Working It Out: A Japanese Alternative to Fighting It Out

David J. Przeracki

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Since the end of World War II, Japan has soared to the summit of importance in the world economy. In recent years, the balance of trade between the United States and Japan has been tipped strongly in favor of the Japanese. The trade imbalance created such furor in the United States...

[1] Americans have attempted to correct the imbalance of trade with Japan by using a traditionally American, belligerent methodology. For example, a sophisticated congressional report on the issue is prefaced with the observation that, "we went to Japan to deliver a message, as clearly as possible, that the unacceptable trade imbalance of about $12 billion in 1978... is creating pressure in the American Congress for protectionist legislation... The threat of restrictive legislation is the most serious in our experience in Congress." SUBCOMMITTEE OF THE HOUSE COMM. ON WAYS AND MEANS, 95TH CONG., 2D SESS., TASK FORCE REPORT ON UNITED STATES-JAPAN TRADE 110 (Comm. Print 1979).

In 1980, Mr. Phillip Caldwell, former chairman of the Ford Motor Company, summarized his position succinctly, saying, "look at the types of trade between the U.S. and Japan: What is it that Japan has that we are vitally required to have?..."
during 1987 that “Japan Bashing” became a national focus: American politicians hurled protectionist accusations at Tokyo almost daily. In an effort to improve the trade situation with Japan, the United States publicly and privately dictated the terms by which the “Japan Problem” was to be resolved. Working from its position as a global economic (and military) power, the United States’ approach was rather typical: dealing on its own terms. This approach, however, may no longer be appropriate or appreciated. The world business community is growing increasingly less tolerant of dealing only on American terms.

B. Purpose and Approach

Since America’s hegemony in international contracting is waning, especially with the Japanese, new approaches must be considered. The selection of approaches should be based on an understanding of alternatives. The purpose of this Note, therefore, is to provide the reader with an understanding of the difference between Japanese and American legal consciousness. A recognition of these differences should equip the American lawyer and businessman with a foundation upon which to build a better approach to transnational transactions. The fundamental difference between Japanese and American approaches to the law lies in cultural heritage differences between the two countries. The Japanese approach

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2 See infra text accompanying notes 30-31.

4 One reason that America’s methodology of doing business with Japan may no longer be appropriate is the importance of Japan’s increased direct investment in United States’ industries. What was a small amount of yen investment in the United States became overwhelmingly large with the widening of the difference between Japanese and U.S. interest rates. “Japanese direct investment in the United States in fiscal 1985 was $5.39 billion. This was an increase of 60% over the previous year. The overall percentage of [United States’] investments [as compared to] total Japanese overseas investments moved from 33.1% in fiscal 1984 to 44.2% in fiscal 1985.” BUSINESS INTERNATIONAL OF DELAWARE, INC., JAPAN BUSINESS ATLAS, 131 (1987).

North American investments (accumulated cases of total Japanese investments for fiscal years 1951-1985) accounted for the largest share of total Japanese foreign investments at 36%. Aside from Asian investments (31%), other world regions were, in all cases, less than 15%. Id. at 136-37. With Japanese investments in the United States growing fast, it is certain that the Japanese investors will not appreciate being told how to operate what they own. For the same reason, American methodology would be inappropriate under similar circumstances.
emphasizes the maintenance of societal harmony. The American approach stresses the maximization of individual rights and benefits. The Japanese approach is non-confrontational; the American approach is confrontation.

Because the Japanese approach yields an exceptionally low rate of litigation, a secondary goal of this Note is to apprise the American reader of the non-confrontational Japanese approach in contracting, with an eye for promoting its use in the United States. Attempts at a Japanese-styled approach to contracting in America have been successful, though success has been contingent upon a strong commitment to change. With such a commitment, the Japanese approach may provide some relief to the overburdened dockets in the courts of one of the world’s most litigious countries.

This Note first provides an analysis of contemporary approaches to transnational contracts between private parties. Although a variety of approaches to international contracting is available, it will be shown that Americans, through the use of choice of law clauses, impose their own law in international contracts.

This Note next examines the historical and cultural perspectives of Japanese and American approaches to contract law, with much emphasis on the Japanese approach. The historical perspective traces the legal differences to distinct origins: “Confucian consensus” for the Japanese versus “Roman rights” for Americans. The cultural perspective illustrates that the legal systems were molded, and are now dominated, by pervasive, opposing cultural norms, each with opposing views of confrontation. Can either side “win” if an American confrontational approach to law is imposed? Does either side have to win? The two perspectives will help answer both questions.

Finally, it shall be seen that the use of contract law is appropriate as the vehicle for demonstrating the disparity of cultural legal attitudes. Contract law offers concrete examples of otherwise difficult-to-visualize concepts which pervade legal philosophies. Several examples in contract law, from formation through performance and dispute resolution, will vividly illustrate the contrary cultural approaches to the law. Furthermore, since the contract is the legal vehicle for trade, and since Japan is of global interest because of commercial trade, subsidiary practical benefits derive from the use of contract examples.

II. BACKGROUND: CONTEMPORARY APPROACHES TO TRANSNATIONAL CONTRACTS BETWEEN PRIVATE PARTIES

A brief overview of contemporary approaches to international private party contracting will provide a basis from which to compare Japanese and American methods. While many approaches to transnational transac-

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*Throughout this Note, “contract” refers to contracts between private parties. Government and other public contracts are beyond the scope of this Note.*
tions are available, the controlling law is usually dependent upon whether an American is one of the contracting parties.

A. Formation

Good faith⁶ and shared purpose premise the effectiveness of the international private contracting process. Of course, neither good faith nor shared purpose can be legally compelled, especially in the formation-negotiation stage.⁷ According to American common law tradition, a contract is a product of arm's-length negotiation. Beyond the possibility of compelling a party to an international contract to negotiate, there is no clear duty to bargain in good faith in Anglo-American law.⁸ The concept of good faith arises only after a contract has been formed.⁹ Consequently, common purpose must be the stronger guiding force in international negotiations, at least when an American is a contracting party.

Civil law, on the other hand, approaches contract negotiations by adopting the doctrine of *culpa in contrahendo*, which is rooted in the notion of good faith. This doctrine of liability for "fault in negotiating," introduced in 1861 by the German scholar Ihering, emphasizes the nature of contract as a relationship rather than an arm's-length negotiation.¹⁰ The result is an approach directly opposite to that taken by the common law: good faith in contract negotiations versus an absence of good faith.

The civil law approach to contract, emphasizing relationship rather than bargain, is more attuned to the inevitable changes and adjustments arising out of international contracts. The binding force of a negotiated bargain, implied in the bilateral contract of Anglo-American law, renders it rigid and inflexible, more demanding of fulfillment in accordance with its terms.¹¹

When the American attorney is involved in international contracting, his detailed and arm's-length bargain methodology is the rule. The American lawyer feels compelled to meet his negotiating counterpart on

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⁹ Id. That the obligation of good faith is imposed only during contract performance and enforcement is reflected in U.C.C. § 1-203: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (1978).
¹⁰ de Vries, supra note 8, at 76, 78 (emphasis added).
¹¹ Id. at 58-59.
his own ground.\textsuperscript{12} He demands concessions while only grudgingly acceding to the demands of the other party. He treats the other party as an adversary, typically pounding his fists on the “negotiating” table to underscore his position.

