Yakult — Inside Look at Philippines License Negotiation

BY LLEWELLYN L. LLANILLO*

It takes more than a good license agreement for good relationship

Every morning, the stirring strains of Yakult Philippines' hymn waft across the factory grounds at the foothills of scenic Mt. Makiling, 50 kilometers south of Manila. Every working day begins with an iteration of the company creed "to form a happy family and a healthy society within the country and in the world, ... to explain the scientific value of Yakult to more people in the shortest time possible, and to deliver Yakult to more customers everyday."

The evocative sight of rank-and-file and management, Filipinos and Japanese expatriates alike, pledging to serve in harmonious cooperation betrays none of the turbulence that had wracked the company during its early years. In its 10-year history, Yakult Philippines survived two crippling strikes, less than the normal number of strikes that blighted Filipino firms but more than that experienced by other Japanese firms during the same period.[1] In 1981, financial collapse was averted by a timely infusion of capital, a drastic cutback on expenses, particularly salaries of Japanese expatriates, and a management reorganization reached after intense and lengthy negotiations in Tokyo and Manila.

For now, Yakult Philippines' plant is alive and well, producing some 250,000 bottles of "Yakult" cultured milk a day (projected to double in five years). Its administrative and factory personnel number 150 and its sales force now includes 400 independent dealers called "Yakult Ladies" (planned to increase to 720 in the next five years). The company turned a modest profit in 1987, and if the upward trend of the Philippine economy continues, 1988 should be a banner year.

FORMATION OF YAKULT PHILIPPINES, INC.

As Philippine counsel to Yakult Honsha Co., Ltd. of Japan ("Yakult Honsha"), I have helped set up Yakult Philippines as a joint-venture corporation between Japanese and Filipino partners." For 10 years, I have witnessed its growth and helped the partners overcome legal and oftentimes nonlegal problems.

Yakult Philippines was organized as a corporation in 1977, with Yakult Honsha owning 40% of its equity and the Filipino shareholders 60%. The relationship between the partners is documented in a joint-venture agreement, which sets out with specificity the shareholders' voting powers, areas of responsibility, capital contribution, and management positions. Pursuant to a trademark, patent and technical assistance agreement ("License Agreement"), which has been renewed twice, Yakult Honsha provides Yakult Philippines technology and technical assistance to produce "Yakult" cultured milk for sale under Yakult Honsha's trademarks. Under Philippine law, no company with any alien equity may legally engage in retail trade.[2] The product is, therefore, marketed by Yakult Philippines only on wholesale basis to supermarkets and to independent dealers. A separate marketing company owned wholly by the Filipino shareholders was organized to cover gaps in the retail market.

LICENSING TO A JOINT VENTURE

Why did Yakult Honsha choose to license its "Yakult" technology to a joint venture? Why not just a license without an equity investment? The reasons are many and varied. I shall discuss three of them here.

First, licensing to a joint venture presents mutual benefits to the parties that are not possible in a purely licensing relationship. By taking equity in the licensee, the licensor assumes a greater financial risk, but precisely because of the greater exposure, the licensor becomes even more committed to the success of the enterprise. In Yakult Philippines' case, the joint-venture agreement provides that in the event the business needs of the company so requires and the parties mutually agree in writing that financing shall be made available to the company, the parties shall exert their best efforts to assist it in obtaining loans or other financing at the most favorable terms. The agreement further provides that borrowings of the company, if necessary, shall be guaranteed by the parties in proportion to their respective shareholdings. Thus, when Yakult Philippines suffered financial reverses in 1981, the parties, through negotiation, saved it by infusing more equity and guaranteeing domestic loans for operating capital. With that kind of support, Yakult Philippines successfully weathered the crisis and was thus able to continue its licensed activity.

Yakult Honsha's corporate policy calls for insuring that all "Yakult" milk produced anywhere in the world is of the same high quality as that produced in Japan. By licensing only to joint ventures, it could exercise supervision and control

*Senior partner, Sycip, Salazar, Hernandez & Gatmaitan, Manila, Philippines; President of LES Philippines.

over production in a way that is not possible where it is merely a licensor to a nonrelated company. By owning equity in the licensee, it is entitled to assign representatives and technicians to the licensee not solely in its capacity as licensor but as a part owner. After the license expires, it can maintain its assigned personnel and continue the same close supervision and control.

Second, in a licensing-equity arrangement, the dividends on the licensor's equity investment compensates for what might otherwise be unacceptably low royalty income. It is possible to structure the company's equity to allow the licensor to accept cumulative preferred shares that earn a fixed-dividend rate. Since the dividends on the preferred shares are cumulative, losses in deficit years are recoverable by the licensor in surplus years. The preferred shares may also be made participating to entitle the licensor to a further share in the earnings over and above the stipulated dividends on the preferred shares. The terms of participation may be varied to suit the requirements of the parties and government regulations.[3] In another licensing transaction in which I was involved, the royalty rate was only 2% on net sales. As a preferred shareholder, however, the licensor was entitled to preferred cumulative dividends of 10%.

