

CONTRACTING BETWEEN A JAPANESE ENTERPRISE AND AN AMERICAN ENTERPRISE: THE DIFFERENCES IN THE IMPORTANCE OF WRITTEN DOCUMENTS AS THE FINAL AGREEMENT IN THE UNITED STATES AND JAPAN

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"One cause of the failure of mission work is that most of the missionaries are entirely ignorant of our history . . . 'what do we care for heathen records?' . . . and consequently estrange their religion from the habits of thought we and our forefathers have been accustomed to for centuries past."¹

I. INTRODUCTION

A. *The Differences in the Approach to Forming a Contract*

Generally, the Japanese approach to contract formation differs significantly from the American approach. Indeed, without this difference many disputes between the countries would not exist. Nevertheless, presently, the typical American business person says the Japanese approach to business negotiations wastes time.² Conversely, the Japanese complain about the American dry approach to business deals.³

The significance of a written document in the American legal system is tremendous. For example, the Statute of Frauds, Parol Evidence

1. INAZO NITOBÉ, *BUSHIDO: THE SOUL OF JAPAN* (1905).

2. Robert J. Walters, *Now That I Ate The Sushi, Do We Have a Deal?*, 12 NW. J. INT'L L. & BUS. 335, 339 (1991).

3. Dania Zhang & Kenji Kuroda, *Beware of Japanese Negotiation Style: How To Negotiate With Japanese Companies*, 10 NW. J. INT'L L. & BUS. 195, 209 (1989).

Rule, and other theories highlight the importance of a written agreement. As a result, American business people tend to start a relationship after they have closed the deal. By contrast, the typical Japanese business enterprise would not immediately enter into an agreement, especially with a foreign enterprise. This might be the result of the historical skepticism towards strangers in the Japanese society.⁴ In any event, the Japanese business entity will attempt to establish a trusting relationship with their potential partners before they finally enter into an agreement. This slow process of trying to know each other before entering into an agreement appears to be an irritating process for American business people.

The attempt to establish a trustworthy relationship before entering into a contract goes further. In other words, the Japanese entity will carry over the established relationship beyond the closing of the deal. The corollary of this attitude is that the end result of the deal, which is the written contract itself, is no more than a signed agreement which would prove a trustworthy relationship has been established. Accordingly, the Japanese entity would not expect an entity with which they have a trustworthy relationship to insist on a term which turned out to be a very bad deal, not to mention initiate a lawsuit.⁵

In order to reduce the possibilities of a lawsuit, it is important to identify the problems which may arise in the course of contracting. In drafting a contract, the parties must envision two significant aspects in which a problem may arise. One aspect concerns the use of words. The use of unclear words creates an interpretation problem. This problem is most prominent when two parties using different languages attempt to agree to a document written in either language. The second problem arises when the importance of a written document, as a matter of law,

4. The analysis of the historical skepticism of the Japanese towards strangers and foreigners is beyond this article, and, therefore, is not discussed.

5. Professor Steven R. Salbu has mentioned in his article that:

[i]n the United States, finely articulated contract terminology combined with a high incidence of litigation tends to create a mistrustful contracting environment relative to other cultures. Yet, as contracting in the United States has progressed from classical to neoclassical and even relational varieties, the American contracting culture may be moving toward greater flexibility and reliance upon justifiably trustworthy alliances. In other countries, such as Japan, contracts traditionally have been little more than declarations of good faith and a general commitment to support future dealings with another party.

Steven R. Salbu, *Parental Coordination and Conflict in International Joint Ventures: The Use of Contract to Address Legal, Linguistic, and Cultural Concerns*, 43 CASE W. RES. L. REV. 1221, 1232-33 n.52 (1993). In the same article Professor Salbu states that the "Japanese business people often rely on mutual trust to the exclusion of formal contracting," and that "[t]hey have traditionally viewed the need to contract as a lack of good faith, potentially injuring future relations between venture parents." *Id.* at 1260.

differs significantly. This will especially be a problem between a Japanese business enterprise and an American business enterprise because of their being accustomed to legal systems in which one attaches significant importance to a written document, and the other does not. These issues will be discussed separately in the subsequent sections.

This article will describe the difference in attitude towards the terms of a contract between Japanese business entities and American business entities. The difference in attitude towards a written document in America and Japan stems from the differences in the contract law itself. The most significant difference is an absence of an equivalent to the Anglo-American Parol Evidence Rule or the Statute of Frauds in Japanese contract law. This article will highlight this absence and other differences between Japanese contract law and American contract law by applying Japanese contract law to the fact patterns of famous American cases. Finally, this article will propose an ideal method of contracting with an entity from a different jurisdiction.

B. The Differences Between Anglo-American Law and Continental Law

Before discussing the differences between Japanese contract law and American contract law, one should understand the differences between Anglo-American law and Continental law, which is the basis of Japanese law. Generally, modern continental law is based on the *will theory*. In other words, the law focuses on the specific intent of the contracting party. For example, if an individual enters into a contract, the "modern Continental law, apart from certain requirements of proof . . . asks only, Did [sic] the promisor intend to create a binding duty?"⁶

The origin of the *will theory*, therefore the origin of Continental law, can be found in the thoughts of seventeenth century jurists. In the seventeenth century, the decisive element to contract "was the idea of deduction from the nature of man as a moral creature and of legal rules and legal institutions which expressed this ideal of human nature."⁷ Furthermore, in the period when the law was nothing more than a rule describing the morals of human beings, the courts "searched the conscience of a defendant by an examination under oath, and believed [they] could reach subjective data that were beyond the cognizance of a jury."⁸ Accordingly, the origins of Continental law relied on the

6. ROSCOE POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 238 (1921).

7. *Id.* at 253.

8. *Id.* at 271.

metaphysical existence of a natural law which was deduced from human morality. As a result, it focused more on the intent and the morality of the contracting party rather than on the effect created by the manifestation of that intent.

On the other hand, "Anglo-American jurists paid little or no attention to the systems of the metaphysical school."⁹ In the wake of the industrial revolution, the Anglo-American jurists recognized "[t]he need of stability and certainty in the maturity of law and in the importance of the social interests in security of acquisitions and security of transactions in a commercial and industrial society."¹⁰ The philosophers of this school thought the source of obligation to a contract was in the form itself.¹¹ Accordingly, the rule was laid down "by parol the party is not obliged."¹² Furthermore, philosophers say that the American legal system does "not give effect to promises on the basis of the will of the promisor, although the [American] courts of equity have shown some tendency to move in that direction."¹³

In summary, the origin of Anglo-American law "insists on uniformity, the [Continental law] on morality; the former on form, the latter on justice in the ethical sense; the former on remedies, the latter on duties; the former on rule, the latter on reason."¹⁴ As a result, these basic notions still linger on to influence the present-day law in respective nations.

II. THE HISTORICAL DEVELOPMENT OF THE PROBLEM OF INTERPRETATION AND THE PAROL EVIDENCE RULE IN THE UNITED STATES

A. *The Criticism of The Parol Evidence Rule*

The Restatement (Second) of Contracts says the parol evidence rule is a rule of substantive law and not a rule of evidence, which "renders

9. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 152 (1921).

10. *Id.* at 148.

11. See generally POUND, *supra* note 9.

[I]n the strict law the source of obligation was in the form itself. For in primitive thinking forms have an intrinsic efficacy. It has often been pointed out that the faith in legal forms belongs to the same order of thought as faith in forms of incantation and that legal forms are frequently symbols to be classed psychologically with the symbols of magic.

Id.

12. OLIVER WENDELL HOLMES, *THE COMMON LAW* 232 (1881).

13. POUND, *supra* note 6, at 270.

14. POUND, *supra* note 9, at 141.

inoperative prior written agreements as well as prior oral agreements.”¹⁵ Accordingly, if the rule is applied literally, when a contract dispute arises, any prior stipulated agreement or condition which did not appear in the final written contract, cannot be considered in the trial.

The rigid application of this rule has been widely criticized among legal scholars. Professor Arthur Corbin stated that “extrinsic evidence is always necessary in the interpretation of a written instrument.”¹⁶ Specifically, the view that the written contract must be ambiguous before the parties may introduce extrinsic evidence to determine their real intentions has been criticized. Judge Posner observed that “a clear document can be rendered unclear—even have its apparent meaning reversed—by the way in which it connects, or fails to connect” with the subjects it describes.¹⁷ “Discrepancy between the word and the world is a common source of interpretive problems everywhere.”¹⁸ Furthermore, he criticized the rule because it assumes a precision in language which cannot exist, and because it requires the trial judge to determine the true intent of the parties in a transaction to which he is far removed both in time and in circumstance.¹⁹

While the rule has been criticized for its rigid application, American contract law is departing from such a rigid application. For example, the Uniform Commercial Code allows evidence of course of dealing, usage of trade, and course of performance to play a significant role in the interpretation of commercial agreements.²⁰ This requirement

15. RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a (1979). Section 213 states that: 1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them. 2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope. 3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

Id. at §213 cmt. a.

16. Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 188-89 (1965).

17. *AM Int'l, Inc. v. Graphic Management Assoc., Inc.*, 44 F.3d 572, 577 (7th Cir. 1995).

18. *Id.* at 577.

19. *URS Corp. v. Ash*, 427 N.E.2d 1295, 1299 (Ill. App. Ct. 1981).

20. U.C.C. § 2-202 (1994). This section provides that:

[t]erms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement, but may be explained or supplemented (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and (b) by evidence

arises from the notion that commercial merchants are better off being bound to the actual rules which bind ordinary merchants in the real commercial world, than to be bound by the court-made rules which are sometimes far from being practical in a commercial sense.²¹

B. *The Meaning of Interpretation*

In international negotiations, it is almost impossible to ascertain the true intention of the parties without introducing extrinsic evidence. Therefore, the finality of a written agreement may cause difficulty in performance because the meaning placed on a word is influenced, among other things, by the interpreter's culture, age, and environment. For example, a person who grew up in Boston might attach a different meaning to a particular word than a person who grew up in Los Angeles. Furthermore, a Japanese speaking person and an English speaking person may attach different meanings to the same word as well. Even though a rigid application of the rule has been criticized, the importance of a written contract still remains quite intact. The written contract is still "meant to finalize and formalize the agreement, so the use of less formalized oral evidence to determine its meaning is considered retrograde."²²

The emphasis placed on a written contract is seen in the famous *chicken* case.²³ In that case, a contract dispute arose between an American seller and a Swiss buyer regarding the sale of *chicken*.²⁴ The terms of the agreement provided as follows: "US Fresh Frozen Chicken, Grade A, Government Inspected, Eviscerated 2 1/2 - 3 lbs. and 1 1/2 - 2 lbs., each, all chicken individually wrapped in cryovac packed in secured fiber cartons or wooden boxes, suitable for export."²⁵ A dispute arose when the *chicken* sent to Switzerland turned out to be fowls and stewing chickens,

of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Id. at § 2-202.

21. See generally Raymond T. Nimmer, *Article 2B Preface: Meeting the Information Age*, V (UCC Discussion Draft, Dec. 1, 1995); GRANT GILMORE, *THE DEATH OF CONTRACT* 8 (1974).

22. Salbu, *supra* note 5, at 1249. Professor Salbu further states that "even when there is ambiguity, [the American] proclivity is to favor drafting intent over negotiating intent. The [drafting] party's assertion of intent in choosing terms is generally considered more compelling than a[n] [agreeing] party's statements concerning its understanding of intent at the time of negotiation." *Id.*

23. *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

24. *Id.*

25. *Id.* at 117.

rather than fryers and broilers as intended by the buyer.²⁶ The New York court said the issue in the case was "what is chicken?"²⁷

The court held the fowls and stewing chickens sent to the buyers "did coincide with one of the dictionary meanings" of *chicken*; the buyer had the burden of proving the word was "used in the narrower rather than the broader sense;"²⁸ and the buyer had not discharged its burden.²⁹ As a result, the court held the stewing chickens sent to the buyer were well within the definition of *chicken*, and, therefore, held for the American seller.³⁰ Thus, it can be said that instead of determining "what is chicken?" the court determined "[w]hether the goods the seller sent to the buyer was chicken or not."³¹

The court did not look into whether the word *chicken*, if literally translated into German, would constitute the same meaning in English.³² Failing to look at a word's direct translation may produce problems when a Japanese person enters into a contract with an American. For example, according to the *Shogakukan, Progressive: English-Japanese Dictionary*, the word *chicken* has more than one meaning as a noun.³³ Its first meaning "is a '*niwatori*,'" a chick (within one year of age); generally, a young chicken. cf. fowl."³⁵ It follows that Japanese people will ordinarily associate a young tender chicken with the word *chicken*.³⁶

If the courts do not to consider this extrinsic evidence just because the judge finds the word unambiguous, a very unfair result may follow. Furthermore, given the hierarchy of languages in the context of international business transactions, those who have English as the native language would have an advantage over other parties unless the courts are willing to consider the cultural differences in societies. What is also

26. *Id.*

27. *Id.*

28. *Id.* at 121.

29. *Frigaliment Importing*, 190 F. Supp. at 121.

30. *Id.*

31. MARVIN A. CHIRLESTIEN, *CONTRACTS* 78 (1990).

32. *Frigaliment Importing*, 190 F. Supp. at 116.

33. OKANA KATSUJINO JITSUYO SHIN [SHOGAKUKAN, PROGRESSIVE: ENGLISH-JAPANESE DICTIONARY] 625 (3d ed. 1985).

34. *Niwatori*, is a domestic bird belonging to the pheasant family that is for edibles, eggs, and appreciation. *Id.*

35. *Id.*

36. It must be noted that the word *chicken* is used *as is* in the Japanese language. In other words, an ordinary person without any special knowledge of the English language would understand the word *chicken* if one were to use it.

troublesome, is that in the language context, some English words are used *as is* in Japanese which do not have precisely the same meaning. For example, the word *mansion* in English would describe a large expensive home. On the other hand, the word *mansion* used *as is* in Japanese would describe something close to an apartment house or a tenement house.³⁷ If a Japanese real estate developer and an American company were to enter into a contract to lease a *mansion*, the result would be significantly different in a Japanese court than in an American court.

III. HOW WRITTEN AGREEMENTS AND THE ISSUE OF INTERPRETATION IS DEALT WITH IN JAPAN

Japanese contract law constitutes a part of the Japanese civil code. The Japanese civil code adopted the German code in 1866.³⁸ They adopted the German code at that time in the hope they would become the Germany of Asia.³⁹ Germany, which was a small country at that time, was surrounded by France, Britain, Russia, and other powerful nations. The Japanese, after their civil revolution, desired to become a civilized nation in the western sense, and therefore, searched for a role model in the western civilization. As a result, they found themselves in a similar situation to the Germans.

Additionally, the Japanese felt the way the Germans governed their country fitted the needs for their own.⁴⁰ Accordingly, the Japanese adopted the law of that country.⁴¹ Still, in modern society, the civil code plays an important role in business transactions although the Commercial Code will also play a significant role.

37. If the reader has difficulty in comprehending this notion, think about the following. The word *futon*, which is Japanese, would describe a soft cover used when sleeping in the United States. In Japan, however, the word describes the cover, but also includes the mattress that goes beneath the human body when we sleep. Similarly, the word *hibachi*, also a Japanese word, would describe anything that has a grill with fire burning underneath. On the other hand, a typical Japanese person would associate the word with a specific type of pot (which can be interpreted as *(b)hachi*) made of ceramic with fire (which is interpreted as *hi*) burning from a pile of charcoal.

38. See generally MINPO, Law No. 89 of 1896, Law No. 9 of 1898.

39. 1 RYOTARO SHIBA, TOBU GA GOTOKU 235 (1980). See also 3 ZENTARO KITAGAWA, DOING BUSINESS IN JAPAN § 3.01(4) (1990).

40. SHIBA, *supra* note 39, at 237. See also KITAGAWA, *supra* note 39, § 3.01(4).

41. For a more detailed discussion on why the Japanese adopted German customs, see SHIBA, *supra* note 39, at 74-75, 232-40 (describing the era after the Japanese Civil Revolution up to when one of the prominent politicians of that era, Takamori Saigo, led an attempted coup-d'état). See also 2 RYOTARO SHIBA, TOBU GA GOTOKU 161 (1980).

A. *The Japanese Civil Code and the Relation With the Continental Law*

The basic theory behind the Continental law, as discussed previously, is the notion of the *will theory*. Under the *will theory*, the law focuses on the intention of the parties, and gives little attention to the appearances of the intention of the parties.⁴² On the other hand, the American common law is based on the *relations theory*.⁴³ Under this theory, the law focuses on the objective relation between the parties and not the subjective intent of the party or parties.⁴⁴

Under the *will theory*, the Japanese Civil Code established the principle that a "contract is a legal product which is created by the meeting of two or more conflicting wills."⁴⁵ This general principle seemed to operate until the industrial revolution. With the increase of trade business, focusing only on the intention of the party produced problems because of an individual's effect on third parties' reliance on their expression of their intention.⁴⁶ As a result, principles such as the requirement of *honesty* and *loyalty*, developed in order to impose restrictions on the *will theory*.⁴⁷

B. *The Fundamental Principles of the Japanese Civil Code and Contract Law*

There are three fundamental Civil Code principles constituting the Japanese Civil Code. These include: 1) the freedom of contract; 2) liability for negligence; and 3) the ownership principle. The freedom of contract consists of four important aspects:⁴⁸ first, the freedom to make a contract; second, freedom to enter into a contract with a chosen party; third, freedom to determine the contents of the contract; and finally, the freedom from formal requirements.⁴⁹

42. See generally GILMORE, *supra* note 21, at 17.

43. This *theory of relation* must be absolutely distinguished from the so-called *relational contract theory*. GILMORE, *supra* note 21, at 106 n.7.

