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“Now That I Ate the Sushi, Do We Have a Deal?” — The Lawyer as Negotiator in Japanese-U.S. Business Transactions

*Robert J. Walters**

There is timing in everything. * * * [T]here is timing in the Way of the Merchant, in the rise and fall of capital. All things entail rising and falling timing. You must be able to discern this. In strategy there are various timing considerations. From the outset you must know the applicable timing and the inapplicable timing, and from among the large things and small things and the fast and slow timings find the relevant timing, first seeing the distance timing and the background timing. This is the main thing in strategy. It is especially important to know the background timing, otherwise your strategy will become uncertain.¹

I. INTRODUCTION

The above-quoted words of Miyamoto Musashi, written in 1645, epitomized the samurai code of strategy, and in more recent times have been viewed as an important guide for the Japanese businessperson.² They are no less applicable to the U.S. attorney whose client is Japanese or whose client is engaged in or contemplating a transaction in which one or more of the opposite parties is Japanese. An attorney's failure to appreciate or become familiar with the importance of the cultural influences which affect the Japanese client or party often reveals itself at a critical stage of the transaction, and the results can be disastrous.

This article focuses on the role a lawyer may have in a transaction involving a Japanese client or party. It will encourage the attorney at

* J.D., 1984, University of Wyoming College of Law. The author wishes to express his deepest appreciation to his wife and best friend, Debra, for her great support and encouragement, without which this article would not have been possible.

¹ M. MUSASHI, *A BOOK OF FIVE RINGS* 48 (V. Harris trans. 1974).

² *Id.* at 22. *Cf.* R. TUNG, *BUSINESS NEGOTIATIONS WITH THE JAPANESE* 52-53 (1984).

early stages to look beyond the legal tasks to the underlying reasons for the transaction. In other words, it encourages the attorney to ask questions and obtain information that ordinarily may not be considered critical to the purely legal aspects of the transaction. The *nihonjin*³ generally will place greater emphasis on the development of the relationship.⁴ Thus, laying the groundwork and devoting sufficient attention to the "typical" or "expected" stages of a business negotiation will be important features of the lawyer-negotiator's task.

As background, this article will discuss traits characteristic of the Japanese as viewed by persons with substantial experience negotiating with the Japanese. This will include a description of how lawyers and aspects of the U.S. legal system are viewed by the Japanese, and will be contrasted with the Japanese legal system. In addition, this article will provide an overview of the legal framework in Japan for "the practice of law" by foreign lawyers. An appendix is included which identifies resources which may assist in the development of a negotiation practice.

II. THE *NIHONJIN* IN CULTURAL BUSINESS PERSPECTIVE

The Japanese are a fairly simple people with a clear set of rules, at least to the Japanese. United States businesspersons are unaccustomed to having to conform to a different set of rules than those which apply in typical U.S. business transactions. The reverse is also true of the Japanese businessperson. Certain rules will apply even when all parties to the transaction are Japanese. If the rules are not followed, a transaction may

³ The word "*nihonjin*" refers to the Japanese person. It is in contrast to words such as "*Amerikajin*" for Americans and "*gaijin*" for foreigners generally. The latter literally means "outside person" or "outsider." The Japanese are particularly sensitive not only to their own ethnicity, but to the status of the person with whom they are interacting. See *infra* note 11.

⁴ The relationship will be more important to the Japanese than the written contract itself. See Mori, *A Practitioner's Perspective on Negotiations and Communication with Japanese Businessmen*, in ABA, *CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA* 47 (J.O. Haley ed. 1978). The following quote more descriptively expresses the Japanese attitude toward contracts:

Americans carefully observe the law, regulations and contractual agreements, and they make full use of these legal forms. Japanese do not have a sufficiently clear conception of such legal forms but honor and trust *jōjō* [the surrounding circumstances], *giri* [moral or social obligations to others], *ninjō* [human feeling], *yujō* [friendship], *magokoro* [sincerity] and so forth . . . It is perhaps well known that Americans observe contractual obligations more closely than the Japanese. Conversely, an American will say that he is not responsible for what he did not agree to. When a Japanese makes an agreement with another person, the *goodwill and friendship that gave rise to the agreement is more important to him than the agreement itself*. If there is sincerity, it does not matter if the contract itself is not executed exactly according to its terms. To Americans legal agreements and feelings of friendship are completely different things. In these circumstances Japanese tend to be occupied with a *friendly atmosphere and are careful to see that the agreement itself is thorough*.

Kawashima, *The Legal Consciousness of Contract in Japan*, 7 *LAW IN JAPAN* 1, 6-7 (1974) (emphasis in original).

not be consummated. Such rules are not eliminated when one of the parties is from the United States. Rules may be relaxed and transgressions overlooked only when the Japanese party perceives that it is necessary for the success of the transaction, and the U.S. party (or what he or she brings to the transaction) is indispensable. Thus, one of the first questions should be "Who is seeking whom?"

If the Japanese party initiates the relationship, the immediate second question should be "What are they after?" The response to this question should be divided into two categories: the *tatemae* and the *honne*.⁵ It is quite likely that the Japanese party already knows a great deal about the U.S. client or enterprise. Indeed, the attorney is not likely to be brought in at early stages of meetings between the principal parties.⁶ Not having had the benefit of the ordinary background interactions, the attorney may not be prepared to answer the "what are they after" question. He or she must obtain this information from the client (assuming that the client

⁵ The familiar phrase "form over substance" provides some insight into the concepts of *tatemae* and *honne*. "*Tatemae*" is the form and "*honne*" is the substance. Cf. D. ROWLAND, JAPANESE BUSINESS ETIQUETTE: A PRACTICAL GUIDE TO SUCCESS WITH THE JAPANESE 19-20 (1985); B. DE MENTE, JAPANESE ETIQUETTE AND ETHICS IN BUSINESS 19-21 (1987); Wagatsuma & Rosett, *infra* note 84, at 85-87. Distinction should be made between the two concepts since serious misunderstandings may arise if reliance is placed upon the superficial explanation, and the true intentions of the Japanese party are not ascertained. "*Tatemae*" has been described as "official stance" versus "*honne*," which is translated as "true mind" or "real intentions." J. GRAHAM & Y. SANO, SMART BARGAINING 23-24 (1984); see also R. MARCH, THE JAPANESE NEGOTIATOR: SUBTLETY AND STRATEGY BEYOND WESTERN LOGIC 141-42. Such behavior has been explained as the result of Japanese socialization which places "face" over one's true feelings, where the social situation dictates behavior and speech. *Id.* Most Japanese accept and recognize the *tatemae-honne* duality as valid and appropriate and a mark of human maturity, where the failure to recognize this norm smacks of insensitivity and bad taste. E. FROST, FOR RICHER, FOR POORER: THE NEW U.S.-JAPANESE RELATIONSHIP 91-92 (1987). Although the Japanese use of *tatemae* may be perceived as dishonest and manipulative to most Americans, especially to those who have had little experience in interactions with the Japanese, it should not be viewed as such. Indeed, the use of *tatemae* by the Japanese counterpart should be expected because a situational use of *tatemae* for outsiders (the *gaijin*) and *honne* for insiders is common practice in Japan. M. MATSUMOTO, THE UNSPOKEN WAY - HARAGEI: SILENCE IN JAPANESE BUSINESS AND SOCIETY 65 (1988). Accordingly, suspicion should be avoided, especially in early stages. Any ambiguity in the relationship between the parties will not be resolved until the Japanese side has settled on a position respecting not only the viability of the transaction but the potential for compatibility between the parties.

⁶ Unlike U.S. transactions which are consummated fairly quickly, requiring attorneys to be involved in the negotiations from the outset, Japanese negotiations seek to determine compatibility and strategic fit, such as access to desired markets or technology. Information which the Japanese investor or company is not able to obtain through ordinary resources is sought in the early stages through informal meetings. Another reason lawyers are not typically a part of early negotiations is because they are viewed with suspicion and distrust. See *infra* notes 90-93 and accompanying discussion. See *The Trouble with Lawyers*, 4 BUSINESS TOKYO 26, 29 (Oct. 1990) [hereinafter *Lawyers*] (suggesting that the lawyer should be brought in after the "getting to know you" phase of negotiations).

is not the Japanese party⁷), who may only view the entire transaction in its superficial elements. The importance of the client understanding the Japanese party's motivation in the transaction should not be overlooked. If it is the U.S. client which seeks to initiate the transaction, the immediate second question should be "What have you done thus far?" Unless the U.S. client has laid or is willing to lay the "correct" groundwork, a great deal of effort and expense will likely be wasted.⁸ In this context, however, focus should be directed at the desirability of the transaction from the Japanese viewpoint. In the former context discussed above, the Japanese party had already determined that the transaction was necessary or desirable for its objectives, and the selected opposite party or parties showed at least adequate promise.⁹ With the burden on the U.S. client to convince a Japanese company or investor of the desirability of the transaction, the task is more difficult and the client should be prepared for a more lengthy and laborious process.

A. The Structure of Japanese Negotiations

Business negotiations with the Japanese occur in discernible stages.¹⁰ In either the Japanese-initiated transaction or the U.S.-initiated transaction, the formal beginning point is the *aisatsu*.¹¹ At the *aisatsu*,

⁷ A Japanese client is likely to consult a U.S. attorney only for legal advice or to prepare documents which only the U.S. attorney could do, or for representation in litigation in a U.S. forum. See Zaloom, *Problems Facing Japanese Firms Entering the United States and their Counsel*, in ABA, CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 42 (J.O. Haley ed. 1978).

⁸ Negotiating with Japanese companies requires extensive preparation, not only by analyzing the market, the business environment and the competition, but in the selection of the form of entry or business partner. M. MATSUSHITA & T. SCHOENBAUM, JAPANESE INTERNATIONAL TRADE AND INVESTMENT LAW 47-48 (1989).

⁹ The term "adequate promise" should actually be viewed as a question of strategic fit or compatibility. The Japanese company in international negotiations is seeking a relationship characterized by friendship, trust, and respect between the negotiating parties. Zhang & Kuroda, *Beware of Japanese Negotiating Style: How to Negotiate with Japanese Companies*, 10 NW. J. INT'L L. & BUS. 195, 201 (1989). This is, of course, secondary to maintaining the security between the company and its employees which is characteristic of Japanese companies (*kaisha*) and influenced significantly by the Japanese concepts of *wa* and *amae*. For further discussion of *amae* and *wa* see *infra* notes 14 and 21, respectively.