Third, by virtue of government regulations, the royalties are limited not only as to amount but also as to time i.e. the royalty accrual period is coterminous with the life of the license agreement. A joint venture affords the licensor an avenue to benefit financially (in the form of dividends) from the transferred technology, even after the licensing relationship has expired.

CULTURE AND LICENSING

Turning to an important dimension of the licensing relationship, it is a truism that the success of any licensing arrangement, particularly where it is run through a joint venture, depends upon the right choice of licensee. Such choice cannot be appropriately made without an understanding of the licensee's culture and ways of doing business. Permit me therefore to dwell briefly on the Filipino culture.

Filipino Culture

Filipinos are a mixture of races although, basically, they are of Malay origin. Strong influences of Chinese, Hindu and Islamic culture were introduced when merchants from various Asian countries began trading with the Philippines. Three centuries of Spanish colonization followed by nearly half a century of American rule have left an indelible Western stamp on the Filipino culture.[4] There is in the Filipino character a blending of East and West, so that Filipinos manifest curious cultural features which foreigners are apt to misunderstand. Native sangfroid and Latin emotion make for occasional unpredictability. For this reason, the Filipinos have been called "occidental orientals,"[5] exhibiting both the conservatism of the East and the liberalism of the West.

One aspect of Philippine culture that easily catches a Western observer's attention is the role of the family in the life of the individual. The greatest loyalty in Philippine society is to the family. Filipinos possess a strong sense of family loyalty which reaches beyond the nuclear family of parents and children. Family obligations extend not only to remote relatives and to in-laws, but, by a Christian twist, also to godfathers and godmothers who are made part of the family by such ceremonies as sponsorship at a marriage or baptism. In the extended family, the Filipino is related equally to his father's relatives as to his mother's relatives. This bilateral extended kinship system means ideally that each Filipino has many people to whom he can look for help and support and he will have demands from many for whatever help or influence he has available. Accordingly, employment and advancement in business are dependent upon family loyalties to an extent unknown in the West. Unlike in the West, security is sought by Filipinos not by independence so much as by interdependence.

Family firms make up almost the totality of small enterprises in the Philippines. Yakult Honsha's partner and licensee is one such family firm.

Personal Relationships

Among Filipinos, personal relationships are of supreme importance. It is always desirable, if not indispensable, that personal relationships be cultivated with the key officers of a Philippine licensee. A personal bond between individuals in the licensor's and the licensee's organizations ensures the smooth and harmonious implementation of the license agreement over its term and, in critical situations involving differences of viewpoints, could prevent minor misunderstandings from deteriorating into major controversies. Contracts become a personal commitment between individuals rather than mere impersonal legal obligations between juridical entities.

Debt of Gratitude

Utang na loob or debt of gratitude is an aspect of the Filipino brand of personal relationship. Simply expressed, it refers to the obligation that one owes to a friend or person who has helped him.[6] It is a deeply-rooted trait that cements Filipino ties. It engenders a fierce sense of loyalty to the person to whom one is indebted, oftentimes in the extreme.[7] Earning and cultivating a debt of gratitude in a Filipino licensee solidify the licensor-licensee relationship.

Social Acceptance, Economic Security and Social Mobility as Paramount Values

Filipino behavior is influenced in large measure by three basic considerations: social acceptance, economic security and social mobility.[8] A strong sense of shame *(hiya)* can easily be aroused in Filipinos by social rejection and criticism. Filipinos are likely to seek smooth interpersonal relations by the use of linguistic euphemisms, deliberate ambiguity and an inclination not to disagree. This probably explains their general aversion to litigation and predilection to settle civil disputes so long as self-esteem and good name are not at stake, rather than litigate to final conclusion. To avoid embarrassment, Filipinos are apt to be flexible in the application of rigid rules.

Social mobility and economic security are sought to be achieved by Filipinos primarily through education which is given great importance in the country. Educationally, the Philippines is among the most advanced of Asian countries having a literacy rate of approximately 70%.

Negotiating with Filipinos

The Filipino's stress on smooth interpersonal relationship and harmony shapes his negotiating style. Proposals are made in a roundabout fashion, by suggestion and not infrequently by indirection. A direct and blunt approach is avoided, particularly where the possibility of rejection is present.