In the absence of American participation, many international businessmen are accustomed to negotiating without first consulting a lawyer; they tend to trust the simplicity of the law and are amenable to risk-taking.\textsuperscript{13} In one instance, which came before the German courts, the owner of a large German business had negotiated the settlement of trademark difficulties with a Swiss competitor by an oral agreement limited to one sentence: “We will henceforth no longer harm each other.”\textsuperscript{14} Although no lawyer was consulted, this was held in the German courts to be a valid agreement, from which the courts elaborated all legal consequences deriving from it.

The rule for private party international contracting, accordingly, seems to depend upon whether an American lawyer is participating in the process. When an American is involved, so is his law.

\textbf{B. Choice of Law}

“Since, in contracts between two private persons, neither is a subject of international law, the removal of the contractual relation from the authority of all internal laws is not possible.”\textsuperscript{15} As a result, most parties to international contracts designate a body of law to govern their contract.\textsuperscript{16} Historically, courts did not uphold choice of law clauses.\textsuperscript{17} Such clauses were ruled attempts to undermine the authority and jurisdiction of otherwise proper fora. In 1760, however, Lord Mansfield planted the seed for the modern choice of law rule. In dictum in \textit{Robinson v. Bland},\textsuperscript{18} he said, “[t]he law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.”\textsuperscript{19} Sixty-five years later, much to the satisfaction of American world traders, the Supreme Court of the United


\textsuperscript{13} \textit{Id.} at 8.

\textsuperscript{14} \textit{Id.}


\textsuperscript{16} \textit{Id.} at 31.

\textsuperscript{17} For a detailed history of choice of law clauses in private international contracts, see J. Thomas, \textit{Private International Law} (1955).


States upheld choice of law clauses in *Wayman v. Southard*. The Court said, "universal law recognizes the principle that in every forum a contract is governed by the law with a view to which it was made." Choice of law clauses now are, as an ordinary matter, included in private transnational contracts and are universally upheld. However, due to American xenophobia and fear of the unknown laws of foreign nations, it is usually the case that when an American is among the contracting parties, he insists that American law govern the contract. Because of America's (currently declining) preeminence in international affairs, he has usually gotten his way. As a result, with American involvement, choice of law clauses offer no choice whatsoever to the foreign contracting party.

C. Dispute Resolution: Arbitration and Conciliation

Two major forms of resolving legal disputes are known the world over. *Either* the parties to a conflict determine the outcome themselves by negotiation, which does not preclude that a third party acting as a mediator might assist them in their negotiations; or, the conflict is adjudicated, which means that a third, and ideally impartial, party decides which of the disputants has the superior claim.

Arbitration has become a necessary element in the context of international contracts. The neutral character of arbitral proceedings, complete with their typically fast and efficient results, makes them very popular. The place, procedure, and substantive law for arbitration are usually addressed in transnational contract arbitration clauses.

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21 Id. at 48.
23 See de Vries, supra note 8; *see also* infra note 150 and accompanying text.
24 H. Ehrmann, Comparative Legal Cultures 82 (1976).
26 An example of a Japanese arbitration clause included in a contract between a Japanese company and an American company appears in Noel v. S.S. Kresge Co., 669 F.2d 1150 (6th Cir. 1982): "(15) Arbitration. In case of disputes arising, the case will be settled in Osaka. The dispute should be settled as amicably as possible, failing which the dispute will be referred to The Japan Commercial Arbitration Association in Osaka or Tokyo." Id. at 1153.
27 The location and procedure of arbitration can be (and usually are) governed by the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL). *See* Bagner, supra note 25, at 576-77.
Conciliation, closely connected with arbitration, often precedes arbitration and sometimes occurs during an ongoing arbitration. The parties attempt to resolve their difficulties while overseen by a conciliator or conciliation panel. The conciliator or panel may enforce any settlement agreement reached. Unlike the confrontational approach to dispute resolution taken by Americans, conciliation is friendly and non-confrontational. These elements, friendliness and cooperation, are preferred by most international businesspersons. They are also fundamental to all aspects of the Japanese approach to the law.

### III. The Japanese Approach

#### A. Perspective

The United States' influence in world trade is diminishing vis-a-vis the influence of Japan. Consequently, the Japanese are in an increasingly better position to control the contracting process with their American counterparts. Consideration, therefore, must be given to the use of a Japanese approach to international transactions. The Japanese approach is one in which the dictation of rights, duties and obligations has for centuries been unknown. While the Japanese find their approach to international contracting successful, others find it problematic.

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27 Id. at 578. It is important to add that conciliation is often required prior to arbitration. Id.

28 See infra notes 112-15 and accompanying text. While statistics reveal that Americans tend to file many law suits, one aspect of litigiousness, the nature of the claims brought reveal other aspects: triviality and absurdity. A few examples prove the point:

- Redskins fans were angered by the referees' decision in a St. Louis Cardinals - Washington Redskins football game that a Cardinals' player had end zone possession of the football long enough (before dropping it) to score the winning touchdown. The Redskins' fans sued in federal court to have the referees' call overturned. Footlick, *Too Much Law?*, *Newsweek*, Jan. 10, 1977, at 42.

- Alleging no physical injury, a thirty-year employee at Los Alamos Scientific Laboratory sued for occupational disability benefits. His claim was grounded on his assertion that he had become mentally incapacitated "by a neurotic fear that radiation would kill him." *N.Y. Times*, Mar. 31, 1978, at A14, col. 1.

Although plaintiffs typically lose these cases, what is important is that less than twenty-five years ago, Americans would not conceive of suing on sometimes frivolous or absurd matters. Now such claims are at least partially processed by the judicial machinery before being dismissed. J. Lieberman, *The Litigious Society* 5 (1981).

Responding to “The Japan Problem,” Kazuo Aichi, a member of the Japanese House of Representatives (The National Diet), said: Business [in Japan] is based to a considerable extent on longstanding relationships and the desire to continue working together for years into the future . . . It just happens that other Asian countries have lacked the power to deal from a position of equality and have been compelled to bow in the face of Western demands . . . Japan, meanwhile, has achieved a level of strength equaling or surpassing that of many Western countries, with the result that Westerners have become painfully conscious of the differences between our systems and their own . . . I believe that the international society of the future will resemble the present system within Japan . . . The days are over when the United States can decide the direction in which the entire world will move. Americans may not care for this state of affairs, but they should accept it as reality.  

Whether Mr. Aichi is correct is a matter of speculation. However, the international business community does agree with him in at least one regard: it is growing increasingly less tolerant of deferring to the United States relative to standard-setting and custom of contract. For many reasons, therefore, it behooves Americans to increase their awareness of Japanese jurisprudence.

B. Socio-legal History

1. The Confucian Influence

In stark contrast to America’s legal and cultural heritage, and essential to an understanding of contemporary Japan, is the recognition of the pervasive influence of Confucian philosophy on Japanese society from the earliest times. Best known for its moral philosophy, Confucianism “gives primary emphasis to the ethical meaning of human relationships, finding and grounding the moral in the divine transcendence.” The relationships

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30 The Japan Problem, written by Karl G. van Wolferen, is the title of an article published in the winter 1986/87 issue of FOREIGN AFFAIRS. The “Problem” is, according to van Wolferen, that because Japan’s method for conducting business is vastly different from that of the rest of the world, it is difficult for foreigners to do business there. Van Wolferen advocates forcing Japan to change its business and trade systems to better accommodate the Western businessperson.


one has with others, if harmonious, lead to achievement of the basic Confucian virtue of jen (translated as compassion, human-heartedness or "man-to-manners"). For the Japanese, the spirit of harmony and concord [is] expressed in the virtue of wa. If people abided by wa, disputes would not arise. It is one's duty to avoid discord. En is the principle of social tie. The net effect of these two principles [constitutes the foundation of]...the Japanese. ...[perspective]. Maintaining the relationship bound together by these two forces is the paramount concern.

