

History of Japanese Economic Thought

Lecture No. 6

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5 Contract

5 – 1. Ambiguous Contract

- The mechanism of the Japanese-style adjustment that emphasizes a preliminary coordination requires a revision through another postmortem adjustment so as to assure the resultant equality that is unforeseeable beforehand. Such characteristic best shows up in way of thinking about contract.

Bemusement of Siemens AG

Testimony of **Schmidt Leda**, German consular in Japan in the mid-Meiji Period:

● Chinese always honor exchanged contracts and deal with business with objective judgments, whereas among Japanese the following perception is prevalent to one extent or another: When a contract once concluded becomes a nuisance to a party, he thinks it is unreasonable for the other side to keep insisting on compliance with the contract.

(Toru Takenaka, *Siemens and Japan in Meiji*, Tokai University Press, 1991, P.116)

● "...”That is, regardless of the sentences words in contract, in case state of affairs changes, parties concerned mutually make an admission of the exemption from contracted obligations implicitly, and to do so has even become a norm of commercial integrity.” This constitutes the characteristic of the concept of contract.

Testimony of People of Siemens AG

● “Business here (Japan) is mostly conducted based on personal relationships,” was a fundamental perception unanimously held by Siemens’ personnel engaged in business in Japan. Because “only upon such activities, do inquiries and business bonding, or beneficial personal companionships transpire.” These specifically include visits with customers from time to time to hand out new product information, not missing greetings of *Bon* festival and year-end, and the implementation of gift-giving and entertainment as deemed appropriate. To continue such socialization surely costs no small expenditure, but which played for pay for itself. For, it cost them less after all to set up contacts and maintain personal connections in occasions their services were unnecessary and not pressing. Otherwise, for an instance of subsequent business, to resume a contact that had been lost required a huge amount of commission charges.

- Henneberg (Electric Engineer of Siemens AG)
- “There exists no such thing as what we call ‘vigorous transaction of business’ in Japan. It looks as though everything gets carried on in mellow comfort at an extraordinarily sleepy tempo, and then, way beyond expectation they suddenly make good gains with the work in a flurry.” Or again, Lonholm in capacity of legal counselor on business with Japan leaves an advice: “Here (Japan) unfriendly and blunt behaviors, whatsoever, should be absolutely avoided. In light of a distinctive character of Japanese, it is not wise to bustle out business negotiations or trench to hasty words and deeds.”

(Toru Takenaka, *Siemens and Japan in Meiji*, Tokai University Press, 1991, P.115)

Action on Uncertainty of Result

- An episode pertaining to a contract of Ichibei Furukawa who became a major business partner of Siemens AG:
- In the background that an international syndicate was organized centering around France that attempted a boost in copper price through a cornering, Jardine, Matheson & Co. as this syndicate's agent in Japan concluded a contract with Ichibei Furukawa in Jul. 1888 to make a purchase of all copper of 19,000 tons produced by Koga by the end of 1890.
- The price was fixed at ¥20.75 per 100 *kin* (about 600g/*kin*).
- Coming to a deadlock in raising fund for making a corner in copper, however, the syndicate bankrupted in Mar. 1889 to result in a complete failure. Amid a market position totally different from when the contract was concluded, the issue was a whereabouts of ¥6 million, a huge contract back then.
- Peculiar to this contract are; first, rejecting a principle contracting method which called for a direct dealing with the syndicate, Ichibei Furukawa sought Jardine, Matheson & Co. to be the contracting party, and cleaved through it; and second, on the premise of the business at a fixed price, the contracting parties mutually adhered to it and fully implemented the agreement by the yearend of 1890.

