ZEITSCHRIFT FÜR JAPANISCHES RECHT
JOURNAL OF JAPANESE LAW

SONDERHEFT / SPECIAL ISSUE 11 (2018)

Information Duties

Japanese and German Private Law

Edited by
Marc Dernauer / Harald Baum / Moritz Bälz

Carl Heymanns Verlag

ZEITSCHRIFT FÜR JAPANISCHES RECHT
JOURNAL OF JAPANESE LAW

SONDERHEFT 11 / SPECIAL ISSUE 11 (2018)

Verlag / Publisher: Carl Heymanns Verlag – a brand of Wolters Kluwer Germany, Luxemburger Straße 449, D-50939 Köln, phone: +49 221-943 73-7000; Internet: www.heymanns.com; Customer Service: phone: +49 2631-801-2222, e-mail: info-wkd@wolterskluwer.de

Bezugspreis: Das Sonderheft kann über den Verlag zum Preis von 69,– € zzgl. Versandkosten bezogen werden. Mitglieder der Deutsch-Japanischen Juristenvereinigung e.V. können das Sonderheft zum Vorzugspreis von 59,– € zzgl. Versandkosten beziehen.

Subscription price: The special issue can be purchased from the publishers for € 69 plus postage. Members of the German-Japanese Association of Jurists may buy the special issue for the preferential price of € 59 plus postage.

Anzeigenverkauf / Advertisement Sales: Janosch Kleibrink, Phone: +49 221-943 73-7797, e-mail: janosch.kleibrink@wolterskluwer.com

Anzeigendisposition / Advertisement Disposition: Wolters Kluwer Germany, Advertisements, Karin Odening, Luxemburger Str. 449, D-50939 Köln, phone: +49 221-943 73-7760, e-mail: anzeigen@wolterskluwer.com. Price list No. 11, 1 January 2018.

Druckerei / Printed by: rewi Druckhaus, Reiner Winters GmbH, Wissen

ISBN 978-3-452-29117-2

www.ZJapanR.de

Table of Contents

III. Capital Markets Law

IV. Insurance Law

Information Duties in Relation to the Ownership and Transfer of Rights to Objects and Other Assets under Japanese Civil Law

Hisanori Nemoto[*]

I. INTRODUCTION

The aim of this paper is to reveal a real function of information duties in relation to the ownership and transfer of rights to objects and other assets under Japanese civil law.

The information duty is an obligation of a party to a contract or a person who is negotiating a contract to provide the other party certain information in a proper way.[1]

---

* Prof. Dr. Hisanori Nemoto, Associate Professor for private law, Hokkaidō University.

1 Information duty in this sense is usually called *"jōhō teikyō gimu"* or *"setsumei gimu"* in Japanese. See for example H. NAKATA, *Saiken sōron* [Law of Obligations

Traditionally, it has been thought that in Japan no such information duty exists from one person to another because the principle of private autonomy requires that one should, first, gather all the necessary information by oneself before deciding to enter into a contract and, second, evaluate the meaning and importance of the information at one's own risk.[2] Therefore, there are no regulations regarding information duties in the Japanese Civil Code (hereafter: Civil Code).[3] Furthermore, even today, this traditional view forms the fundamental principles underlying information duties in Japan.[4]

On the other hand, some scholars, referring to the German theory of *culpa in contrahendo,* began to suggest in the 1960s that a party negotiating a contract should compensate for loss incurred by the other party, under certain circumstances, as a result of his or her improper provision of information.[5] Based on this discussion and the so-called good faith principle set forth in Article 1, Paragraph 2 of the Civil Code,[6] the judiciary also gradually recognized such liability.[7] Currently, there is no objection either theo-

---

(General Part)] (3rd ed., Tōkyō 2013) 124. Recently the former has been used more often. *"Jōhō teikyō gimu"* is presumably a translation of a French word "obligation de renseignement", while *"setsumei gimu"* comes from the German word "Aufklärungspflicht" (Y. HIRAI, *Saiken kakuron I jō, Keiyaku sōron* [Law of Obligations (Particular Part I a), Contract Law (General Part)] (Tōkyō 2008) 132). Meanings of the two Japanese terms are nowadays understood almost equally.

2 K. YAMAMOTO, *Keiyaku-hō no gendai-ka I* [Modernization of the Contract Law I] (Tōkyō 2016) 64 and 81. See also NAKATA, *supra* note 1, 124.

3 *Minpō,* Law No. 89/1896 and No. 9/1898, as amended by Law No. 71/2016; English translation: EIBUN HŌREI-SHA (ed.), EHS Law Bulletin Series (loose leaf, Tōkyō) Vol. II, FA-FAA, No. 2100-2101 (as of 2016).

4 The amendment of the law of obligations was concluded in 2017 and the new rules will come into force on the 1 April 2020 (this paper is based on the current version of the Civil Code): At the beginning of the deliberation for the amendment the possibility of introducing a new article that stipulates general information duties between two parties in the pre-contractual period was considered. However, the new article was in the end abandoned mainly due to the difficulty in precisely describing the necessary conditions for the duty.

5 See for example Z. KITAGAWA, *Keiyaku sekinin no kenkyū* [A Research of Contractual Liabilities] (Tōkyō 1963) 343–344, 356.

6 Article 1, Paragraph 2 of the Civil Code: "The exercise of rights and performance of duties must be done in good faith".

7 The discussion among scholars in 1990s was strongly influenced by French theories of "obligation de renseignement". Representative papers which analyse the French theories as a model for Japanese civil law are M. GOTŌ, *Furansu keiyaku-hō ni okeru sagi, sakugo to jōhō teikyō gimu (1)-(3) [*Fraud, Mistake and Information Duties in the French Contract Law], Minshō-hō Zasshi 102-2 (1990) 180, 102-3 (1990) 314, 102-4 (1990) 442, H. MORITA, *"Gōi no kashi" no kōzō to sono kakuchō riron (2)* [Structure of a "Defective Agreement" and Theories for Its Expansion (2)], NBL 483 (1991) 58-

retically or practically to the idea that one who is in the process of entering into a contract has an information duty to the other party and should take responsibility for a breach of the duty. Courts have already expressed their opinions in many concrete cases, addressing issues such as when a person should be burdened with the duty and what types of remedies are available to the other party for the breach of such duty.

