ESSAY

Negotiating Contracts With the Japanese

by Elliott Hahn*

From the bestseller book lists to television, art, and magazines — indeed, to literally every imaginable fount of information — Japan today looms large in the American consciousness. Of course, the greatest impact on Americans has been Japan's tremendous economic success.

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1 Two recent best-selling non-fiction books are, W. Ouchi, THEORY Z: HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE (1981) and R. Pascale & A. Athos, THE ART OF JAPANESE MANAGEMENT (1981). The authors of both works argue that American companies should study Japanese management techniques to improve their own.

2 "N.B.C.'s adaptation of James Clavell's Shogun rang up ratings second only to those of Roots with nearly 75 million people watching each episode of the five-night series." Samurai Night Fever, NEWSWEEK, Sept. 29, 1980, at 51.

3 The exhibit at New York's Japan House of art from Horyu-Ji (a Buddhist Temple near the ancient Japanese City of Nara) has drawn considerable attention from the press. See, e.g., Hoelterhoff, Treasures from the Temple of the Exalted Law, WALL ST. J., Sept. 18, 1981, at 31, col. 3.

4 The pages of such weekly news magazines as Time and NEWSWEEK are replete with articles about the Japanese, especially in the economics and business sections. See, e.g., Bryon, How Japan Does It, TIME, Mar. 30, 1981, at 54; Nicholson, Putting the Brakes on Japan, NEWSWEEK, Mar. 30, 1981, at 63.

5 One need only glance at the dollar figures for U.S. trade with Japan to see how large a role the Japanese play in our trade picture:

U.S. TRADE WITH JAPAN, 1976-1980

(in millions of dollars, f.a.s. value basis, seasonally unadjusted)

<table>
<thead>
<tr>
<th></th>
<th>Change Over Year-Earlier</th>
<th>Change Over Year-Earlier</th>
<th>Trade Balance</th>
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<tbody>
<tr>
<td></td>
<td>Period</td>
<td>Imports</td>
<td>Period</td>
</tr>
<tr>
<td>1976</td>
<td>$10,144</td>
<td>6.1%</td>
<td>$15,504</td>
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<tr>
<td>1977</td>
<td>10,529</td>
<td>3.8</td>
<td>18,550</td>
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<tr>
<td>1978</td>
<td>12,885</td>
<td>22.4</td>
<td>24,458</td>
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<tr>
<td>1979</td>
<td>17,579</td>
<td>36.4</td>
<td>26,243</td>
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<tr>
<td>1980</td>
<td>20,790</td>
<td>18.3</td>
<td>30,701</td>
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*Domestic and foreign merchandise, including Department of Defense shipments.
Yet, for all of the material written about Japan’s economic success, very few words of practical advice have been offered to Americans on the topic of doing business with the Japanese. This essay will discuss the non-legal points that an American lawyer should remember when he is either negotiating a contract with a Japanese businessman or representing a Japanese client. Not only should the American lawyer keep these non-legal points in mind, but he should also take care to see that his American client is aware of them. Let me hasten to add one caveat: many of my assertions are general. As to each point discussed below, the American lawyer must be cognizant of the personal views of the Japanese businessman with whom he is negotiating in order to determine the extent to which he should follow my advice in that particular area.

The American lawyer who either conducts negotiations with the Japanese or who represents Japanese clients will have many problems if he brings his Western values and ideas into the negotiations. Although on the surface Japan is a Westernized nation, it is a country whose people have maintained the traditional beliefs that have marked their country for centuries. There are striking differences between the attitudes and behavior of American and Japanese businessmen. The lawyer negotiating in Japan should be aware of and respect these fundamental differences. The attorney should ensure that consideration is given to the laws of the two countries throughout the negotiation, drafting, execution, and performance of the contract. However, the American negotiator may easily displease or anger the Japanese negotiator by transgressing on a strongly held Japanese value through his ignorance or lack of attentiveness. Such a transgression could jeopardize the business relationship of the parties.