Abhorrence of confrontation is manifested by frequent nodding of the head in the middle of conversation, his tendency to interject light talk and banter during serious negotiation, and his predisposition to smile not just when he is happy but when he feels embarrassed or shy.[9] In this regard, the Filipinos and the Japanese appear to share a similar trait, although perhaps for disparate reasons. Thus, it is often stated that the Japanese would take every care to avoid open confrontation, to the point where a flatly negative form is rarely employed in conversation.[10] An American businessman will not hesitate to ask how much you can afford, but such a question would be considered an insult by a Filipino.[11]

◄ Sub-Culture ►

If there is a Filipino culture with its set of values, traditions and customs, there are within that culture sub-cultures based on ethnic origins. A foreign licensor who intends to appoint a Philippine licensee would do well to determine his prospective licensee's ethnic background. Yakult Honsha's joint-venture partner belongs to a Filipino social sub-group called the "overseas"[12] Chinese.

Overseas Chinese in the Philippines have shown remarkable resilience and adaptability. As Filipinos, they have imbibed the cultural traits that have been distilled through centuries of interaction with native and Western influences, without losing their Confucian values. Group focus and submission to authority form the foundation of approved behavior patterns and attitudes, among the most significant of which are:

—Submission to authority (parents, elders and superiors) rather than a concern for one's rights.

—Primacy of group harmony (smooth interpersonal relationships) rather than individual preferences and even objective reality (e.g. hesitancy to contradict a superior's statement even if it is patently false).

—Esteem for the force of example over the validity of ideas.

—Primacy of broad moral values (i.e. respect for authority) over specialized competence.

—Strict observance of social rules among different members of society;

- Between parent and child — respect and gratitude.
- Between brother and brother — respect and harmony.
- Between husband and wife — wifely virtue and husbandly concern.
- Within the clan — mutual support and cordiality.[13]

One of the most significant attributes of such cultural values is the Chinese preoccupation with "face". (The distinction between face (Chinese) and self-esteem (Western) is that self-esteem is the individual's view of himself, whereas face is the individual's assessment of how others close to him see him).[14] Such cultural values have implications for successful licensing relationships.

Under the Chinese social system, any misdeed by an individual means "loss of faith" by the community in that person's family and clan. The family and clan can therefore by expected to exert the necessary social pressure on the individual not to betray the trust reposed on him by members of the same family and clan.

Thus, credit within the Chinese business community is a matter of personal references and guarantees. This reliance on personal trust is reflected in the Filipino-Chinese businessman's indifference to, if not disregard of, formal contract documentation. Personal relationships are given more immediate importance than contractual clarity, certainty and efficiency in business dealings.[15]

In view of the perceived remarkable economic performance of the overseas Chinese in the Philippines, Victor Simpao Limlingan's theory of the Chinese managerial system in the Philippines should be of interest to prospective licensors of Filipino-Chinese licensees. According to Limlingan, the Chinese managerial system possesses a duality of structure. It is both entrepreneural and administrative, characteristics attributable to the Chinese businessmen's belief that entrepreneurship is a family or stockholder function, while administration can be a professional management function. The structure of the Chinese managerial system consists of the following:[15]

—an entrepreneural group consisting of the family.

—a professional management group consisting primarily of professional managers.

—a custodial group which performs the control function for the entrepreneural group over the professional management group and which consists primarily of family members and trusted retainers.

Figure 1 shows the typical structure of a large-scale Chinese business group.

If managerial systems are classified into Western and Eastern, the Filipino-Chinese falls under the latter. In comparison to the Western system, which is individual-oriented and based on impersonal relationship in the workplace, the Filipino-Chinese system is an Eastern system, which is group-oriented and based on interpersonal relationship in the workplace.

Compared to the other Eastern managerial systems, the Filipino-Chinese managerial system relies on the family to perform the entrepreneural function and on professional managers to perform the administrative functions. The Japanese system relies on professional managers for both entrepreneurship and administration, while the Korean managerial system is in transition from the family corporation (business group type), to the public corporation (Japanese group type).[17]

The Filipino-Chinese managerial system may be placed in relation to other managerial systems as depicted in Figure 2.

