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
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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

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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

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ISBN 978-3-452-29117-2

www.ZJapanR.de

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Information Duties under Japanese General Contract Law and Japanese Law of Consumer Contracts

Marc Dernauer[*]

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I. INTRODUCTION

Contract law is a set of rules for contracts that may also stipulate legal duties to provide information between (and among) contract parties and, although rare, to third parties. One can distinguish information duties before or upon the formation of a contract (pre-contractual information duties), information duties that result from the conclusion of a contract (contractual information duties), and information duties that survive the termination of a contract (post-contractual information duties).

This paper aims to identify and explain important information duties under Japanese contract law (in Japanese generally called "説明義務, *setsumei gimu*" or "情報提供義務, *jōhō teikyō gimu*"[1]) as well as their functions.

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1 Both terms are equally used for "information duties" in Japan. Although, the former term would be literally translated mean "duty to explain", the latter "duty to provide information", this shall mean no difference. The degree of required information, e.g. only a formal provision of information or a more thorough explanation, depends on

Moreover, it will explain how Japanese law safeguards compliance with such information duties. The analysis will focus on general contract law and consumer contract law, but in some places also refer to information duties in regard to commercial contracts. As one particular example, it will explore information duties with relevance for financial transactions, such as the sale of financial products. The paper will not only address private law information duties, but also duties based on public law. Administrative law and criminal law duties feature quite frequently in Japanese law and must therefore also be addressed.

Before analyzing the specific information duties under Japanese contract law, however, in order to facilitate the understanding of the legal framework, the basic structures of private and "public" contract law in Japan shall be briefly explained.

II. Basic Structures of Japanese Contract Law

In Japan, the core contract law rules can be found in the Japanese Civil Code (民法, *Minpō*)[2] and the Japanese Commercial Code (商法, *Shōhō*).[3] The Japanese Civil Code came into force in 1898, the Commercial Code in 1899. Both acts were significantly influenced by the German law of that time. Despite several reforms during the more than a hundred years that followed their enactment until today, except for changes to details, the basic structure of contract law laid down in these acts remained almost unaltered.[4] As a result, Japanese contract law today is still influenced to a remarkable extent by German contract law.

1. The Japanese Civil Code (CC)

The Japanese Civil Code consists of five major parts that are called "books" and which were systematically arranged in a pandect manner as in the German Civil Code, the "*Bürgerliches Gesetzbuch* (BGB)" of 1900.

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the specific case, not the used word. There are also many special types of information duties with particular designations and meaning, for example "written formal information duty (書面交付義務, *shomen kōfu gimu*)", "prohibition to provide false information (不実告知の禁止, *fujitsu kokuchi no kinshi*)" or "prohibition to provide a determinative opinion (断定的判断の禁止, *dantei-teki handan no kinshi*)". The extent and details of the duties depend on the respective case.

2 Law No. 89/1896.

3 Law No. 48/1899.

4 For instance the reforms after the World War II ("democratization") and the reform of 2004 ("modernization of the language and reform of surety law"). See H. Nakata, *Keiyaku-hō* [Contract Law] (Tōkyō 2017) 3–4.

The first (1887) and second draft (1895) of the BGB served as a model for content structure, which for their part followed the suggestion of proponents of the German Historical School of Jurisprudence such as *Bernhard Windscheid*. They had developed their concept of a complete body of civil law based on ancient Roman law, in particular based on the *Digesta* (also known as the *Pandects*). This compendium of juristic writings on Roman law became the second part of the *Corpus Iuris Civilis* compiled on order of the Eastern Roman Emperor Iustinian I around 530. One difference between the ordering of the BGB and the Japanese Civil Code is that the order of Book Two on property law and Book Three on the law of obligations is reversed. Thus, the five books in the Japanese Civil Code are as follows: General Provisions (Book One), Property Rights (Book Two), Obligations (Book Three), Kinship (Book Four), and Succession (Book Five). The rules on contract law are laid down mostly in the first and third book.