44. GILMORE, *supra* note 21, at 41-45.

45. SAKAE WAGATSUMA, SHIN-TEI MINPO SOUSOKU 244 (1965); KIKUO ISHIDA, KEIYAKU NO KOUSOKURYOKU [THE BINDING EFFECT OF CONTRACTS], 1 MINPO KOGI 88.

46. POUND, *supra* note 9, at 148.

47. TSUYOSHI KINOSHITA, AN INTRODUCTION TO THE COMPARISON OF JAPANESE AND AMERICAN CONTRACT LAW 8; KEIYAKU-HO GAISETSU, CONTRACTS IN INTERNATIONAL TRANSACTIONS 1, 4.

48. 3 KITAGAWA, *supra* note 39, § 1.02 (1).

49. As Professor Kitagawa states, "[u]nder the Civil and Commercial Codes, contracts are consensual and thus need not be committed to writing to be effective. In fact, formality requirements are alien to the Civil and Commercial Codes and even a gift contract may be

Because of the practical effect of the fourth requirement, namely, the freedom from formal requirements, Japanese judges have the luxury of considering extrinsic evidence even if the contract is purported to be integrated.⁵⁰ Accordingly, the negotiators are accustomed to drafting documents with this notion in mind. Furthermore, because written agreements are nothing more than a document evincing mutual trust, the contractual documents tend to be very short.

The Civil Code, which includes contract law, starts with general provisions. Article one provides that: "1) individual rights are subject to public policy. 2) The exercise of rights and performance of obligation shall comply with the requirements of loyalty, and exercised with honesty. 3) Abuse of rights is not tolerated."⁵¹ In performing the obligations of the contract, time of performance, place of performance, and other specific details may raise a problem. The law and the agreement itself may be able to provide for the details, but in solving most of the problems, "the parties, especially the promisor, are required to act honestly in order to resolve the problem."⁵² In other words, the resolution of a problem is premised on the honesty of the promisor. These principles were defined in the French Civil Code⁵³ and the German Civil Code,⁵⁴ but not specifically in the Japanese Civil Code. However, treatises and cases have taken the same view.⁵⁵

In interpreting the *loyalty* and *honesty* requirement, the Saiko Saibansho, the Supreme Court of Japan, held the "principle of *loyalty* and

concluded orally." *Id.* There are, however, certain contracts which do require a certain written document be submitted and filed with a governmental entity. This requirement, however, does not prevent parties from creating a contract, and, furthermore, is in the realm of administrative law. Accordingly, it is outside the scope of this article.

50. 3 KITAGAWA, *supra* note 39 Professor KITAGAWA provides that there are a number of reasons for the differences in resolving ambiguities or uncertainties.

[F]irst, the maxim that a contract is to be interpreted so as to be effective and valid; second, Japanese judges, being unhampered by either a parol evidence rule or by exclusive rules of evidence, may concentrate directly on the parties' purpose; and third, optional provisions which clarify or supplement the parties' intentions often dispense with the necessity for drafting detailed contract clauses.

Id. § 1.09(4).

51. MINPO [CIVIL CODE] art. 1 (1886) (Japan).

52. KIYOSHI IGARASHI ET AL., RIGHTS UNDER THE CIVIL CODE, 1 MINPO KOGI.

53. CODE CIVIL [C. Civ.] art. 1134 (Fr.).

54. Bürgerliches Gesetzbuch (BGB) [CIVIL CODE] art. 242 (G.D.R.).

55. Because Japanese law is not a system similar to common law, the significance of a prior disposition of a court is somewhat less than that of a precedent in the United States. Treatises, however, have a significant influence in determining the outcome of the cases. *See generally* Wean Khing Wong, *Protecting American Software in Japan*, 8 COMPUTER L.J. 111, 115-16 (1988); KITAGAWA, *supra* note 39, § 3.02(a).

honesty not only applies to exercise of rights and performance of obligations, but also constitutes a criteria in interpreting contracts.”⁵⁶ Accordingly, in determining the rights and obligations of the parties to a contract, any evidence would be considered to determine whether the parties acted in a loyal and honest way towards each other.

IV. CASES WHICH DISCUSS THE PROBLEMS OF INTERPRETATION AND THE PAROL EVIDENCE RULE AND THE JAPANESE LAW

The following cases describe the development of the problem of interpretation and the parol evidence rule. The first case is from the 1928 New York Court of Appeals where Judges Andrew, Kellog, and Cardozo sat on the bench.⁵⁷ The second group consists of three cases from the California Supreme Court lead by Justice Traynor.⁵⁸ The third group are cases from the Court of Appeals for the Seventh Circuit where Judge Posner sat in as the Chief Judge.⁵⁹

A. *Mitchill v. Lath*⁶⁰

1. The Disposition by the Original Court

The facts of the case are as follows: defendants, the Laths, hoped to sell a parcel of farmland. On the other side of the road they owned an icehouse which stood on the land owned by a third party. The plaintiff, Mrs. Mitchill, thought of purchasing the land, but she thought the icehouse to be objectionable. Subsequently, the Laths “orally promised and agreed to remove the icehouse”⁶¹ the following spring, in consideration of the purchase of their farm by Mrs. Mitchill. As a result of relying on the promise, Mrs. Mitchill purchased the property and made substantial improvements on the property. However, the Laths did not remove the icehouse.

56. Judgment of July 5, 1957, Saikosai [Supreme Court], 11 MINSHU 1193 (Japan).

57. *Mitchill v. Lath*, 160 N.E. 646 (N.Y. 1928).

58. *Masterson v. Sine*, 436 P.2d 561 (Cal. 1968); *Pacific Gas & Elec. Co. v. G.W. Thomas Draynage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968); *Delta Dynamics, Inc. v. Arito*, 446 P.2d 785 (Cal. 1968).

59. *Briston v. Drake, Inc.*, 41 F.3d 345 (7th Cir. 1994); *AM Int'l, Inc. v. Graphic Management Assoc., Inc.*, 44 F.3d 572 (7th Cir. 1995); *Cannon v. Wittek Co. Int'l*, 60 F.3d 1282 (7th Cir. 1995).

60. *Mitchill*, 160 N.E. at 646.

61. *Id.*

The court had to determine whether the oral promise, which was not included in the final written contract, could be enforced.⁶² The court stated that in order for an oral agreement to vary the written contract

(1) The agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing, or, put in another way, an inspection of the written contract, read in the light of surrounding circumstances, must not indicate that the writing appears 'to contain the engagements of the parties, and to define the object and measure the extent of such engagement.' Or, again, it must not be so clearly connected with the principal transaction as to be part and parcel of it.⁶³

The court found that the agreement did not fulfill any of the requirements.⁶⁴ Accordingly, the court held the oral agreement the Laths had made was not enforceable.⁶⁵ Therefore, the Laths had no obligation to remove the icehouse.⁶⁶

2. Disposition by a Hypothetical Japanese Court

What would happen if this case was tried in a hypothetical Japanese court? Would the result change? We will start the analysis by applying the general principle of the Civil Code. First, as discussed previously, the court will not prevent the introduction of the evidence that the Laths had made an oral agreement with Mrs. Mitchill. Accordingly, the oral agreement between the parties would constitute evidence. At this point, it would already make a significant difference because the only reason the majority in the New York Court of Appeals could not consider the evidence was the existence of the parol evidence rule.⁶⁷ Furthermore, the reader of the case can easily infer how the court was reluctant to hold for the Laths by looking at the court's expression such as, "we are not

62. *Id.*

63. *Id.* at 647.

64. *Id.*

65. *Id.* at 646.

66. Judge Lehmen dissents in this case and attempts to divide the agreement into two parts. In other words, Judge Lehmen found the written agreement to convey the land and the oral agreement to remove the icehouse to be two separate agreements. Accordingly, the agreement does not fit the third condition, and, therefore, is not barred by the parol evidence rule. *Mitchill*, 160 N.E. at 648-50.

67. *Id.* at 647.

dealing with moral delinquencies,"⁶⁸ implying that the Laths were morally blameworthy.

The Civil Code further provides that the principle of loyalty and honesty also require the courts to interpret the contract accordingly. The problem here is that if the court were to interpret the contract itself according to the trust and honesty principle, it would make no difference from the result the New York court reached because the obligation is not provided for in the contract. The main focus, however, of the loyalty and honesty requirement is on the conduct of the parties, and, therefore, the Civil Code would require the Laths to remove the icehouse.