¹⁰ These stages have been suggested as 1) non-task sounding, 2) task-related exchange of information, 3) persuasion, and 4) concessions and agreement. J. GRAHAM & Y. SANO, *supra* note 5, at 69-92. Cf. D. MCCREARY, JAPANESE - U.S. BUSINESS NEGOTIATIONS: A CROSS CULTURAL STUDY 25-26 (1986); Graham, *Negotiating with the Japanese: A Guide to Persuasive Tactics*, 10 E. ASIAN EXEC. REP. 8 (Dec. 1988).

¹¹ The *aisatsu* is the formal introduction of the principal parties. JETRO, DOING BUSINESS IN JAPAN 47 (1984). In significant or major transactions, it may be characterized by a meeting of the higher ranking officials or executives of each company. The *aisatsu* is viewed not as the time to discuss details of the transactions, but as a means for the parties to become acquainted and to be-

the most important ritual is the exchanging of business cards, or as the Japanese call them, the *meishi*.¹² The Japanese place a great deal of emphasis on status and corresponding etiquette. This ritual assists them in clarifying these issues, so each individual may receive the appropriate level of respect.¹³ This also provides an opportunity for each side to become acquainted with members of the negotiation teams and other important company personnel. Moreover, it is at this stage that the Japanese side will try to determine the level of trust that may be expected between the parties.¹⁴

Before the actual negotiations have begun, it is important to be aware of the so-called "Japanese Negotiation Strategies"¹⁵ and make appropriate preparations. The objectives of the Japanese participants, as

come familiar with the overall plan. *Id.* See also B. DEMENTE, *supra* note 5, at 142; J. GRAHAM & Y. SANO, *supra* note 5, at 4-5. Details of the transaction are left initially to persons involved in the underlying subject matter.

The *aisatsu* should not occur until some groundwork has been laid, particularly with the U.S.-initiated transaction. This includes the use of a contact common to the parties as a conduit for the introductions, or the utilization of firms which specialize in such matters or referral by a recognized organization such as the Japan External Trade Organization (JETRO). See U.S. DEPT. OF COMMERCE (INT'L TRADE ADMIN.), *MARKETING IN JAPAN 19* (Overseas Business Report, Apr. 1987) [hereinafter U.S. DEPT. OF COMMERCE]. If possible, profiles of the companies involved and key personnel should be obtained and discussed as part of the briefing prior to the actual *aisatsu*.

If the attorney is involved at this stage of the relationship, attempts to relieve the anxiety that his or her presence is likely to cause should be made by indicating his or her role as a facilitator of the negotiations. R. TUNG, *supra* note 2, at 44. See also *infra* notes 90-93 and accompanying text.

¹² *Meishi* should be two-sided, with the same information printed on both sides: in English on one side and in Japanese characters (*kana* and *kanji*) on the reverse. When handed to Japanese counterparts, the Japanese side should be face up and readable without fumbling. One should pause and read the *meishi* asking questions to confirm understanding of the information or to determine common ground between particular individuals, instead of merely taking the card and placing it in a pocket. Several authors have suggested appropriate etiquette in the exchange of *meishi* which should be consulted. See E. HAHN, *JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM* 31-33 (1984); R. TUNG, *supra* note 2, at 59-60; D. ROWLAND, *supra* note 5, at 14-17; JETRO, *supra* note 11, at 27-39.

¹³ D. MCCREARY, *supra* note 10, at 31. Status distinctions are ingrained in Japanese culture and dictate what can or cannot be said and what bargaining strategies may be used during Japanese business negotiations. J. GRAHAM & Y. SANO, *supra* note 5, at 19-20. See also R. TUNG, *supra* note 2, at 59-61.

¹⁴ This is tied to the concept of *amae*, which is a significantly important underlying dynamic in Japanese society embracing business as well as family contexts. *Amae* is "dependence" in a pure form not unlike that which exists between mother and child. It has been described as "a feeling of complete trust and confidence, not only that the other party will not take advantage of them, but also that they — business or private individuals — can presume upon the indulgence of the other." B. DEMENTE, *supra* note 5, at 12 (emphasis in the original). Cf. D. MCCREARY, *supra* note 10, at 31-32; R. MARCH, *supra* note 5, at 134.

¹⁵ These have been characterized as "Normative Strategies" (which are culture-based and include politeness, mutual cooperation and compromise, obligation and pre-giving), "Rational Strategies" (which are characterized by team organization, trust building, the use of *amae*, information seeking orientation and the like), "Assertive Strategies" (such as bulldozing or persistence, tactical questioning, repetitive discussions on subject matter believed to be settled), "Avoidance Strategies"

well as the role of each individual, and their company's overall goal will likely have been established. This may or may not imply a predetermined or particular time period for consummating an agreement. The typical Japanese approach is methodical and deliberate. The Japanese side generally is prepared for a lengthy and time-consuming process.¹⁶

Selection of the appropriate team is an important preliminary, based in part on information obtained prior to and at the *aisatsu*.¹⁷ The personnel selected may be critical to the process. Potential issues of dispute or difficulty must be identified and strategies developed to resolve them.¹⁸ Awareness of the personnel which the Japanese side has selected will be important, although it should not be assumed that these persons have the authority to bind the Japanese side to any particular point.¹⁹ On the

(such as the use of silence, vague and noncommittal responses) and "Nonverbal Expression." R. MARCH, *supra* note 5, at 127-52.

¹⁶ One commentator noted that some long-term contracts have been known to take as long as two years to negotiate. Mori, *supra* note 4, at 48. Cf. R. TUNG, *supra* note 2, at 176 (six years). Again, it should be emphasized that the Japanese company in any transaction has a greater concern for the development of a long term relationship. Actual length of the negotiations will depend upon substantive issues which the parties will need to resolve, and the Japanese level of comfort or confidence in the relationship. Awareness of cultural dynamics as well as typical practices will assist in eliminating wasted time over unnecessary misunderstandings. Though Japanese decision-making is time-consuming, there are advantages to this system. Once a decision has been reached it will be supported by the entire organization and its implementation can be expected to occur in a smooth manner. In addition, the chances of serious error are significantly reduced because the "hands-on" personnel as well as other levels of management have provided input and will understand the requirements. Lansing & Wechselblatt, *Doing Business in Japan: The Importance of Unwritten Law*, 17 INT'L LAW. 647, 656 (1983).

¹⁷ See J. GRAHAM & Y. SANO, *supra* note 5, at 33-50, where an entire chapter is devoted to the subject. The Japanese negotiating team will consist of several players, each having a distinct role. Negotiations conducted by a single person representing the U.S. firm present the potential for disadvantage. Accordingly, it has been suggested that the principal U.S. negotiator have several assistants. D. ROWLAND, *supra* note 5, at 29-30.

¹⁸ J. GRAHAM & Y. SANO, *supra* note 5, at 51-57. The authors suggest that a checklist should include: 1) assessment of the situation and the people, 2) facts to confirm the negotiation, 3) agendas, and 4) the best alternative to a negotiation agreement or a contingency plan.

¹⁹ Watts, *Briefing the American Negotiator in Japan*, 16 INT'L LAW. 597, 605 (1982). This has been described as characteristic of Japanese negotiating style (*i.e.* step by step negotiations), in which particular lower-ranking company staff are involved in the initial stages of the negotiation, followed by involvement by middle-ranking managers in charge of relevant sections of the negotiation, followed by participation of one or more senior executives of the company who finalizes decisions or signs the agreement. This allows for later alteration, which means that what appears as early concessions by lower-ranking personnel may not be considered binding in later stages. This is also central to the *ringi* system of consensus decision-making of the Japanese, which itself is characterized by a series of discussions between middle- and lower-management through a process of *ringisho* and *nemawashi* which precedes final go ahead by higher company officials. For further discussion of this dynamic, see Zhang & Kuroda, *supra* note 9, at 197-201; Hahn, *Negotiating Contracts with the Japanese*, 14 CASE W. RES. J. INT'L L. 377, 381 n. 16; J. GRAHAM & Y. SANO, *supra* note 5, at 24-25. See also JETRO, *supra* note 11, at 39-45. This should have substantial impact on timing considerations, as well as influence travel and accommodations planning in Japan.

other hand, information critical to the transaction or which discloses how the transaction fits into the overall objectives of the Japanese party should be discerned to the extent possible prior to the first business meeting. The U.S. party should not overlook preparations necessary to respond to the Japanese side's need for information, however. Thus, a significant amount of preparation will precede the actual discussions incident to the negotiation.

Once the negotiations have begun, awareness of Japanese communication styles and how they are used in business negotiations is crucial. Such styles are also influenced by cultural norms.²⁰ The most important is the concept of *wa*, which seeks above all to maintain harmony.²¹ If the Japanese side makes a concession, it will expect reciprocity from the opposite party. Unwillingness by the U.S. side to accommodate is threatening to the *wa* because the sense of *amae* which was established in the *aisatsu* may become compromised. This in turn may cause the Japanese side to retreat and either rethink its position or suspend or terminate further negotiations.²² As one author has aptly put it, "[f]or the Japanese, a contract is the end result of having established a relationship of trust and friendship."²³

Another way in which *wa* is expressed is in the communications between the respective negotiating teams.²⁴ One key area is the Japanese

²⁰ See, e.g., Van de Velde, *The Influence of Culture on Japanese-American Negotiations*, 7 FLETCHER F. 395 (1983); R. BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* (1946); G. FIELDS, *FROM BONSAI TO LEVIS* (1983); E. HALL & M. HALL, *infra* note 24, at 39-61. But see Zhang & Kuroda, *supra* note 9, at 209, where the authors note that negotiation tactics may vary depending on whether a Japanese firm or a U.S. firm initiates the transaction. In the former situation, the Japanese negotiators will more or less adopt the approach of the U.S. negotiators. Traditional Japanese forms will prevail in the latter, particularly in small or medium-sized firms.