SOME STATISTICS ON JAPANESE TECHNOLOGY LICENSED TO THE PHILIPPINES

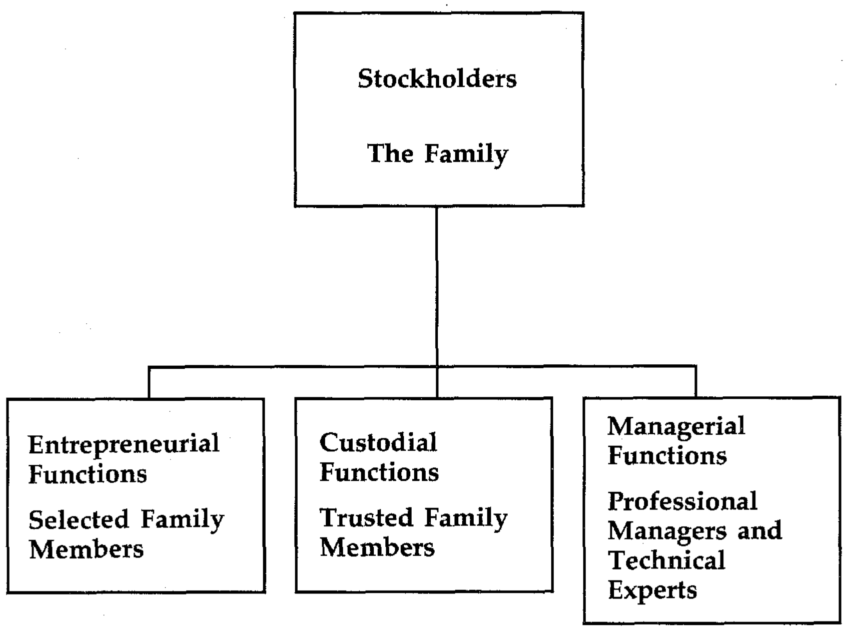
Statistics of the Bureau of Patents, Trademarks and Technology Transfer ("BPTTT") show that Yakult Honsha comes from a country that is second only to the United States in terms of products licensed for manufacture in the Philippines. Australia comes in sixth. The 10 countries with the largest number of products licensed under technology transfer agreements as of April 7, 1988 are listed in Figure 3.

The ranking holds true in terms of number of registered license agreements. The first 10 countries are listed in Figure 4.

The technology transfer agreements entered into with Japanese companies mostly pertain to electrical supplies, appliances and accessories, and car parts and transport equipment. Under the beverage classification, "Yakult" milk stands out as the sole technology licensed by a Japanese company to the Philippines.

So, what is "Yakult"? It is a health drink developed in Japan based on the research and discovery of Dr. Minoru Shirota in whose name the lacto-bacillus strain, which constitutes the active agent of the drink, is named. The activity of harmful bacteria in the human intestines is linked to infectious intestinal diseases, food poisoning and present-day adult diseases, including hypertension and cancer. "Yakult" milk is recommended daily not as an antibiotic but as a prophylactic, employing a beneficial type of bacteria that suppresses pathogenic bacteria.

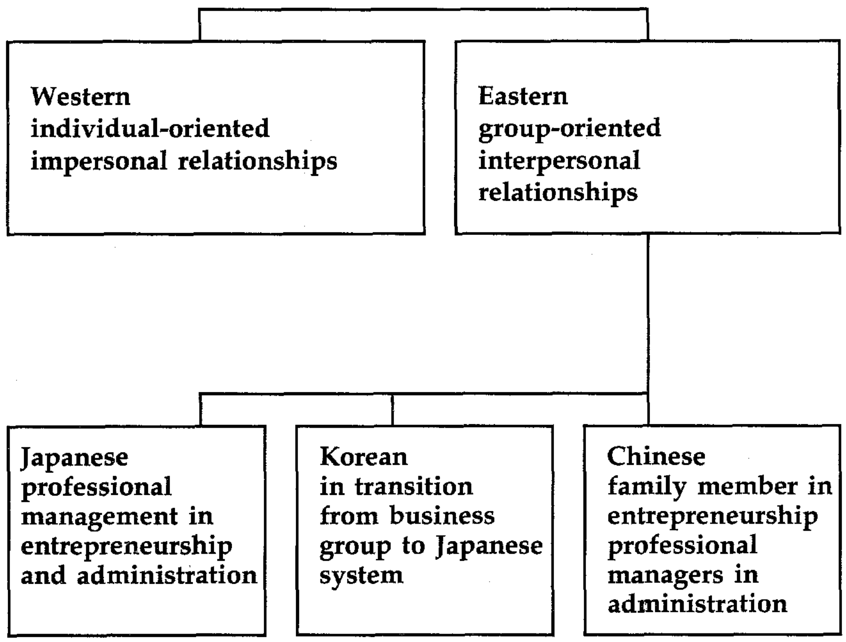
ORGANIZATIONAL STRUCTURE OF THE CHINESE MANAGERIAL SYSTEM



Source: V.S. Limlingan, The Overseas Chinese in ASEAN: Business Strategies and Management Practices.

Figure 1

A TYPOLOGY OF MANAGERIAL SYSTEMS



Source: V.S. Limlingan, The Overseas Chinese in ASEAN: Business Strategies and Management Practices.