In *Sanjo-Kikai-Seisakusho, Inc. v. Sanko Diesel Inc.*,⁶⁹ the defendants attempted to escape the liability of paying the amount of money for the business which they acquired from the plaintiffs. The plaintiffs had transferred the business according to the contract which was made several years ago. Furthermore, the defendants had made improvements on the business and had used the facilities which were assigned to the defendants according to the contract.

The dispute arose because the defendants had not paid the purchase amount for the business they acquired from the plaintiffs. The defendants' argument was that the transfer of the business was not provided for in the Articles of Incorporation pursuant to article 168, paragraph 1, item 6 of the Commercial Code. In other words, the defendants were making an argument substantially similar to that of the Laths which is *you did not put it in writing*. The Japanese Supreme Court, however, held the defendants' argument was against honesty and loyalty. The Japanese Supreme Court explained that agreeing to perform pursuant to an oral agreement and subsequently taking advantage of the fact the agreement was not reduced to writing was in violation of the trust and honesty requirement.

Applying the principle derived from *Sanjo-Kikai-Seisakusho*, we can infer that the Japanese court would require the Laths to remove the icehouse even if the language was not provided in the written agreement. Furthermore, although the Civil Code does not specifically provide for it, Japanese contract law requires the parties to extend honesty and trust to collateral contract duties.⁷⁰ In other words, requirements such as disclosure at the time of the agreement and informing the other party of any difficulties during the performance of the duty are requirements which

68. *Id.* at 646.

69. Judgment of Sept. 11, 1986, Saikosai [Supreme Court], 624 HANREI TIMES 127 (Japan).

70. See generally 3 KITAGAWA, *supra* note 39, § 1.03(3)(f).

must be complied with even in the absence of such terms in the contract.⁷¹ Accordingly, the court would look to any collateral duties which the parties were required to perform.

Another analysis may be made by applying a theory which is analogous to the Anglo-American estoppel theory. Post-war Japanese cases show the variable application of the *trust* and *honesty* requirement. One of the concepts which can be derived from these applications by the courts is a concept which is similar to the promissory estoppel theory. It is contended that the application of the principle was used to police the parties' antimoralistic conduct.⁷² Some cases discuss situations in which a party conducts itself in a certain way and performs in a way contradicting the previous conduct. These are situations where the courts are applying a theory similar to the Anglo-American estoppel theory.⁷³ Accordingly, the result a Japanese court may reach could be predicted by applying the promissory estoppel theory without applying the parol evidence rule.

Section 90 of the Restatement of Contracts provides in pertinent part that:

[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.⁷⁴

An illustration provided in section 90 describes a situation which is similar to the fact pattern in the *Mitchill* case, except for the existence of the written document. If the written document constituted only a part of the evidence, and there is other parol evidence, this illustration perfectly fits the facts of the *Mitchill* case.

The illustration provides that "A promises B not to foreclose, for a specified time, a mortgage which A holds on B's land. B thereafter makes improvements on the land. A's promise is binding and may be enforced by denial of foreclosure before the time has elapsed."⁷⁵ This illustration may be further simplified by describing the situation as follows: A promises to do X. B performs Y relying on A's promise. A's promise shall be enforced. In the *Mitchill* case, A is the Laths, B is Mrs. Mitchill, X is

71. 3 KITAGAWA, *supra* note 39, § 1.09 (3)(f) (Incidental Duties).

72. IGARASHI ET AL., *supra* note 52, at 20.

73. *Id.*

74. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979).

75. *Id.* § 90 cmt. a, illus. 2.

removing the icehouse, and *Y* is purchasing the land and "[spending] considerable sums in improving the property for use as a summer residence."⁷⁶ The court would decide that *A*'s (the Lath's) promise should be enforced. Accordingly, the Japanese courts reach a contrary result by utilizing a concept similar to the promissory estoppel theory, and therefore, would enforce the Lath's oral promise.

According to the *Mitchill* Court, in many cases courts have held the introduction of "collateral contracts said to have been the inducing cause of the main contract"⁷⁷ was improper. The court further cited many cases as authority, holding "an oral stipulation, said to have been the inducing cause for the subsequent execution of the lease itself, concerning some act to be done by the landlord, or some condition as to the leased premises, might not be shown."⁷⁸ Japanese courts, however, would likely arrive at a different result in each of these cases. If the opponent is able to produce ample evidence, including prior oral agreements, and in fact, any relevant evidence to establish bona fide reliance on the oral agreement, the judge will enforce the collateral agreement pursuant to the honesty and loyalty requirement.

3. Disposition by an American Court in the Present Day

Application of the Restatement (Second) of Contracts (hereinafter Restatement),⁷⁹ which is relied on as authority by many courts in the present day, may render a different result in the *Mitchill* case. According to the Restatement, if the document is a binding integrated agreement, it "discharges prior agreements to the extent that it is inconsistent with them."⁸⁰ Furthermore, if the document is completely integrated, it "discharges prior agreements to the extent that they are within its scope."⁸¹ Whether a document is an integrated document is "determined by the trial judge in the first instance as a question preliminary to an interpretative ruling or to the application of the parol evidence rule."⁸² Furthermore, determining whether the documents are integrated "is a question of fact to

76. *Mitchill v. Lath*, 160 N.E. 646 (N.Y. 1928).

77. *Id.* at 648.

78. *Id.* The *Mitchill* case cites cases such as *Daly v. Piza*, 94 N.Y.S. 154 (1905); *Love v. Hamel*, 69 N.Y.S. 251 (1901); *Taylor v. Hopper*, 62 N.Y. 649 (1878); *Wilson v. Deen*, 74 N.Y. 531 (1875); *Johnson v. Oppenheim*, 55 N.Y. 280 (1873).

79. This section will refer to the Restatement (Second) of Contracts as the Restatement because of the lack of necessity to refer to the first Restatement.

80. RESTATEMENT (SECOND) OF CONTRACTS § 213 (1).

81. *Id.* § 213(2).

82. *Id.* § 209 cmt. c.

be determined in accordance with all relevant evidence."⁸³ In other words, the judge will take all the relevant evidence into consideration and then determine whether the document is integrated or not. Accordingly, in the *Mitchill* case, the trial judge would take into consideration the fact that the Laths had orally made an agreement to remove the icehouse to determine whether the document was integrated.

The New York Court of Appeals found that the document was integrated, and therefore, did not allow the evidence to be introduced.⁸⁴ However, under the modern view, the evidence would likely be admissible because the Restatement employs a more liberal standard than that used in the *Mitchill* case. Furthermore, the jury (assuming there is a jury trial) would consider the oral agreement made between the two parties and probably would require the Laths to remove the icehouse.

This conclusion shows that the American courts are heading in the direction towards the admission of any relevant evidence as long as it does not create fraud. The problem of fraud is prevented by the screening process conducted by the trial judge. The trial judge determines whether credible evidence exists as to any prior or simultaneous written or oral agreements in addition to any other parol evidence. If the trial judge determines such evidence exists, the judge will determine the written document was not integrated. This will allow any evidence to come in, permitting the trier of fact to determine whether there was, in fact, an oral agreement. This screening process, conducted by the judge, seems to be a sufficient barrier because the judge is familiar with contract law as well as the rules of evidence. The judges will be able to assess the potential harm which the introduction of parol evidence may cause to the opponent of such evidence, and will be able to avoid any injustice which might be created therein. The trend towards destruction of the parol evidence rule is further carried out in the following California cases from 1968.

B. *The Traynor Trilogy*⁸⁵

1. *Masterson v. Sine*

In 1968, the Supreme Court of California, by the opinion of Justice Traynor, substantially decreased the significance of the parol evidence rule.⁸⁶ It started with the case of *Masterson v. Sine*.⁸⁷ The facts

83. *Id.*

84. *Mitchill v. Lath*, 160 N.E. 646 (N.Y. 1928).

85. The discussion of these three cases which emasculated the parol evidence rule can be found in PETER LINZER, *A CONTRACT ANTHOLOGY* 313 (1st ed. 1989).

86. *Id.*

of the case are as follows: Dallas Masterson and his wife Rebecca, who were the plaintiffs, conveyed a ranch to the defendants Medora, Dallas' sister, and Lu Sines, the appellant in the case, by deed which stated:

[r]eserving unto the Grantors herein an option to purchase the above described property on or before February 25, 1968, for the same consideration as being paid heretofore plus their depreciation value of any improvements Grantees may add to the property from and after two and a half years from this date.⁸⁸

After the conveyance the Grantor was adjudicated bankrupt. The trustee in bankruptcy and Rebecca brought suit to establish their right to exercise the option.⁸⁹

The defendant grantees attempted to introduce into evidence the testimony which would show "that the parties wanted the property kept in the Masterson family and that the option was therefore personal to the grantors and could not be exercised by the trustee in bankruptcy."⁹⁰ However, the trial court rejected the defendants' argument and excluded the evidence that the option was personal to the grantors.⁹¹ The Supreme Court of California lead by Justice Traynor reversed, holding the trial judge erred in excluding the extrinsic evidence.⁹²

Justice Traynor initiated the discussion by describing that the "California cases have stated that whether there was an integration is to be determined solely from the face of the instrument, (citation omitted) and that the question for the court is whether it 'appears to be a complete agreement.'⁹³ Justice Traynor further stated that "[n]either of these strict formulations of the rule, however, has been consistently applied."⁹⁴ He offered two policies accommodating the parol evidence rule. One was that "written evidence is more accurate than human memory," and the other was based on the "fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts."⁹⁵ It seems Justice Traynor was specifically referring to the jury by using the

87. *Masterson v. Sine*, 436 P.2d 561 (Cal. 1968).