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Even in terms of Japanese investment in the United States, the growth rate has been enormous. For example, in 1981, the Japanese had a controlling interest in over 210 U. S. manufacturing companies alone. S. MacKnight, JAPAN'S EXPANDING MANUFACTURING PRESENCE IN THE UNITED STATES 2 (1981).

Some of the articles available on this issue are: Mori, A Practitioner's Perspective on Negotiations and Communication with Japanese Businessmen, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 47 (Haley ed. 1978); Narcisi, Advising Japanese Corporations Doing Business with Americans, 29 BUS. LAW 835 (1974); and Vaughan, INTRODUCTION TO JOINT VENTURING IN JAPAN, 6 CASE W. RES. J. INT'L L. 178 (1974).

The Japanese are much more homogeneous in their social and cultural beliefs than Americans. The classic work that describes this homogeneity is R. Benedict, THE CHRYSANTHEMUM AND THE SWORD (1946).

Misunderstandings may arise simply from the differences between Japanese and Western customs. Gift-giving, for example, is a prominent feature of the Japanese social landscape. The Japanese are very fond of giving gifts (especially during the months of July and December, the gift seasons). Yet the customs inherent in this gift-giving, for example, will find the Japanese often apologizing for the gift’s lack of grandeur. To a Westerner, this apology may seem odd. It may be regarded as excessive humility. The Japanese, though,
To avoid committing this fundamental mistake, the American lawyer should take time to acquaint himself with the cultural, sociological, economic, and political beliefs of the Japanese.9

The American negotiator will discover that the social and economic aspects of life in Japan are so intertwined that the social aspects will pervade the negotiation process. One example of this commingling of values occurs during the opening and closing of each business meeting in that Japanese businessmen often bow formally to the other side's representatives. The answer to the question of whether Americans should reciprocate is “sometimes.” Those Japanese well-versed in Western ways will simply expect the American to shake hands. If the American does decide to bow, a nod of the head or a slight bow is considered acceptable.

The key factor that should be kept in mind by every American lawyer involved in negotiations with the Japanese is the Japanese attitude toward contracts.10 To Americans, the word “contract” means a legal regard the gift as simply a small expression of the good feelings toward the recipient. By declaring that the gift is only a trifle, the gift-giver does not embarrass the recipient with effusive sentimentality and yet still conveys to the other the depth of his feelings. In this way, the giver allows the recipient to accept the gift comfortably. If the recipient of the gift is a Westerner he should be aware of the traditional Japanese aversion to witnessing the opening of the gift. By not opening the gift in the presence of the Japanese, the recipient avoids commenting on the giver’s feelings by looking at his gift and thus embarrassing the giver. See, e.g., A Word from the Publisher, 17 THE EAST 4 (June 1981).

9 One knowledgeable commentator has written that these differences in beliefs are so fundamental that, by necessity, the American attorney should brief his clients “in a much broader area of social, political, economic and cultural matters than is generally true in domestic practice where the context for legal opinions can be taken for granted.” Henderson, “The Role of Lawyers in U.S.-Japanese Business Transactions,” 38 WASH. L. REV. 1, 9 (1963).

10 Professor Hattori Shiro, a language professor at Tokyo University, made this point clear when he wrote:

“Americans carefully observe the law, regulations, and contractual agreements and are a people who make full use of such legal forms. Japanese do not have a sufficiently clear conception of such legal forms and honor and trust in things such as jōjo [the surrounding circumstances], giri [moral or social obligations to others and to one’s name], ninjō [human feeling], yūjō [friendship], and magokoro [sincerity] . . . . It is common knowledge that Americans will observe a contract obligation more closely than Japanese. Conversely it is very clearly stated [in America] that not agreeing does not lead to responsibility toward the other person. When a Japanese agrees with another person, he emphasizes the good will and friendship which gave rise to the agreement rather than the agreement itself. If sincerity also is present, there is not necessarily a hindrance even if the contract itself is not necessarily a hindrance even if the contract itself is not executed as precisely as the words say . . . . To Americans there is a clear distinction between legal agreements and feelings of friendship. In these circumstances Japanese are preoccupied with a friendly atmosphere and are not careful to see that the agreement itself is enough . . . .”