²¹ *Wa* is a symbiotic concept which deemphasizes "self" in all contexts, family, social, and business. One author notes that *wa* is exhibited in several forms: 1) in group or consensus decision-making, 2) by avoidance of extremes and tendency to take the middle ground, 3) avoidance of confrontation by disguising one's true feelings or the situational use of *tatemae* and *honne*, 4) in the Japanese emphasis on saving face, and 5) in compromising and conciliation (a means of facilitating dispute resolution). R. TUNG, *supra* note 2, at 49. Accord, J. GRAHAM & Y. SANO, *supra* note 5, at 23-24; B. DEMENTE, *supra* note 5, at 36-46; D. ROWLAND, *supra* note 5, at 27-32. The situational use of *tatemae* and *honne*, in particular, is said to indicate "the willingness of the Japanese to set aside general rules or principals (including law), whenever the immediate needs and wants of the people in the immediate situation require it." Parker, *Law, Language, and the Individual in Japan and the United States*, 7 WIS. INT'L L. J. 179, 200 (1988).

²² Again, the Japanese stress the importance of establishing goodwill and a good working relationship upon which parties may rely as situations dictate, including the harmonious resolution of future problems. R. TUNG, *supra* note 2, at 55-58; Zhang & Kuroda, *supra*, note 9, at 201. The sense of dependence and dependability are important ingredients to this working trust. If these are absent, the relationship is questioned. See also Watts, *supra* note 19, at 602-03.

²³ Lansing & Wechselblatt, *supra* note 16, at 654.

²⁴ One author has described the U.S.-style of negotiations as "the John Wayne Style," which is

propensity to avoid confrontation or extremes, to be indirect or vague, to be concerned with "saving face."²⁵ Thus, it is said that the U.S. negotiator should not assume that assent or concession to any particular point has occurred simply because no disagreement has been articulated, or by mere verbal communications which the U.S. negotiator may literally interpret to mean "yes."²⁶ On the other hand, the Japanese also engage in communicative behavior which may present some confusion or discomfort for the U.S. negotiator. This breaks down into two areas. The first is the use of nonverbal behavior, such as silence. The second is the use of language, both foreign and Japanese. Lack of awareness of the meaning of such behavior often results in the U.S. side making concessions which were unnecessary to form an agreement.²⁷

Nonverbal communication is a strategy used by the Japanese and is referred to as *haragei*.²⁸ It is more likely to occur during crucial stages of the negotiations and may be characterized as either "hot" or "cool."²⁹ The former may be accompanied by a *naniwabushi* approach, or a veiled threat or bluff to obtain a concession or get past a stalemate involving a

counter to the Japanese style. J. GRAHAM & Y. SANO, *supra* note 5, at 7-16. The potential for conflict is rooted in cultural differences in basic values, which also influences business negotiation styles. *Id.* at 31-33 (see especially Table 3-2). See also E. HALL & M. HALL, *HIDDEN DIFFERENCES: DOING BUSINESS WITH THE JAPANESE* 114-29 (1987). Cf. Moran, *Business Negotiations and the Japanese View of Americans*, 8 E. ASIAN EXEC. REP. 17 (Mar. 15, 1986).

²⁵ R. TUNG, *supra* note 2, at 53-55. This is most clearly exhibited in the Japanese reluctance to say "no." Instead, the Japanese will use such phrases as "Let's think about it a little more," or "We'll do our best," or even not respond at all. See D. MCCREARY, *supra* note 10, at 61-66. Cf. J. GRAHAM & Y. SANO, *supra* note 5, at 23-24. When this happens, it is suggested that the U.S. negotiator ask the Japanese for more information or pose indirect questions which will get them talking about their concerns. D. MCCREARY, *supra* note 10, at 66. Becoming argumentative or persisting on the point tends to be counter-productive.

²⁶ Often, the U.S. negotiator will rely on nonverbal cues, such as the affirmative nod of the head, or simple expressions of affirmation, to determine whether he or she is persuading the opposite party. In negotiations, such nonverbal cues and the use of the word "*hai*" (which literally means "yes"), do not signify assent. See, e.g., D. MCCREARY, *supra* note 10, at 60-61; JETRO, *supra* note 11, at 39-41; E. HAHN, *supra* note 12, at 44; U.S. DEPT. OF COMMERCE, *supra* note 11, at 19-20. This is the flip side of the Japanese reluctance to say "no." The intent of the latter is to avoid discord by disagreement or a flat rejection. In the former, the intent is to superficially indicate that the point is heard or understood. If the subject matter deviates from "Japanese agenda," consensus decision-making dictates that the point be considered in typical *ringisho* and *nemawashi* fashion before agreement is communicated.

²⁷ This phenomenon has been noted by several authors, particularly when Japanese negotiators engage in silence. See, e.g., J. GRAHAM & Y. SANO, *supra* note 5, at 14; D. MCCREARY, *supra* note 10, at 53-54.

²⁸ *Haragei* has been explained as "a technique for solving a problem through negotiation between two individuals without the use of direct words." D. MCCREARY, *supra* note 10, at 45. See generally M. MATSUMOTO, *supra* note 5.

²⁹ Hot *haragei* refers to those critical situations in which breakdown is imminent, whereas cool *haragei* refers to less critical situations where metamessage (communications of a subtle but unmistakable nature) or silence of *haragei* replaces direct talk. D. MCCREARY, *supra* note 10, at 47-58.

significant issue.³⁰ The latter, on the other hand, typically utilizes silence or less dramatic approaches. It is important to recall that the use of *haragei* is strategic, seeking appropriate or desired responses.³¹ Accordingly, the *tatemaie* which the Japanese side communicates must be distinguished from the *honno* which is sought to be achieved.³²

When the Japanese side becomes silent during discussions, it should not be interpreted to mean that the U.S. proposal has been rejected. The silence, particularly if the proposal is new or a modified version of a prior proposal, may simply mean that the Japanese side has not considered the new or modified term in typical consensus fashion and has not resolved it internally for response.³³ Silence may also reflect that an impasse has been reached and that it is time for each side to reconsider their positions.³⁴ Of course, silence may not be intended to communicate a message at all because it is otherwise considered virtuous or appropriate by the Japanese at certain times.³⁵

When the Japanese negotiator "speaks," the popular imagery of the entourage of two-sworded samurai duty-bound to their master may come to mind, where one sword represents the Japanese language and the other represents the use of English or other foreign language. This image is reinforced when one considers that the Japanese negotiation team typically consists of nonlegal staff. The use of nonlegal staff in negotiations is common and intentional; it serves to insulate the Japanese counsel and to control some aspects of the negotiation.³⁶ Some will be involved directly

³⁰ *Id.* at 53-56. *Naniwabushi* is an approach which seeks empathy and concession through an emotional appeal to the opposite party. See, e.g., J. GRAHAM & Y. SANO, *supra* note 5, at 21-22.

³¹ This dimension of Japanese negotiation is referred to as "*awase*," which is intended to create an atmosphere conducive to frank discussions and to lead to relationships that permit the parties to make accommodations and exceptions as circumstances dictate. Van de Velde, *supra* note 20, at 397. The ability to be frank about motives and long term objectives may have the additional benefit of avoiding unnecessary delay in the negotiations. Mori, *supra* note 4, at 48.

³² See *supra* note 5 for discussion of *tatemaie* and *honno*.

³³ See *supra* note 19. See also J. GRAHAM & Y. SANO, *supra* note 5, at 14 (suggesting that the U.S. discomfort with silence, often marked by efforts to compensate with persuasive appeals, is counterproductive because it does not permit effective or necessary exchanges of information, especially from the Japanese); R. MARCH, *supra* note 5, at 140-41 (suggesting that silence may be used because the issue or request is misunderstood, or to buy time to contemplate the appropriate response).

³⁴ R. TUNG, *supra* note 2, at 55. See also D. MCCREARY, *supra* note 10, at 54, indicating that responses to silence such as criticism, anger or impatience may surprise and confuse the Japanese.

³⁵ E. HALL & M. HALL, *supra* note 24, at 126; D. ROWLAND, *supra* note 5, at 51-52; E. FROST, *supra* note 5, at 86-87.

³⁶ One commentator has suggested that these persons will have a "limited" ability to use English which may be used as a means to retain boilerplate language with complicated legal terminology or to force U.S. negotiators to explain the legal concepts in a plain or more easily understood form. Zhang & Kuroda, *supra* note 9, at 203-04. Since these persons will have little or no authority to bind the Japanese company, this also permits the channeling of information to the appropriate staff to

in the discussions and others will be responsible for observing and note-taking.³⁷

A common tactic is that a Japanese negotiator may pretend not to understand English, not to understand it very well, or may misunderstand intentionally.³⁸ On the other hand, it should not be assumed that "common" words have the same meaning or connotation to the Japanese. For example, the fact that both sides are jointly entering into a transaction, which in part will be governed by a "contract," does not mean that the written agreement connotes the same thing to the Japanese side that it does to the U.S. side. The Japanese word for "contract" is *keiyaku*, which does not imply a legally enforceable promise or set of promises, but rather the promissory stage of negotiations in which the parties agree to work together to create a mutually advantageous relationship.³⁹

In anticipation of these and other types of language-related barriers, the U.S. side may attempt to compensate by using interpreters or a Japanese-speaking negotiator. Although this practice is sometimes recommended (despite the likelihood that the principal Japanese negotiators are sufficiently proficient in English or the appropriate foreign language⁴⁰), the interpreter must be more than a translator and should be briefed on the subject matter, the objectives and other background information.⁴¹ The use of "legalese" by the lawyer may create some specific difficulties for an interpreter and should be avoided because of the unavailability of precise translation.⁴²

Sometimes, however, the ability to communicate in Japanese can have adverse effects. It may cause the Japanese side to believe that the speaker has greater ability to comprehend what is said, or to require a

obtain direction. Consequently, the Japanese negotiators will have control over the pace of the negotiations and the dissemination of information. Mori, *supra* note 4, at 49. Methods to obtain repeated explanations will also help the Japanese side to understand the motives of the United States side. *Id.*

³⁷ D. ROWLAND, *supra* note 5, at 29.

³⁸ See Zhang & Kuroda, *supra* note 9, at 204-05. The authors warn that this type of "sword and shield" approach of purported "limited" English ability may lull the U.S. negotiators to confer openly in front of the Japanese negotiators, unintentionally revealing information from the U.S. side on the false assumption that it would not be "understood." In addition, the U.S. negotiators may become exasperated into making concessions or dropping certain points.