As explained above, the theory behind the information duty under general civil law has developed in Japan through academic study, on the one hand, and through the judiciary on the other. Therefore, we must examine both in order to understand the real function of the duty.

II. General Theory behind the Information Duty

First, we should overview the general theory behind the information duty in Japan. This overview should at the same time serve as preparation for the subsequent analysis of judgments.

1. Information Duty for the Security of Self-determination

According to the prevailing opinion,[8] information duties are imposed on one party so as to eliminate any disparities in the quality and quantity of information and in the negotiating power between the two parties that might make self-determination difficult. The purpose of the duty is, therefore, to secure the freedom of self-determination of people who are in a more vulnerable position regarding the gathering of information and negotiating with others. This type of duty is usually called an "information duty for the security of self-determination".

As for the effects of a breach of the information duty, two possibilities are considered. One is the unwinding or annulment of the contract through cancellation, fraud, or mistake. The other is compensation for damages under tort law.

Regarding compensation, two different things can be regarded as constituting the substance of loss or the legally protected interest set forth in Article 709 of the Civil Code.[9] First, the right to self-determination can be

---

61 and M. Yokoyama, *Keiyaku teiketsu katei ni okeru jōhō teikyō gimu* [Information Duties in the Process of Concluding a Contract], Jurisuto 1094 (1996) 128–136.

8 Y. Shiomi, *Saiken sōron I* [Law of Obligations (General Part) I] (2nd ed., Tōkyō 2003) 578.

9 Article 709 of the Civil Code: "A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence".

infringed when information is not provided or provided inappropriately.[10] In this case, the infringement results in mental suffering which should be compensated through a solatium.[11] Second, money that would not have been spent had the information been properly provided, e.g. the price actually paid for property, can also be considered a loss.[12] In this case the difference between the price and the real value of the property must be compensated. These two grounds are compatible with each other.

2. Information Duty for the Achievement of the Contractual Purpose

Many scholars[13] point out that in addition to "the information duty for the security of self-determination" there is another type of information duty. It is what is known as the "information duty for the achievement of the contractual purpose".[14] We find this type of duty where a person would have entered into a contract whether or not the information had been appropriately provided. For example, a food seller fails to tell the buyer how to keep the food fresh and as a result the food spoils. In this case, presumably, the buyer would have bought the food even if he or she were informed of the proper way to keep the food fresh. In other words, the self-determination of the buyer was not infringed by the improper provision (in this case, no provision) of information. However, because of the improper behaviour of the seller, the buyer did not receive the benefit that he or she intended to receive through the contract. Therefore, in this case, the inappropriate provision of information hinders the achievement of the buyer's contractual

10 S. NISHIGORI, *Torihikiteki fuhō kōi ni okeru jiko kettei-ken shingai* [Infringement of the Right to Self-determination through Torts in Business Transactions], Jurisuto 1086 (1996) 86.

11 For instance, A. KUBOTA, *Torihiki kankei ni okeru fuhō kōi* [Torts in Business Transactions], Hōritsu Jihō 972 (2006) 72 indicates the possibility of such a compensation with a solatium.

In Japan, a person whose rights or legally protected interests were infringed can claim in general a solatium against the infringer. See Article 710 of the Civil Code: "Persons liable for damages under the provisions of the preceding Article must also compensate for damages other than those to property, regardless of whether the body, liberty or reputation of others have been infringed, or property rights of others have been infringed."

12 Y. HASHIMOTO, *Torihiki-teki fuhō kōi ni okeru kashitsu sōsai* [Comparative Negligence in Cases of Torts in Business Transactions], Jurisuto 1094 (1996) 153 and Y. HASHIMOTO, *Fuhō kōi hō ni okeru sōtai zaisan no hogo* [Economic Losses and Japanese Tort Law], Hōgaku Ronsō 164-1=6 (2009) 408–410.

13 For example, SHIOMI, *supra* note 8, 582–583, HIRAI, *supra* note 1, 134, and NAKATA, *supra* note 1, 128.

14 YOKOYAMA, *supra* note 7, 130–131, insisted on, based on a French theory, the existence of this type of information duty in Japan for the first time.

purpose. Putting it the other way around, the information duty of the seller is not to secure the self-determination of the buyer but to ensure the fulfilment of his or her purpose. So, we should understand this duty as based on the contract itself; consequently, whether or when one party owes this duty to the other depends on the nature of each contract.[15]

As for a breach of the information duty for the achievement of the contractual purpose, only compensation for damages will be taken into consideration.[16] In contrast to a breach of the information duty for the security of self-determination, the unwinding of the contract is, namely, not allowed because, as explained above, the buyer here would have concluded the contract with the seller regardless of the latter's improper provision of the information, and thus the right to self-determination of the buyer about entering into the contract was not infringed through the act of the seller. Therefore, in this case it is not necessary to reject the validity of the contract itself.

III. Analysis of Cases Regarding the Information Duty in Relation to the Ownership and Transfer of Rights to Objects and Other Assets

In this section, we will analyze cases concerning the information duty in relation to the ownership and transfer of rights and other assets. However, before we begin the analysis, its subjects and method (e.g. the nature and limitations of the cases) must be discussed. In addition, one general rule about the information duty which can apply to all the cases should also be clarified in advance.

1. Subjects and Method of Analysis

As for the subjects and method of the analysis, first, the analysis is based on 62 Japanese court judgments (two from the Supreme Court, 60 from lower courts) that have been published in law reports.[17] Naturally, they do not encompass all the cases that address the information duty we are now examining. However, this number seems to be sufficient to investigate practice trends and that is precisely what the following analysis attempts to do.

Second, the cases are categorized according to the nature of the conflict into five different types because it is presumed that the necessary condi-

15 See Shiomi, *supra* note 8, 583.

16 Yokoyama, *supra* note 7, 130.

17 The list of the judgments (as of 31 March 2017) can be found at the end of this article. In the following analysis each judgment will be specified by its number on the list.

tions for the duty and the effects of its breach will reflect the particular character of each conflict and therefore will be different.

Third, most of the cases involve conflicts relating to the transfer of the ownership of immovable properties. From the extent of my research, there are almost no cases that specifically address an information duty regarding the transfer of ownership of movable properties. The probable reason for this will be discussed at the end of this article. Cases regarding the trade of stocks, securities, and insurance were excluded from the analysis because there will be a separate paper on these types of properties.