88. *Id.* at 562.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 567.

93. *Masterson*, 436 P.2d at 563.

94. *Id.*

95. *Id.* at 564.

words "finder of facts." This is because later Justice Traynor stated the "tendency of the jury [is] to find through sympathy and without a dispassionate assessment of the probability of fraud or faulty memory that the parties made an oral agreement collateral to the written contract, or that preliminary tentative agreements were not abandoned when omitted from the writing."⁹⁶ As a result, Justice Traynor concluded that "[e]vidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled."⁹⁷ Again, in this context, it is safe to say that *fact finder* describes the jury. Further, Justice Traynor provided that the standards in which the credibility of the evidence could be assessed is found in the Restatement and the Uniform Commercial Code.⁹⁸ The corollary of this argument is that the parol evidence rule is based at least in substantial part, if not wholly, on the court's distrust towards the jury.

The danger of not having a rule similar to the parol evidence rule is substantially reduced in the Japanese courts because the Japanese legal system does not utilize the jury system. In other words, all the proceedings in Japan are tried as a bench trial. Accordingly, the danger that the trier of fact would be misled would be substantially decreased or at least reduced to the level as if the parol evidence rule was in force. This is not to say the jury is never capable of assessing the truth, but to describe the nonexistence of the parol evidence rule in Japan would not be a problem, as in the United States, from the aspect of the policy described by Justice Traynor.

2. Pacific Gas & Elec. Co. v. G.W. Thomas Draynage & Rigging Co.

The second case in which the Supreme Court of California, lead by Justice Traynor, discussed the problems of interpretation and the parol evidence rule was *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co. Inc.*⁹⁹ This was an action for damages to the plaintiff's

96. *Id.*

97. *Id.*

98. See RESTATEMENT (FIRST) OF CONTRACTS § 240(1)(b) (1932). The Restatement permits proof of a collateral agreement if it is "[s]uch an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract." *Id.* In other words, the Restatement employs a *might naturally* test. The Uniform Commercial Code applies a more liberal test. Section 2-202 cmt. 3, provides in pertinent part that "[i]f the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact." U.C.C. § 2-202 cmt. 3 (1994). In other words, the Uniform Commercial Code employs a *would certainly* test.

99. *Pacific Gas & Elec. Co. v. G.W. Thomas Draynage & Rigging Co.*, 442 P.2d 641 (Cal. 1968).

property under an indemnity clause in a contract.¹⁰⁰ The defendant entered into a contract to provide labor and equipment to remove and replace an upper metal cover of the plaintiff's steam turbine. The written agreement provided, in pertinent part, that the defendant "agreed to perform the work at [its] own risk and 'expense' and 'indemnify' plaintiff 'against all loss, damage, expense, and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract.'"¹⁰¹ In the course of the performance, the cover fell and injured the exposed rotor of the turbine. Subsequently, the trial judge found that the indemnity clause covered the injury and held for the plaintiff.¹⁰²

The issue in the case was whether the trial court erred by excluding the evidence offered by the defendant in the attempt to prove that "in the indemnity clause the parties meant to cover injury to property of third parties only and not to plaintiff's property."¹⁰³ In holding that the trial court erroneously refused to consider extrinsic evidence offered to show the indemnity clause in the contract was not intended to cover injuries to plaintiff's property, the court stated that "[s]ome courts have expressed the opinion that contractual obligations are created by the mere use of certain words, whether or not there was any intention to incur such obligations."¹⁰⁴ This language describes the theory of objective intent or *anti-will theory* which is in the tradition of the Holmesians.¹⁰⁵ Justice Traynor further stated that "[u]nder this view, contractual obligations flow, not from the intention of the parties but from the fact that they used certain magic words. Evidence of the parties' intention therefore becomes irrelevant."¹⁰⁶ This describes, although exaggerated, the objective theory which is the foundation of the traditional Anglo-American common law system.

Justice Traynor, as a prominent judge in the Anglo-American legal system, held that in California "the intention of the parties as expressed in the contract is the source of contractual rights and duties."¹⁰⁷ Furthermore, Justice Traynor stated that "[a] court must ascertain and give effect to this intention by determining what the parties meant by the words they used."¹⁰⁸

100. *Id.* at 643.

101. *Id.*

102. *Id.* at 648.

103. *Id.* at 643.

104. *Id.* at 644.

105. *Pacific Gas & Elec. Co.*, 442 P.2d at 644.

106. *Id.*

107. *Id.*

108. *Id.*

Finally, Justice Traynor also said "the exclusion of relevant, extrinsic evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone."¹⁰⁹ This assertion brings into the legal analysis the metaphysics which the Anglo-American legal system has vigorously rejected.¹¹⁰ This case describes the movement of the *relation theory* towards the *will theory*. Justice Traynor concluded by stating that words "do not have absolute and constant references."¹¹¹ In other words, in Justice Traynor's view, the traditional theory of interpretation, integration, and the parol evidence rule no longer has a place in American jurisprudence.

3. Delta Dynamics, Inc. v. Arito

The third case is *Delta Dynamics, Inc. v. Arito*,¹¹² where the manufacturer brought suit against the distributor for the breach of the distributorship agreement. The written distributorship agreement provided in pertinent part that, "[s]hould [the distributor] fail to distribute in any one year the minimum number of devices to be distributed by it . . . this agreement shall be subject to termination' by [the manufacturer] on 30 days' notice."¹¹³ The written contract further provided that "[i]n the event of breach of this agreement by either party, the party prevailing in any action for damages or enforcement of the terms of this [a]greement shall be entitled to reasonable attorneys' fees."¹¹⁴ The distributor failed to distribute the minimum number of devices, and the manufacturer terminated the contract and brought suit to recover the damages for the distributor's failure to purchase the first years' quota under the agreement. The trial court rejected the distributor's argument that the only remedy available for the manufacturer was to terminate the contract, and entered judgment for the manufacturer.¹¹⁵

In this case, Justice Traynor held that

109. *Id.* at 641.

110. KINOSHITA, *supra* note 47, at 4. According to Professor Kinoshita, Holmes said that contractual liability accrues, not because of a meeting of the minds or a true synthesis of wills existed, but because the words used by the promisor to describe his acceptance reasonably induced a bargain from the other party to infer that business was to take place. Furthermore, Kinoshita cites Holmes' words: "Contract theory is exclusively formal and external." *Id.* (citing OLIVER WENDELL HOLMES, *THE COMMON LAW* 195-264 (1881)).

111. *Pacific Gas & Elec. Co.*, 442 P.2d at 644.

112. *Delta Dynamics, Inc. v. Arito*, 446 P.2d 785 (Cal. 1968).

113. *Id.* at 786.

114. *Id.*

115. *Id.*

[t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning, to which the language of the instrument is reasonably susceptible.¹¹⁶

The court found the language of the termination clause to be ambiguous because it was susceptible to two reasonable interpretations.¹¹⁷ One was that the parties may have included the termination clause to spell out with specificity the condition on which the manufacturer would be excused from further performance under the contract.¹¹⁸ The other reasonable interpretation, according to Justice Traynor, was that it was intended "to set forth the exclusive remedy for a failure to meet the quota in any year."¹¹⁹ As a result, the court held the trial court erred in excluding the evidence offered to prove the meaning of the termination clause contended for by the distributor.¹²⁰

In this case, Justice Mosk, who concurred in the previous two cases,¹²¹ dissented by noting that "[g]iven two experienced businessmen dealing at arm's length, both represented by competent counsel, it has become virtually impossible under recently evolving rules of evidence to draft a written contract that will produce predictable results in court."¹²² This opinion fairly describes the problem of not having a rule giving priority to a written agreement. However, an argument that the parties disagree on the interpretation of the contract language renders the contract ambiguous, might prevail in court.¹²³ Thus, if that situation is to arise, the meaning of a written document will be reduced to nothing more than one of the evidences.

The three cases discussed, however, do not exhibit the general rules in the American courts today. The courts still hold valid the parol evidence rule and exclude parol evidence which does not pass a certain

116. *Id.* at 787 (quoting *Pacific Gas & Elec. Co.*, 442 P.2d at 641).