Asahi Shimbun, Dec. 20, 1952, at 6 (morning ed.) quoted in KAWASHIMA, NIHON JIN NO
agreement defining the rights and responsibilities of the parties. The Japanese, on the other hand, envision a business transaction as an ongoing, harmonious relationship between the participants. Once the contract is executed, the Japanese believe that the parties have impliedly agreed that any problem that might arise between them will be resolved in an atmosphere characterized by congeniality and trust. One author has expressed the view that the Japanese do not really negotiate contracts, but rather relationships. What the Japanese traditionally strive to achieve, even in a business relationship, is the spirit of what the Japanese call "wa," or harmony. Consequently, during initial negotiations, the Japanese will often seek to probe the attitudes and ideas of the Western participant to ensure that he also desires a long-term business relationship characterized by friendship and trust. This negotiation process may take a longer period of time than do negotiations between two American businessmen. Rather than becoming impatient or resenting the delay involved, the American attorney should facilitate this process by being frank about his client's long-term interests and goals. He must take time to become fully informed not only about the overall business picture of his own client but also that of the Japanese businessman on the other side of the bargaining table.

In order to get to know their American business partner personally and to develop a relationship characterized by friendship and trust, the Japanese businessmen first devote a great deal of time to socializing with their prospective partners. This socializing time is so important to the business negotiations that the American should not automatically bring his spouse to Japan. The businessman must caution his spouse that she will not usually be included in these after-business-hours events and that she should not resent this omission. As we have seen, these social events are an important vehicle for creating an atmosphere of friendship and trust that will benefit the business relationship; thus, social invitations


11 See, e.g., U.C.C. § 1-201(12).

12 Many Japanese contracts appear strange to an American lawyer. They are very short (often one page) recitals of the parties' rights and obligations in which the parties broadly agree to negotiate in good faith any problem that may arise. See, e.g., Kawashima, The legal Consciousness of Contract in Japan, LAW IN JAPAN 1, 15-16 (1974). The Chinese share the traditional antipathy of the Japanese toward lengthy contracts. One American lawyer has commented that "The Chinese are always asking why we want so much detail . . . . They say, 'Can't we just shake hands? If we have a problem, we'll work it out.'" Ross, S.F. Firms Make Presence Felt in Chinese Capital, L.A. Daily J., Nov. 3, 1981, at 1, col. 2.


14 Mori, supra note 6.
should be eagerly accepted by the American. Typically, the Japanese businessman will invite the visiting foreigner to dinner at one of the myriad of restaurants in Japan and afterwards to a bar or cabaret. As a rule, the Japanese businessman's wife will not accompany her husband, and the American's spouse will not be invited either. To the Japanese, the social hours are a necessary carryover from the business hours and serve to cement the ties which bind the parties.

A second reason why the Japanese often spend more time on contract negotiations than do Americans is a consequence of the method by which contracts are approved in a Japanese corporation. This process, called "ringi-sho" in Japanese, depends on the achievement of a consensus among the officers within the Japanese corporation. Reaching this consensus takes a considerable amount of time.

A point related to the Japanese businessman's desire to establish a long-term harmonious relationship is the traditional Japanese distrust of attorneys. Even today, many Japanese businessmen oppose the idea of

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15 In contrast to the United States, though, rarely will the dinner invitation be to the home of the Japanese businessman. Most Japanese consider their homes too small for invited guests.