³⁹ *Id.* at 206. But see Note, "Working It Out": A Japanese Alternative to Fighting It Out, 37 CLEV. ST. L. REV. 149, 161-62 (1989) [hereinafter *Working It Out*].

⁴⁰ See R. TUNG, *supra* note 2, at 96. The practice to de-emphasize the speaker's fluency in a foreign language is not necessarily intended to be dishonest or misleading and may be simply a form of etiquette.

⁴¹ See, e.g., D. ROWLAND, *supra* note 5, at 56-58.

⁴² E. HAHN, *supra* note 12, at 42.

different posture in manner of speech.⁴³ There is the potential that unintended meanings may offend the Japanese and actually backfire.⁴⁴ When the U.S. attorney chooses to speak *nihongo* (Japanese) during the negotiations, the importance of using the correct level of politeness must be kept in mind.⁴⁵

Equally important to what is being said to and by the Japanese negotiators is the identity of the speakers and how those persons fit within the Japanese hierarchy. A specific job title may not mean that such a person wields the same authority as a U.S. negotiator with a comparable or identical title.⁴⁶ It is not unlikely that the Japanese company's legal counsel or higher-ranking executives may seek to reverse or renegotiate unfavorable terms on the ground that they are the only ones who have the authority to bind the company despite "agreement" by the lower ranking staff.⁴⁷

This is consistent with the Japanese view of contracts, which is in stark contrast to the typical U.S. view. Moreover, it reflects the normative influences to maintain *wa*, which must be reflected in the manner in which each party is willing to accommodate the other if the circumstances dictate, including the manner of resolving disputes. In this sense, the contract is only the *tatema*, but the relationship between the parties is the *honne*. Unwillingness to resolve disputes in a harmonious manner, which first seeks to preserve the relationship and second the particular transaction, will cause the Japanese side to be reluctant to finalize the contract.⁴⁸ Insistence by the U.S. party to rely on the written agreement

⁴³ Japanese etiquette dictates the use of certain levels of speech depending on the status of the person the speaker is addressing. See B. DEMENTE, *supra* note 5, at 99. The more proficient a speaker, the less tolerant the Japanese side may be regarding breaches of etiquette. At times, the perception that a Japanese-speaking U.S. negotiator may understand more than would ordinarily be expected, may cause the Japanese side to engage in "codeswitching" between formal and colloquial forms of speech among themselves to conceal meanings or to continue the ability to confer in the presence of U.S. negotiators. See D. MCCREARY, *supra* note 10, at 40-43.

⁴⁴ *Id.* at 43; R. TUNG, *supra* note 2, at 58-59.

⁴⁵ See Hahn, *supra* note 19, at 384.

⁴⁶ Zhang & Kuroda, *supra* note 9, at 207 n. 40. See JETRO, *supra* note 11, at 27-39, which provides some discussion of particular job titles in Japanese companies and their position in the hierarchy. Along those lines, attention should be made to whom most of the communications should be directed. It has been suggested that as between the one at the head of the table and the one or ones taking notes or asking the most questions, the latter are likely personnel to whom persuasive comments should be made. See, e.g., G. FIELDS, *supra* note 20, at 176-77.

⁴⁷ Zhang & Kuroda, *supra* note 9, at 198. As the authors point out, however, it is fairly common practice that in Japanese transactions, even when all the parties are Japanese, early agreements may be altered or reversed at early stages. *Id.*

⁴⁸ The Japanese side will insist on a provision in the contract which requires the parties to confer in good faith regarding future disputes and to settle the dispute harmoniously by consultation. See *infra* notes 81-82 and accompanying text.

to resolve disputes indicates to the *nihonjin* that the necessary *amae* ingredient in the relationship is missing. Without *amae*, there can be no *wa*.

Japanese negotiations exist within an environment and at a pace which presents the likelihood that the U.S. party will accommodate the needs of the Japanese party beyond the specific contractual terms. This is true not only in the actual business discussions, but also in social contexts, such as "after-hours" socializing.⁴⁹ It is common for the Japanese side to seek to reinforce the sense of *amae* by returning over and over to issues which the U.S. side believed had been resolved.⁵⁰ It is likely that the draft agreement also will be subject to countless revisions, even if the provisions at issue are considered "boilerplate" by U.S. standards.⁵¹

Once the principal contract terms are settled and the Japanese side has confidence in the reliability and durability of the "contractual" relationship,⁵² execution of the contract will be imminent. No assumption should be made, however, respecting the time frame in which the agreement should be consummated, unless such parameters were introduced at the *aisatsu* and the Japanese side made a commitment to execution of an agreement within the desired period.⁵³

Nor should it be assumed that the actual contract will be a detailed document, since the Japanese side will attempt to negotiate a written agreement in broad, familiar terms. Sensitivity to this aspect, however, will be heavily influenced by the level of experience of the Japanese party at the international level, the relative sophistication of the Japanese side in legal matters,⁵⁴ and the forum in which the agreement is to be en-

⁴⁹ See, e.g., D. ROWLAND, *supra* note 5, at 65-68; B. DEMENTE, *supra* note 5, at 94-97; E. HAHN, *supra* note 12, at 36-37. The after-hours socializing in part is a means for the Japanese "to be themselves." It is also used as a means to get to know co-workers and new members to a joint enterprise. Cf. Wagatsuma & Rosett, *infra* note 84, at 88, where the authors state:

Japanese like to be among *kigokoro no shireta nakama* (those whose dispositions are well known to each other). Among the *kigokoro no shireta* friends and colleagues, Japanese can be relaxed, informal, frank and trusting.

⁵⁰ This is a negotiation tactic referred to as regurgitation. D. MCCREARY, *supra* note 10, at 38-40. Use of this tactic by the U.S. side is cautioned, however, because the motives will be questioned. *Id.*

⁵¹ Mori, *supra* note 4, at 50.

⁵² This aspect is considered critical to long-term success and durability of the contractual relationship. Several authors suggest that it is crucial that the U.S. side seek to maintain the relationship by calling upon the Japanese side at intervals after the execution of the formal agreement. See, e.g., J. GRAHAM & Y. SANO, *supra* note 5, at 99-100.

⁵³ The downside to a particular deadline or stated time frame is that the Japanese side's awareness of the need for urgency may create a tactical advantage for them. Holding out to the last minute may result in concessions by the U.S. side to avoid missing the deadline. E. HAHN, *supra* note 12, at 37-38.

⁵⁴ Zhang & Kuroda, *supra* note 9, at 206-207.

forced.⁵⁵ One nonetheless should not overlook the influence of traditional norms and emphasis on *wa*, trust, and internal resolution of problems by the parties themselves, and how these will affect the negotiations.⁵⁶

B. The "Regulatory" Influence of the Japanese Government

There are two significant features to the role of the Japanese government in international transactions. The first is the extent to which the transaction must be approved by a particular agency, and the second is what is referred to as "administrative guidance." The former is embodied by enactments such as the Japanese Antimonopoly Act⁵⁷ and the Japanese Foreign Exchange and Foreign Trade Control Law (FETCL).⁵⁸ For example, under the Antimonopoly Act, all international agreements must be submitted to the Japanese Fair Trade Commission for approval within thirty days after they are executed.⁵⁹ The FETCL imposes notice requirements on foreign investors of direct domestic investment transactions and reporting requirements on parties to international joint ventures which must be filed with the Japanese Ministry of Finance.⁶⁰ The FETCL also authorizes the Japanese government to order alterations to or suspend such direct domestic investment transactions.⁶¹ If the client desires to do business in Japan on a continual basis, the Commercial Code requires the appointment of a representative in Japan, registration with the government and notice of registration.⁶²

However, it may be more critical for the lawyer to be cognizant of the importance of administrative guidance. The most noteworthy aspect of administrative guidance, or *gyosei shido*, is that an applicable govern-

⁵⁵ Cf. E. HAHN, *supra* note 12, at 79-80.

⁵⁶ *Id.* at 10-11.

⁵⁷ Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade in Japan, Law No. 54 of 1947, as amended, *reprinted in* JAPAN MINISTRY OF FINANCE, GUIDE TO ECONOMIC LAWS OF JAPAN 595 (1979) [hereinafter Anti-Monopoly Act].

⁵⁸ Foreign Exchange and Foreign Trade Control Law, Law No. 228 of 1949, as amended [hereinafter FETCL].

⁵⁹ Anti-Monopoly Act, *supra* note 57, at art. 6(2). See also Higgins, *Japanese Fair Trade Commission Review of International Agreements*, 3 LOY. L.A. INT'L & COMP. L. ANN. 43, 44-45 (1980); Hiroshi, *Antitrust and Industrial Policy in Japan: Competition and Cooperation*, in LAW & TRADE ISSUES OF THE JAPANESE ECONOMY 56-82 (G. Saxonhouse & K. Yamamura eds. 1986); K. ISHIZUNI, ACQUIRING JAPANESE COMPANIES 194-204 (1988).

⁶⁰ FETCL, *supra* note 58, at arts. 27 and 29, respectively. See also K. ISHIZUMI, *supra* note 59, at 185-93.

⁶¹ See Zhang & Kuroda, *supra* note 9, at 211; McArthur, *Joint Ventures in Japan*, 20 U. BRIT. COLUM. L. REV. 471, 487-88 (1986) (noting that the Japanese government is authorized to impose restrictions on the importation of technology into Japan).