117. *Delta Dynamics, Inc.*, 446 P.2d at 787.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Masterson v. Sine*, 436 P.2d 561, 567 (Cal. 1968); *Pacific Gas & Elec. Co.*, 442 P.2d at 648.

122. *Delta Dynamics, Inc.*, 446 P.2d at 789.

123. *Northwest Airlines, Inc. v. Globe Indem. Co.*, 225 N.W.2d 831, 837 (Minn. 1975). Although heavily criticized and virtually overruled, it was the law in Minnesota that the very fact the two parties disagree to the interpretation of a particular word renders that word ambiguous.

contractual muster. The following cases describe the present state of the rule.

C. *The Rule in the Present Day*

A practitioner must bear in mind that the rules which can be extracted from the three California cases are rather extreme. Accordingly, the present general view adopted by courts must be determined. At least one court has considered the rule recently. The next three cases were decided in the United States Court of Appeals for the Seventh Circuit by Judge Posner.

1. *Briston v. Drake Street, Inc.*¹²⁴

The *Briston v. Drake Street, Inc.* case arose from a breach of an employment contract. The plaintiff was hired by the defendant to be an associate producer of a play for the defendant who was the author and the producer of the play.¹²⁵ The plaintiff was seeking the salary she would have received between the termination and the scheduled expiration of the contract.¹²⁶ The written agreement provided that the defendant would be authorized to terminate the contract upon thirty days prior written notice, or if the employer should cease conducting its business, or if the employer becomes insolvent. The written agreement further provided that the only ground on which the defendant could terminate the contract without liability was the plaintiff's conviction of a crime.¹²⁷ The remedies in the agreement provided that "if the employee is terminated by employer for any reason other than a conviction of illegal acts in connection with the performance of her duties under the agreement then such termination shall be deemed a breach of the agreement."¹²⁸ Additionally, the contract included a standard integration clause.¹²⁹ The trial court rejected the plaintiff's argument that the written agreement was clear and unequivocal on its face.¹³⁰ The court allowed testimony of the defendant that the payment of the salary was contingent on the show remaining open, notwithstanding the plaintiff's testimony that she had "insisted on an

124. *Briston v. Drake Street, Inc.*, 41 F.3d 345 (7th Cir. 1994).

125. *Id.* at 350.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 345.

130. *Briston*, 41 F.3d at 350.

ironclad contract precisely because of the incessant if transient firings to which the defendant had subjected her."¹³¹

The Court of Appeals for the Seventh Circuit, lead by Judge Posner, reversed the trial judge's ruling and held that the contract was clear on its face, and the admission of the evidence to contradict the writing was barred by the parol evidence rule.¹³² The court said that:

[i]f a contract so drafted can be upended by the self-serving oral testimony of one party to it that his duty to perform was actually dependent on a condition nowhere expressed in the contract and flatly contradicted by what is expressed in the contract, . . . the parol evidence rule is dead and integration clauses ineffectual.¹³³

The court further noted that it had no intention of abolishing the rule.¹³⁴ The court also explained how the dangers of using the parol evidence rule are prevented. The screening by the judge, (allowing the submission of extrinsic evidence to the judge for a determination whether a knowledgeable insider would think the written contract meant something different from what it appeared to mean),¹³⁵ and the judge's consideration of evidence of *trade usage*,¹³⁶ are the devices which the judges use to prevent absurd results.¹³⁷ One of the reasons, although not expressly mentioned in the opinion, the court invoked the parol evidence rule was that the person adversely affected was an employee who was sexually harassed by the employer. The doctrine of *contra proferentum*, often mentioned in insurance cases to prevent unjust results to the insured, is probably the key in this case.¹³⁸ In other words, the proponent of the parol

131. *Id.* at 350-51.

132. *Id.* at 351.

133. *Id.*

134. *Id.* at 345.

135. Only if the judge is persuaded by the evidence does he allow the jury to consider it. This was referred to by this court as being the "doctrine of extrinsic ambiguity." *Id.* at 351-52.

136. The court explains that usage of trade, "because it is evidence about public facts, public meanings, it is less easy to fake. Allowing it into evidence therefore does less harm to the desire of parties who enter into written contract to fix their agreement in a form that will protect commitments against being upset by juries." *Briston*, 41 F.3d at 352.

137. *Id.*

138. Similarly, in Japanese cases, the doctrine of *contra proferentum* is invoked. For example, adhesion contracts are generally interpreted in favor of the party who is the drafter. In a Tokyo Superior Court case where the landlord drafted a written agreement providing that "in the default of the tenant's payment of the rent for a month, the landlord will acquire the right to the tenant's immediate evacuation regardless of the existence of a security deposit," the court held that the parties in these situations usually intend only to enter into a lease agreement and do

evidence cannot, by self serving testimony, establish ambiguity in order to introduce the evidence especially when the proponent is in a better bargaining position.

2. *AM International, Inc. v. Graphic Management Associates, Inc.*¹³⁹

The facts of this case are as follows: both parties were manufacturers of printing machines used in the newspaper business. One of these machines was called a "newspaper inserting machine," and it came equipped with a Missed Insert Repair System (MIRS). These are complicated and expensive machines, which must be customized to the purchaser's specifications.¹⁴⁰ AM brought a patent infringement suit which ended in a settlement including a license agreement, effective on the day of the settlement.¹⁴¹ This agreement entitled AM to a royalty of \$200,000 on each MIRS-equipped newspaper inserting machine made by GMA and shipped after the settlement date and before the expiration date of the patent, which was to expire approximately three years later.¹⁴²

Furthermore, an exception to this agreement was inserted providing that "beginning as of January 1, 1991 and continuing to July 23, 1991 royalty shall accrue on the receipt by GMA of a bona fide purchase order for a product, provided that product is shipped prior to December 31, 1991."¹⁴³ Thereafter, GMA was ordered to provide nine machines to a purchaser.¹⁴⁴ Four of them were not shipped until after December 31, 1991. The other five were shipped between September and November of 1991, and thus before December 31. AM contended royalty was due on these machines.

The court, in *AM International, Inc.*, held that in determining whether contract language is ambiguous or not, courts must look to the objective and subjective evidence of ambiguity.¹⁴⁵ The court reinstated the rule that "a self serving statement that a party did not understand the

not intend to give effect to the printed words unless they are specifically negotiated and given attention to by the parties. Accordingly, even though the whole contract was agreed to and signed by the tenant, the said clause is only a hypothetical sentence and does not have a binding effect. *MINSHU* 13-366 (Feb. 26, 1934).

139. *AM Int'l, Inc. v. Graphic Management Assoc., Inc.*, 44 F.3d 572 (7th Cir. 1995).

140. *Id.* at 574.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 575.

145. *AM Int'l, Inc.*, 44 F.3d at 575.

contract to mean what it says (or appears to say) will not suffice"¹⁴⁶ to open doors to extrinsic evidence. The court also said that "only an offer to show that anyone who understood the context of the contract would realize it could not mean what an untutored reader would suppose it meant will suffice."¹⁴⁷ Although the parties in this case, unlike the parties in the previous case, were in the same bargaining position, the rule that self serving testimony will not suffice to open the doors for introduction of parol evidence was reinstated.¹⁴⁸

There are two noteworthy cases from the Japanese courts. One is from the Japanese Supreme Court and the other is from the Fukuoka High Court. The facts of the Fukuoka High Court case¹⁴⁹ were that: X and Y entered into a supply contract where X was to supply oil in an amount not exceeding 2,000,000 Yen. The writing in issue provided that "in the default of the buyer to pay for the petroleum provided, the seller immediately acquires a right to recover the amount of 2,000,000 Yen."¹⁵⁰ In other words, the party provided for a liquidated damages clause.

The buyer defaulted on the payment and the seller asserted that they had a right to recover 2,000,000 Yen pursuant to the written agreement even though no evidence existed that the petroleum provided was worth 2,000,000 Yen. The court, however, held that the seller cannot recover an amount in excess of the value of the petroleum provided for the buyer.¹⁵¹ The court reasoned that the agreement included a tacit agreement which upon default, the value of the provided petroleum for the buyer did not exceed the amount of 2,000,000 Yen.¹⁵² The buyer would pay the damages of 2,000,000 Yen, but at the same time would acquire a right to a

146. *Id.*

147. Judge Posner further states that

[e]ven the strongest devotees of the 'plain meaning' rule of statutory interpretation, a rule that resembles the 'four corners' rule of contract law, allow it to bend when necessary to avoid absurd results [citation omitted]. An absurdity in the application of the plain-meaning rule usually results from a comparison of the apparently plain meaning to the real-world setting in which the statute is to be applied. It is the same point that a clear document can be rendered unclear . . . by the way in which it connects, or fails to connect, with the activities that it regulates.