Wa is the principle of harmony which the Japanese feel is a condition of one's being in any relationship, including contractual. Accordingly, wa may prevent discord in all activities.

Owing to simple Confucian principles, the Japanese are socialized to avoid interpersonal disputes in every realm, including social and business. The principles of wa and en are still practiced in contemporary Japan, as evidenced in Japanese contract methodology and Japanese dispute resolution techniques which are characterized by conciliation, less litigation, and very few lawyers.

2. Political Background

As early as the eighth century A.D., Japan adopted criminal codes based on those of China, replete with Confucian philosophy. They were simply short codes of social and political morality. Although later falling to a caste system, not at all unlike the European feudal system, custom had already developed — and flourished — based on feelings of loyalty and self-denial. Self-denial meant dedication to a social or group ideology. A clear hierarchy developed during the fourteenth century with the vassals abnegating to their lords.

Arriving in 1549, the Portuguese Jesuits introduced Christianity to the Japanese, converting about 300,000 in fifty years. Christianity so upset the existing social order that the Tokugawa Shoguns took steps to exterminate it and closed Japan to the outside world for two-and-a-half centuries.

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35 Id. at 250; Watts, supra note 33, at 600.
36 Watts, supra note 33, at 600.
37 See infra text accompanying note 90-92, 96, and 101.
38 See infra note 156, at 340, 341.
39 Watts, supra note 33, at 599.
41 Id. at 61. See infra note 156, at 341.
In 1853, Admiral Perry of the United States forced the opening of isolationist Japan.\(^{42}\) What he encountered was a society of proprietary rules. These rules of behavior, specifying conduct to be followed each time one individual encountered another, were known as *giri*. *Giri* regulates how one transacts with others: one's family, one's business contacts, and one's society. The fundamental purpose of *giri* was to maintain the Confucian principle of societal harmony.\(^{43}\) To this end, it was found that the Tokugawa Shogunate government developed institutionalized mechanisms for non-confrontational dispute settlement between parties. Under this government, "it was believed by judicial personnel that a good judge should not decide but *induce* an amicable settlement."\(^{44}\) This mechanism for interpersonal settlements came to be known as reconcilement.\(^{45}\)

Unfortunately for the Japanese, the goal of newly-arriving Western traders was not harmony. Rather, of course, their goal was profit. Savvy in international contracting, Western traders swiftly took advantage of the Japanese. The Japanese frequently found themselves the subservient party in adhesion contracts for trade.\(^{46}\) For this reason, the Japanese were forced to adopt an Occidental approach to international commerce. A new era in Japanese history, referred to as the Meiji Period, began. In their quest for an alternative approach, draftsmen of the Japanese Civil Code researched many Western legal systems. In 1898, the Japanese Civil Code (MIMPO), based primarily on the German Civil Code, came into effect.\(^{47}\) The Code survived essentially unchanged until the American Occupation following World War II. An American-style constitution was drawn and imposed on the Japanese during the Occupation.\(^{48}\) The Occupation forces knew that the customs and traditions of a society could not be changed by compulsion; it takes a long time before new ideas can be assimilated into the hearts and minds of a people.\(^{49}\) Whether the imposition of a constitution on Japan has affected societal change remains debatable in the 1980s.\(^{50}\)


\(^{43}\) Watts, *supra* note 33, at 600.


\(^{45}\) See *infra* note 156, at 355.

\(^{46}\) Watts, *supra* note 33, at 599.

\(^{47}\) Keon-Cohen, *supra* note 6, at 178. For a detailed account of the Japanese reception of Western law, see Y. Noda, *supra* note 42, ch. III, at 41.

\(^{48}\) Watts, *supra* note 33, at 599.


\(^{50}\) See *infra* notes 103–09 and accompanying text.
Because of the myriad of influences on the development of law in Japan, the Japanese legal system of the twentieth century has been described as a melange of (1) civil law, (2) American law, and (3) Japanese Legal Consciousness. The first element, civil law, refers to the Japanese Civil Code based on the German Civil Code. While the Code remains in effect in 1988, these legal rules function merely as guiding principles (tatemae) in the development of the more important social-political consensus. According to Judge Sho Watanabe, a veteran judge of the Tokyo District Court, this societal consensus, coupled with the judge's innate or "gut" feeling, constitutes "honei," the ultimate basis for judicial decisions.

The second element of Professor Taniguci's description of the modern-day Japanese legal system is American law. The American-style constitution, imposed upon Japan during the Occupation after World War II, was accompanied by Code revisions concerning both family law and corporate law. Furthermore, a new Securities Exchange Law, Anti-Monopoly Law, and Income Tax Code—all patterned after American law—were enacted.

"Japanese Legal Consciousness," the third element, can be described as a natural, collective abhorrence to confrontation at any level. It is:

[A] combination of native attitudes, traditions, and social norms that make the Japanese process different from any other, despite the highly imitative nature of Japanese statutory law. [G]enerally, this special legal consciousness results from the fact that in Japan relationships, including economic relationships, are considered basically to be social rather than legal.

Japanese Legal Consciousness has also been described as akin to an heirloom sword. The law of the West was first considered to be "no more
than an... ornament or a prestige symbol to make Japan respectable in Western eyes. It was taken out and shown to outsiders but never used or only rarely used in actual combat." Japanese Legal Consciousness places ultimate emphasis on relationships. Writes Cornell sociologist Roger J. Smith,

Contemporary Japan remains a place where family, neighborhood and work place yield formidable sanctions over the behavior of individuals. Loyalty, obedience, deference to authority, acquiescence, and group identity are powerful deterrents to misbehavior. Though informal, penalties are stringent, for this is a society in which the incurring and repayment of obligations...in human relations characterize the lives of[nearly all] its...members. Finally, while there exists in contemporary Japan a concept of duty to another, or duty to the group (both are giri), unlike in America, there does not exist any notion of individual right. For instance, the Japanese word for law, ho, bears no notion of substantive rights as incorporated in Western law. The law for most persons means government restraints on individuals for governmental purposes. Fundamentally, to insist on an individual right would be to violate one's own giri. "The Japanese aversion to the law is really an aversion to the use of law in the legal process, to the shame of the courtroom, to the judgment that blames." Shame here implies the immense social pressure brought to bear on the individuals to resolve their conflicts without disturbing the social order. Hence, in contract negotiation, positions are not asserted adversarily. Rather, contracts are made by the parties without substantial disagreement.

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58 Stevens, supra note 57, at 13.
60 Watts, supra note 33, at 604.
61 Y. NODA, supra note 42, at 159.
62 Id. at 37.
64 Id.
65 See infra text accompanying notes 67-68.