⁶² E. HAHN, *supra* note 12, at 81.

ment agency is recognized as being able to exert influence to require that a particular business, Japanese or foreign, engage in particular acts or refrain from a particular course despite the absence of specific statutory authority.⁶³ The best definition of administrative guidance may be "a request made by an administrative body for voluntary cooperation."⁶⁴ Although there are instances in which administrative guidance reflects specific statutory authority,⁶⁵ the reference typically is to the "informal" means of obtaining compliance. Such action is preferred among the Japanese over more formal administrative decisions, such as orders or directives, because it is conducive to the normative influence of *wa*, which in this context is intended to preserve important values of harmony and consensus between the government and business.⁶⁶

Three separate categories of administrative guidance are generally recognized: (1) promotional or "protective" administrative guidance, (2) conciliatory administrative guidance, and (3) regulatory administrative guidance.⁶⁷ It should be recognized that these forms of government "regulation" are not only used as a "shield" by the Japanese government, but also may be used as a "sword." The best example of administrative guidance as a sword is the oft-cited *Sumitomo* case, in which the Sumitomo Metal Mining Company refused to comply with suggestions issued by the Japanese Ministry of International Trade and Industry (MITI) to limit production of certain industrial goods. Ultimately,

⁶³ An analytical discussion of administrative guidance is beyond the scope of this article. However, the subject is one which should not be overlooked. Other noteworthy works which should be consulted are Narita, *Administrative Guidance*, 2 LAW IN JAPAN 45 (1968); Young, *Administrative Guidance in the Courts: A Case Study in Doctrinal Adaption*, 17 LAW IN JAPAN 120 (1984); Haley, *Administrative Guidance versus Formal Regulation: Resolving the Paradox of Industrial Policy*, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES 107-28 (G. Saxonhouse & K. Yamamura eds. 1985); F. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 166-204 (1987); C. JOHNSON, MITA AND THE JAPANESE MIRACLE (1982).

⁶⁴ M. MATSUSHITA & T. SCHOENBAUM, *supra* note 8, at 31.

⁶⁵ *Id.* at 34 (noting that some laws authorize the agency to issue "suggestions" (*kankoku*) or "warnings" (*keikoku*), such as the Petroleum Industry Law which authorizes MITI to recommend price and production levels so that supply will not exceed projected demand); and E. HAHN, *supra* note 12, at 122-23 (noting MITI's authority to regulate business in international trade under the Export Trade Control Order and the Export and Import Transactions Law, the latter of which requires exporters to obtain written approval from MITI and grants MITI broad power to forbid or attach conditions on licenses).

⁶⁶ M. MATSUSHITA & T. SCHOENBAUM, *supra* note 8, at 31-32. The authors suggest that the Japanese generally feel that government directives must be respected, whether they are based on legal authority or not. *Id.* at 33.

⁶⁷ See, e.g., *id.* at 32. Promotional administrative guidance is advice and information given to enterprises to advance and promote their own interests. Conciliatory administrative guidance is used to assist private enterprises to solve disputes among themselves. Regulatory administrative guidance is used by government agencies to regulate the conduct of business enterprises and persons, often as a substitute to formal action.

MITI threatened to curtail Sumitomo's foreign coal import quota, an action fully embraced by statutory authority, and the matter was settled by the two entities.⁶⁸

The clearest example of the use of administrative guidance as a shield, on the other hand, is barriers to entry in particular markets or professions. The lesson is clear: cooperation with relevant government agencies and officials is critical to survival and success. This suggests an aspect of administrative guidance which presents the greatest difficulty for foreign businesses and reflects a potential disadvantage that foreign businesses face compared with their Japanese counterparts in the area of access to administrative officials.⁶⁹ Accordingly, both U.S. management and attorneys must develop personal contacts with the bureaucrats, just as the Japanese do.⁷⁰

Two further implications should be noted. First, the attorney should become familiar with the particular Japanese agencies which will have regulatory jurisdiction over the transaction. This awareness should assist in determination of the overall time period within which the transaction should be consummated. Of course, one should not overlook the possibility that the Japanese party to the transaction may attempt to gain some concessions from the U.S. party during the negotiations because the regulatory agency might "impose" certain conditions to the transaction. Familiarity with the scope of the agency's authority may preclude misunderstandings over matters which are formally required.

Second, if the lawyer is expected to make contact with a Japanese government official, such individual or individuals should be approached cautiously and in a similar manner to the early stages of a negotiation, Japanese-style. In other words, the lawyer should seek to obtain a letter of introduction and, in a nonaggressive manner, explain the scope of the transaction and its objectives. Early meetings should be devoted to no more than obtaining information and allowing the agency official to be-

⁶⁸ E. HAHN, *supra* note 12, at 118-20. Cf. Stevens, *Japanese Law and the Japanese Legal System: Perspectives for the American Business Lawyer*, 27 BUS. LAW. 1259, 1266-67 (1972) (discussing use of administrative guidance to keep foreign businesses within approved purposes); Zhang & Kuroda, *supra* note 9, at 211-12 (government may use its powers often in an unrelated field to discipline an uncooperative business).

⁶⁹ Stevens, *supra* note 68, at 1267. Access here does not refer to the ability of a particular business to obtain a conference with officials in government agencies, but is a recognition that linguistic and cultural inexperience or difficulties often preclude effective direct communication and the reality that foreign businesses rarely possess liaisons with particular agencies which come from the hiring of retired Japanese officials. As a result, these businesses must rely on U.S. and Japanese lawyers in Japan, which may be counterproductive because lawyers are viewed with suspicion as antagonistic. *Id.*

⁷⁰ J. HUDDLESTON, *GAIJIN KAISHA: RUNNING A FOREIGN BUSINESS IN JAPAN* 86 (1990).

come familiar with the important representatives, including the attorney. Some authors have suggested that these contacts with Japanese officials occur principally through the Japanese partner.⁷¹ If the U.S. side chooses to appear independent of the Japanese side, less confusion regarding the motive may occur if the intention is communicated from the Japanese side.

To summarize, the most difficult aspect likely to trouble the U.S. lawyer is the important role administrative guidance will play in the transaction. To the extent he or she has been successful in influencing U.S. government agencies, such as by use of the threat of litigation to challenge or compel agency action, it should be understood that the rules are different in Japan and resort to similar approaches will be counterproductive for the client.⁷² Nor should the U.S. attorney view the Japanese agency as a forum to resolve disputes between the U.S. and Japanese parties because such intervention is said to be nonexistent between the Japanese government and foreign parties.⁷³

C. The Role of Japanese Counsel

Japanese attorneys will be noticeably absent during most aspects of the negotiation of the transaction, but this absence is only superficial. The attorneys representing the Japanese side will have been kept informed not only as to the progress of the negotiations, but will have utilized nonlegal staff to seek clarification of particular terms and their meanings in early drafts of the written agreement.⁷⁴ The Japanese attitude toward lawyers, both Japanese and U.S., will be discussed later in this article.

However, it should be noted that the Japanese side will consider direct involvement by an attorney in negotiations to be counterproductive to the necessary bartering of terms and conditions, unless it is clear that the U.S. attorney will play a non-adversarial role in the negotiations. Even then, distrust and suspicion are likely to delay the formation of an agreement.

⁷¹ See, e.g., Watts, *supra* note 19, at 607; R. TUNG, *supra* note 2, at 88. See also Libby, *Retaining Legal Counsel in Japan: Guidelines for New-to-Market Firms*, 12 E. ASIAN EXEC. REP. 17, 18 (July 1990) (suggesting that a qualified Japanese attorney should also be involved); Miyake, *The Who, Whens, and Hows of Retaining Legal Counsel in Japan*, Presentation at the ABA National Institute entitled "Japan-United States Trade and Investment: Strategies for the 1990's," 10-11 (Nov. 30 - Dec. 1, 1989) (indicating that in negotiations with national or local government agencies which involve sensitive areas, the appropriate Japanese attorney can be critical).

⁷² Cf. *Lawyers*, *supra* note 6, at 29.

⁷³ Zhang & Kuroda, *supra* note 9, at 212.

⁷⁴ See *supra* note 36 and accompanying text.

The Japanese attorney is considered the specialist and is only called in to consult on a particular problem.⁷⁵ The attorney's principal role is to review the contractual provisions of the agreement for language problems and consistency with the intent of the parties, particularly that of the Japanese side.⁷⁶ On the other hand, involving the Japanese attorney to resolve disputes during the negotiations may have the effect of saving time instead of regurgitating previously discussed issues and potentially raising additional areas of misunderstanding. In addition, the Japanese attorney advises on particular questions of Japanese law to the extent that they arise in the course of negotiations.

III. JAPANESE PERSPECTIVES ON LAW AND LAWYERS

A. Historical and Cultural Influences

The relatively quiet role the Japanese lawyer plays in international negotiations is partially explained by the historical roots of the Japanese legal system and the historical perception of the Japanese towards attorneys. The Japanese legal system is a hybrid of Japanese, German and United States influences.⁷⁷ The Japanese influence is most strongly rooted in the Tokugawa period and still permeates modern Japanese legal norms.⁷⁸ The German influence originated around the period of the Meiji restoration when Japan was beginning to open its doors to the outside world and sought to develop the Japanese legal system to accommodate the new internationalization.⁷⁹

The U.S. influence, of course, resulted from the U.S. occupation in Japan following Emperor Hirohito's surrender to the United States in the

⁷⁵ See generally Stevens, *Multinational Corporations and the Legal Profession: The Role of the Corporate Legal Department in Japan*, in ABA, CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 34-41 (J. Haley ed. 1978); E. HAHN, *supra* note 12, at 40. In addition, it was not until the late 1960s that Japanese companies formed corporate legal departments and the attention of Japanese attorneys began to shift to legal aspects of international business transactions.

⁷⁶ *Id.* See also Hahn, *An Overview of the Japanese Legal System*, 5 NW. J. INT'L L. & BUS. 517, 532 (1983) (extent of Japanese attorney's ability to redraft the written terms of agreement may be limited by prior approval of contract by the department's section chief, the *bucho*). In part, the limited role of the Japanese attorney is influenced by the Japanese attorney's training, which emphasizes practical litigation skills and the drafting of contracts. To the extent that the members of the Japanese company's legal department are involved in the negotiations, their skills are also different than those of a U.S. attorney. Although experienced with certain practical legal skills, those persons have only been trained in law at the university level. *Id.* at 531-32.

⁷⁷ See, e.g., *Working It Out*, *supra* note 39, at 156-59; Kaino, *Some Introductory Comments on the Historical Background of Japanese Civil Law*, 16 INT'L J. SOC. L. 383 (1988).

⁷⁸ Hahn, *supra* note 76, at 518-20. See also 2 Z. KITIGAWA, DOING BUSINESS IN JAPAN § 3.01[3] (1989); Uchtmann, Blessen & Maloney, *The Developing Japanese Legal System: Growth and Challenge in the Modern Era*, 23 GONZ. L. REV. 349, 350-52 (1987) [hereinafter Uchtmann].

⁷⁹ Uchtmann, *supra* note 78, at 352-54; Hahn, *supra* note 76, at 521.