Id. at 577. He concludes that "[d]iscrepancy between the word and the world is a common source of interpretive problems everywhere." *Id.* In other words, Judge Posner recognizes the practicality in bending the rigid rule of interpretation when necessary.

148. *Id.* at 575.

149. Judgment of May 12, 1960, Fukuoka Kosai, KOMINSHU (Japan).

150. *Id.* at 263.

151. *Id.* at 264.

152. *Id.* at 265.

refund for the excess amount.¹⁵³ Furthermore, the court found it was unfair to interpret the agreement as asserted by the seller.¹⁵⁴

Although the Japanese court ignored the explicit language in the written agreement, it may arrive at the same result in the *AM International* case. One of the reasons the court created a new provision, which even the parties did not agree to, was that the court felt that to require the buyer to pay that amount of money for what they did not get was inequitable.¹⁵⁵ Furthermore, the court felt that the immediate acquisition of a right to damages by the seller in the event of a default constituted a forfeiture which the court desired to avoid.¹⁵⁶

In the *AM International* case, on the other hand, the protection of intellectual property rights may not be enough for the Japanese court to rewrite the contract.¹⁵⁷ After all, in *AM International*, the holder of the patent did collect the royalty from the licensee which was close to the full amount asserted by the licensor.¹⁵⁸ To attempt to collect further royalty by producing only subjective testimony may constitute an abusive use of rights in the Japanese courts.

Another case is from the Supreme Court of Japan.¹⁵⁹ The case involved a mortgage on a land which was foreclosed.¹⁶⁰ The written agreement provided for a *Daibustu-Bensai*, but the court held that the written agreement should be interpreted to mean a *Saiken-Tanpo*. Again, the court interpreted the words to create a new legal effect. The court's intention was probably to prevent forfeiture against the debtor because the court felt that it was better practice to let the debtor regain his property by paying off the debt before the auction of the property even though he had defaulted on the debt.

153. *Id.* at 267.

154. *Id.* at 265.

155. Judgment of May 12, 1960, Fukuoka Kosai, Kominshu (Japan).

156. *Id.*

157. *AM Int'l, Inc. v. Graphic Management Assoc., Inc.*, 44 F.3d 572 (7th Cir. 1995).

158. *Id.* at 574.

159. MINSHU 22-12-2710 (Nov. 19, 1968).

160. Because of the structural differences in the real property law area, the words nonrecourse and recourse will not be used. For the sake of clarity, the following terms will be used: *Daibustu-Bensai*, which is a concept similar to the Anglo-American accord and satisfaction; *Saiken-Tanpo*, which is a concept similar to the concept of secured transaction where the creditor acquires a right to first payment for the full amount and the rest goes to the secondary creditors. The simple difference in the two concepts is that in the former situation, the creditor acquires the property no matter what the value is, and in the latter situation, the creditor acquires the right to full recovery and not more. MINPO, arts. 377, 378, 482.

3. Cannon v. Wittek Co. International¹⁶¹

The facts of this case are as follows: Plaintiff Cannon was hired as a full-time secretary *float*er by Wittek Companies International (hereinafter Wittek) who provided health insurance to its employees through Health Care Service Corporation, the Blue Cross Blue Shield Plan (hereinafter Blue Cross).¹⁶² Under the plan, new employees were automatically enrolled in the insurance plan on the ninety-first day of their employment. Cannon was *separated* from her employment in connection with a reduction in the work force at Wittek, fifty-seven days into her employment. The personnel transaction sheet read *layoff* as to Cannon's type of separation.

Later that year, Cannon was called to return to the job without filling out any job application form or an insurance form. They were already filled out at the beginning of her employment. Fifty days after her return she suffered a heart attack and incurred substantial medical expenses. By then she had worked for Wittek for one hundred and twelve non-consecutive days. She learned that Blue Cross was denying her coverage due to their notion that Cannon was terminated instead of being laid off and, therefore, her ninety-day waiting period was reinstated at the time Wittek *rehired* Cannon.¹⁶³ The district court ruled that, in the absence of any language to the contrary, the ninety days must be consecutive and could not be tacked.¹⁶⁴ As a result, the district court denied Cannon's coverage by Blue Cross.¹⁶⁵

The issue relevant to this article that was raised on appeal was whether Wittek was *terminated* instead of *laidoff*.¹⁶⁶ This would determine whether the ninety days could be tacked in order to satisfy the condition to the payment on the policy. After determining the personnel transaction sheet was controlling on the issue of termination, the court pointed out the fact that the sheet indicated that the type of separation was a *layoff* rather than a *discharge*.¹⁶⁷ Here again, the employer asserted by self-serving testimony that even though the personnel transaction sheet indicates a *layoff*, Wittek actually meant to terminate Cannon.¹⁶⁸ The court rejected

161. Cannon v. Wittek Co. Int'l, 60 F.3d 1282 (7th Cir. 1995).

162. *Id.* at 1283.

163. *Id.*

164. *Id.* at 1284.

165. *Id.*

166. *Id.* at 1285.

167. Cannon, 60 F.3d at 1285.

168. *Id.*

the argument and restated that if an unambiguous contract "can be upheld by the self-serving oral testimony of one party to it that his duty to perform was actually dependant on a condition nowhere expressed in the contract, . . . then the parol evidence rule is dead."¹⁶⁹

The court finally came to a conclusion that "if Wittek is permitted to go behind the plain language of the contract with self-serving testimony about what it really meant when it checked off 'lay-off' on the Personnel Transaction sheet, then the parol evidence rule would have no force."¹⁷⁰ Accordingly, the court recognized that the parol evidence rule was still alive and well.

From the preceding cases we still can determine when the court, in light of all the circumstances, concludes that the introduction of parol evidence would render unjust results, and prohibit its introduction. Circumstances that render unjust results are determined on a case by case basis, but facts indicating differences in bargaining power, the existence of an independent tort, and lack of objective evidence that the parties had agreed on a different meaning, etc., would constitute elements in determining the admissibility of parol evidence.¹⁷¹

D. The Japanese Courts' Disposition of the Cases

Certain rules can be extracted from the foregoing analysis of the cases. The Japanese courts would consider all relevant evidence in attempting to determine the true intention of the parties. On the other hand, the American court would first introduce all relevant evidence to determine whether the written agreement was meant to be the final agreement. As a practical matter, the result would be the same because the Japanese courts do not have a jury which could be misled by the introduction of parol evidence. The American courts would, at this point, introduce the parol evidence to the judges only.

Next, the Japanese courts would determine whether the asserted discrepancy actually existed. The American courts would conduct the same analysis at this point. They may, however, impose a rule that self-serving testimony would not suffice to render the document ambiguous. This would allow them to introduce parol evidence to prove the asserted intention of the party. On the other hand, the Japanese courts would probably consider the self-serving testimony as evidence in determining the facts because, as discussed previously, the tradition of the Continental civil

169. *Id.*

170. *Id.*

171. *Id.* at 1282.

code focuses on the intention of the parties. It can be said, technically, that self-serving testimony is also relevant in determining the intention of the parties. Accordingly, discrepancies may exist at this stage.

This difference may not be significant, however, because of the factual determination by the judge in Japanese courts. Because the distrust towards the jury does not exist in Japanese courts, the possibility that the factual determination will be misled decreases substantially. Furthermore, the Japanese courts may require the proponent of the parol evidence to show they have relied upon the alleged fact, which was not described in the written agreement, in order to establish the violation of *honesty* and *loyalty* requirement.¹⁷² If the court finds that the party acted in response to a fact which was not included in the final written agreement, the other party will generally be required to perform their obligation.¹⁷³

V. THE PROPOSED APPROACH IN CONTRACTING BETWEEN A JAPANESE ENTERPRISE AND AN AMERICAN ENTERPRISE

Having described the differences in the two legal systems, it may seem that the American law has become more liberal regarding the introduction of parol evidence, and, therefore, the written contract has no significance to it. Furthermore, it may seem that because of the governmental requirements imposed on Japanese enterprises to file every agreement entered into with a foreign enterprise, a Japanese enterprise may agree to execute a fully detailed written contract that will exclude any parol evidence. Because the Japanese culture prefers avoiding documentation of agreements, they are still likely to avoid detailed contracts. For an American business entity it would be safer to assume that the Japanese will resort to outside evidence when it comes to performance.¹⁷⁴

The first problem the parties must solve is in which language the contract or the agreement will be drafted. Generally, the Japanese will understand English more than the Americans will understand Japanese. This generalization, however, must be studied carefully. The parties must understand that the language they are using is not ordinary English, but often *legalese* English. As previously discussed, words are understood in conjunction with the surrounding circumstances and the situation in which

172. 3 KITAGAWA, *supra* note 39, § 1.09(4).

173. In Japan, as in most civil code countries, specific performance is the ordinary remedy and, unlike in the United States, monetary damages are rare. GILMORE, *supra* note 21, at 14.