- Ichibei Furukawa's recollection

- “Whether quite certain or uncertain, this agreement was a story no one could make a judgment on. But back then, a person named Reimers, director of 118-ban Kan in Yokohama, went between and eagerly exerted himself for this agreement together with WaHer, director of Jardine, Matheson & Co. But, as I'm telling now, without a good understanding of the nature of a syndicate, I first thought a direct contract with it would be detrimental. And it followed that I would accept a direct contract with Jardine, Matheson & Co, which turned into reality. But in fact I ended up with an indirect contract with the syndicate.”

(Itsukakai in Furukawa Partnership Co. ed., *Old Man's Firsthand Story*, Itsukakai, 1924, p.64)

- Ichibei Furukawa who showed a posture to emphasize trust on the contracting party more than on the contractual text
- As for the execution of the contract, Ichibei demanded for the fulfillment in accordance with the text, while the foreign mercantile establishment requested a reexamination of the contract.
- "Reexamination" was not a monopoly of Japanese people.
- What comes out of this series of process is that it was not ordinary state for Japanese in days when Siemens AG came over to Japan to call on a practical alteration of contract in its execution by enumerating this and that excuses despite the prior contractual text. While the doors were opened to ex-post readjustments, necessary conditions for such adjustments to be actualized were long-term and successive relationships between contacting parties.

Research on Continual Business in U.S.

- Empirical research in America

Achievement of Professor Macaulay who conducted an empirical study regarding business-to-business transactions based on an inquiry survey and an interview survey with 68 businessmen in Wisconsin

- "Businessmen described by Professor Macaulay look exactly like typical those of Japan," says an appraisal.

(J. Mark Ramseyer, *Japanese Law: An Economic Approach*, Kobundo, 1990, p.71)

Result of That Research

- These businessmen totally disregard legal standard when they negotiate on business. The same even after disputes incur. At making a plan with their business partner, once a major direction for business is set, they immediately terminate negotiations right there, and never touch upon details lawyers are sensitive about.
- For selling goods, they use their firms' standardized format for a contract, but having no idea about its text. Without any understanding of or, any interest in, a context of the format, a businessman on one side uses his own firm's format while the other uses his own in many instances.
- But in such kind of cases, as there is not a complete concurrence of indication of intentions between the two parties concerned—necessary for the completion of a contract—it follows that a contract sustainable for an examination in court has not been made. After all, that type of business without contract occupied about 70% of the total transactions.
- Furthermore, since they treat a contractual document too much a nuisance that, even though there is an agreement empowering the court to enforce at the incidence of dispute on business, those researched by Professor Macaulay disregard this agreement.

(J. Mark Ramseyer, *Japanese Law: An Economic Approach*, Kobundo, 1990, pp.69-70)

- Explained businessmen, “Even with a high risk, we want to rely on the ‘man-to-man promise’ written on a short letter, or a handshake, or the other party’s ‘sincerity and kindness.’ It is said that an important thing for them was to have selective eyes capable of identifying trustworthy business partners, in whose faith they put their confidence. The first requirement for establishing a contract was confidence in other side, and a condition for a businessman to be successful was catching how many of such business partners.
- “For a negotiation on contents of transaction, instead of deciding on points of detail in advance, many of businessmen considered that they would deal with it if some problem should incur later on. And, to solve such a problem, they avoided a court as much as possible, and faced with a compromise to be made, they settled it under a condition which had nothing to do with an expected value in the lawsuit.” (J. Mark Ramseyer, *Japanese Law: An Economic Approach*, Kobundo, 1990, p.71)

2. Means of Dispute Resolution

● **Implicit contract**

● “Principle of Good Faith”

● Even nowadays the clause marked down at the foot of estate contract reads: “The seller and the buyer agree to negotiate in good faith and resolve any matters which are not stipulated in this contract according to civil law and its related rules and real estate business practices .”

● Example of *Age Ichi*

● Ronald P. Dore, professor in sociology department, London University: In Japanese business circles, “it is expected to reduce the pursuit of one’s own interests through behavior, fairness and mutual concessions.”