In terms of content, the Japanese Civil Code was influenced by the two drafts of the BGB, particularly the first and third book that include the rules on contracts, but also by the French civil code and about thirty other foreign civil codes of the time.[5] At the time of enactment, books four and five, which deal with family (kinship) law and inheritance (succession) law, were initially based to a broad extent on traditional Japanese concepts. Two professors of the University of Tōkyō, *Yatsuka Hozumi* and *Masaaki Tomii,*[6] as members of the drafting commission, were especially responsible for the significant orientation toward German law in view of the structure and other important parts of the content. A preliminary draft, which had been announced in 1890, was very similar to the French civil code at that time and thus primarily influenced by French civil law. This preliminary draft was heavily disputed in public, and in the end dismissed.[7]

In June 2017, the Japanese legislator enacted a law for the reform of the law of obligations, which will amend Books One and Three of the Civil Code on a large scale, particularly the provisions regarding contracts and the general law of obligations.[8] This reform act will enter into force on 1 April 2020. Although it is a reform on a large scale, many amendments concern only details. In many cases, the enactments featured settled case law of the Supreme Court, with only a few cases involving fundamental reforms. The structure and basic principles of contract law will remain unchanged.

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5 G. RAHN, Rechtsdenken und Rechtsauffassung in Japan (Munich 1990) 110, citing N. HOZUMI, The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence (Tōkyō 1912) 21.

6 RAHN, *supra* note 5, 111–112.

7 See also e.g. NAKATA, *supra* note 4, 1–2, with further references.

8 *Minpō no ichibu wo kaisei suru hōritsu,* Law No. 44/2017.

a) *Basic principles and rules of contract law*

Japanese Contract Law is based on the principle of contractual freedom (契約の自由, *keiyaku no jiyū*) as a manifestation of the more general concept of private autonomy (私的自治, *shiteki jichi*) in Japanese civil law.[9] The principle of contractual freedom is not explicitly defined or mentioned in the Civil Code, but clearly acknowledged by the Supreme Court and in legal theory as the fundament of Japanese contract law guaranteed by the Japanese Constitution.[10] As a result of the upcoming reform of the law of obligations, the principle of contractual freedom will be explicitly referred to and acknowledged by provisions newly added to the Civil Code (new Sections 521, 522(2) CC).[11] Contractual freedom, however, can be restricted by law, and in fact has been subject to broad restrictions in Japan.[12]

The requirements for the conclusion of a specific contract are also not clearly defined. However, there is a common understanding in Japan that a contract is a juristic act requiring congruent declarations of intent (consent) from the parties to enter into a contract with specific content. One declaration is technically called the "offer", the other the "acceptance".[13] Contracts involving three or more parties require numerous acceptances (or offers).[14] After the act reforming the law of obligations comes into force, a corresponding definition will be provided in the new Section 522(1) CC. Further additional rules for a conclusion of a contract are stipulated in Sections 521 to 528 CC, primarily in regard to the exchange of declarations between parties who reside at different locations.

Some general principles of civil law that also apply to contractual relations are laid down in Section 1 CC. These are the principle of loyalty and good faith (principle of *bona fide,* 信義誠実の原則, *shingi seijitsu no gensoku*), the principle that prohibits the abuse of any kind of rights (権利濫用の禁止, *kenri ran-yō no kinshi*), and the principle that all private rights are respected by law only if they are not contrary to the common good.

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9 NAKATA, *supra* note 4, 23–25, 29–32; K. YAMAMOTO, *Minpō kōgi I: sōsoku* [Lecture on Civil Law I: General Provisions] (3rd ed., Tōkyō 2012) 107–115.

10 Supreme Court, 12 December 1973, Minshū 27, 1536 (Mitsubishi Jūshi).

11 The new Sections 521, 522(2) CC expressly mention the most important aspects of contractual freedom: The freedom to enter into a contract or not, the freedom to determine the content of a contract, and the freedom to conclude a contract without adhering to a specific form.

12 NAKATA, *supra* note 4, 25–29; YAMAMOTO, *supra* note 9, 112–115.

13 NAKATA, *supra* note 4, 20–21, 77.

14 For general explanations, however, in the following the concept of a contract between two parties will be taken as a basis.

b) Legal capacity, juristic acts, and declarations of intent

Many general rules stipulated in Book One, which can also be called the "general part" of the Civil Code, are also applicable in regard to contracts.