Describing historical influences on the Japanese conception of contracts, one author writes:

[The] Japanese way of life was such that we did not need the kind of contract which Westerners developed in order to form a community. We Japanese were agrarian people and settled ourselves in large numbers in a given locality as tillers of land from the early days of our history. We therefore felt no particular need for a contract. In order to cooperate among ourselves, we did not need a contract whose violation invoked sanctions. People got together and talked things over to enlist the cooperation of their neighbors. This tradition has bred in the minds of the Japanese a very easy-going attitude toward contracts.

C. Japanese Contracts

1. Formation

According to one definition, a Japanese contract (kuwaiti) is “[a]n agreement of two or more parties which is intended to produce fixed effects under private law among such persons.”66 Practically speaking, however, a Japanese contract is really something quite different. Consistent with Confucian ideology, the Japanese businessman believes that the relationship he has with the other contracting party is of most importance.67

For the Japanese, a contract is the end result of having established a relationship of trust and friendship. This relationship of mutual trust is more important than the obligations embodied in the contract, for it indicates that both parties possess an understanding that can be employed if and when future problems arise.68 Furthermore, “[i]f a contract is concluded between two parties, for instance, its precise content will depend more upon what the parties feel their relationship is or is expected to be than upon the objective words used to frame the contract.”69

It is clear, therefore, that business relationships are giri relationships,70 replete with emotive qualities. Contracting parties strive to achieve the spirit of harmony (wa) and trust,71 and are dedicated to the long-term relationship. The Japanese Ministry of International Trade and Industry observed that many Japanese business relationships stretch back over three generations.72

During the course of contract formation, the Japanese are “not really negotiating contracts, but rather relationships.”73 Elements of mutual

66 Keon-Cohen, supra note 6, at 189.
67 Id. at 182; Lansing & Wechselblatt, supra note 63, at 654. For a detailed discussion on Japanese business relationships, see MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, SELLING JAPAN FROM A TO Z (1986).
68 Lansing & Wechselblatt, supra note 63, at 654 (emphasis added).
69 Keon-Cohen, supra note 6, at 182; Stevens, supra note 51, at 668.
70 Y. Noda, supra note 42, at 174-79.
71 For a discussion of the importance of trust in business relationships in Japan, see MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, supra note 67, at 139-142. Gerold W. Libby, an American attorney practicing with Whitman & Ranson, Los Angeles, has acknowledged the traditional emphasis on relationships in business in Japan. However, he comments that “the Japanese are now very well informed as to legal practices in the United States,” and that the Japanese would no longer “be surprised by, or object to . . . [an American approach to doing business].” G. Libby, Representing a Japanese Company in the United States (1985) (unpublished manuscript).
72 MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, supra note 67, at 137.
dignity and reciprocal respect, both aimed at harmony maintenance, are critical to successful contract negotiations with the Japanese.74 Japanese Legal Consciousness, which directs all aspects of Japanese legal relations, implies a notion of good faith in Japanese contract negotiations.75 As seen earlier, there is no corresponding good faith requirement in American contract law.76

Because of the Japanese emphasis on relationships, it should not be surprising that lawyers are typically not involved in contract negotiations. “In the past, the Japanese believed that lawyers destroyed wa by stressing their client’s position and by ignoring compromises that benefit society as a whole.”77

It should also not be surprising that because the Japanese negotiate relationships rather than contract terms, the concept of consideration does not exist in Japan. There is no bargained-for-exchange in Japanese contract negotiations.78 In Japan, the long-term relationship is more important than the short-term profit.

Consequently, the written document is not particularly important to the Japanese businessman. When a contract is reduced to a writing, it is typically very short, often not longer than one page. The writing does not attempt to account for every contingency, but rather leaves areas intentionally grey to allow for future modification. The terms are vague and sketch only a general outline of the course of exchanges to take place. Again, mutual trust and commitment to the business relationship will define the terms ultimately performed.79 Consequently, after the signing, it is unlikely that a Japanese businessman will ever again look at the written document.

74 This dimension of Japanese negotiation is termed “awase” (adjustment, adaptation, accommodation). Van de Velde, infra note 121, at 397.
    In this framework, each side is prepared to adjust to the situation of the other, the objective being to establish personal ties between parties in order to create an atmosphere conducive to frank discussions and exchanges of favors. Specific details of each side’s position are not offered; negotiations are based on adapting to mutual inferences. Particular attention is paid to special circumstances, making generalities inapplicable. Awase negotiations are intended to lead to relationships which permit the two parties to make exceptions for each other.

Id.

75 See infra note 81 and accompanying text.

76 See supra note 9 and accompanying text.

77 Hahn, Negotiating with the Japanese, 2 Cal. Law. 20, 22 (1982); Watts, supra note 33, at 605.


79 See Hahn, supra note 77, at 22; See infra note 156, at 353; Watts, supra note 33, at 604.
2. Performance

As seen earlier, Japanese contract terms are generally amorphous and vague. Consequently, performance is not restrictively defined. Rather, the general terms are guided by Japanese Legal Consciousness. This principle, as it applies to contract performance, is enshrined in the doctrine of good faith and is codified in Article 1 (2) of the Japanese Civil Code. In relevant part, this section reads, "The... performance of duties shall be done in faith and in accordance with the principles of trust." 781

3. Dispute Resolution

It is worthy of reiteration that there exists no concept of right in Japanese society. Historically, the emphasis has been on duty, specifically, a duty to maintain harmonious relationships. As a consequence, the Japanese approach to dispute resolution reverses the order of practice in America; the Japanese strongly prefer extra-judicial, informal means as opposed to litigation. "When a dispute arises, the relationship functions as the dispute settling mechanism." 83 Dispute resolution is usually initiated by the introduction of a "naniwabushi," a tear-jerking statement. "Since the Japanese are more aesthetic and sentimental than logical and rational, they are susceptible to sad stories... Compromise is not difficult to achieve." 85

The procedure by which interpersonal settlements are made has been called "reconcilement." 86 Reconcilement is described as "the process by which parties in the dispute confer with each other and reach a point at which they can come to terms and restore or create harmonious relationships." 87 Japanese confidence in reconcilement is perhaps best exemplified in the "We Can Work It Out" clause which invariably appears at the end of Japanese contracts. The clause will typically take one of two forms: If in the future a dispute arises between the parties with regard to the... [provisions]... stipulated in this contract, the parties will confer in good faith [Sei-i o motte Kyogi Suru].
or,

... will settle [the dispute] harmoniously by consultation [Kyogi Ni Yori emman Ni Kaiketsu Suru].

80 See supra text accompanying note 79.
81 See Keon-Cohen, supra note 6, at 183.
82 See infra note 156, at 351.
83 Watts, supra note 33, at 601; see also Hahn, supra note 73, at 380 (comparing American business relationships with those of the Japanese) (emphasis added).
84 A naniwabushi statement attempts to politely induce the other contracting party to forgive further performance under the contract.
85 J. Sawada, Subsequent Conduct and Supernoverv Events 222 (1968).
86 See infra note 156, at 355.
87 Id. For an analysis of dispute resolution in Japan, see Kawashima, Dispute Resolution in Contemporary Japan, Law Japan 42 (1963).
88 D. Henderson, Conciliation and Japanese Law 194 (1965); Stevens, supra note 51, at 668.
The notion of reconcilement recalls the traditional idea that both parties are to blame when a conflict arises (kenka ryoseibei), since both have failed to maintain harmonious relations. It is, therefore, in the best interest of each party to settle the dispute privately.