Second World War.⁸⁰ Although the present system resembles the U.S. model, the U.S. attorney should not assume that the Japanese legal system operates in the same manner. Indeed, any generalization of the similarity between the two systems may be misplaced and may have serious unintended consequences, particularly with respect to contract formation and enforcement.

Because of traditional influences from the Tokugawa Era of *giri* and *wa*, the Japanese emphasize resolution of disputes without resort to litigation.⁸¹ Accordingly, the Japanese prefer that contract language specifically include provisions which require the parties "to resolve disputes in a harmonious manner" or otherwise "confer in good faith" when a dispute arises.⁸² Moreover, the Japanese are more at ease with flexible contract terms or vague provisions.⁸³

This is contrasted with the U.S. concept of a "contract," which is defined as a legal agreement defining the rights and responsibilities of the parties.⁸⁴ Elements of contract consideration and individual rights, enforceable by law, influence the U.S. attorney when involved in contract negotiation. Such emphasis on "rights" implies resort to an adversarial process to enforce the agreement when disputes arise or one party is unable to or refuses to perform according to the terms of the contract. In a U.S. legal environment, the court provides a forum to enforce assertions of rights created by contract. This is in direct opposition to the group-oriented Japanese, who historically have not possessed notions of individ-

⁸⁰ Z. KITIGAWA, *supra* note 78, at § 3.01[5].

⁸¹ See, e.g., Note, *Japanese Thought and Western Law: A Tangential View of the Japanese Bengoshi and the Japanese American Attorney*, 8 LOY. L.A. INT'L & COMP. L. ANN. 301, 302-13 (1986) [hereinafter *Japanese Thought and Western Law*]. See also Watts, *supra* note 19, at 598-601.

⁸² Watts, *supra* note 19, at 604; *Working It Out*, *supra* note 39, at 163-64.

⁸³ *Working It Out*, *supra* note 39, at 162; Kawashima, *supra* note 4, at 16. Hence the emphasis in negotiations upon development of the relationship. If the relationship is strong, it is assumed and generally expected among the Japanese that the good will and mutual concern of the parties will solve disputes or problems which might arise in the future. Cf. Watts, *supra* note 19, at 604.

⁸⁴ The contrast between Japanese and U.S. concepts of contract has been described as follows:

While in the American mind the function of contract is to anticipate possible future strife and trouble as well as to pre-define disputes and enunciate rights, contract in the Japanese mind is a symbolic expression or reflection of mutual trust that is expected to work favorably for both parties in case of future trouble and never to break down.

Wagatsuma & Rosett, *Cultural Attitudes Toward Contract Law: Japan and the United States Compared*, 2 U.C.L.A. PAC. BASIN L. J. 76, 84 (1983) (noting that U.S. contracts define such rights and responsibilities through detailed provisions to which the parties resort when relations and cooperation have broken down); E. HAHN, *supra* note 12, at 33-34. *But see* Gray, *The Use and Non-Use of Contract Law in Japan: A Preliminary Study*, 17 LAW IN JAPAN 98, 113 (1984) (suggesting that more modern Japanese lawyers appear to have created the type of law practice similar to U.S. corporate lawyers and the tendency for small or medium-sized corporations to utilize the Japanese attorneys to participate in a broad range of corporate matters, including the negotiation and drafting of contracts). Cf. Z. KITIGAWA, *supra* note 78, at § 3.02[3]; Hahn, *supra* note 76, at 206-07.

ual rights.⁸⁵ Proclivity towards litigation is not characteristic of the Japanese.⁸⁶

The Japanese legal system does not exist to enforce individual rights and is strongly influenced by the group harmony and consensus-based dispute resolution which is characteristic of Japanese business and Japanese society generally.⁸⁷ This is not to say that litigation does not occur in Japan. However, there is significant stigma to the Japanese person or company that resorts to or threatens litigation.⁸⁸ Litigation also is an undesirable method to resolve disputes because it involves a lengthy process and is very costly.⁸⁹

Further, the Japanese are distrustful of attorneys. This distrust is not limited to foreign attorneys, but is directed towards Japanese attorneys, or *bengoshi*,⁹⁰ as well.⁹¹ The distrust of Japanese attorneys in par-

⁸⁵ See, e.g., *Working It Out*, *supra* note 39, at 160, 172; Wagatsuma & Rosset, *supra* note 84, at 84; Kawashima & Noda, *Dispute Resolution in Contemporary Japan*, in *INSIDE THE JAPANESE SYSTEM: READINGS ON CONTEMPORARY SOCIETY AND POLITICAL ECONOMY* 191-93 (D. Okimoto & T. Rohlen eds. 1988). See also Kawashima, *supra* note 4, at 6-7.

⁸⁶ Tanaka, *The Role of Law and Lawyers in Japanese Society*, in *INSIDE THE JAPANESE SYSTEM: READINGS ON CONTEMPORARY SOCIETY AND POLITICAL ECONOMY* 194-96 (D. Okimoto & T. Rohlen eds. 1988). But see Haley, *The Myth of the Reluctant Litigant*, 4 *J. JAPANESE STUD.* 359 (1978) (although Japanese are more willing to accept settlements, there are institutional barriers to litigation, such as the lack of access to courts and insufficient capacity of the courts to provide adequate relief).

⁸⁷ Tanaka, *supra* note 86, at 194-96. The practitioner should not overlook, however, the potential application of Japanese law to contracts found in the Civil Code (*Minpō*) and the Commercial Code (*Shōshō*). The Commercial Code, absent agreement to the contrary, controls most transactions, and in the absence of specific applicable provisions, customary laws will be applied. In the event that no applicable commercial customary law is discernible, the Civil Code will apply. COMM. CODE, ART. I. See generally 3 Z. KITIGAWA, *DOING BUSINESS IN JAPAN* (1990) (in particular chapter on "Contract Law in General").

⁸⁸ See, e.g., *Japanese Thought and Western Law*, *supra* note 81, at 308, 317. Litigation also is viewed as a failing of the parties.

⁸⁹ Miller, *Apples vs. Persimmons: The Legal Profession in Japan and the United States*, 39 *J. LEGAL EDUC.* 27, 33-35 (1989).

⁹⁰ *Bengoshi* refers to the only class of attorneys in Japan which is authorized to represent clients before Japanese courts. Another subclass of *bengoshi*, the *shogai bengoshi* or international practitioners, spends a substantial amount of time on international transactions or representing foreign clients doing business in Japan or Japanese clients doing business abroad. Young, *Foreign Lawyers in Japan: A Case Study in Transnational Dispute Resolution and Marginal Reform*, 21 *LAW IN JAPAN* 84, 99-103 (1988). There are several other Japanese legal professions whose members are licensed to handle matters which would be considered the practice of law in the United States, such as *shiho shoshi*, who draft and research legal documents and provide legal advice on a wide range of subjects, *koshonin* (notary publics), *benrishi* (patent practitioners), *seirishi* (tax practitioners), and *gyosei shoshi* (administrative scribes). Miller, *supra* note 89, at 28-29. Cf. Hahn, *supra* note 76, at 530.

⁹¹ The distrust of attorneys in Japan is rooted in the early development of the profession which was notoriously shady. Z. KITIGAWA, *supra* note 78, at § 3.02[3]; Young, *supra* note 90, at 95. As time went on, despite the elevated status that the profession reached in more modern times, this distrust resulted from the orientation of the *bengoshi* towards litigation which is considered at odds

ticular is not a recent phenomenon and has existed for several centuries.⁹² The Japanese typically consult attorneys in a very limited fashion. Contact for dispute resolution or litigation purposes is a last resort because such action within a purely Japanese environment would naturally be perceived as a hostile and non-conciliatory gesture.⁹³ Accordingly, the cultural orientation is not only negative to a legal forum for dispute resolution, but also to the profession. In negotiations of a business transaction, the perception is that the lawyer will add an adversarial element which suggests that the party whom the lawyer represents is only interested in his or her client's concerns and not in the formation of a positive and harmonious business relationship.

B. Current Limitations to "Legal Practice" in Japan by Foreign Attorneys

Just as the Japanese legal system possesses similarities to the U.S. legal system, the legal profession in Japan also bears some resemblance to the U.S. legal profession. The most striking difference is the number of attorneys. Unsurprisingly, Japan has the lesser number.⁹⁴ However, the real difference is found in the practice of law in Japan. There are several "classes" of attorneys in Japan, from the *bengoshi* mentioned above to the persons who have a legal education and work in the corporate legal department of a company or governmental agency.⁹⁵ Of all such "classes," only the *bengoshi* is authorized to appear before the Japanese courts and administrative tribunals.⁹⁶

Foreigners are virtually precluded from representing a client, whether or not Japanese, before a Japanese court or administrative tribunal. This limitation, combined with other restrictions on the practice of law by foreign attorneys in Japan, has come to represent a major trade

with the creation or maintenance of harmony and consensus-based dispute resolution. See, e.g., Hahn, *supra* note 76, at 518-20; Zhang & Kuroda, *supra* note 9, at 209-10.

⁹² For interesting reading on the history of the Japanese *bengoshi* and the development of that class of lawyers see Young, *supra* note 90, at 95-99; *Japanese Thought and Western Law*, *supra* note 81, at 313-17.

⁹³ E. HAHN, *supra* note 12, at 35; *Japanese Thought and Western Law*, *supra* note 81, at 317; Lansing & Wechselblatt, *supra* note 16, at 652-53. On the other hand, Japanese companies, particularly the larger ones, have shown less hesitation to enter into or defend against litigation in foreign forums, such as the United States. See, e.g., Thompson, *Japan Inc. on Trial*, 9 CAL. LAW. 43 (May 1989).

⁹⁴ A recent estimate shows that there were approximately 13,000 *bengoshi* in 1988. Miller, *supra* note 89, at 27-28. There are other legal professions which, if combined with the number of *bengoshi*, bring the number of lawyers in Japan to approximately 100,000. This contrasts with the estimated 650,000 persons licensed to practice law in the United States at the same time. *Id.* at 28-29.

⁹⁵ See *supra* note 90.