Dissemination of Sale by Credit

Statement in a guidebook about store management in Taisho Period:

●“From ancient days, they conduct the so-called collection twice a year in local regions. There are some regions where it is still practiced even now. With a small capital and not in a position at all to run selling on credit by any possibility, they run two collections a year, the longest term for the charge sale, and one almost wants to ask, Are you a businessman yet? The reason for this is that they deal with meager back-country customers who cannot pay every month even in Taisho age. So they approve the term of people saying, ‘let me pay when I get some income,’ as is. In case of farm families, they pay after rice got tuned to money. So easy and leisurely.”

(Masaki Shimizu, *Fund Management and Reduction in Expenses*, Shotenkaisha, 1922, pp.16-17)

Significance and Posture of Dialogue

Observation of Mikio Sumiya

- “Tone of argument of Japanese side was roughly as the following: We quite understand America’s complaints to Japan. We also well acknowledge economic difficulties the U.S. is faces with. With that, Japan is going to take such and such countermeasures.
- In contrast to this, American side, without showing any interest in what kind of economic problems Japan confronts, single-mindedly kept insisting on problems America was requested to resolve solely based on America’s interest.”

(Mikio Sumiya, *Industrial Policy and Economic Development*, 1998, p.189)

Ruling of “*Sumo Wrestling Referee*” History of Japanese Economic Thought 2004

● Posture of Japanese

- Despite the central player in negotiations, they, just like a third party, listen to both parties' assertions and seek a concession from two sides.
- That is not necessarily a posture that one-sidedly insists on own interests in an attempt to extract concessions from other party, and evaluates results of negotiations based on the degree of concessions achieved.
- It quite resembles a procedure in a bid-rigging, in which, even though it's a discussion within the group, an umpire with a role of “*sumo wrestling referee*” probes into a point for mutual agreement.
- In spite of negotiations, Japanese try to handle both positions of a privy and umpire.
- Japanese-style posture in negotiations is effective if an “implicit contract” is in place, and an expectation is shared in “reducing the pursuit of one's own interests through behavior, fairness and mutual concessions.”
- The variance between Japan and the U.S. lies in the premise of discussion that is different.

Market Price of Dispute Resolution

Condition for discussion for adjustment to be effective:

- In case there is a possibility for ruling by the court, that may provide a foundation to solving conflicts between the parties involved.
- Statutes ordained after the World War I, such as the labor disputes conciliation act, the tenancy conciliation act, and the land and house lease law, were the foundations that fulfilled certain roles in resolving social problems.

- Legal scholar Takeyoshi Kawashima poses a question: In Japan, “Why is a utilization ratio of judicial trail low?”
- “Legal system in Western modern format and its various institutions are in every corner built into a structure, based on the above-mentioned idea, centering around rights regarding social relationships and disputes among people; Lacking this concept, Japanese cannot relate themselves to it. Amid vertical relationships in dominance/sanctuary and dutiful respect as well as horizontal communal/integrated relationships in a group one directly belongs to, it is normal for Japanese to keep down on making assertions about own interests without reservation, imply in subtle ways at best, and plead with expectation for a favorable measure from the other side.”

(Takeyoshi Kawashima, *Japanese Consciousness of Law*, Iwanami Shinsho, 1967, p.139)

- Ramseyer's research

- Victim of traffic accidents (heirs of the dead in accidents) almost always seek out own legal right, and resolve the disputes outside of judicial trials within the scope of money amounts the court would approved in actual lawsuits.

(J. Mark Ramseyer, *Japanese Law: An Economic Approach*, Kobundo, 1990, p.45)

That is, from these studies and observations:

- It is assumed that there is a condition where a “market price of dispute resolution” is socially shared.