Sections 3 et seq. CC, for instance, generally define the entities under private law that are capable of holding private rights and of owing duties (legal capacity). This includes the assumption of relative rights such as obligations (or receivables) deriving from the conclusion of a contract (contractual obligations) – as creditor and debtor, respectively. These entities are divided into natural persons and legal persons (legal entities). Natural persons older than twenty usually have the (full) capacity to act and to deliver a declaration of intent, and thus can enter into a contract, or undertake other juristic acts, whose formation always requires the delivery of specific declarations of intent by the involved parties. Legal persons act through their representative organs. Most forms of legal entities are regulated in detail by special laws.[15]

Since a contract is a specific juristic act, Sections 90 et seq. CC on juristic acts and declarations of intent also apply to contracts. Contracts, as other juristic acts, are (fully or partly) void if they contravene public order or policy (Section 90 CC). Parties may, in particular, not agree on contractual terms that deviate from mandatory provisions, which usually express public order or policy in a particular context (Sections 91, 92 CC).

Section 95 CC stipulates that declarations of intent are void in case of an error of the declaring party. Section 96 CC provides that declarations of intent can be avoided in case of fraudulent misrepresentation (詐欺, *sagi*) or duress. Both provisions also apply to declarations of intent to enter into a contract. The rules on representation (or agency) in Sections 99 et seq. CC allow an agent with the necessary power of agency to conclude a contract or undertake other forms of juristic acts with effect for and on behalf of another person, the principal, by delivering the required declaration of intent, unless this is specifically excluded by law.

c) Performance of obligations and remedies for non-performance

The various grounds for discharge of obligations (Sections 474 to 520 CC), such as, for example, performance of an obligation, also apply to contractual obligations.

The same applies for the ordinary provisions on the liability of the debtor for non-performance of an obligation (Sections 412, 414 to 422 CC); they are supplemented by Sections 540 et seq. CC, which only apply to

15 For instance, companies are regulated by the Company Act (会社法, *Kaisha-hō*), Law No. 86/2005.

contracts. Sections 415, 540 et seq. CC in particular stipulate the requirements and legal consequences of (negligent) non-performance of a contractual obligation. Where the debtor is liable for non-performance, the creditor may claim compensation for damages and, in some cases, also rescind the contract. In particular, this liability for non-performance (債務不履行責任, *saimu fu-rikō sekinin*) may include the non-performance of information duties as an element of a duty of performance of a contractual obligation, be it a main duty or an accessory duty.

In case of reciprocal agreements, Sections 534 to 536 CC (new Section 536 CC) also need to be generally considered. They determine the party that has to bear the risk of counter-performance if one party, without negligence, cannot (fully) perform its contractual obligation. The impossibility of performing an information duty, however, is usually not the contentious issue in legal disputes.

d) Regulated types of contracts

Further rules on specific types of contracts are stipulated in Sections 549 to 696 CC. They refer to various frequently used types of contracts, such as for example, purchase contracts, lease contracts and loan contracts. With a few prominent exceptions, these provisions are non-mandatory provisions that only apply if there is no deviating agreement between the parties.

e) Tort law

General tort law (不法行為法, *fuhō kōi-hō*) in Japan is stipulated in Sections 709 to 724 of the Civil Code. Tort law, originally, was not particularly created to solve contract law issues. Due to the general and flexible constituent elements stipulated as requirements for a tort liability, and the resulting broad scope of application of tort law in Japan, however, tort law also applies as a basis for legal liability in cases of a breach of certain pre-contractual and contractual duties, including a breach of information duties, as will be demonstrated below.

2. Special Private Law and Public Law Regulation

In Japan, specific contracts are additionally regulated by countless special acts of a private law and/or public law nature, with the latter mainly represented by business laws that regulate specific business sectors or specific trading platforms, such as stock markets. One objective of these special laws is often the protection of consumers – in a broad sense – or of customers of financial service providers, who may or may not also be consumers. The regulation can refer to the formation of a contract, the content of a contract

and/or the performance of a contract. This often includes stipulations regarding pre-contractual and contractual information duties, as well as their performance and special remedies for non-performance (or non-fulfillment).