16 The Japanese decision-making process:

JAPANESE DECISION-MAKING PROCESS

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17 The Japanese believe that attorneys destroy "wa" (harmony) by stressing their client's position and ignoring a compromise that may better benefit society as a whole. The Japanese are not alone in this belief. An American who is frequently involved in legal negotiations in China has stated that "the Chinese are not quite convinced of the utility of law-
an attorney being involved in the negotiation of a contract. By entering
the negotiation process as the representative and advocate of one party,
the Japanese believe that the attorney prevents the establishment of the
desired business relationship. The American lawyer should be sensitive to
this feeling; at the outset, he should stress to the Japanese that his role is
to help the negotiations flow smoothly.

The American attorney who is negotiating a contract in Japan should
take care to see that he displays patience at all times. He should never
show indignation or anger towards the Japanese. To lose one's temper is
disruptive to the harmonious relationship ("wa") that the Japanese seek
to establish. Neither the American lawyer nor the American businessman
should ever flatly reject ideas proffered by the Japanese; such an event
would cause the Japanese to lose face. In addition, the American attor-
ney should be careful, when representing an American client, not to dom-
inate the negotiations to such a degree that his client is rarely heard.
Americans should keep in mind that, for the Japanese, one of the pur-
poses of the negotiations is to become familiar with the other side.

Another important point is that the American must not give any in-
dications that he expects the negotiations to be completed within a stated
deadline. The Japanese are notorious for delaying serious negotiations
until the deadline draws near and then, knowing that the prospects for
career advancement may hinge on whether the American businessman
brings home a signed contract, attaining significant concessions that
would not have been agreed to earlier.

Great care should be exercised by the American businessman in mak-
ing initial contact with a Japanese businessman. This point is especially
ture for potential exporters of goods to Japan. Japanese companies fre-
quently do not respond to initial correspondence in the same way Ameri-
can companies do. For example, Japanese companies sometimes do not
answer written inquiries concerning possible business dealings. The rea-
son for this is that Japanese companies usually prefer initial discussion of
these matters in person so that they can decide whether they wish to do
business with the exporter. Thus, a more effective method of contact for
the American businessman may be to follow contact by letter with per-
sonal contact. Failure by the Japanese to respond quickly to an inquiry

yers.” See Ross, supra note 12, at 1.


19 For a humorous anecdote that makes this point explicit, see H. Cohen, You Can
Negotiate Anything 93-95 (1980).

20 This point, it must be emphasized, is not true for all Japanese companies. For ex-
ample, an effective Japanese economic institution, the trading company (in Japanese, "sogo
shosha"), is well-versed in the ways of the West, including contact by letter. See, e.g.,
Kanabayashi, Japan's Big and Evolving Trade Firms: Can the U.S. Use Something Like
by letter should not be deemed to indicate a lack of interest on their part. This is especially true when contacting a small Japanese company, which may not be accustomed to being contacted in English by foreign companies. In addition, as we have seen, the decision-making process in Japanese companies, "ringi-sho," is slower and more decentralized than in the typical American company; replies may be delayed while a consensus is sought within the company.\textsuperscript{21}

In Japan, personal introductions often play a crucial role in ensuring that initial meetings proceed smoothly. If at all possible, the American custom of telephoning governmental or business officials directly to set up an appointment should be avoided. Instead, a longstanding acquaintance of the official should arrange an introduction. When he arranges this introduction the middleman will also explain to the Japanese official why the American wishes to see him, what company he represents, and his position in the company.\textsuperscript{22} The use of the intermediary is also recommended because if properly chosen, he will have a strong relationship with the Japanese official; that relationship will often carry over into the American's dealings with the Japanese and lead the latter to be more favorably disposed to the American's ideas.\textsuperscript{23}

Before arriving in Japan, the American businessman should take steps to procure items that he would not ordinarily use in negotiations with Westerners but that are indispensable when doing business with the Japanese. One is the "meishi", or business card. The card serves several functions. It informs each party of the other's position in a Japanese society that is still highly stratified.\textsuperscript{24} In addition, the card prevents the embarrassment that may occur when one party forgets the name of another, and it provides a record of the name, position, and company affiliation of each person one meets. The American businessman going to Japan should ensure not only that his meishi is properly written in Japanese, but also that he will be able to keep a file of these calling cards when he arrives in Japan. Today, it is quite common for a meishi to be written in Japanese on one side and English on the other, with each side of the meishi stating the name of the individual, his title, company, and address.