Figure 2

EVALUATION BY THE BUREAU OF PATENTS, TRADEMARKS AND TECHNOLOGY TRANSFER

When Yakult Honsha expanded to the Philippines, it had to follow government regulations, like any foreign licensor. As early as 1973, the Philippine government had in place a regulatory structure (eventually to evolve into the Technology Transfer Registry of the BPTTT), whereby license agreements were subjected to evaluation, approval and registration based on certain stipulated criteria.[18] The initial draft of the 1978 License Agreement between Yakult Honsha and Yakult Philippines contained numerous provisions that were considered by the evaluating governmental authorities to be contrary to public policy. These resulted in substantial delay in the processing of the application. Of course, at that time, there was no explicit specification as to what was contrary to public policy. The guidelines for evaluation have not been published and, consequently, considerable time was spent in discussing with the officials and preclearing specific provisions of the agreement.

In 1978, the Technology Transfer Board ("TTB") was created.[19] The criteria for evaluation under its rules were fairly specific. Specified restrictive business clauses were expressly prohibited. The TTB has since become the Technology Transfer Registry ("TTR") of the BPTTT,[20] but the TTB rules continue to be applied at the present time.[21]

It is, therefore, now possible to construct a license agreement in conformity with the rules and anticipate with reasonable certainty that it will meet with the approval of the authorities. Submitting a license agreement congruent with BPTTT rules and guidelines ensures expeditious processing and approval and generates a reservoir of goodwill to the licensor and the licensee from the perspective of the governmental authorities. Better than a license agreement with prohibited contractual clauses, which the government authorities are likely to strike down, an agreement that need not be further amended avoids delay, bitterness and friction.

To reinforce the BPTTT's coercive powers, the Central Bank of the Philippines will not allow remittance abroad of royalties or other technical assistance fees unless the relevant technology transfer arrangement is first approved and registered by the BPTTT.[22] The Central Bank definition of "technology transfer arrangements" tracks that of the BPTTT rules and covers "all agreements/contracts entered into directly or indirectly with foreign companies and/or foreign-owned companies covering the following matters:

"a. The licensing of the use of patents for inventions, improvements, industrial models and drawings;

"b. The licensing of the use or exploitation of trademarks;

"c. The furnishing of technical data, know-how and information by means of a description of processes, formulas, specifications and

TOP 10 COUNTRIES BASED ON NUMBER OF PRODUCTS LICENSED TO THE PHILIPPINES AS OF APRIL 7, 1988

Country	No.	%
United States	389	46.9806
Japan	138	16.6666
United Kingdom	59	7.1256
Switzerland	58	7.0048
Federal Republic of German	41	4.9516
Australia	20	2.4154
Hong Kong	19	2.2946
France	17	2.0531
Netherlands	15	1.8115
Canada	8	0.9661
Others	64	7.7301
Total	828	100.0000

Source: Bureau of Patents, Trademarks and Technology Transfer

Figure 3

TOP 10 COUNTRIES BASED ON NUMBER OF LICENSE AGREEMENTS WITH PHILIPPINE LICENSES AS OF APRIL 7, 1988

Country	No.	%
United States	378	46.6
Japan	139	17.1
United Kingdom	57	7.0
Switzerland	55	6.8
Federal Republic of German	41	5.0
Australia	20	2.5
Hong Kong	18	2.2
France	17	2.1
Netherlands	15	1.8
Canada	8	1.0
Others	64	7.9
Total	812	100.0

Source: Bureau of Patents, Trademarks and Technology Transfer

Figure 4

other means applicable to productive activities on a continuing basis; and

"d. The furnishing of management and technical consultancy services relating to the operation of industrial enterprises on a continuing basis."[23]

Included in the foregoing agreement are "local distributorship/export marketing agreements that involve the licensing of foreign trademarks, the retainership of foreign firms or individual technicians for the rendering of management and/or technical consultancy services as part of the technology transfer or licensing agreements."[24]

SELECTED PROBLEM CLAUSES IN LICENSE AGREEMENTS

In the context of the evaluation criteria formulated by the Philippine Government, it is instructive to examine certain restrictions which have been considered typically problematical by licensors. How these were dealt with in the Yakult Honsha experience may be enlightening.

Term and Renewal

The Yakult License Agreement is now on its 10th year. It had an original term of five years and it has already been extended twice, the first in 1983 and the second only this year. The BPTTT rules limit the term of a license agreement to not more than five years and prohibits automatic renewal clauses. A longer term or even automatic renewals may, however, be allowed if the agreement is royalty-free.

First or second renewals of license agreements are readily granted. According to a TTR official, the inescapable reality is that licensing arrangements between foreign licensors and Philippine licensees tend to continue indefinitely by renewals although each renewal is limited to five years. He observed that Philippine licensees depend almost totally upon their licensors for assistance in the manufacture of the licensed products, even though their license agreements are on their second or third renewal. He blamed this on the licensor's failure to transfer, and the licensee's inability to absorb, the licensed technology.