Fourth, there are two categories of transactions depending on the parties concerned. The first situation involves a real estate buyer and seller. The second involves a real estate buyer and a real estate broker retained by the seller. In this second category, there is no contractual relationship between the broker and the buyer. In Japan, real estate brokers must be licensed and have to follow the regulations set forth in the Real Estate Brokerage Act.[18] According to the Act, a broker retained by a seller must, at the same time and to a certain degree, also respect the rights of the buyer.

Finally, it has to be noted that there are several cases that do not fit within a specific type of conflict.

2. The Limit of "Information" that Should Be Provided – A General Rule

In the trade of immovable properties, not every item of information and every detail about a property have to be provided by its seller or the real estate broker retained by the seller. To put it in another way, the information which a seller or a real estate broker is obliged to tell his or her buyer is limited. Regarding the criterion for the limit, one judgment[19] suggests that only information which is considered as a significant and influential factor for deciding whether to purchase a property must be disclosed, and whether the information is "significant and influential" should be evaluated not from the subjective view of the real buyer but from the perspective of an "ordinary person" based on the standard of the "socially accepted idea". Therefore, under this criterion it will not be regarded as a breach of the information duty that a seller did not, for instance, disclose a fact which cannot, as considered from the above-mentioned perspective, be viewed as "significant and influential" for making the decision. Presumably, many courts follow such a criterion tacitly. In fact, all the information in the cases which we are going to analyze below seems to satisfy this criterion.

---

18 *Takuchi tatemono torihiki gyō-hō,* Law No. 176/1952, as amended by Law No. 56/2016.

19 Judgment No. 23.

3. Analysis of the Five Types of Conflict

In the following section, we will examine each type of conflict, focusing on the necessary conditions for the information duty.

a) Conflict over the current state of the property

The first type of conflict is over the current state of the property. The meaning of "state" is here understood broadly. In addition to the physical state of a piece of land or a building, things such as the actual value of a property in the market or an original poor view from a single room in a large apartment building[20] or the fact that a former resident of the house committed a suicide there also belong to the "state" of the property.

According to the judgments,[21] when the exact state of a piece of real estate at the moment of the agreement was not explained by the seller or the real estate broker retained by the seller and the buyer finds out later that it is not suitable for his or her contractual purpose, the buyer can bring suit for damages against the seller or the real estate broker who knew of the fact at the time of concluding the contract by alleging a breach of the information duty. An example is as follows: where a real estate broker retained by the seller realizes that the ground on a parcel of residential land is so weak that the ground might sink in the future, the broker must disclose this fact to the buyer. In the event the ground actually does sink after executing the contract and the broker neglected to disclose the fact in advance, the seller must assume responsibility.[22]

Furthermore, professional sellers should be burdened vis-à-vis buyers with a duty to investigate the actual state of a property to a certain degree and to explain it to buyers correctly.[23] Therefore, professional sellers are liable to buyers when they have negligently failed to recognize the current

---

20 A case in which a view that was originally good at the time of concluding a contract got worse afterwards because of an environmental change to the building is classified under the third type of conflict (conflict over future environmental changes to the property).

21 Judgments Nos. 16, 18, 19, 26, 29, 31, 32, 35, 36, 38, 39, 40, 41, 42, 43, 44, 46, 47, 49, 51, 52, 54, 55, 56, 58 and 59. Judgments Nos. 60, 61 and 62 can also be understood as judgments that denied any knowledge on the part of each seller regarding the current state (weakness) of the property.

22 This is the conclusion of Judgment No. 31.

23 Judgments Nos. 35, 39 and 54. Conversely, Judgment No. 32 clearly denies such a responsibility. However, an anonymous comment on this judgment (Hanrei Taimuzu 1115 (2003) 186) thinks the decision is questionable and suggests that a real estate broker retained by the seller who could have recognized a defect of the property and indicated it to the buyer should be liable.

state of the property (and could not consequently inform the buyers appropriately). This type of information duty (a duty of investigation) owed by professional sellers can be justified with Article 35 of the Real Estate Brokerage Act.[24] Pursuant to Article 35, a professional seller has an obligation to explain to buyers, before entering into a contract, actual states of the property that are generally regarded as important matters for buyers who are making a decision to (or not to) purchase the property. Naturally, for a proper explanation, the sellers must investigate the state beforehand. The Tōkyō High Court stated in a judgment in 1977,[25] as a general principle, that the obligation of professional sellers under Article 35 of the Real Estate Brokerage Act is a duty that they owe to buyers under private law.[26]

On the other hand, it is not easy to say whether courts think that a real estate broker retained by the seller is also obliged to buyers to investigate the current state of a property. One judgment[27] affirms such a duty in general, while another two judgments[28] reject it.

Moreover, several courts[29] seem to have held that a non-professional seller basically has no such duty of investigation.

In addition to liability due to the infringement of the information duty, in this type of conflict a buyer can also pursue the liability of his or her seller based on the warranty against defects set forth in Article 570 of the Civil Code.[30] In fact, in two cases[31] the liability of the seller is approved primarily on the grounds of the warranty.

---

24 Judgment No. 54.

25 Judgment No. 4.

26 See also HIRAI, *supra* note 1, 133–134.

27 Judgment No. 54. As the concrete conclusion to the case, the judgment denied a breach of the investigating duty of the broker retained by the seller about the state of the property (here, a suicide of its former resident).

28 Judgments Nos. 58 and 59 (The latter is an appeal court judgment of the case which the former judgment judged as a first instance). Both judgments said, however, that a real estate broker retained by the seller who knew a fact (here, also a suicide of a former resident of the property) by accident must notify the buyer of the fact.

29 Judgments Nos. 42, 44, 46, 47, 49 and 51. See also Judgment No. 52.

30 Article 570 of the Civil Code: "If there is any latent defect in the subject matter of a sale, the provisions of Article 566 shall apply mutatis mutandis; provided, however, that this shall not apply in cases of compulsory auction." Article 566, Paragraph 1 of the Civil Code: "In cases where the subject matter of the sale is encumbered with for the purpose of a superficies, an emphyteusis, an easement, a right of retention or a pledge, if the buyer does not know the same and cannot achieve the purpose of the contract on account thereof, the buyer may cancel the contract. In such cases, if the contract cannot be cancelled, the buyer may only demand compensation for damages."