Arbitration/Conclusion by Discussion

- A peculiar idea regarding sequence, procedure to arrive at a conclusion to be called a “middle ground”
- In the wake of presentation of a realistic solution, it’s a question of a practical context that, whether a conclusion which lacks fairness—as in twisting a privy’s arms into a “reluctant concession”—is forced by members who do not make an assertion on own interests and merely “bend their knees”, because of the vertical dominance-relationship or communal restriction.
- In actual cases reconciled under various conciliation acts ordained after WW I, it was often spotted that local persons of influence who were in high standing in regions where disputes incurred, such as heads of the police stations or school principals, fulfilled the role of mediation, presented settlement proposals for resolution, and set out courses for discussion.
- As the mainstay for these sumo-wrestling referees handling settlements and judgments, “market price of dispute resolution” serves the purpose.

Conclusion of “Unanimous Agreement”

● Research by Kazuhiko Hirayama

(Kazuhiko Hirayama, *Logic of Tradition and Custom*, Yoshikawa Kobunkan, 1992)

- To examine “what kind of resolution methods were employed at the congregations of villagers, so-called villagers’ get-togethers, in Japanese village societies,” the research classifies data collected in the folklore studies, and discovers the two types of methods; a unanimous-vote system being “primitive” or, “village-community type,” and a “loose type” of majority vote.
- As to the former, there were few examples of the unanimous-vote order that bills were not passed even with one objectionable voice; it was a system that “made a pretence of a unanimous vote even though all members’ intentions were not accordant, in order not to leave an unpleasant feeling at a future date.” (same source as in the above, p.189)

- Example of Ina in Tsushima introduced by Tsuneichi Miyamoto:
- When an agreement is required in the village, they carry out discussions for days until all come to fully understand the issue.
- At the start, everyone assembles and listens to the ward head, and people separated by region discuss within each group, and take in each conclusion to the ward head.
- If they do not come to terms, they go back to the individual group discussion.
- Persons having an errand to do go back home sometimes. But the ward head/designee must stay there as villagers' listener and mediator. At any rate, the talks are going on for two days. There are no nights and days for those people. They say that, last night again, the discussion continued nearly till the dawn, but if some feel sleepy and have nothing to say any further, they are free to go home.

“Boxing in Lord” and Assertiveness

- Collegial system found in Japanese traditional society
(*Consciousness of Samurai*, study by Kazuhiko Kasaya, researcher of Japanese modern history, 1993)
- Research on incidents where “*Karo* [chief retainer] boxed in his lord and handled the affairs of state” that are considered to deviate from the order of the feudal status society.
- A traditional formula of “decision by discussion” seen in Japanese society—different from the principle of majority rule constituting rationale for democracy—“signifies that the assertiveness, which is inevitably possessed by the members in proportion to each individual’s power and ascendancy (quota-oriented influence), functions.”

- “Boxing in a lord” is “based on a premise of a popular belief that such is a rascally conspiracy conducted by a vicious *Karo*.”
- Nonetheless, according to Kasaya, this “was regarded to be a legitimate deed in the society of those days,” and “existed as a prevalent customary practice. Further, it is considered that such was understood **not as an abusive rebeldom, but as a legitimate behavior**, and even as a rightful action which belonged to authorities of the echelon of *Karo*/key vassals.”
- In a *Daimyo* family, “inasmuch as a position appointment was ... comprised on a basis of the status-hierarchy order, its position edifice suffered a strongly stereotyped class system and each position was seized among a certain status-class families, thus, these positions presented an appearance looking just like their homestead. As appointments and dismissals of positions were operated upon this status order, it was difficult even for the lord to run it freely and arbitrarily based on his own intention.”

- “A functional significance which the class-system structure possesses in this position system and bureaucracy is that distribution/repartition of power and a state of political decision-making in the given *Daimyo* family is prescribed in the above-mentioned status-hierarchy order.
- Which is to mean that political power, right to speak, initiatives and so on are proportionately distributed in proportion to the status order of the echelon of *Karo*/key vassals and other subordinates, and that such continues to be reproduced on a permanent basis.
- That indicates the following two points:
 - First, the greatest initiative is no one but the *Daimyo* lord himself at the top of this status-hierarchy ranking;
 - Second, however, a decision is not made by the lord alone, and is implemented in the distribution of initiatives in proportion to the aforementioned status order.
 - It can be said that the lord sort of possesses the largest quota of decision-making power, but he does not monopolize it and has to take others' quota into his consideration.
 - And if a summation of others' quota exceeds his own, albeit the lord's intention, it cannot help but be taken back.”