Unless fluent in the nuances of Japanese,\textsuperscript{25} the American should conduct his part of the negotiations in English. Obviously, though, the American should be certain that the opposing Japanese party understands ex-

\textsuperscript{21} Supra note 16.

\textsuperscript{22} To the hierarchy-conscious Japanese, this last point of information is very important. See, e.g., Halloran, supra note 18, at 228-30.

\textsuperscript{23} Id. at 155.

\textsuperscript{24} Id. at 147.

\textsuperscript{25} Professor Henderson has written that "foreigners never master written Japanese; they only achieve lesser degrees of ignorance in it." Henderson, supra note 9, at 9.
actly what he is saying. Although English is a compulsory subject in Japanese schools, most Japanese read and write the language far better than they speak it. Many, in fact, become visibly nervous when speaking English to a native-born speaker. If the Japanese party is not fluent in English, an interpreter should be used. Similarly, if a contract is prepared, either the English or Japanese version should be mutually stipulated to be the authoritative one.

Even one who barely speaks Japanese must be aware of just how complex that language is. If a Westerner chooses to speak Japanese during the negotiations, he should be careful to keep in mind the importance of using the correct level of politeness. When addressing an old friend or someone who occupies a lower rung on the company or governmental hierarchy, a low level of politeness is used. When one speaks with individuals of the same general social standing who have been previously introduced, the medium level of politeness is used. While addressing someone who occupies a higher position in the corporate or governmental system, a formal degree of politeness is used. The intricacies and subtleties of these details are so great that the reader is again cautioned to use English unless his Japanese is of the highest proficiency.

If the negotiations are conducted in English without the presence of an interpreter, the American should keep in mind that a constant Japanese response of "yes" to an American's business proposal does not necessarily signify that he is in agreement nor that he is trying to mislead the American. Rather, it may be a reflection of the differences between the English and Japanese languages. In Japanese, use of the word for "yes," "hai," does not mean that the listener agrees with the other person's assertions. Instead, "hai" may be used simply to indicate an understanding of what has been said. Many Japanese will use the English word "yes" in the same way that "hai" is used.

The desire of the Japanese to preserve the appearance of harmony may also lead them to use "yes" as a device to avoid outright rejection of the point being discussed. To overcome this reluctance, it is often advisable for the American to suggest at the beginning of negotiations that, although he too desires to establish a harmonious relationship, the best way to prevent misunderstandings may be for each party to state frankly their

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A personal anecdote may illustrate this point. This past summer I flew to Kochi (a city on Shikoku, the smallest of the four main islands of Japan) to meet with officials of the Asian Legal Research Institute. While there, I was taken to meet a professor at a local university who taught English. After being introduced to him, I asked him, "How long have you been teaching English?" He replied after a moment's hesitation, "I am fine, thank you."

ideas and reactions to the other's ideas with each party taking no offense at the candor. The American should stress that in this way possible future disruptions of harmony may be avoided. Even if the Japanese should quickly agree to this spirit of candor, the American should, during the course of the negotiations, reiterate how important frankness will be to preventing possible future breaches of the spirit of harmony.

In conclusion, let me emphasize how important it is for the American involved in contract negotiations with the Japanese to remember that no matter how "Westernized" the Japanese may appear on the surface, they have far different beliefs, customs, modes of behavior, and values than do Americans. The American must be sensitive to these differences, and respect them; ultimately, it is in his own interest to do so. Only in this way can he hope to achieve a contractual relationship that will subsequently benefit both sides.