31 Judgments Nos. 31 and 39.

b) Conflict over administrative regulations

The second type of conflict involves administrative regulations. A typical example of such a regulation is Article 56 of the Building Standards Act,[32] which provides different height limits for buildings in various urban areas.

In this type of conflict courts[33] presumably apply a similar rule about information duties as the one applying to the first type of conflict.

First, professionals who regularly sell immovable properties for business must investigate and explain relevant regulations[34] to buyers. Although all the judgments concern themselves with cases in which a professional seller did not explain to a buyer the existence of an administrative regulation that the seller had knowledge of, it is nevertheless assumed that these judgments have no intention to affirm the responsibility of professional sellers only for these cases. Furthermore, the ruling about the investigating duty of professional sellers – based on Article 35 of the Real Estate Brokerage Act – in relation to the first type of conflict can apply also to administrative regulations because Article 35, Item 2 of the Real Estate Brokerage Act imposes a duty on professional sellers to inform buyers of administrative regulations that govern the contractual object. Therefore, when a professional seller does not identify and explain a relevant regulation to a buyer, either intentionally or negligently, the seller or broker will be held liable for the buyer's loss. For example, in a case where a buyer has purchased a piece of land from a professional seller in order to build a house upon it but the buyer cannot build the house as tall as he or she originally intended because of Article 56 of the Building Standards Act, the seller should assume responsibility if he or she did not investigate or explain to the buyer that the grounds come under the regulation.

Second, real estate brokers retained by the seller, who like professional sellers similarly have to explain to the buyers the existence of relevant administrative regulations on a property based on Article 35, Item 2 of the Real Estate Brokerage Act, are equally burdened with the duty to investigate the relevant[35] regulations in advance.[36] This duty of the broker is an important difference between this type of conflict and the first type.

---

32 *Kenchiku kijun-hō,* Law No. 201/1950, as amended by Law No. 72 /2016.

33 Judgments Nos. 5, 7, 8, 9, 12, 13, 14, 15, 17, 27, 48, 53 and 57.

34 On the meaning of the "relevant" regulations, see the following footnote.

35 Not all administrative regulations are regarded as the "relevant" regulations here. Judgment No. 14 held, for example, that a real estate broker retained by the seller had no obligation to the buyer to investigate whether a property fell under the regulatory scope of Article 93 Paragraph 1 (former Article 57-2) of the Cultural Properties Protection Act (*Bunka-zai hogo-hō,* Law 214/1950, as amended by Law 2014) governing unexcavated cultural properties.

Third, the liability of a non-professional seller depends on whether he or she knows of the existence of the administrative regulation at the time of entering into a contract; when the seller knows of it, he or she should disclose this fact to his or her buyer.[37] However, according to several judgments,[38] a non-professional seller has no general obligation to investigate what kind of administrative regulations exist on his or her immovable property. Therefore, the seller will not be held responsible for loss of the buyer, even if it turns out afterwards that the buyer cannot use the property as he or she first hoped to due to an administrative regulation which the seller was not aware of.

c) Conflict over future environmental changes to the property

The third type of conflict involves future environmental changes to the property. A classic example of this type of conflict is a case in which shortly after the sale of a single room in a large apartment building, a high building is built, blocking the south side of the apartment. The buyer, who did not expect the construction of a new building, can no longer enjoy the benefit of sunlight or the view because of the obstruction. The buyer brings suit against the seller or the real estate broker retained by the seller for the compensation of damages. In such a conflict, the most important issue becomes whether or under what circumstances, at the time of making the agreement, the seller or the broker has an information duty regarding future, potential environmental changes near the property.

Courts have held on this issue that the seller – regardless of whether he or she is a professional – and the broker typically have no obligation to investigate the possibility that the environment may change in the future;[39] consequently, there is no duty to provide such general information. However, when an environmental change is already planned and the seller or the broker knows of this fact, then he or she must advise the buyer.[40] Therefore, in the above-referenced case, if the seller or broker had already known of the plan for the construction of a new building next to the apartment at the moment of concluding the contract and nonetheless did not disclose this fact, he or she would be liable due to the breach of the information duty.[41]

---

36 Judgment No. 14.

37 Judgment No. 15.

38 Judgments Nos. 7 and 17.

39 Judgments Nos. 3, 10, 11, 21, 22, 24, 25, 28, 33, 45 and 50.

40 However, a single judgment, No. 6, runs counter to this ruling. It says that a seller who knows of a concrete plan to change the environment does not necessarily have to inform his or her buyer of the plan. This relatively old judgment can be regarded today as an insignificant deviation from the current standard of the judgments.

d) Conflict over a lower price in the future for property of equal value

The fourth type of conflict involves a conflict over a potentially lower price in the future for property of equal value.

This type of conflict typically occurs between a seller of many single rooms in one large apartment building and a buyer of a single room in that building. Does the seller have to explain to the buyer at the time of entering into a contract that he or she might sell a similar room at a reduced price in the future? Should the seller be liable for the loss incurred by the buyer based on a breach of the information duty when he or she was not informed of such a possibility and where such information would have prevented the buyer from purchasing the single room as he or she would have waited for the price reduction had he or she known of it? Such conflicts were common in Japan during the severe economic depression of the 1990s as the value of most immovable properties dropped radically.

Courts have ruled on this fourth type of conflict similarly to their rulings on the third type.[42] Namely, sellers have in principle no duty to explain the general possibility of a price reduction that may happen in the future. However, according to the Supreme Court,[43] when the seller knows that the present price of the single room is so high that he or she cannot obtain the same price for a similar unit in the near future – meaning he or she needs to reduce the price radically at other sales – and when the seller does not explain this fact to the buyer, thereby severely violating the good faith principle (Article 1, Paragraph 2 of the Civil Code), then the seller will assume responsibility.

The case on which the judgment of the Supreme Court was based is as follows. A public corporation (Y) which owned a housing complex had decided to rebuild the complex and told X and others who had rented residential units in the complex that Y would provide them with the opportunity to preferentially purchase residential units of the new housing complex prior to public subscription, but only if X and others entered into new sales contracts with Y beforehand and evacuated their current units by a certain date. X and others thought that this offer of Y was aimed at enabling them to secure residential units in the new housing complex without taking part in a lottery, on the premise that Y would offer the remaining unsold residential units for public subscription immediately after the preferential offer to X and others and that the price offered for the public subscription would be at least the same as that offered to them. On the other hand, Y knew at the time of concluding the sales contracts with X and others that the price offered to them was too high

41 This was in fact the conclusion of judgment No. 24.

42 Judgments Nos. 1, 20, 30, 34 and 37.

43 Judgment No. 2. Judgments Nos. 34 and 37 that were issued by the initial court and by the appeal court on the case also reflect the same view.

to solicit purchasers though public subscription, and thus Y actually had at that time no intention of offering the remaining units for public subscription soon after the offering to X and others. However, Y did not explain these facts to X and others at all. It was not until three years after the sales contracts with X that Y offered the remaining unsold residential units for public subscription at a lower price than that offered to X and others. The average rate of the price reduction was about 25% (stated in figures, the amount of reductions was roughly 8,500 million yen on average).