A second level of dispute resolution in Japan is conciliation (chotei). Also rooted in Confucian philosophy, and first codified during the Tokugawa Shogunate, conciliation is now provided for in the Civil Conciliation Law of 1951. According to Article 1, "[t]he purpose of this law is to devise, by mutual concessions of the parties, solutions for disputes concerning civil matters, which are consistent with reason and befitting actual circumstances." The negotiations are conducted through a third party (a conciliator or a judge) or a committee. When a compromise is reached, the settlement is enforceable as if determined by a court.

Conciliation is very popular in Japan. Surveys conducted over a three-year period indicate that 80% of Japanese would seek settlement through conciliation. Only 20% would prefer settlement in court (after first attempting reconcilement). The Western practice of arbitration, however, is not very popular in Japan. The Japanese dislike arbitration because it "imposes a decision on the parties rather than allowing [them] to mold the outcome under the [influence] of a social superior." Litigation, consequently, is considered only as a last resort. "To bring a case to court emphasizes a failure of society and individuals to resolve suits through traditional means. Any hope of restoring harmony is thus destroyed."

The non-litigious nature of the Japanese is generally attributed to their desire to maintain social harmony. However, several other reasons have been proffered to explain their non-litigious propensities. The first of these is the dearth of effective legal sanctions. In Japanese civil cases, the ultimate sanction is to attach property. While other sanctions include...
civil fines, the ability to collect them is heavily reliant upon the party's willingness to pay. Another reason is the relative expense to bring suit in Japan. Filing fees, for example, are pro-rated to the amount in controversy, and can be very costly. A final reason to explain the scarcity of litigation is the short supply of lawyers in Japan. There are less than 15,000 lawyers in the entire country. This results in a ratio of 1 lawyer for every 10,000 Japanese, compared to 19.4 lawyers per 10,000 Americans. Interestingly, the number of Japanese lawyers is not likely to increase. Although many universities offer a law curriculum, there is only one lawyer-producing institution in Japan, the Legal Research and Training Institute. Fewer than 500 lawyers graduate from the Legal Research and Training Institute each year, and many become judges and prosecutors rather than private practicing attorneys.

For whichever or all of these reasons, the Japanese are not a litigious people. Or are they? One of the most outspoken commentators on the subject in recent times, Professor John O. Haley, believes that a moral impediment to non-litigiousness in Japan is a myth. He believes that it is due to the Japanese government's desire to inhibit litigation (for reasons of cost and convenience, among others) that the Japanese don't sue. Judicial system inefficiency, kept in place at the insistence of the government, maintains the incidence of litigation at very low levels. E. Charles Routh echoes Haley's position. He believes that "the status of [Japanese] litigation has been changing over the last few years, and that it will continue to change towards a greater acceptance of litigation as a method of resolving disputes." Another authority, Dan Fenno Henderson, agrees, citing for whichever or all of these reasons, the Japanese are not a litigious people. Or are they? One of the most outspoken commentators on the subject in recent times, Professor John O. Haley, believes that a moral impediment to non-litigiousness in Japan is a myth. He believes that it is due to the Japanese government's desire to inhibit litigation (for reasons of cost and convenience, among others) that the Japanese don't sue. Judicial system inefficiency, kept in place at the insistence of the government, maintains the incidence of litigation at very low levels. E. Charles Routh echoes Haley's position. He believes that "the status of [Japanese] litigation has been changing over the last few years, and that it will continue to change towards a greater acceptance of litigation as a method of resolving disputes." Another authority, Dan Fenno Henderson, agrees, citing

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100 Taniguchi, infra note 117, at 96.
101 MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, supra note 67, at 143.
103 See generally Haley, supra note 53, at 1-4.
105 Id. at 188.
106 See D. HENDERSON, supra note 88, at 194-95.

Mr. Routh believes that litigation will play an increasing role in dispute settlements in Japan. As an example, Mr. Routh refers to the settlement ultimately reached by forty-four Japanese plaintiffs with McDonnell-Douglas. The law suit arose out of the crash of a DC-10 aircraft several years ago near Paris. The Japanese plaintiffs were the last to settle in this case. They settled for an amount approximately four times greater than had been given to the other plaintiffs, and a major factor in this delay in settlement was the requirement that the company acknowledge responsibility and that there be punitive damages. This was a landmark case, in which a federal court in California assessed punitive damages for the first time in a wrongful death action. Non-litigious? Hardly. Id. at 188-89.

While Mr. Routh argues that the Japanese are litigious, he believes that litigation is resorted to mostly in transactions involving non-Japanese. Because the Japanese are dealing with foreigners (gaijins literally, "aliens"), there is no established relationship, no girl to follow. Consequently, the Japanese deal with the foreigner on the foreigner's terms and sue. Id.

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100 Taniguchi, infra note 117, at 96.
101 MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, supra note 67, at 143.
103 See generally Haley, supra note 53, at 1-4.
105 Id. at 188.
106 See D. HENDERSON, supra note 88, at 194-95.
as a reason increased Japanese experience as defendants in American courts."

Others have taken the position that the myth of Japanese non-litigiousness is itself a myth. It is strongly argued that the "appearance of the Americanization of Japan ... is deceptively misleading. The fact is that they [the Japanese] are essentially and inherently Japanese through and through." Offering substantial support for this position is the well respected anthropologist, Chie Nakane. Professor Nakane writes:

"The basic system of modern Japan was inherited ... and that the modern changes ... which appear so drastic ... occurred without any structural change in terms of the basic state configuration. Japanese ... look at modernization ... as a process that has been ... based on ... a combination of the Japanese spirit and western knowledge. [But,] modernization should be seen in terms of the structure of the political and social configuration: modernization has been carried out not by changing the traditional structure but by utilizing it."

"Litigious" and "non-litigious" are probably inappropriate adjectives for the Japanese in any event. The facts remain that there are far fewer law suits per capita in Japan than in the United States, and that the Japanese strongly prefer extra-judicial means for dispute resolution.

IV. THE AMERICAN APPROACH

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses and waste of time.

Abraham Lincoln

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107 Id. at 195.
109 Chie Nakane is a professor of social anthropology at the Institute of Oriental Culture of Tokyo University. She also held the position of Lecturer in Asian Anthropology at the School of Oriental and African Studies, University of London, and that of Visiting Professor in the Department of Anthropology, University of Chicago.
111 ABRAHAM LINCOLN, NOTES FOR A LAW LECTURE (July 1, 1850).
Discourage litigation? In America? With the incidence of litigation in America at an all-time high, President Lincoln's advice to lawyers seems to have gone unheeded. Thousands of lawsuits are filed each day in major cities across the country. The observation of American litigiousness is supported by the ever-increasing number of lawyers entering the profession each year. The very nature of the American legal system - adversarial - promotes litigiousness. This is particularly true when combined with the rights-conscious, individualistic attitudes of Americans.