To comply with Philippines regulations, Yakult Honsha and its licensee eventually agreed to an initial term of five years, renewable by the parties for successive terms of five years each, "subject in each instance of renewal to validation or approval by the appropriate governmental authorities of the Philippines and of Japan." Based on such factors as the Philippine financial crisis, labor strikes, high turnover of factory workers and technical personnel as reasons for the failure to complete transfer of the licensed technology, and the complexity of the technology involved (i.e. bacteria culture and control), the planned expansion of production capacity, and substantial contribution to employment generation as justification for continuing the license, the BPTTT approved a second five-year renewal of the License Agreement.[25]

In another licensing transaction in which I was involved, the licensor wanted only a two-year license agreement because it was not prepared to commit itself to a long-term relationship. It wanted to be able to disengage should it later find the licensee's performance unsatisfactory. As it turned out, however, the Philippine licensee performed exceedingly well, but the parties now had to face the problem of obtaining governmental approval for the renewal of the license agreement. The renewal was eventually granted, but to avoid a repetition of the dilemma, the parties agreed to a renewal term of five years subject to termination by either party after the lapse of two years upon six months' prior notice. This obviated the need to renew the license agreement after two years if the licensee continued to perform well but gave the parties flexibility to disassociate after two years, if necessary.

Royalty Base

The royalty clause is another sensitive issue. Licensors find particularly problematical the government requirement that royalties be computed as a percentage of net sales which the BPTTT rules define as "invoice value" based on "actual sales minus: (1) trade, quantity or cash discounts and broker's or agent's commissions, if any; (2) return credits and allowances; (3) tax, excise or other government charges; and (4) freight, insurance and packaging cost." In Yakult Honsha's case, the problem centered specifically on the deductibility of "packaging cost." "Yakult" milk is sold in a uniquely designed polystyrene bottle, the cost of which forms a significant part of the product's price. The deduction of the bottle's cost substantially reduces the royalty base. The government initially insisted on the application of the definition. After negotiations with the government officials, they were persuaded to agree that the bottle should be considered as part of the product, since it was manufactured in-house utilizing Yakult Honsha's technical information and the unique and distinctive design functioned as a valuable trademark. The rule then is where the container of a licensed product itself embodies proprietary technology, production and sale of the container may be licensed.

Export Restrictions

The Yakult License Agreement contains no prohibition on export of the licensed product. In fact, it expressly provides that "for purposes of exporting the Products, the term Territory shall be understood as not being limited to the ... Philippines."

The "export" clause was, however, a serious problem to the licensor in another licensing transaction. After negotiation with the officials, the issue was resolved by a stipulation in the agreement restricting exports to countries where such exports would infringe the licensor's industrial property rights or where the licensor has already granted exclusive licenses to use the technology.

To encourage exports, the BPTTT may grant an export bonus royalty of 2% of net foreign exchange earnings on top of the regular royalty. To compel exports, it may also approve license agreements on condition that royalties be remitted abroad only from the licensee's net foreign exchange earnings, defined to mean the FOB value of the exported licensed products less the landed cost of imported materials and components used in connection with the manufacture of such products. This requirement is normally imposed only in respect of purely trademark licenses or technology licenses in mature or "sunset" industries (e.g. cigarettes and other tobacco products and alcoholic beverages like beer).

Arbitration

With respect to arbitration, Yakult Honsha and its licensee had agreed to arbitrate under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. They could not, however, decide on the place of arbitration. As a compromise, it was finally agreed that if arbitration is initiated by the Philippine licensee, the venue would be Tokyo, and if arbitration is commenced by Yakult Honsha, the venue would be Manila.

The issue of venue may, however, soon become academic. Proposed new BPTTT rules would require that arbitration be held in the Philippines.

Technical Services

When a license agreement contemplates the performance of technical services or other business activities in the Philippines by personnel of the foreign licensor, the question arises as to whether the performance of those activities would result in the foreign licensor being held doing business in the Philippines. If it does, the licensor must obtain the requisite license to do business in the Philippines. Otherwise, certain adverse legal consequences follow: (i) it may be precluded from maintaining or intervening, by itself or by assignee, in any suit or proceeding in any court or administrative agency of the Philippines;[26] (ii) its transactions may be declared by the courts to be null and void[27] or at least unenforceable;[28] (iii) it would be held subject to service of process or to the jurisdiction of Philippine courts;[29] and (iv) its officers, directors or agents transacting business for such corporation in the Philippines may be subject to penal sanctions.[30]

On the other hand, if the proposed activities of the foreign corporation do not constitute "doing business," it need not go through the various formalities entailed in securing a license to do business locally.[31]

The sweeping language of the Board of Investment's Rules and Regulations Implementing the Omnibus Investments Code ("BOI Rules") poses to the foreign licensor a real risk of a finding of "doing business." That term is broadly defined by the BOI Rules to include "any ... act or acts which imply a continuity of commercial dealings or arrangements and contemplate to that extent the performance of acts or works or the exercise of some of the functions normally incident to, or in the progressive prosecution of, commercial gain for the purpose and object of the business organization."[32] Since a license agreement may run for a period of five years during which technicians and officers of the foreign licensor periodically perform technical or show-how services to the licensee in the Philippines, it may be argued that there is sufficient continuity or permanency in the activities being undertaken to constitute the foreign licensor as a person doing business in the Philippines.