Based on these circumstances, the Supreme Court stated that Y's failure to notify X and others of its lacking an intention to offer the remaining unsold residential units for public subscription immediately after making the offer to them deprived X and others of the opportunity to assess the appropriateness of the offer price sufficiently before deciding whether or not to conclude the sales contracts with Y. Moreover, Y's behavior in this manner can be regarded as a severe violation of the good faith principle set forth in Article 1, Paragraph 2 of the Civil Code. Therefore, Y infringed the information duty toward X and others illegally and hence should be held responsible for their losses.

Scholars, without exception, support these rulings by the Supreme Court. It can be said that in this case X and others in fact lost the freedom of self-determination, believing that they had had to enter sales contracts immediately with Y at the price offered by Y in order to keep residential units in the new housing complex because most of the residential units would be bought at the same price by third persons at the public subscription that would have taken place shortly after the offering to X and others. This misunderstanding of X and others was mainly caused by Y's having demanded the conclusion of "preferential" contracts with Y, which, as a professional seller, had much more information about the current situation in the immovable properties market than X and others, and which did know at that time that such a future purchase of the remaining unsold residential units would not – more accurately stated, objectively could not – occur. Under these circumstances Y's intentional silence as to the facts can be considered "almost as fraudulent".[44]

At the same time, however, it should be noted that the judgment of the Supreme Court affirming the liability of a seller for breach of an information duty in the fourth type of conflict is very exceptional. The Supreme Court itself indicates this by requiring that the conduct of a seller must violate the good faith principle "severely". Principally it is buyers who

44 This is stated by T. KOGAYU, *Torihiki ni okeru setsumei gimu (1)* [Information Duties in Trade (1)], in: Hirose/Kawakami (eds.), *Shōhi-sha-hō hanrei hyakusen* [Selection of 100 Important Cases for Consumer Law] (Tōkyō 2010) 35.

have to assume the risk that the price of a property identical or similar to the one he or she purchases might drop in the future.[45]

e) Conflict over how to properly use the property

Lastly, the Supreme Court held in a 2005 judgment[46] that there is a breach of the information duty of a seller when he or she did not explain to the buyer how to properly use the property. In this case, upon delivery to the buyer, the company which sold a condominium did not explain where the buyer could find the switch or how to operate the switch to open a fire door located in the condominium. When a fire later broke out, there was increased loss to the buyer's condominium because he was unable to open the fire door. According to the judgment, the seller had a duty to instruct the buyer on the details of the switch as a contractual duty ancillary to the main duty to deliver; therefore, the seller had to compensate for the increased loss.

This duty should not be regarded as "the information duty for the security of self-determination" because the buyer would have bought the condominium even if the seller had told him how to turn on the switch. As many scholars[47] point out, the information duty that the Supreme Court approved in this judgment is the "information duty for the achievement of the contractual purpose".

The purpose of the buyer in purchasing a condominium equipped with a fire door[48] is undoubtedly to protect his property, including the condominium itself – and furthermore, the lives of himself and his family – in the event of a fire. For the fulfilment of this purpose, it is crucial that the buyer is informed of where he can find the switch and how to turn on it. On the

45 Y. SHIOMI, *Sōba no hendō to keiyaku* [Fluctuation of Market Price and Contract], Hōgaku Kyōshitsu 222 (1999) 47, 49, 51.

46 Judgment No. 2. M. DERNAUER, Civil Law – Tort Law/Contract Law – Liability for a Breach of Pre-contractual, Contractual and Non-contractual Information Duties – Liability of Experts – Claim for Damages, in: Bälz/Dernauer et al. (eds.) Business Law in Japan – Cases and Comments (Alphen aan den Rijn 2012) includes details on the facts and findings of this judgment in English.

47 See for example, T. KOGAYU, *Manshon no hanbai o itaku sareta takken gyōsha no setsumei gimu-to* [Information Duty of a Real Estate Broker Who Was Consigned by a Seller to Sell a Condominium, etc.], Minshō-hō Zasshi 134-2 (2006) 278-279, Y. YAMAMOTO, *Keiyaku junbi, kōshō katei ni kakawaru hōri (1)* [Legal Principles of Pre-contractual Negotiation I], Hōgaku Kyōshitsu 334 (2008) 72–73, S. OJIMA, *Keiyaku teiketsu ni saishite no setsumei gimu* [Information Duty in the Process of Negotiating a Contract], in: Nakata/Shiomi et al. (eds.), *Minpō hanrei hyakusen II* [Selection of 100 Important Cases for Civil Law II] (6th ed., Tōkyō 2009) 11.

48 The buyer knew of course that the fire door was located in the condominium. He was simply not told where the switch was.

other hand, the company which sold the condominium to the buyer itself obviously recognized the purpose of the buyer at the time of making the contract. Therefore, it is possible to conclude that the seller has the duty to provide the buyer enough information about the switch for the realization of the purpose of purchasing the condominium as an obligation based on the contract itself, where the buyer did not know about the switch. This duty of the seller is ancillary to his or her main duty to deliver the condominium. However, this sub- or co-duty, namely the "information duty for the achievement of the contractual purpose", plays a significant role in the process of executing the sale contract exactly to guarantee the buyer the fulfilment of his purpose of buying and receiving the condominium.

In the light of such a function of the "information duty for the achievement of the contractual purpose", it can be said that, for example in the above-referenced case, the seller had to explain the switch to the buyer not necessarily at the time of the agreement but at least by the delivery of the condominium (at the latest before the buyer has begun to live in the condominium). This as well is an important difference between this duty and "the information duty for the security of self-determination", which must be fundamentally performed before concluding a contract.