174. "Japanese businesspeople often rely on mutual trust to the exclusion of formal contracting. They have traditionally viewed the need to contract as a lack of good faith, potentially injuring future relations . . ." Salbu, *supra* note 5, at 1260.

they are used. Accordingly, it may seem impossible to agree on one meaning of a word that describes a legal effect without knowing the whole legal system. Even the word *contract* is understood differently within the two systems.¹⁷⁵ Do the parties then have to describe the legal theory behind every word that they are using? Unfortunately, in order to have a complete understanding, the answer must be yes. One solution to this problem is to negotiate with a lawyer or lawyers who have knowledge of the law in which the document is being drafted. At the same time the lawyer should be a native speaker, or a very fluent speaker of the language that is not being used in the contract or the agreement. For example, if the contract is going to be written in English, the American business entity must negotiate with a delegate from the Japanese business entity who has substantial knowledge of the American legal system and the English language.

The second factor which the parties must concentrate on is the choice of law clause. This is because the importance of a written document may be significantly different. The parties should first determine whether any disputes which may arise shall be governed by Japanese law or American law. This choice will determine the whole mode of the negotiation. Furthermore, that choice will determine what the final product will look like. If, for example, the parties determine American contract law will govern the disputes, the written document will have to include agreement. If the parties fail to insert any clause or agreement into the final written document, the possibility that the prior oral or written agreement will be subject to the parol evidence rule will be significant, and will therefore, be excluded as evidence. Only if the judge determines that the written document is fully integrated will the rule apply and will parol evidence be excluded.

On the other hand, if the parties agree that Japanese law will determine the disputes, it is not necessary to incorporate every single agreement at which they arrived, although it is a better idea. From a

175. Commentators say that:

[w]hile contract is used in the United States to mean a legally enforceable promise or a set of promises with accompanying duties and rights, *keiyaku* (which means "contract" in Japanese) implies just part of the process of negotiation, namely, the promissory stage, in which two parties agree to work together to create a mutually advantageous relationship. The implications of a transaction created by a *keiyaku* is unclear to Americans because much of the negotiation and most of the details of the transactions are intended to be filled in later. . . . [M]any Japanese negotiators deplore specificity and verbosity in contracts because they believe that it is like making an arrangement for divorce when preparing for marriage.

Zhang & Kuroda, *supra* note 3, at 206.

practical point of view, however, it is much more convenient for both parties to include all their agreements in the written document. It will be easier for reference purposes and more efficient timewise. The practitioner or any lawyer who is giving advice to their client must realize that written documents are not created for the purpose of being submitted into evidence for trial.

Another notion the practitioner must bear in mind is that even though the parties orally agreed to choose Japanese law as the governing law, and thus will be able to introduce this into evidence in a Japanese court, it is better to insert the choice of law clause in the agreement. This is because the case may be thrown into an American court despite the fact the parties orally agreed to choose Japanese law. Eventually, the oral agreement pertaining to the governing law may be barred by the parol evidence rule. Similarly, if the parties stipulated to American contract law as the governing law, but were hailed into a Japanese court, an oral assertion that Japanese law was agreed to may be admitted into evidence despite its untruthfulness.

In any event, it is a better idea to insert a choice of law clause even if it may manifest a hostile attitude towards the other party. The parties will benefit from that determination by not having to worry about whether or not the written document will constitute the only reference. Similarly, choice of forum clauses may be important in the absence of a choice of law clause because the forum court's law will determine which law will apply. Although many of these agreements between foreign business enterprises are submitted to arbitration, some will consider it more advantageous to go to court. Accordingly, the choice of law clauses and choice of forum clauses are best included in the agreement.

VI. CONCLUSION

A. *The Differences in The Law*

So far we have examined the differences between Anglo-American contract law and Japanese contract law by focusing on the rule concerning written documents. Furthermore, we have seen that the gap between the American interpretation of the written document and the Japanese interpretation of the written document has been narrowed. This is evidenced by the Uniform Commercial Code's requirement that in every document a covenant of good faith and fair dealing is implied, in addition to a liberation from the rigidity of the parol evidence rule.¹⁷⁶ A practitioner, however, still must not underestimate the differences.

176. U.C.C. § 2-202 (1994).

Part II of the Convention on Contracts for the International Sale of Goods,¹⁷⁷ which the United States of America has signed and approved, conforms to the Civil Code principles of the freedom from formal requirements.¹⁷⁸ This means that the Statute of Frauds and the Parol Evidence Rule have no application between signatory countries. Article 96, however, provides that a country whose ordinary practice requires a written document, may opt out of the requirement.¹⁷⁹ Since this article is not concerned with the effect of the choice of law clause, but is concerned with the way business enterprises negotiate with each other, there will be no analysis as to what happens when a signatory country and a non-signatory country enters into a contract. One must emphasize, however, that the international transaction produces discrepancies in the importance of a written document.

Accordingly, in the Japan - United States context, the American practitioner must bear in mind that the Japanese party they are dealing with is accustomed to simple documents and usually does not require putting every single agreement in the document. On the other hand, the Japanese practitioners must bear in mind that the party which they are dealing with is accustomed to practicing under the Statute of Frauds and should have some notion of the Parol Evidence Rule in mind.

B. The Differences in The Culture

So far the discussion has focused on the law itself and explains, for the most part, the differences between the Japanese attitude and the American attitude towards contracting. One significant aspect, however, must never be overlooked. The aspect is the differences which stem from the societal culture. It is not as simple as saying the Japanese appreciate communitarian values and the Americans will cherish rugged individualism. In other words, the Japanese are as aggressive as the Americans and the Americans appreciate the value of community as well as the Japanese. When the focus is on the society as a whole, however, each society might have a tendency towards appreciating individualism over societal values and vice versa.

The long history of the Japanese society's development shows that the Japanese have always been required to contribute to the society by sacrificing their individual values. This is true whether we are talking about the 250 years of seclusion from the rest of the world, or about the

177. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF. 97/18, Annex I (1980).

178. *Id.*

179. *Id.* at art. 96.

unfortunate war in which the whole world was involved. Expression of individuality was almost a crime in the pre-World War II era in Japan. Accordingly, the communitarian values the Japanese are usually associated with do not come from within the individual, but rather come from the long history of compelled totalitarianism.

What emerged from this *communitarianism* are certain norms which only those in the *community* understood. These norms are peculiar to a society which has secluded itself from the rest of the world for a long time. Unlike a country similar to the United States of America, where diversity of the citizens is one of the most powerful elements of the country, Japan derives its power from the homogeneity of the society. In other words, the Japanese are not required to fully debate an issue in order to reach a conclusion because the values the society appreciates and the values the individuals are supposed to appreciate are often the same. On the other hand, the American way is to give full credit to any minority opinion. Accordingly, the society must fully debate an issue in order to reach a conclusion because one value is rather alien to another. As a result, Americans tend to debate every aspect of an issue in order to reach a truly democratic conclusion.

One fact the Japanese society must realize is that they are no longer living in a homogenetic society. The fact their products and services are flowing into the United States and all over the world, and the fact that most of the foods which reach Japanese children's mouths are imported from around the world, requires them to realize they are living in a truly international society. Accordingly, the values and the attitude which would only be appreciated in a homogenetic society must be abandoned, at least in a business setting including a foreign enterprise. The adherence to a totalitarian character, i.e. resorting to norms that only the *insiders* would understand, would only make the misunderstandings worse. On the other hand, Americans must realize that this historical character which has been around for more than a thousand years would not be easily abandoned even if they tried. Thinking that the slow process of negotiating by the Japanese is only strategic misses the whole point.¹⁸⁰ Americans must understand the long tradition of this character.

180. Some commentators say that the Japanese use the technique of pretending not to understand English or say that they have to ask their superiors in order to take time and come up with the best solution. The negotiation styles of Japanese are discussed in Zhang & Kuroda, *supra* note 3. Furthermore, a rather patriotic article may be Walters, *supra* note 2. This title, *Now That I Ate The Sushi, Do We Have a Deal?* is highly offensive, and as long as these inadvertent (or is it intentional?) expressions are used, the road to harmony between the two societies will be very long.

In conclusion, what can be and should be required from both parties is that they should communicate the ambiguity to the other party when they are not sure of a certain aspect of the agreement, whether they put it in writing or not. This can be described as the requirement of presentation. In the United States, more and more cases recognize the requirement of presentation,¹⁸¹ and hold the party who takes advantage of the other's lack of knowledge in breach of an implied covenant of good dealing and fair play.¹⁸² This seems to be the American counterpart of the Japanese *honesty* and *loyalty* requirement. Finally, the parties must not forget that the Uniform Commercial Code and article 1 of the Japanese Civil Code both require the notion of *good faith*, *fair dealing*, *honesty*, and *loyalty*. Although the precise usage of the words are different, they mean absolutely the same thing.

181 See generally LINZER, *supra* note 85.

182. *Id.*