A. Religious and Cultural Influences

Why are Americans so litigious? Several theories have been proffered. One very simple theory is the ease and affordability of bringing a lawsuit in America. Bringing the lawsuit, which requires only a simple filing, is typically the first step in American dispute resolution. Filing fees for lawsuits are relatively inexpensive. They are fixed low, irrespective of the amount in controversy. Filing fees can cost between $30 and $100, depending upon the jurisdiction. Depending on the conditions of the case, negotiation and settlement may occur prior to trial. “Litigation has become

112 In United States district courts alone, for example, 241,842 civil cases were filed in 1983 (an average of 470 for each of the 515 authorized judge positions). The number of cases represents a 17.3% increase over 1982 and an 85.2% increase over 1976 (the first year of the 1983 report period). Contract actions (84,017) accounted for 34.7% of all civil cases commenced, more than any other type of action except statutory. ADMIN. OFF. U.S. CTS., PICTORIAL SUMMARY FOR THE 12-MONTH PERIOD ENDED JUNE 30, 1983 (1983).

113 Americans’ propensity to sue has become so widespread that one observer wrote, “litigation has become the nation’s secular religion.” The Chilling Impact of Litigation, BUS. WK. JUNE 6, 1977, at 58.


115 See infra notes 116-17 and accompanying text.

merely a part of strategy in an effort to solve a dispute.”

Another theory, presented in 1987 by Richard B. Parker, a visiting professor of law at Tokyo University, suggests that the American's sense of individualism and rights-consciousness cause him to be litigious. This theory is founded on the premise that the "basis of Western thought is the overwhelming belief in one omniscient God." Professor Parker finds that 85% of all Americans believe in God. As a result, America is a "theocracy of sorts, standing before God as the ultimate guilt authority." To the extent that this proposition has affected the American legal and judicial systems, America stands apart from the rest of the world. According to Professor Parker's theory, one omniscient God provides a standard by which the American must measure his individual performance. The God-fearing Americans are, consequently, highly individualistic. In relative terms, American culture stresses a strong sense of individualism while, as discussed above, Japanese culture places more importance on social identity.

The discouragement of dependence on others in America yields a high level of rights-consciousness unknown in the East. An additional reason for this high value on individual rights may be found in early American history. European immigrants, typically poor, alone, and lost in the New World, were forced, out of a Darwinian matter of survival, to conceptualize and assert the rights incorporated into American culture by the documents

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Some observers allude that the great changes in American social structures during the nineteenth century formed the beginnings of America's litigious nature. The traditional bonds of social relations in America prior to the nineteenth century, which may have inhibited Americans from resorting to litigation as a means of resolving disputes, dissolved with the pressures of a capitalist form of social organization. Capitalists were driven irrespective of their personal will of greed to compete with one another for markets for their products and to extract the greatest possible production from their workers at the lowest possible cost. Workers were forced to sell their labor power to owners for a wage in order to survive. [S]ocioeconomic processes based on competition and individual self-interest reorganized the social universe.


118 Professor Parker is a practicing attorney with Goldstein & Manello in Boston, Mass. He was on leave in Japan during 1986-87 to conduct legal research and to teach law at Osaka University and Tokyo University.

119 Lecture by Professor Richard B. Parker, Visiting Professor of Law at Tokyo University (June 29, 1987).

120 Id.

121 Van de Velde, The Influence of Culture on Japanese-American Negotiations, 7 FLETCHER F. 395 (1983); see infra note 122 and accompanying text.
establishing the government. The necessity became habit and thus assimilated into American contract negotiation.\textsuperscript{122} The fight for individual rights in the legal realm is clearly perpetuated in the negotiating room where the American lawyer pounds his fists and rattles the walls to accentuate his client’s position.\textsuperscript{123}

A third theory to explain the American confrontational approach to law is not necessarily exclusive of the second. E. Allan Farnsworth, a prominent authority on American contract law, expressed his views at “A Conference on Aspects of Comparative Commercial Law” held in 1968.\textsuperscript{124} Preliminarily, he offered three explanations for American litigiousness: (1) Because Americans come from a federal state, legal behavior is necessarily more complicated; (2) Since Americans come from a common law country, they find legislation (civil law codification approach) unfamiliar and distasteful; and (3) Americans, separated from Europe and Asia by the Atlantic and Pacific Oceans, feel remote from much of the rest of the world and consequently behave differently.\textsuperscript{125}

According to Farnsworth, of paramount importance in explaining American attitudes is the existence of two American cultural “defects” which affect the way every American behaves.\textsuperscript{126} First, the American is

\textsuperscript{122} The assimilation of individualism and rights-consciousness into American culture has been acknowledged at many levels. The highest level was the Committee on National Goals appointed in 1959 by President Eisenhower. The Committee head was Dr. Henry H. Wriston, President of Brown University, who, in a speech entitled “Our Goal: Individualism or Security?”, extolled the “rugged individual.” Address by Dr. Wriston at Bowdoin College (1960).

In the nineteenth century, people experienced and were forced to adapt to the appearance of the factory and the slum, the rise of the industrial city, and a violent rupture of group life and feeling that crushed traditional forms of moral and community identity in favor of that blend of aggression, paranoia, and profound emotional isolation and anguish that is known romantically as the rugged individual. Gabel & Feinman, supra note 116, at 174-75.

The “rugged individual” of the 1980s is militantly self-reliant. The rugged individual’s self-reliance has two attributes. The first is fierce competitiveness. The rugged individual must advance or regress according to his own efforts and luck. . . . The other attribute is the high premium on aggressive creativity. Creativity has become such a popular word in the United States that when one wants to praise someone’s work to the extreme, all one has to say is that the work is creative . . . . Since each individual has to compete perpetually to defend [his] rugged individualism, he must forever find new ways of getting ahead of . . . fellow competitors. In fact, he has to be creative to keep his place at all.


\textsuperscript{123} See supra text accompanying notes 12-13.

\textsuperscript{124} See Farnsworth, Unification of Sales Law at the Regional and International Level: Why They Behave Like Americans, in ASPECTS OF COMPARATIVE COMMERCIAL LAW 110 (1969).

\textsuperscript{125} Id. at 114-15.

\textsuperscript{126} Id. at 115-20.
given to excess in all things. Americans earn the most money, drive the largest cars, commit the most crimes, etc. The second and more important defect in character is that the American is given to practicality in all things. 127 Farnsworth regards this as a serious shortcoming because it causes Americans to ask, "Why?" While others, including the English, would be satisfied with a simple reply of "Because that is how it is," the American is not satisfied with anything less than a practical answer and will typically fight until he is provided with one. Whatever the underlying reason happens to be, it is clear that Americans are rights-conscious, assertive, and highly litigious. While these characteristics pervade the general American approach to law, they are most acutely perceivable in a study of American contracting.

B. American Contracts

1. Socio-legal History

Roman Law 128 and English Law each recognize the ability of persons to give up rights or to come under duties. 129 A person did this by indicating his will to do so. 130 English Law, perhaps surprisingly, did not adopt the

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127 Id.
128 Enforcement of contractual obligations took different forms in early Roman Law. Because specific performance was unknown to the early law, every form of enforcement possible at the time was to make punishment the alternative of performance. W. Buckler, The Origin and History of Contract in Roman Law 3 (1895).

Under early Roman Law (The Regal Period), a promise could be enforced either (1) by the person interested, (2) by the gods, or (3) by the community. Agreements, then, might be of three kinds corresponding to the type of sanction enforced. They might consist of (1) an entirely formless contract, (2) a solemn appeal to the gods, or (3) a solemn appeal to the people. Id. at 3-6.