Business laws of a public law nature primarily belong to the field of economic administrative law. At the same time, they are part of contract law if they regulate contracts, forming a "public contract law" so to speak. While in theory, private contracts can be regulated by administrative law (alongside private law), from the viewpoint of European and German legal tradition, this is rather unusual. In Japan, on the other hand, this is quite common. If one further looks at other countries in Asia, where a regulation of contracts by public law is also evident, it no longer appears to be such an unusual pattern of law. Such regulation also includes legal provisions that stipulate public law information duties, which can be further subdivided into administrative law information duties and criminal law information duties.

III. Pre-contractual Information Duties

Pre-contractual information duties can be divided into *"positive information duties"* and *"negative information duties"*. Whereas positive information duties refer to duties to actively provide certain information, negative information duties are understood as prohibitions against providing false and misleading information.

In Japan, such pre-contractual information duties can be relevant between the parties about to enter into a contract who have therefore started contract negotiations. Pre-contractual information duties in this respect usually ensure that both parties enter into a contract with sufficient information about the main subject matter of the contract, the further terms and conditions of the contract and/or important surrounding circumstances. A breach of either form of pre-contractual duties – positive or negative information duties – can bring about the same undesired result, that is, one party may not be fully and correctly informed about these matters when deciding whether to enter into the contract or not. Pre-contractual information duties may also be imposed on third parties involved in the formation of the contract.

Below, explicit and implicit pre-contractual information duties of all kinds shall be explored, covering an analysis of the Civil Code, of special private law regulations and of public law regulations.

1. Private Law Information Duties

a) The Civil Code

In the Japanese Civil Code, however, one can only find very few pre-contractual information duties. When the Civil Code was originally enacted

More than hundred years ago, the Japanese legislators saw no specific need to stipulate such duties. Their concept was based on the general assumption that contract parties shall be treated as equal and therefore shall gather the information they need themselves.[16] A possible disparity of information among contract parties was generally treated as legally irrelevant. Subsequent amendments of the Civil Code so far have not brought a fundamental change of this concept.

aa) The concept of fraudulent misrepresentation

One exception to this is the already mentioned rule on fraudulent misrepresentation (Section 96 CC, 詐欺 *sagi*), similar to the German rule on *"arglistige Täuschung"* (Section 123 BGB). Generally, this rule could be treated as a specific *negative information duty* not to mislead a person into rendering a declaration of intent to enter into the contract based on the misinformation. This misinformation may involve facts about the main subject matter of the contract, the further terms and conditions of the contract or important surrounding circumstances. Misleading may also take the form of omitting to inform another party about certain facts, if the circumstances require the information of the party, such as in cases of a significant information disparity or for other reasons.[17] The provision thus also encompasses a *positive information duty*.

According to the general perception in legal theory and practice, Section 96 CC is only applicable when it is intentional, and if the conduct can be regarded as illegal. While the latter requirement would not pose any particularly high obstacle for applying the provision, the former requirement of "intent" significantly limits its scope of application. Moreover, it appears difficult to apply this provision in cases of a mere exaggeration, and in particular if it refers not to verifiable facts, but only estimations, evaluations, or assumptions regarding future developments, such as for instance future market prices or future decisions and possible acts of third parties. Whether Section 96 CC, however, really sets these requirements of "intent" or misleading statements about "facts" is at least disputable. Neither "intent" nor misleading statements about "facts" is expressly mentioned as requirements in the text of the provision.

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16 K. YAMAMOTO, Vertragsrecht, in: Baum/Bälz (eds.), Handbuch Japanisches Handels- und Wirtschaftsrecht (Cologne 2011) 461 ff., 474; NAKATA, *supra* note 4, 129; M. KONDA, *Setsumei gimu joron* [Introduction (regarding) Information Duties], in: Konda (ed.), *Setsumei gimu no riron to jissai* [The Theory of Information Duties and the Reality] (Tōkyō 2017) 3.