IV. Analysis of Real Functions of the Information Duty in Relation to the Ownership and Transfer of Rights to Objects and Other Assets

We have just analyzed judgments about five different types of conflicts that address the information duty in relation to the ownership and transfer of rights to objects and other assets. Based on the results of the analysis, we should now determine the real function of the duty as a whole.

1. The Reason for No Information Duty Relating to the Existence of Rights to the Property

First, based on my research, there are no judgments that addressed the information duty as it relates to the existence of rights to a property, such as mortgages. The reason is presumably that people who want to buy immovable property can easily examine, for instance, whether a mortgage exists on the property by reviewing the register by themselves. In addition, according to Article 35, Item 1 of the Real Estate Brokerage Act, this type of information must be explained to the buyer by the professional seller or real estate broker before making a contract. Therefore, it can be said that any disparities regarding the existence of rights have been eliminated by these legal mechanisms.

2. The Reason for the Liability of Non-professional Sellers

Second, in the first, second and third types of conflict, courts are of the view that sellers should tell their buyers certain information about the state of the property, administrative regulations affecting the property and future environmental changes regarding the property which they actually know, even if the sellers are not professionals. It can be asked whether transactions between non-professional sellers and non-professional buyers entail disparities in the quality and quantity of information and in the negotiating power – the basis of the information duty for the security of self-determination – because such disparities are found typically between a professional seller and a (non-professional) buyer. Why are buyers not required to examine the information by themselves here and are instead allowed to trust that sellers will disclose this information to them as far as the sellers have it?

One possible answer to this question is that sellers generally have more opportunities to gain such information than buyers. For instance, it is presumably not difficult for a seller who lives in a room of a large apartment building to realize that another large apartment building will be built near his or her building and that the present good view from the room will be lost soon. On the other hand, buyers, especially those who still live in other places, are not always able to find out these facts easily. In this sense, it can be said that sellers – although they are not professionals – are basically in a closer position to the properties and thus have superior power for gathering information (and hence for negotiating) as compared to buyers in relation to the state of their property, the existence of administrative regulations on them and future environmental changes affecting them. In other words, here as well the information duty imposed on a non-professional seller works to eliminate such a disparity in the quality and quantity of information and in the negotiating power between the seller and the buyer.

3. The Reason for the Difference in the Liability of Real Estate Brokers Retained by the Seller

Third, according to the judgments we have analyzed, real estate brokers retained by the seller basically owe a duty of investigation as to the existence of relevant administrative regulations on the contractual objects. On the other hand, courts seem to be less positive about imposing such a duty on brokers in relation to the state of the properties. As we have already seen, there are two judgments[49] which clearly reject this kind of investigating duty.

Real estate brokers are licensed by the state to run agency services for the trade of immovable properties as a business. They are supposed to have

49 Judgments Nos. 58 and 59.

certain legal knowledge and be able to gather correct legal information which is important for commercial trade, if necessary. Needless to say, the existence of administrative regulations impacting immovable property is a typical example of such information. However, it would be inappropriate to expect that real estate brokers have in general special knowledge or a better ability than others to investigate and discover, for example, a physical defect in the basement of a building.[50] From this point of view, the (presumed) rationale of the courts rulings about the investigating duty of real estate brokers retained by the seller can be justified and, moreover, in itself seems to be reasonable (the conclusion reached by two judgments to reject a duty to investigate the state of the property should be supported).

4. The Reason for the Difference in the Liability of Professional Sellers

Regarding the necessary conditions for imposing an information duty on professional sellers, there is a significant difference between, on the one hand, the information duty relating to the current state of the property (in the first type of conflict) and administrative regulations (in the second type of conflict), and, on the other, the duty relating to future environmental changes near the property (in the third type of conflict). As we discussed earlier, in relation to the second type of conflict for instance, courts have held that professional sellers have a duty to investigate and advise a buyer of certain administrative regulations. In contrast to this ruling, in the third type of conflict professional sellers generally do not have to examine the possibility of future environmental changes near the property.

The first reason for this difference can be found, once again, in Article 35, Item 2 of the Real Estate Brokerage Act, because here only the existence and the content of administrative regulations are listed as important matters that sellers must explain to their buyers. However, it is thought that the range of information that must be provided to the buyers by the sellers is not limited to the matters stipulated in Article 35 of the Real Estate Brokerage Act. Instead, it must be decided on a case-by-case basis. The second reason why the information duty relating to future environmental changes near the property is generally denied is presumably the difficulty to investigate, to recognize, or to foresee such changes. It is quite easy, especially for professional sellers, to know how the present state of the property is or if administrative regulations exist in regard to the property and if the regulations apply to buyers. On the other hand, it is difficult for them to say if, how, and when the current environment might change. The third reason is that the object of a sales contract is the property and not its environment,

50 Judgment No. 14 makes a similar statement.

which the sellers do not regulate and therefore cannot control. For these reasons, we must go back to the foundation of the information duty in the third type of conflict. Each buyer must gather and examine all of the information regarding possible changes to the environment surrounding the property at his or her own risk. Only when a professional seller already has specific information regarding a change is he or she required to provide such information to the buyer.

5. The Rationality of the Judgments Regarding the Fourth Type of Conflict

From the above-mentioned perspective, it is understandable and justifiable that a rational judge would see the necessary conditions for the information duty in the fourth type of conflict in a similar manner as those conditions present in the third type, namely, the sellers must provide information only in exceptional circumstances. These conditions can be grounded on the nature of the information as well, which is similar to that of the conditions for the third type of conflict. The economic situation and the price of similar properties in the neighborhood determine how high the price of an immovable property should be, and this price is therefore not necessarily a matter that sellers are able to control on their own.

6. The Scope of the Information Duty

Regarding the scope of the duty, that is to say, the range of information which sellers and real estate brokers employed by the seller must provide, it is notable that duties are – under specific necessary conditions – imposed on sellers and brokers to provide information not only about the nature of the property itself (its current state as well as certain administrative regulations upon on it) but also about the surrounding environment and future prices. One reason for this is the purpose of the contracts typically involved in the third and fourth types of conflict. Most buyers in these cases purchase immovable properties as a place to live. Therefore, it is very important for them that the property is in and remains in a comfortable environment. The price of the property is also a great concern for the buyers. When a radical price reduction in the near future has already been planned, a buyer has an interest in buying the property at a later date at the lower price. This interest should be legally protected to a certain degree.