- The first principle is to let the family continue to exist.
- “In a political framework of a *Daimyo* family, the lord’s power is fundamentally subjected to restraint by a collective power of the echelon of *Karo*/key vassals; while everything deceptively appears to be decided by the lord’s will, it was actually the lord’s will as what was uninterruptedly controlled toward a direction that conformed to a disposition of the echelon of *Karo*/key vassals .”
- In order for participants in consensual decision-makings to play around with ideas toward an objective to maintain the whole organization named the family, and to be called for judgments, it is demanded as their fundamental posture that they cooperate on solving problems under the common objective.
- Discussion is not a place for asserting individual interests, but is one for searching solutions putting heads together for a shared purpose.
- If a third-party-style attitude is seen in Japanese at negotiation, could it be that a basic significance—put in a place for discussion referred to as negotiation—is taken as a “place to put heads together”?

Bid-Rigging and Competition

- Discussions having a role of the *sumo*-wrestling referee in organizations came to be generally observed.
- Without a clear-cut rule on judgment, a facilitator of bid-rigging organization called a “service monger” was supposed to take the leadership of a way to put an end to such discussions. Procedure to make a settlement through discussions there take over characteristics of ways to settle by talks in various meanings.
- In bid-riggings before the war, there was a practice of a sort of trading of rights referred to as the “payment of bid-rigging money”, and such custom was insured by those called “bid-rigging mongers” who sometimes exercised private police authority, i.e. not by an agreement in the industry but by an interposition form outside.

- Such schemes disappeared one after another in early Showa Period due partly to legal restrictions, and after the World War II they changed to mechanisms different from ones in the pre-war days under the antimonopoly law.
- In case examples after the war, a standard that an arbitrator of the discussion employed in an ordinary course was sales activities considered as “marketing efforts” that were conducted prior to the bidding.
- The problem lay in a “competition” positioned as “marketing efforts”, different from a “competitive bid on bid-rigging money”, in which there was a possibility that a winning bidder was not clearly chosen.
- Required for that matter was a facilitator named a “service monger” as a referee, and such a role was borne by persons of vice-president status of leading general contractors in nationwide bid-rigging organizations, and, in case of local organizations, by firms or responsible persons of branches/sales offices suitable for a job to mediate a given region.

● Chuji Maeda, vice president of Kajima Co., reportedly said to people in the company when he assumed the role of a referee, “Consider that we won’t get any job of engineering works at least for a year.” (same source as in the above, p.78) For his role to be accepted as a fair referee in making judgments, it was necessary for him to gain an acknowledgement of all participants in the bid-rigging organization that he was not acting on behalf of the company of his origin. For that purpose, he had to demonstrate the referee’s fairness even at a small disbenefit to his home company surpassing “fairness”. Otherwise people in the referee position could not be approved by other members, nor be admitted to a voice appropriate to the referee status, only to result in nonfunctional bid-riggings incapable of facilitating adjustments.

Summary

- Ambiguity of a concept of contract
- Changeover of a contractual text vis-à-vis the preexisting contract in keeping with eventuality = Smallness of restriction of an initial contract
- Rules of dispute resolution constituting that foundation, and sharing of a viewpoint on market price of dispute resolution
- Difference in significance of discussion, i.e., whether it is a place for ingenerating “wisdom” to find out measures for resolution, or one for insisting on individual interests.
- Consensus building that requires a referee role, whose fairness serves as the backbone of validity of solution strategy for discussions.