⁹⁶ *Id.*

barrier between the United States and Japan.⁹⁷ Presently, a foreign attorney may apply to become the business law advisor or the *gaikokuhō jimū bengoshi*, and if accepted, may only advise clients on the law of his or her home jurisdiction. The foreign attorney is still precluded from representing a client in a Japanese forum or advising a client regarding Japanese law.⁹⁸

Despite the limitations on the scope of the practice, which have tended to cause some practitioners or law firms to consider penetration into the Japanese market to be unrealistic, there are other difficult qualifications which an attorney must possess to initially apply. Those qualifications include:

- (1) The applicant must possess at least five years of practice in his or her "home jurisdiction;"
- (2) The applicant's "home jurisdiction" must provide reciprocity to Japanese *bengoshi*, i.e., permit qualified *bengoshi* the ability to become foreign legal consultants;
- (3) The applicant must not have engaged in any criminal activity or other acts of incompetence or unethical behavior which would otherwise constitute grounds for disqualification under Japanese law; and
- (4) The applicant must be able to compensate clients for damages.⁹⁹

Although the qualifications might appear less onerous in the United States for a foreign attorney to practice law, as of 1988, only six states and the District of Columbia could meet the reciprocity requirement.¹⁰⁰ The major justification for Japan's current restrictive policies are expressed by claims that lessening the restrictions would seriously alter the Japanese legal system's capability to reinforce traditional influences of group harmony and conciliatory dispute resolution.¹⁰¹ In other words, it

⁹⁷ Discussion of the trade issues is beyond the scope of this article. In 1988 there was a symposium on the foreign practice of law in Japan co-sponsored by the Japan-America Society and American Bar Association and the topics and related articles appear in volume 21 of *LAW IN JAPAN*. See also R. WOHL, S. CHEMTOB, & G. FUKUSHIMA, *PRACTICE BY FOREIGN LAWYERS IN JAPAN* (1989).

⁹⁸ Tadaki, *The Gaikokuhō Jimū Bengoshi System: Circumstances of Acceptance and Scope of Practice*, 21 *LAW IN JAPAN* 122, 131-36 (1988). Home jurisdiction, as it is used here, refers to the state in which the attorney is admitted to practice. There is currently no reciprocity between Japan and the United States on a national level with respect to the practice of law in either country. For those states which do qualify under a reciprocity arrangement with Japan, see *infra* note 100.

⁹⁹ Iteya, *Gaikokuhō Jimū Bengoshi in Japan*, 21 *LAW IN JAPAN* 141-48 (1988). For a full text of the law see Note, *Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers*, 21 *LAW IN JAPAN* 193 (1988). See also Note, *Gaikoku Bengoshi Hō, Foreign Lawyers in Japan: The Dynamics Behind Law No. 66*, 62 *S. CAL. L. REV.* 1489 (1989) [hereinafter *Foreign Lawyers in Japan*].

¹⁰⁰ Iteya, *supra* note 99, at 147-48. The seven jurisdictions are: California, New York, Hawaii, Michigan, New Jersey, Texas, and the District of Columbia. Cf., *Foreign Lawyers in Japan*, *supra* note 99, at 1500-03.

¹⁰¹ MacMullin, *Foreign Attorneys in Japan: Past Policies, the New Special Measures Law and*

will more resemble the U.S. system, which is not perceived as an altogether more superior system.¹⁰²

On the other hand, there are significant external and internal influences which suggest that there may be broader opportunities for legal practice in Japan.¹⁰³ It is not anticipated, however, that the major issues which limit foreign practice will be resolved in the short run and the attorney practicing in Japan, even as a *gaikokuhō jimu bengoshi*, will continue to need to rely a great deal on the Japanese *bengoshi*.¹⁰⁴ Thus, efforts to develop strong relationships with members of the Japanese bar are greatly recommended.

IV. IMPORTANT LEGAL CONSIDERATIONS FOR THE CONTRACT

Despite the bias against the written contract as the embodiment of the parties' relationship or of the incidents of the transaction, the Japanese side is aware of the need for a clear contract and the trend, especially with larger concerns, is to draft agreements in characteristically United States detail.¹⁰⁵ Consequently, this section is concerned with identifying "boilerplate" provisions which relate principally to enforcement and conflict of law, as well as to identify some of the considerations for particular provisions.

The form of contract should contain some provisions which are common to purely Japanese transactions, such as the "meet and confer in good faith" and the "resolve disputes in a harmonious manner" requirements.¹⁰⁶ The U.S. side should raise the question in negotiations, however, of the next step should such conciliatory efforts prove unsuccessful. This should be done very cautiously and after a positive sense of the relationship has been achieved. Although the initial reaction may not be favorable, this issue presents a good opportunity to establish some

Future Expectations, 4 FLA. INT'L L. J. 51, 73-75 (1988) (also indicating a fear of losing a substantial share of the international business market to foreign attorneys as well as a belief that foreign attorneys will not be loyal to the political and cultural values observed in Japan).

¹⁰² See, e.g., Fuhrman, *Lions at the Gate*, 10 CAL. LAW. 30, 33 (July 1990).

¹⁰³ *Id.* at 78-73; *Foreign Lawyers in Japan*, *supra* note 99, at 1517-19; Cone, *The Future of Foreign Law Offices in Japan*, 21 LAW IN JAPAN 76 (1988); Shapiro, *Current Opportunities and the Changing Market: The Future of Foreign Law Offices in Japan*, 21 LAW IN JAPAN 79 (1988); Forte, *Despite Barriers, Firms to Head to Japan*, L.A. DAILY J. - CAL. L. BUS. 3 (Sept. 10, 1990 supp.).

¹⁰⁴ Although the *gaikokuhō jimu bengoshi* may not advise on Japanese law and is prohibited from certain types of joint enterprises, there are some circumstances in which collaboration with *bengoshi* is encouraged and also required. This type of cooperation is perceived to benefit both the *gaikokuhō jimu bengoshi* and the Japanese *bengoshi*. See, e.g., Tadaki, *supra* note 98, at 136-37, 140.

¹⁰⁵ See, e.g., Hahn, *supra* note 76, at 520-21; Zhang & Kuroda, *supra* note 9, at 206-07.

¹⁰⁶ See *supra* notes 82-83 and accompanying text.

ground rules and determine the extent to which the Japanese side may be flexible.

In addition, the parties may desire to establish when Japanese law will control and when the law of the jurisdiction of the United States will control. This is recommended for two obvious reasons. First, it resolves potential ambiguity; second, it avoids conflict of law issues.¹⁰⁷ Another important reason which should not be overlooked, however, is that it establishes the forum for enforcement of the agreement if ultimately necessary. One commentator has suggested that Japanese courts have little trouble enforcing the terms of those agreements which specify the extent to which such laws govern.

It is this author's opinion that provisions which actually make litigation the least desirable means for resolution of disputes for both parties should be utilized. For example, if litigation is to ultimately become an option for the parties, the issues of personal jurisdiction, process and discovery are areas in which the parties may provide consent in the agreement by designating which jurisdiction's law is to govern.¹⁰⁸ This actually does not create an advantage for the U.S. party if a U.S. forum is selected, although litigation becomes less of an obstacle. Regardless of the selection of forum for resolution of disputes through litigation, the process will still be long and cumbersome which may allow for greater compromise in areas of dispute or conflict.

Accordingly, pre-litigation arbitration or formal dispute resolution may be provided as a condition precedent to either party initiating litigation.¹⁰⁹ The time frame for resolution should be within any applicable or potential statute of limitations period so that neither party loses the lev-

¹⁰⁷ E. HAHN, *supra* note 12, at 79-82. If the contract is written in both English and Japanese, the parties should specify which version should control. *Id.* at 42.

¹⁰⁸ Caution should be exercised with these provisions since standard Japanese practice and custom are frequently used to resolve contractual terms when the terms are too vague. *Id.* Specific jurisdiction, process and discovery rules are beyond the scope of this article. However, a good discussion can be found by consulting Kim & Sisneros, *Comparative Overview of Service of Process: United States and Japan, and Attempts at International Unity*, 23 VAND. J. TRANSNAT'L L. 299 (1990); Robinson, *The Japanese in the United States: Jurisdiction, Service of Process, Discovery, and Related Procedural Issues*, in ABA, JAPAN-UNITED STATES TRADE AND INVESTMENT: STRATEGIES FOR THE 1990s 295 (1989). Compare E. HAHN, *supra* note 12, at 81-82 (jurisdiction), 86-87 (service of process), and 84-86 (enforcement of judgments); Ishimatsu & Suntag, *Depositions in Japan Can Be Tricky*, L.A. DAILY J. - CAL. L. BUS. 4 (May 29, 1990 supp.).

¹⁰⁹ See, e.g., E. HAHN, *supra* note 12, at 82-84 (noting that arbitration clauses are very common in contracts involving the Japanese). For discussion regarding dispute settlement through a variety of forms including arbitration, see generally 7 Z. KITIGAWA, *DOING BUSINESS IN JAPAN* (1990) (particularly Part XIV on "Dispute Settlement," which contains separate chapters on conciliation and arbitration).

erage which the threat of litigation presents.¹¹⁰ Again, as a reminder, litigation should be an absolute last resort. A bad reputation to use litigation other than as a last resort likely will preclude willingness of the opposite party to maintain the agreement longer than necessary or discourage other Japanese enterprises from entering into an agreement.

It may be desirable to develop a memorandum of understanding or insert appropriate provisions detailing the assistance to be provided each party on matters which are controlled by an administrative agency or ministry. To the extent that administrative regulation of the particular transaction can be memorialized, it may also be helpful to define the entity and the scope of regulation. This may identify regulatory issues which present obstacles to complete performance and the manner in which the parties may resolve potential disputes in this context.

The down-side of detailing the agreement is the preclusion for harmonious resolution if one party is able to insist on specific terms. There are always matters which are overlooked or not anticipated. The main objective should not be to create issues which may be litigated, but to avoid litigation as much as possible.

A Japanese *bengoshi* should be consulted to review the agreement from the U.S. party's standpoint. The *bengoshi* can not only review the language contained in particular provisions, but can be consulted for application of Japanese law to particular issues and other litigation-related issues.¹¹¹ Despite restrictions upon "partnerships" between Japanese *bengoshi* and U.S. attorneys, including the *gaikokuhō jimu bengoshi*, joint review of the agreement and comparative analysis is permitted and strongly recommended.¹¹²

¹¹⁰ In Japan, the basic rule for extinctive prescription (the acquisition of rights and relief from obligation-duties by means of a lapse of a certain period of time) with respect to obligation-rights arising from commercial acts is five years. There are, however, specific time periods for particular instances, e.g., property rights, rights established by judgment, etc. See generally 3 Z. KITIGAWA, DOING BUSINESS IN JAPAN § 1.17 (1990).