Another reason is that courts tend to narrowly construe the meaning of a "latent defect in the subject matter of a sale" as set forth in Article 570 of the Civil Code.[51] Pursuant to the article, if a property has a defect that its

51 On Article 570 of the Civil Code, see *supra* note 30.

buyer cannot easily discover at the point of entering into the contract, the buyer can make a claim against the seller after the sale for loss caused by the defect. Some scholars[52] insist that the meaning of "defect" should be broadly construed so that, for instance, an unexpected environmental change near the property could be treated as a "defect". However, it seems that courts interpret the meaning rather narrowly and believe that an environmental change that was not foreseen should not be considered a "latent defect" in the property.[53] It is thus necessary to use the theory of the information duty in order to resolve conflicts between parties over this issue. From this point of view, it can be said that the information duty plays the role of a functional substitute for the warranty against defects.

This explanation helps us understand why only immovable rather than movable properties are addressed in these cases. When a movable property has a "latent defect", the buyer can bring a lawsuit against the seller for liability under the warranty stipulated in Article 570 of the Civil Code. There is no need for the information duty. Additionally, movable properties have no surrounding environment to speak of.

7. Effects of a Breach of the Information Duty

a) Information duty for the security of self-determination

As for the effect of a breach of the "information duty for the security of self-determination", courts consider cancellation of the contract, compensation for damages or both remedies.[54]

In some lower court cases[55] (six out of 60), cancellation of the contract based on a breach of the information duty was approved. Three of the cases[56] involve the second type of conflict. It seems that in these three cases, each buyer was not able to realize the purpose of his or her contract due to the existence of certain administrative regulations. Therefore, these judgments approving cancellation are understandable, but at the same time, it must be pointed out that it is not easy to justify these conclusions theoretically. Article 541 of the Civil Code says that a party can cancel a contract in cases where the other party does not perform his or her contractual obliga-

52 See for instance S. SHITAMORI, *Manshon no urinushi wa sono bunjō ni saishi kainushi ni rinchi no riyō keikaku ni tuite chōsa kokuchi suru gimu o shingi-soku jō futan shite iru ka* [Do sellers of rooms in a large apartment building have a duty towards buyers to investigate how the neighborhood will be used in the future based on the good faith principle?], Hanrei Taimuzu 311 (1976) 89.

53 For example, see the ruling of Judgment No. 33.

54 As a single exception, Judgment No. 5 found fraud of the seller through silence.

55 Judgments Nos. 4, 9, 12, 15, 26 and 40.

56 Judgments Nos. 9, 12 and 15.

tions. However, in most cases the breach of the information duty occurs before the parties enter into the contract. So it is difficult to logically grasp this duty as a duty based on the contract. In 2011, the Japanese Supreme Court actually stated as much in a judgment.[57] Although the immediate issue in this judgment concerned the availability of contractual damages, rather than cancellation, for breach of information duties, one might be sceptical that the cancellation of a contract due to the breach of "the information duty for the security of self-determination" will, in practice, be approved in the future.

Considering the functions of the "information duty for the security of self-determination", the best remedy for buyers is cancellation of the sale, as they would not have made a purchase if the information had been properly provided. However, as we have just seen, it is theoretically difficult to approve cancellation based on a breach of the information duty under Japanese civil law. Because of such a difficulty, buyers and courts presumably attempt to achieve the same economic result through compensation as if the contract had been cancelled.

The first type of attempt can be seen in the number of courts that order the seller to compensate for the difference between the price actually paid by the buyer and the actual value of the property.[58] Buyers who recover damages can then return to their original economic state, namely, the state they were in before the contract was signed, by reselling the property at the actual value. Therefore, this type of compensation can work as an economic substitute for cancellation.

Second, in several cases,[59] buyers demand that sellers pay an amount equal to the amount they paid as earnest money. This type of compensation is chosen when the sales contract has already been made but the property has not yet been delivered. Here, the buyer claims a breach of the information duty by the seller and rejects acceptance of the property. In such cases, buyers return to their original economic state when they receive restitution for the amount they paid to the sellers as earnest money. Thus, it can be said that compensation in these cases also functions as an economic substitute for cancellation.

In addition to these two types of compensation, there are many other cases where courts have approved claims of solatium because of an infringement of self-determination that has occurred through an improper provision of information.[60]

---

57 Supreme Court, 22 April 2011, Minshū 65, 1405.

58 Judgments Nos. 7, 19, 38, 48 and 58. See also Judgment No. 43.

59 Judgments Nos. 4, 9, 13, 25 and 26.

60 Judgments Nos. 1, 16, 17, 21, 24, 26, 29, 31, 43, 53, 55, 56 and 59.

b) Information duty for the achievement of the contractual purpose

The judgment of the Supreme Courts affirming the existence of the "information duty for the achievement of the contractual purpose"[61] allows the buyer to pursue compensation for damages resulting from a breach of the duty by the seller. As we have already examined, this conclusion is suitable for the nature and function of this kind of information duty. In other words, for the breach of the "information duty for the achievement of the contractual purpose", the unwinding of the contract itself through cancellation is for both buyers and sellers not a proper remedy.

V. SUMMARY

The conclusion of this paper's analysis can be summarized as follows.

There are two types of information duties in relation to the ownership and transfer of rights to objects and other assets under Japanese civil law.

The first is an "information duty for the security of self-determination". Its substance is, first, a duty imposed on a seller, both professional and non-professional, and also a real estate broker retained by the seller who actually know of certain important facts about an immovable property to inform the buyer of the facts. Second, it is a duty imposed on a professional seller of immovable property to investigate and to provide information correctly regarding the state of the property and the existence of relevant administrative regulations. Third, it is a duty imposed on a real estate broker retained by the seller to investigate and to provide information regarding the existence of relevant administrative regulations on the property. In certain circumstances professional sellers and real estate brokers retained by the seller must also notify the buyers of future changes in the environment or price. These duties function to remove disparities in the quality and quantity of information about immovable properties and in the negotiating power between sellers and buyers. Concerning the effects of the breach of the duty, this type of information duty can and does function as a type of economic substitute for the cancellation of a contract.

The second duty is "the information duty for the achievement of the contractual purpose", which is based on the contract itself. This type of the duty is imposed on sellers not in order to secure self-determination of buyers but to guarantee the fulfilment of the buyer's contractual purpose; put alternatively, it is a duty ensuring that each buyer can actually receive the benefit he or she intended to receive upon entering into the contract.