In the case of the Yakult License Agreement, the issue was avoided by placing the Japanese technicians on the licensee's payroll. Their tours of duty were from two to five years. Legally, they became employees of the Philippine licensee.

CONCLUSION

The Yakult licensing experience yields important lessons. It validates well-known truths.

1. It demonstrates that it is not enough that the parties have a good license agreement. The licensor's support is necessary throughout the life of the agreement and that support might readily be forthcoming if the licensor has an equity stake in the licensee. Of further significance to the licensor, a low royalty rate may be more than amply compensated by the dividends received from a successful joint venture.

2. Licensing is culture-bound. A successful transnational technology transfer must take into consideration cultural characteristics, customs and traditions as well as indigenous management systems and decision-making processes. The Japanese *ringi seido* (more-or-less meaning "written proposal system") and *nemawashi* (literally "make sure the roots grow") systems, which reflect a bottom-to-top management decision process, may tend to cause misunderstandings, where the other partner is steeped in the patriarchal autocratic Chinese management system. Prolonged inaction could be mistakenly construed by the other party as a negative response. On the other hand, much could be learned from each other's cultures. Certainly, the Japanese traits of discipline and loyalty to the company, teamwork and emphasis on quality control and training and development of skills are worthy of emulation.

3. Negotiation and compromise should overcome most licensing problems between licensors and licensees and between them and the host country. Alternatives have been found that meet the expectations of the parties to the licensing transaction as well as satisfy the stringent requirements of a developing, debt-strapped and foreign exchange-starved country, even concerning such sensitive areas as the maximum term and renewal of the license, royalty payments and export of licensed products. Just a word of advice: Since the BPTTT rules are admittedly designed to improve the bargaining leverage of the licensee, it would not be prudent to leave the preparation and processing of the BPTTT application to the licensee alone. The licensee may, quite understandably, not be particularly inclined to take a position adverse to that of the government where an alleged restrictive business clause is involved. The licensor should always have the assistance of a Philippine counsel

who can advise and help negotiate for him, liaise with the licensee and the competent officials, report to the licensor, and generally be on top of the application process.

And a final remark: "Yakult" is more than just a beverage. As a medicinal drink, it has been enthusiastically received in Taiwan (1963), Brazil (1966), Hongkong (1969), Thailand (1970), Korea (1971), Philippines (1978), Singapore (1979), Guam (1981) and Mexico (1981). It may soon be in Australia.

NOTES

1. According to a survey by the Center for Labor Relations, only two out of 20 Japanese electronic firms registered with the Board of Investments were hit by strikes in 1981 to 1987. The low strike risk factor may be attributed to the Japanese firms' work ethic and progressive standards of compensation. (Philippine Daily Inquirer, March 14, 1988)

2. Retail Trade Nationalization Law (Rep. Act No. 1180, as amended).

3. Harry G. Guthman and Herbert E. Dougall, Corporate Financial Policy, 4th Ed. (1971), pp. 147-152.

4. T.D. Andres, Understanding Filipino Values (1981), p. 105.

5. C.A. Carag, "Philippine Legal Culture and Protection of Intellectual Property Rights" (unpublished monograph).

6. If a favor is accorded to a person, that person is honor-bound to return the favor some day. (see Charles C. McDougald, The Marcos File (1987), p. 85.

7. This loyalty explains why Marcos could not dismiss General Fabian Ver as Armed Forces Chief of Staff in spite of U.S. pressure to do so in the wake of Benigno Aquino's assassination in 1983, a murder in which Washington believed Ver was involved. Ver and Marcos had been childhood buddies, and as Marcos acquired more power, so did Ver, rising from the president's chauffeur to head of the presidential guards to armed forces chief of staff. Marcos would not forsake Ver even though this meant loss of critical American support. (R. Bonner, Waltzing with a Dictator (1987), p. 347)

8. E.A. Franco, Management in the Philippine Setting (1988), p. 271.

9. T.Q.D. Andres and P.C.B. Ilada-Andres, Making Filipino Values Work for You (1986), pp. 49-50.

10. The avoidance of open and negative expression is said to be rooted in the fear that it might disrupt the harmony and order of the group. (Chie Nakane, Japanese Society, p. 35.)

