were principally responsible for generating this written record will be helpful in shedding light on shadings of meanings in the written record. The written record in a United States-Japan commercial dispute is of critical importance because of the fact that most serious communications between American and Japanese businessmen take place in writing and in English. The attorney should bring to bear an appreciation of language and cross-cultural factors in "interpreting" critical points contained in these documents.

## 2. *The Written Record of the Handling of the Dispute to Date*

The attorney should focus on the actual written record of the handling of the dispute to date and try to sort out to what extent either party was trying to out-bluff the other. Also, the attorney may inevitably come across unfortunate statements which will have to be explained should the matter go to litigation. This part of the attorney's task is no different than if the attorney were involved in a purely American or Japanese dispute situation.

## 3. *The "Madoguchi" Principle and Communications*

In both the negotiation of agreements as well as the resolution of disputes in United States-Japan transactions, it is vitally important that one key spokesperson be appointed for each side in order to convey communications between the parties. In Japan, this is known as the "entrance window" or *madoguchi* principle. It is an important one and cannot be overlooked in a United States-Japan commercial dispute situation. It is not effective and is sometimes self-defeating if there are more than one or, at the most, two persons representing each side of a dispute because they may not all be saying the same thing and there may be confusing signals sent by either side through these various spokespersons. Accordingly, the attorney representing either the American side or the Japanese side in a commercial dispute situation should make it a point of first order to work out the selection of one key person to carry out communications between the companies. This individual should hold a fairly senior position and care should be taken that his superior or the chief executive officer of the corporation does not attempt to override this arrangement and telephone or meet with his top management counterpart on the other side. The person who is selected should not be forced to make ultimate decisions, but he should be responsible enough that he will

be respected for his position. At the same time, he should be a person of moderate personality who will not engage in blunderbuss or bluffing. He should be a person who is studied, quiet and somewhat conciliatory in outlook, not having been overly involved in the events leading up to the dispute. The selection of this individual is probably the single most important factor in getting the parties together short of litigation. The lawyer should assist in making the selection of this person.

The lawyer himself should not act as the *madoguchi* in United States-Japan commercial disputes, because, as an advocate, he may be perceived as lacking objective perception of the problem. Also, to use the lawyer as the *madoguchi* tends to over-legalize and escalate the dispute, which might then create the impression that eventually the dispute is going to be settled only by arbitration or litigation.

#### B. The Importance of Initial Selectivity in the Method of Dispute Resolution

Once the *madoguchi* person has been selected for both sides, it becomes necessary to determine the format in which further discussion will take place. The ideal approach is to begin discussions between the two *madoguchi* representatives. The attorney should assist in these discussions only if invited to do so by both parties. Usually, there will be an attorney for each company working together with these spokespersons. This procedure is a kind of self-imposed mediation in which the parties, without calling in a third party, try to iron out their differences.

If the foregoing proves unsatisfactory, both parties may be willing to call in an outside third party in an informal and non-binding setting, short of arbitration or litigation. As indicated above, there are many groups in the United States which support this concept and there are a number of competent mediators available in the United States for this purpose.<sup>101</sup> In Japan, mediators who have had experience in mediating disputes in this context may be requested to "advise" the company and assist in discussions. The lawyer's role at this stage is to continue providing an ameliorating influence by not permitting the client to take extreme and unreasonable positions. "Flexibility" is probably the most important keyword at this time.

If these procedures have failed, then one or both of the parties may decide that the matter must be arbitrated or litigated. Even at this stage, the attorney can provide a safety valve for making sure that the proceedings do not get out of hand. After all, even in litigation, most cases in the

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<sup>101</sup> See generally *Corporate Dispute Management supra* note 73.

United States do not go to final judgment.<sup>102</sup> A large number of cases are settled at some point during the litigation process because the process usually discloses which party is presently in a stronger legal position, either by virtue of the evidence or the law. Determining the relative strengths of the parties is usually a question of fact-finding and rarely a question of the interpretation of legal standards.

Judges in the United States are increasingly looking at alternative dispute resolution methods. In Chicago, for example, one United States district judge utilizes the services of a negotiating expert in order to resolve lawsuits brought before his court.<sup>103</sup> Of course, judges may have a selfish interest in promoting settlement because their calendars are so crowded that they are overburdened with cases. One experienced negotiator who has acted as a mediator at the recommendation of the United States District Court in Chicago attributes the fact that most lawyers are not good negotiators to the lawyers being primarily interested in proving that their case is stronger than the other side's case.<sup>104</sup> According to this expert, in order to resolve a dispute, it is most important for the lawyers to concentrate on two issues: first, why the problem arose between the parties and not who is right and who is wrong; and second, now that the problem has arisen between the parties, how the problem can be resolved without continuing to find out who is correct as a matter of law. In a way, this type of mediation assistance is the antithesis of litigation because the parties are being asked not to determine who has a stronger point of law or who is in a stronger position vis-a-vis the facts, but simply to determine how they got into this predicament and then to help themselves out of it in a fair and equitable manner.

### C. Staffing Requirements

The attorney called upon to assist either the American company or the Japanese company in a United States-Japan commercial dispute matter must be careful not to overstaff the problem. This can occur in two ways. The attorney can overstaff in terms of the legal and support personnel he engages to assist him in the task and, also, in the number of persons who are involved from the client company's side.

Regardless of how complex or large the problem may be, it is much more effective to create a small working group of lawyers and business-

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<sup>102</sup> HENDERSON, *supra* note 17, at 204. See also Nolan, *Settlement Negotiations*, 11 LITIGATION 17 (1985).

<sup>103</sup> Warren & Kelly, *How One Judge Lessens the Load*, Chi. Sun-Times, Aug. 25, 1983, at 90, col. 1.

<sup>104</sup> *Id.*

men, each of whom has a specific assignment under the overall coordination of one or two persons, preferably one attorney and one businessman from the client's side. The *madoguchi* representative should act as the coordinator from the business side. One lawyer should act as the coordinator for the client. The other members of this group should be given detailed assignments in terms of the overall theory of the case, fact-finding, research regarding legal principles and other information useful in analyzing and presenting the company's side of the problem. The point is to keep the numbers small. Otherwise, there will be too many people involved with too many divergent activities which will not facilitate the speedy resolution of the problem. The selection of the staff for the dispute resolution group should be done on a highly selective basis, taking into consideration the experience and knowledge of the members of the group.

#### CONCLUSION

Disputes between American and Japanese businessmen arising out of private commercial transactions have become increasingly frequent due to the extensive commercial network between the two countries. In terms of time, expense and human resources, it behooves the American lawyer assisting either side in a United States-Japan commercial dispute to determine, with greater selectivity, the most effective form of dispute resolution practicably available. American counsel must pay careful attention to both the legal and non-legal factors which make for more effective implementation of dispute resolution procedures in United States-Japan commercial transactions.

Dispute resolution between American and Japanese business interests is more complex and requires greater sophistication and sensitivity on the part of United States legal counsel than similar disputes between American businessmen alone. The international dimension of these disputes is heightened to the extent that United States legal counsel may not be well acquainted with Japanese dispute resolution traditions or the culture from which it stems. By the same token, American lawyers who are requested to assist in such dispute resolution situations will find it to be a challenging and increasingly rewarding facet of international legal practice.