61 Judgment No. 3.

The Judgments Analyzed for this Paper Are as Follows:

1) Supreme Court, 18 November 2004, Minshū 58, 2225
2) Supreme Court, 16 September 2005, Hanrei Jihō 1912 (2006) 8
3) Tōkyō District Court, 25 January 1974, Hanrei Jihō 746 (1974) 52
4) Tōkyō High Court, 31 March 1977, Hanrei Jihō 858 (1977) 69
5) Tōkyō District Court, 16 October 1978, Hanrei Jihō 937 (1979) 51
6) Tōkyō High Court, 11 December 1978, Hanrei Jihō 921 (1979) 24
7) Tōkyō District Court (Hachiōji Branch), 26 July 1979, Hanrei Jihō 947 (1980) 74
8) Tōkyō High Court, 28 April 1982, Hanrei Taimuzu 476 (1982) 98
9) Ōsaka High Court, 19 July 1983, Hanrei Jihō 1099 (1986) 59
10) Tōkyō District Court, 27 December 1983, Hanrei Jihō 1124 (1986) 191
11) Sapporo District Court, 28 June 1988, Hanrei Jihō 1294 (1989) 110
12) Tōkyō High Court, 25 January 1990, Kinyū Shōji Hanrei 845 (1990) 19
13) Tōkyō District Court, 28 February 1991, Hanrei Jihō 1405 (1992) 60
14) Ōsaka High Court, 21 November 1995, Hanrei Taimuzu 915 (1996) 118
15) Tōkyō District Court, 28 January 1997, Hanrei Jihō 1619 (1998) 93
16) Yokohama District Court, 23 April 1997, Hanrei Jihō 1629 (1998) 103
17) Yokohama District Court, 26 May 1997, Hanrei Taimuzu 958 (1998) 189
18) Urawa District Court (Kawagoe Branch), 25 September 1997 Hanrei Jihō 1643 (1998) 170
19) Tōkyō District Court, 23 January 1998, Hanrei Taimuzu 991 (1999) 206
20) Ōsaka District Court, 19 March 1998, Hanrei Jihō 1657 (1999) 85
21) Matsuyama District Court, 11 May 1998, Hanrei Taimuzu 994 (1999) 187
22) Tōkyō District Court, 25 January 1999, Hanrei Jihō 1675 (1999) 103
23) Ōsaka District Court, 9 February 1999, Hanrei Taimuzu 1002 (1999) 198
24) Tōkyō District Court, 25 February 1999, Hanrei Jihō 1676 (1999) 71
25) Tōkyō High Court, 8 September 1999, Hanrei Jihō 1710 (2000) 110
26) Ōsaka High Court, 17 September 1999, Hanrei Taimuzu 1051 (2001) 286
27) Ōsaka High Court, 30 September 1999, Hanrei Jihō 1724 (2000) 60
28) Ōsaka District Court, 13 December 1999, Hanrei Jihō 1719 (2000) 101
29) Kyōto District Court, 24 March 2000, Hanrei Taimuzu 1098 (2002) 184
30) Tōkyō District Court, 30 August 2000, Hanrei Jihō 1721 (2000) 92
31) Tōkyō District Court, 27 June 2001, Hanrei Jihō 1779 (2002) 44
32) Tōkyō High Court, 16 December 2001, Hanrei Taimuzu 1115 (2003) 185
33) Chiba District Court, 10 January 2002, Hanrei Jihō 1807 (2003) 92
34) Tōkyō District Court, 3 February 2003, Minshū 58, 2233
35) Tōkyō High Court, 25 September 2003, Hanrei Taimuzu 1153 (2004) 167
36) Ōsaka District Court, 15 October 2003, Kinyū Shōji Hanrei 1223 (2005) 24
37) Tōkyō High Court, 18 December 2003, Minshū 58, 2286
38) Ōsaka High Court, 2 December 2004, Hanrei Jihō 1898 (2005) 64
39) Tōkyō District Court, 20 January 2006, Hanrei Jihō 1957 (2007) 67
40) Fukuoka District Court, 2 February 2006, Hanrei Taimuzu 1224 (2007) 255
41) Tōkyō District Court, 5 September 2006, Hanrei Jihō 1973 (2007) 84
42) Tōkyō District Court, 25 December 2007, Hanrei Jihō 2033 (2009) 18
43) Tōkyō District Court, 28 April 2008, Hanrei Taimuzu 1275 (2008) 329
44) Tōkyō High Court, 29 May 2008, Hanrei Jihō 2033 (2009) 15
45) Ōsaka District Court, 25 June 2008, Hanrei Jihō 2024 (2009) 48

46) Tōkyō District Court, 19 November 2008, Hanrei Taimuzu 1296 (2009) 217
47) Fukuoka District Court (Kokura Branch), 14 July 2009, Hanrei Taimuzu 1322 (2010) 188
48) Chiba District Court, 17 February 2011, Hanrei Jihō 2121 (2011) 110
49) Utsunomiya District Court, 8 February 2012, Shōmu Geppō 59-1470
50) Ōsaka District Court, 27 March 2012, Hanrei Jihō 2159 (2012) 88
51) Tōkyō High Court, 13 June 2012, Shōmu Geppō 59-1455
52) Tōkyō District Court, 16 November 2012, Hanrei Jihō 2182 (2013) 99
53) Kōbe District Court, 6 June 2013, Hanrei Jihō 2261 (2015) 153
54) Tōkyō District Court, 3 July 2013, Hanrei Jihō 2213 (2014) 59
55) Ōsaka High Court, 12 July 2013, Hanrei Jihō 2200 (2013) 70
56) Matsuyama District Court, 7 November 2013, Hanrei Jihō 2236 (2014) 105
57) Ōsaka High Court, 23 January 2014, Hanrei Jihō 2261 (2015) 148
58) Tsu District Court, 6 March 2014, Hanrei Jihō 2229 (2014) 50
59) Takamatsu High Court, 19 June 2014, Hanrei Jihō 2236 (2014) 101
60) Tōkyō District Court, 8 October 2014, Hanrei Jihō 2247 (2015) 44
61) Tōkyō District Court, 31 October 2014, Hanrei Jihō 2247 (2015) 44
62) Tōkyō District Court, 25 December 2015, Hanrei Taimuzu 1428 (2016) 237