11. R. Delos Reyes, How to Sell Like a Pro - Successful Selling in the Philippines, p. 242.

12. "Overseas Chinese" are residents in a country who consider themselves Chinese whether or not they are citizens of that country. On a worldwide basis, 96% of all overseas Chinese are in Southeast Asia and 65% of all overseas Chinese are in the ASEAN countries. In the Philippines, overseas Chinese constitute approximately 1.4% of the population or 800,000 out of a population of 57 million. What is significant about this ratio is that in a research paper entitled "Culture and Corporate Performance in the Philippines: the 'Chinese Puzzle,' " G.L. Hicks and S.G. Redding found that while the overseas Chinese constitute only 1.4% of the population, 33.6% of the top manufacturing firms were Chinese-owned and that 43.2% of the top commercial firms were also Chinese-owned. (V.S. Limlingan, The Overseas Chinese in ASEAN; Business Strategies and Management Practice, 1986, pp. 2-4.)

13. V.S.Limlingan, The Overseas Chinese in Asean: Business Strategies and Management Practices (1986) p. 133; see also S.G. Redding, "Cognition as an Aspect of Culture and its Relation to Management Processes: An Explanatory View of the Chinese," in Journal of Management Studies, May 1980, Vol. 17, No. 2, pp. 127 *et seq.*

14. S.G. Redding and Michael Ng, "The Role of 'Face' in the Organizational Perceptions of Chinese Managers," in Organization Studies, 1982, Vol. 3, No. 3, pp. 201-219.

15. See Editorial, IP Asia, March 18, 1988, for a succinct summary of legal culture and enforcement of rights in Asia.

16. V.S. Limlingan, *op cit*, p. 150.

17. *Ibid.*, pp. 154-155.

18. The initial regulation relating to the evaluation of license agreements was contained in Central Bank Circular No. 393 dated December 7, 1973. Under the circular, license agreements which involved the payment of royalties abroad were required to be submitted to the Central Bank for approval. The Central Bank would refer such agreements to the Board of Investments for technical evaluation and, based on the latter's recommendations, approved or disapproved the license agreements.

19. Presidential Decree No. 1520, Sec. 5.

20. Executive Order No. 133, dated February 27, 1987, abolished the TTB and transferred all its functions and personnel to the BPTTT.

21. With the integration of the TTB into the BPTTT, new rules are being prepared in consultation with the private sector and these are expected to be published and be in force by June 1988. The criteria under the new rules are not anticipated to depart substantially from the existing TTB rules and policy guidelines.

22. Central Bank Circular No. 1028, dated October 15, 1984, as amended by Central Bank Circular No. 1062, dated May 28, 1985.

23. Central Bank Circular No. 1028, as amended, Sec. 53.

24. *Ibid.*

25. Under TTR guidelines, renewal may be allowed in any of the following cases: (1) in the case of technology transfer arrangements involving fast moving technologies where local technology recipients need to be constantly kept abreast of technological advances and developments; (2) in case of technology transfer arrangements involving technologies which are covered by industrial property rights, the terms of which are still subsisting; and (3) in cases of technology transfer arrangements involving complicated technologies which would necessitate a period longer than five years to absorb the technology.

26. Corporation Code of the Philippines (BP Blg. 68), Sec. 133.

27. Civil Code of the Philippines (Rep. Act No. 386), Art. 1409.

28. Marshall Wells Company v. Henry W. Elser & Co., 46 Phil. 70 (1924).

29. Revised Rules of Courts, Rule 14, Sec. 14; see General Corporation of the Philippines v. Union Insurance Society of the Philippines, Ltd., 87 Phil. 313 (1950).

30. Corporation Code of the Philippines, Sec. 144; Omnibus Investments Code of 1987 (Executive Order No. 226), Art. 57.

31. See Corporation Code of the Philippines, Sec. 123 *et seq.*; Omnibus Investments Code of 1987, Art. 48.

32. Rules and Regulations to Implement Executive Order No. 226 Otherwise Known as the Omnibus Investments Code of 1987, Rule I, Sec. 1(f)10.

33. Boye De Mente, The Japanese Way of Doing Business (1981), pp. 82-84. See also T.F.M. Adams and N. Kobayashi, The World of Japanese Business, pp. 80-81. The *ringisho* ("written proposal document") "is coming increasingly under attack as over-rigid, ossified, and wasteful, as tending to eliminate authority and foster evasion of responsibility. Now progressive managements incline toward more horizontal interchange, permitting more initiation and initiative at certain levels, with less adherence to rigid routine. Some companies have begun to use the *ringisho* system only as a means of communication, which would be useful, rather than — as formerly — as a method of group decision-making."