¹¹¹ Cf. *supra* note 71. The U.S. side should understand the potential for misunderstanding if Japanese law applies in a manner which contract language did not preclude or because there was an assumption that the English and Japanese terms did not vary. This may arise in connection with the existence of different connotations and interpretations of particular words. See, e.g., Zhang & Kuroda, *supra* note 9, at 205-06. A good example would be those legal terms for which there is no precise Japanese translation or which have no legal significance to the Japanese. See, e.g., E. HAHN, *supra* note 12, at 42. Care should also be exercised with terms which are not purely legal terms but may create potential for serious discrepancy, such as the currency to be used or the exchange rate. *Id.* Not only should the U.S. side understand the nuances of a Japanese contract, but should make sure that the Japanese side fully understands the implications of a detailed U.S. contract. Lansing & Wechselblatt, *supra* note 16, at 656.

¹¹² Tadaki, *supra* note 98, at 140 (specifically noting that collaboration on individual cases is unrestricted and a "constant business cooperation relationship" is permitted if restrictions against partnerships or sharing profits with *bengoshi* have not been circumvented).

In all provisions, the Japanese attention to detail should also apply to the U.S. citizen in international transactions, particularly with the Japanese. Japanese businesses are becoming more sophisticated in these areas and may eventually gain an advantage against those who "do not do their homework." Unless particular provisions have strong justification, it is more than likely that the Japanese side will not agree to their inclusion.¹¹³ Over time, however, it is anticipated that very little difference will be discernible in contracts for international transactions between Japanese and U.S. concerns.

V. CONCLUSION

There are no quick fixes or shortcuts in negotiations which involve a Japanese party. It is this author's hope that this article focused the reader's attention on methods which may facilitate a positive relationship between Japanese and U.S. parties to a transaction, which should begin at very early stages. Both sides have a great deal to gain from successful joint enterprises. However, there is always potential for the relationship to sour, and often times unnecessarily and avoidably.

Understanding that cultural differences may create barriers and developing ways to overcome them will do much toward success of the transaction. Ignoring those differences and insisting on the terms of a written document most often will broaden the gap. Clients should be advised of these dynamics at the outset so that they can gauge the desirability of the transaction and their endurance for the negotiation process.

If an agreement is ultimately executed, the real work begins and the maintenance of the relationship with the Japanese party should almost take on greater importance at this stage than during the negotiations.¹¹⁴

¹¹³ This will not occur as a flat rejection of certain terms but may result from the time-consuming process of consensus decision-making and the intentional twisting of or asserted inability to understand certain legal meanings. See *supra* notes 19, 36-39 and accompanying discussion. Even clauses generally considered by U.S. attorneys to be boilerplate will be subjected to countless revisions. Mori, *supra* note 4, at 50. Consequently, those terms upon which the U.S. side should insist should be carefully selected and the justification or necessity for such terms should be clearly identified by the U.S. team so that its explanation will have greater impact.

¹¹⁴ Maintenance of a long-term relationship will require participation in not only Japanese business customs, but in continued generation of good will exemplified by ceremonial attention in follow-up contacts, both written and in person, and in gift-giving during key seasons. Written follow-ups include letters indicating appreciation and gratitude for the ultimate execution of the contract and to inquire into the status of the transaction. Socializing is also very important to the Japanese and should be part of the agenda when face to face follow-up contacts occur. See, e.g., R. TUNG, *supra* note 2, at 55-58. The U.S. side should be prepared to invest in fairly regular follow-up visits to Japan as an expression of sincere interest in the relationship, and not just when problems arise.

On the subject of gift-giving, the attorney should become familiar with not only the appropriate occasions on which to give a gift, but the significance of certain gifts and manner of gift-giving. Gift-

In the end, it should be recognized that the relationship is what truly matters. The time taken to become aware of and be sensitive to the cultural details will be well worth the effort, and should prove to be a necessary ingredient if the attorney wishes to engage in transactions involving Japanese parties.

Gam'batte, and learn to say, "*Doozo yoroshiku onegai shimasu.*"¹¹⁵

giving in Japan has strong traditional roots and occurs as an expression of the giver's true feelings of friendship, gratitude and respect. There are two "must-give" occasions in Japanese culture: the *O-seibo* at year end and the *O-chugen* in midsummer. *O-seibo* extends from about November 15th to the end of the year and is comparable to the U.S. gift-giving customs at Christmas, without the religious overtones. *O-chugen* lasts for two weeks anywhere from June 15 to August 15, depending on the local region's custom. The gifts are meant to express appreciation for the recipient's cooperation and support during the year. Other gift-giving occasions will depend on the type of relationship which has developed between the principal parties to the relationship.

Certain types of gifts are appropriate given particular occasions, although gifts which relate to an interest or hobby of a particular recipient, especially those of high quality and from the United States, are generally recommended. See, e.g., D. ROWLAND, *supra* note 5, at 79-84. This adds a personal touch. When presenting a gift to the Japanese it is customary to extend it with both hands as a sign of respect and humility. One should also indicate that "it is a trifle," despite actual cost. The Japanese do this not as false modesty, but to say that the relationship is considered much more important than the gift itself or even the price paid for the gift. Other forms of etiquette should be learned, as these gestures will be deeply appreciated by the Japanese party to the transaction.

¹¹⁵ "*Gam'batte*" is a colloquial Japanese expression meaning "Good Luck." The phrase "*Doozo yoroshiku onegai shimasu*" is an expression for which there is no precise English translation, but is understood to request that the hearer bestow a favor upon the speaker in the most humblest of terms (e.g., "Please remember me favorably"). In Japan, members from opposite sports teams say that this expression before the beginning of the game as they bow to each other.

APPENDIX

SUGGESTED RESOURCES AND MATERIALS

I. Important Organizations and Agencies

A. Japan External Trade Organization (JETRO). This is a non-profit organization established to promote foreign trade and commerce in Japan. JETRO has several offices in the United States, including New York, Atlanta, Chicago, Dallas, Houston, Denver, Los Angeles and San Francisco. Specific addresses are identified below. The offices provide some assistance in locating or identifying Japanese companies from their extensive listings, which may present opportunity for strategic fit. In addition, JETRO provides seminars, offers consultation and evaluation of proposed projects.

Office locations in the United States, including addresses and phone numbers, are as follows:

245 Peachtree Center Avenue
Suite 2208, Marquis One Tower
Atlanta, GA 30303
(404) 681-0600

401 N. Michigan Avenue
Suite 660
Chicago, IL 60611
(312) 527-9000

One Tabor Center
1200 17th Street, Suite 1110
Denver, CO 80202
(303) 629-0404

McGraw-Hill Building
1221 Avenue of the Americas, Suite 4400
New York, NY 10020
(212) 997-0400

725 South Figueroa Street
Suite 1890
Los Angeles, CA 90017
(213) 624-8855

Quantas Building
360 Post Street, Suite 501
San Francisco, CA 94108
(415) 392-1333

One Houston Center
Suite 2360, 1221 McKinney
Houston, TX 77010
(713) 759-9595

World Trade Center Dallas
2100 Stemmons Freeway, Suite 152-1
P.O. Box 58234
Dallas, TX 75258
(214) 651-0839

B. Japanese Embassy. The Japanese Government maintains its embassy in the United States at 2520 Massachusetts Avenue, N.W., Washington, D.C. 20008 (202-939-6700). Consulate General Offices are located in New York, Chicago, Seattle, Portland, San Francisco, Los Angeles, San Diego, Boston, Atlanta, New Orleans, Houston, Kansas City, Honolulu, and Anchorage.

C. U.S. Department of Commerce. The Department of Commerce, located at 14th Street and Constitution Avenue, N.W., in Washington, D.C. 20230 (202-377-2867), can supply interested parties with information on Japan, export opportunities in Japan, as well as details on trade fairs. Persons planning to export to Japan may use the Department's agency - distributorship service to help find an agent in Japan.

D. U.S. International Trade Commission. The International Trade Commission, located at 500 E Street, S.W., in Washington, D.C. 20436 (202-205-2000), has numerous international trade studies, statistical data and tariff schedules of the United States.

E. Other organizations too numerous to list, can be consulted for a variety of specific purposes. See, e.g., such publications as U. S. Department of Commerce, *Overseas Business Report: Marketing in Japan* (OBR 87-02) published in April 1987 at pages 34-37; and D. Rowland, *Japanese Business Etiquette* (1985) at pages 156-164.

II. Publication Lists

A. Britt, *The Japanese Legal System and International Trade: Up-To-Date Sources of Information in English*, 82 LAW LIBR. J. 313 (1990). Provides an updated annotated list of several different sources of current information on subjects related to the Japanese legal system and trade.

B. Feldman, *Annotated Bibliography: Japanese Law and Society*, 21 LAW IN JAPAN 219 (1988). Provides an annotated list on a variety of subjects, including "Explaining Japanese Non-Litigiousness: Culture vs.

Structure," constitutional law, antitrust, administrative law, legal history, regulation of the legal profession, and contracts.

C. E. HAHN, *JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM* (1984). Includes a bibliography of suggested reading and materials consulted.

D. R. COLEMAN & J. HALEY, *AN INDEX TO JAPANESE LAW: A BIBLIOGRAPHY OF WESTERN LANGUAGE MATERIALS 1867-1973* (1975). This is a special issue of the legal periodical, *LAW IN JAPAN*, published by the Japanese American Society for Legal Studies.

E. R. NERI, *U.S./JAPAN FOREIGN TRADE: AN ANNOTATED BIBLIOGRAPHY OF SOCIOECONOMIC PERSPECTIVES* (1988). Provides an annotated listing of books or articles on the following subject categories: culture and society or social dynamics; science, technology and environment; law and politics; general works on the economy; economic planning; finance; commerce, business and industry; industrial management, organization and productivity; industrial relations; U.S.-Japan relations and U.S.-Japan economic relations.