Although formless agreements contained the seed of contract, they could not have developed into true contract law since they lacked binding force. "Their sanction depended on the caprice of individuals, whereas the essence of Contract is that the breach of an agreement is punishable in a particular way." Id. Agreements made in view of the public, a method peculiar to the Romans, were enforced by penalties imposed by the laws of the nation upon bad faith. The sanction may have been public disgrace. In any event, publicity of the agreement ensured its fairness and placed its existence beyond dispute.

129 For the reason that contract rights and duties arise from the will of the obligor, they differ from other types of obligations. Countless other duties exist regardless of anyone's will to be bound. For example, each member of Western society is under a duty not to strike another, not to trespass upon property, and not to slander. It should be clear that contract obligations are set apart by their origin. M. Ferson, The Rational Basis of Contracts and Related Problems in Legal Analysis (1949).
130 Id. at 123.
already-developed Roman Law regarding contracts. One might at least expect that English contracts evolved from the rational idea that a person should be bound according to his promise. But the simple English contract did not originally rest on that notion.\textsuperscript{131} While the promise was an important fact, it was not deemed the basis of an obligation.\textsuperscript{132}

Gradually, some promises did become obligations - legally enforceable obligations. "Every legal system has found it necessary to draw a line somewhere between promises which are enforceable in law and those which are not."\textsuperscript{133} The English courts drew the line establishing the doctrine of consideration. Without this contractual element, no simple contract is valid.\textsuperscript{134}

The test [for contract validity - consideration] ultimately reached was obtained by asking whether the damage resulting from the breach of the agreement was caused solely by the breach of the agreement, or whether, in consequence and on the faith of the agreement, the plaintiff had been led to change his position, so that the damage which he suffered was caused not merely by the breach of the agreement, but also by the change of position which the making of the agreement had induced.\textsuperscript{135}

Simple contracts, therefore, became enforceable in England so long as there was, in addition to a promise, consideration.

Although America imported most of the English common law for contracts, the American concept of consideration differs from the English formulation. In America, consideration has almost become synonymous with "bargain."\textsuperscript{136} The development of consideration as a "bargained-for-exchange," characterized by arm's-length negotiation, is attributable in large part to Oliver Wendell Holmes.\textsuperscript{137} Consideration is an essential element in American contracting, for without consideration a contract is unenforceable.

The presence of consideration in American contracts enables a contracting party to enforce strict adherence to bargained-for rights and duties. Samuel Williston, the great American legal scholar, defined "contract" as "a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which in some way recognizes as a duty."\textsuperscript{138}

\textsuperscript{131} Id. at 125-26.
\textsuperscript{132} Id. at 126.
\textsuperscript{133} H. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 407 (1929).
\textsuperscript{134} M. FERSON, supra note 129, at 130.
\textsuperscript{135} Id.
\textsuperscript{137} "It is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made or accepted as the conventional motive or inducement for furnishing the consideration." O.W. HOLMES, THE COMMON LAW 293 (1881). For a discussion of Holmes' role in the development of the bargain theory, see G. GILMORE, THE DEATH OF CONTRACT 19-21 (1974).
\textsuperscript{138} S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1 (3d ed. 1957).
He remarked that a true contract consists of “intangible rights and duties...[evidenced by]...the writing or document.”\footnote{Id. at 1 n.1.}

American courts support the creation and enforcement of rights and duties in contracts. In 1819, the Supreme Court stated that “the regular effect of all contracts is on one side to acquire, and on the other side to part with... rights.”\footnote{Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 656 (1819).} Every contractual right is the correlative of a corresponding legal duty.\footnote{Niblett Farms v. Markley-Bankhead, Inc., 202 La. 982, 13 So. 2d 287 (1943); 17 C.J.S. Contracts (1963).} Rights cognizance so permeates American legal consciousness that many “rights” are actually enumerated in the American Constitution. The first ten Constitutional amendments are, in fact, commonly referred to as the Bill of Rights.\footnote{While the Bill of Rights enumerates specific American rights, according to the American Civil Liberties Union, “it left a lot out. The original Bill of Rights... left out whole classes of people. It left out racial minorities, and to a large extent it left out women. To this day, the laws of the land are stained with the residue of those original exclusions.” American Civil Liberties Union, Our Endangered Rights (N. Dorsen ed. 1984).} All in all, Americans are more aware and more assertive of individual rights and duties than any other national group in the world.\footnote{Although more likely due to the consensus of American sentiment than to that of the American Civil Liberties Union, the Supreme Court of the United States has promulgated additional rights for Americans by regular reinterpretation of the due process clause of the fourteenth amendment, including the right to vote and the right to privacy.} The emphasis on rights assertiveness in America is in direct opposition with Japan where, as stated above, notions of individual right do not exist. Harmonious relationships cannot exist when one party insists on rights.

2. Formation

True to the importance of contract consideration and assertion of individual rights, the American lawyer’s negotiating room techniques are premised on adversarial interaction.\footnote{While Americans are more individualistic than any other cultural group, the \textit{nature} of American individualism is somewhat different from that of the rest of the world. In 1923, President Herbert Hoover wrote that, our individualism differs from all others because it embraces [America’s] great ideals: that while we build our society upon the attainment of the individual, we shall safeguard to every individual an equality of opportunity to take that position in the community to which his intelligence, character, ability, and ambition entitle him; that we keep the social solution free from frozen strata of classes; that we shall stimulate efforts of each individual to achievement; that through an enlarging sense of responsibility and understanding we shall assist him to this attainment; while he in turn must stand up to the emery wheel of competition. Herbert Hoover, \textit{American Individualism} 9-10 (1923).}
[Choice, selection (and) singling out... characterize the American style of negotiation. (The) negotiations begin with each side clearly stating its stand on issues of importance, thus taking care of business immediately and directly. Once viewpoints of both negotiating teams are assessed, possible alterations are offered and mutual compromise leads to agreement... (N)egotiators from the United States often enter discussions so convinced of the correctness of the American position that they expect that the other negotiating team will conform. In essence, United States negotiators have claimed universal cause validity and have regarded their negotiating partners as being weaker.145

While American negotiators are assertive, rights-conscious and consideration-conscious, they are not under a clear general duty to negotiate in good faith.146 As stated earlier, the obligation of good faith arises only after contract formation in American law.147 This convention runs directly opposite to the formulation of good faith in Japanese contracting.148

The American lawyer, moreover, attempts to freeze time in contracts. According to Farnsworth,149 due to his character "defect" of excessiveness, the American lawyer writes excessively long contracts "that are so detailed as to make any applicable law... as unimportant as is possible and that frequently end by making [American] law applicable anyway in the unlikely event that it makes any difference."150

The American draftsman attempts to accommodate all eventualities in a contract rather than leave any open terms.151 The international business

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145 Van de Velde, supra note 121, at 397 (emphasis added).
146 See supra notes 8-9 and accompanying text.
147 See supra notes 8-9.
148 See supra note 75 and accompanying text.
149 See supra note 124 and accompanying text.
150 Farnsworth, supra note 124, at 117.
151 The result of trying to accommodate all eventualities in American contracts is an excessively long document. For example, a "cost-plus-fee" construction management agreement will have not fewer than 138 clauses, just to accommodate "essentials," McGRAW-HILL BOOK Co. CONSTRUCTION MANAGEMENT FORM BOOK 276-95 (1983). "Essentials" include such common-place assumptions as planning meetings, attending meetings, hiring a staff, giving notice should difficulties arise, and constructing the building in accordance with architectural drawings. Id.

The detail that Americans desire to encompass in their contracts adds even more length to the contract document. An example of American detail in contracts is found in atypical masonry contract clause:

_Cement._ All cement is to be Portland cement, of such fineness that 90 percent will pass through a 100-mesh sieve. The initial set shall be in not less than 30 minutes, and pats of neat cement, about 3 inches in diameter and 1/2-inch thick in the center, worked off to a thin edge, which has been exposed in air or immersed in water for seven days, after the cement has set sufficiently not to be disintegrated by water, shall show no discoloration, warping, cheeks, or signs of disintegration.

community has expressed its attitude that a perfectly water-tight contract cannot be achieved. Although some international contracts have been described as lax, many international businessmen seem to be satisfied with them and look upon the more precise American drafting as a waste of time.152

Why are American contracts so long and complex? One reason might be an inadequate supply of readily available synthetic concepts. Synthetic concepts are easily definable terms, easily understood by all parties. American jurisprudence lacks easily definable terms. An example of a concept lacking precise definition is “force majeure.” This term means, effectively, “Act of God” and may not always be perfectly clear since so many events are possible. Although impossible, Americans still attempt to guard against every contingency. As a result, American contracts are full of space-consuming enumeration of concepts which can easily be depicted by one or two words.153

As already suggested, another reason for long American contracts can be found in the nature of the United States as a federal state. Since an American draftsman cannot predict in which jurisdiction a litigation may arise, he attempts to prepare for all possibilities.154

Finally, a third reason may be that in his rights-consciousness, the American seeks to ensure that all of his rights are accommodated, for failure to record them would prevent their later assertion.155 In any event, Americans have a strong affinity for lengthy contracts.

3. Performance and Dispute Resolution

Unlike the Japanese, Americans expect that performance will conform precisely to the terms of the contract. “Anglo-American contract law excuses performance under such doctrines as frustration and impossibility only in extreme situations; otherwise, the party must live with [his] contract — a contract which was made under conditions that invariably no longer exist.”156 The subject of American dispute resolution has already

152 van Hecke, supra note 12, at 10-11.
153 Id.
154 Id. at 11.
155 The American law prohibition against assertion of rights after the formation of a written contract is perhaps best evidenced in the “Parol Evidence Rule.” U.C.C. § 2-202 (1978). Only usage of trade, course of dealing, and sometimes evidence of consistent additional terms may be asserted after contract formation. U.C.C. §§ 1-205, 2-208 (1978)
been discussed. 5 Absent arbitration and conciliation agreements, litigation remains the most prevalent form of dispute resolution in America.

V. CONCLUSION

It has long been the case that, when Americans are involved in international business intercourse, American business methods and American law, both assertive and confrontational, dominate the transaction. Perhaps it has been too long, particularly in transactions with the Japanese, since Japan has grown to become a very powerful force in the world economy. The Japanese approach to business and the law is relationship-oriented, non-confrontational, and quite unreceptive to American aggression. For this reason, and because of the high rate of domestic American litigation burdening our judiciary, the time is ripe to implement change in the American approach to business and the law.

Can a Japanese approach to business and the law work in America? Yes, it can. Bold attempts at trying the Japanese system have already proven successful. One of the greatest success stories of an American company using Japanese-styled business methodologies is the Chrysler Corporation - Mitsubishi Heavy Industries automobile joint venture in 1968.158

Chrysler heavily researched Japanese business systems prior to commencing negotiations. It sent an advance team to Tokyo to study Japanese business culture. It made very early contact with Mitsubishi, simply planting the seed for a relationship. The seed was nurtured by informal visits by the Americans to their Japanese counterparts. The Chrysler team was quite receptive to the Japanese following suit:

An informal atmosphere characterized the negotiation with Chrysler in Japan. This consisted of . . . "qokigen-ukagai" or "dropping in to say hello," also known as "selling one's face." . . . This was a particularly useful tactic when negotiations were at an impasse. After exchanging greetings, the conversation would come around to whatever problems were causing a stalemate at that time . . . .

A particular example of this technique was the solution of a problem caused by the difference in methods used by the Americans and the Japanese to forecast sales. One of the Japanese from the Mitsubishi negotiation teams . . . [went] . . . to the Chrysler office . . . after lunch break to see one of the Chrysler executives he knew best, and the subject of the difference in forecasting came up during the conversation. He then explained the Japanese method of forecasting to the negotiator, who was able to adjust his figures to coincide with the Japanese version.159

157 See supra notes 111-15 and accompanying text.
158 A. KAPOOR, PLANNING FOR INTERNATIONAL BUSINESS NEGOTIATION 93 (1975).
159 Id. at 120.
Chrysler and Mitsubishi both recognized the need for continuous discussions, particularly in matters of technical concern. Realizing the importance of the relationship in Japanese business negotiations, Chrysler emphasized the need to maintain a friendly atmosphere.

The negotiations between the companies were characterized by a friendly and cordial atmosphere. Mitsubishi was especially satisfied with the flexibility displayed by Chrysler in seeking terms: Chrysler's approach had been to propose ideas for discussion and not as rigid statements. Mitsubishi would then comment on the viability of these ideas for the Japanese context and Chrysler would generally accept Mitsubishi's interpretation because of its far greater knowledge of the Japanese business context.180

The transnational negotiations were very successful: In less than one year—July 1968 to May 1969—Mitsubishi and Chrysler had reached agreement. This pace of negotiation and agreement is not typical of joint ventures with Japanese companies, especially for projects of the scale of the Mitsubishi-Chrysler joint venture. Other considerations required a different approach to negotiation. The two companies themselves developed a sharper perception of the project as time passed, resulting in changes.181

180 Id.

The Chrysler team maintained harmonious relationships when it came to major decisions as well as in smaller matters. Chrysler did this by remaining reasonable and flexible. On one very important issue, concerning knockdown production of Chrysler cars in Japan, Chrysler reconsidered its original idea of importing major components, such as engines, from the United States. Rather, Chrysler offered to purchase the parts in Japan.

"One of the reasons for growing confidence in Chrysler by Mitsubishi was the cultivation of personal relations ..." Id. Recognizing, again, the importance of the relationship in business with Japanese, Chrysler actively sought different ways to enhance relations.

One way of doing this is through entertainment, which affords the negotiators the opportunity to get away from the strain of the conference table. One example of the understanding of this factor shown by Chrysler was the fact that during the negotiations the Chrysler representatives gave a party for the Japanese members (including wives) of the negotiating team. This made an extremely good impression on the Japanese involved, and helped to facilitate and lighten the negotiation atmosphere.

Id. at 119.

181 Id. at 121. A few weeks after the announcement of the joint venture agreement, approval from the government of Japan was sought. Approval was ultimately given in 1971.
What is required for success is a recognition that the American way is not the only way, coupled with a commitment to change. Only with change in approach can America maintain a presence of success in the global business environment. The non-confrontational Japanese approach works. It is now imperative for America to learn a lesson from the East and try to “Work It Out.”

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162 Id. at 93-97.

Chrysler’s commitment to change its approach to doing business with the Japanese was pervasive. In almost every phase of the joint venture project, Chrysler’s team remained reasonable and flexible. Id.