17 YAMAMOTO, *supra* note 9, 228–232.

Nonetheless, because of the generally perceived restrictive requirements in Section 96 CC, it is particularly difficult to apply this provision to cases of a sale of investment products such as stocks, bonds or derivatives and potentially insufficient or misleading information about the prospects of return and the financial risks involved. In fact, the provision is generally rarely applied in practice.[18] If the requirements were met however, the deceived contract party would be allowed to avoid its declaration of intent and could therefore nullify the contract. If the deceived contract party was not deceived by the other party, but by a third party, avoidance of the declaration of intent would be only possible if the other contract party was aware of the deceit, or – after the coming into effect of the reform of the law of obligations – if the other party could have known of the deceit (new Section 96 CC). The courts in Japan so far have not recognized any attributing responsibility of the other contract party for a deceit committed by some special kinds of third parties who could be classified as standing essentially on side of the other contract party, such as agents (with power of attorney) or other kind of assistants or commissioners (including experts and specialists) assigned by the other contract party to help in soliciting and concluding the contract.[19]

Related to Section 96 CC, but applying to sales contracts only, there is a more specific provision in Section 572 CC, which provides that if a seller fraudulently, that is intentionally, concealed a defect of the object of purchase, this inevitably would lead to a warranty responsibility under statutory law (Section 572 CC) for such defect, even if the seller and buyer have excluded this statutory warranty by agreement. Similar provisions can be found with regard to several other specific contracts, such for instance contracts to produce a work (Section 634 CC), donations (Section 551 CC), and loan contracts (Section 590 CC).

The basic function of Section 96 CC and Section 572 CC (and similar provisions) is to ensure fair behavior in contract negotiations and to protect the counterpart against intentional fraud. The scope of application of these provisions, however, is quite narrow. If either provision is applicable, in many cases an additional criminal liability for fraud (Section 246 Penal Code)[20] and a tort liability (Section 709 CC) can also be affirmed.

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18 An exception, for example, is the decision of the District Court Kōbe, 5 November 1965, Hanrei Jihō 442, 50, in a case of a transaction regarding commodity futures.

19 Some legal scholars recommend that at least a deceit committed by an agent should be attributed to the principal and that the deceived party in such case should be allowed to avoid the contract; see T. ISOMURA, Chapter 5 in Ishida (ed.) *Gendai minpō kōgi 1: Minpō sōsoku* [Lecture on Modern Civil Law 1: Civil Code, General Provisions] (Tōkyō 1985) 119 et seq., 166; K. SHINOMIYA, *Minpō sōsoku* [Civil Code, General Provisions] (4th ed., Tōkyō 1986) 186.

bb) Surety contracts: written form requirement functioning as a positive information duty

Another exception is the written form (or electronic form) requirement for the valid conclusion of contracts of suretyship (Section 446(2), (3) CC), which also includes a function to inform the would-be surety and warn him about the specific duties involved in a suretyship. This requirement was introduced by a law reform in 2004.[21]

The reform of the law of obligations will add a specific pre-contractual notarial recording requirement for a declaration of intent from a would-be individual surety. This declaration of intent must detail the performance of an obligation arising from suretyship for a loan debt assumed by the principal debtor for business purposes, before entering into the actual contract for suretyship itself. A violation of this formal requirement renders the later contract for suretyship invalid. Moreover, the notarial recording itself must fulfill certain requirements. The would-be surety, in principle, must, before the public notary, verbally declare the main duties involved in the respective surety obligation that is intended to be assumed. The public notary must subsequently read aloud and show the recorded text to the would-be surety and to confirm the correctness of the recording (new Section 465-6 CC).

Moreover, the reform act will introduce a specific duty of a principal debtor to provide detailed information about its financial situation to an individual person who is about to enter into a contract with the principal debtor, in which the person would promise the principal debtor to enter into a contract of suretyship with a creditor of the principal debtor, and stand surety for the performance of an obligation of the principal debtor, which the principal has assumed for business purposes (new Section 465-10(1) CC). If the principal debtor has omitted to inform the person, that is the would-be surety, or has provided false information, and if the person in false belief then entered into the contract of suretyship with the creditor and become a surety, the person (surety) may avoid the contract of suretyship if the creditor knew or could have known about the omission or false provision of information (new Section 465-10(2) CC). This new information duty has an additional warning function. It intends to ensure that the would-be debtor will be correctly informed not only about the duties of the suretyship, but also about the financial situation of the principal debtor, thus providing a basis for assessment of the actual risk involved in the suretyship should the surety be called to perform the principal obligation instead of the principal debtor. The Japanese legislator thought it necessary to assist

20 刑法, *Keihō,* Gesetz Nr. 45/1907.

21 YAMAMOTO, *supra* note 16, 467.

sureties who have been induced to enter into a contract by fraudulent or misinformation. This is due to the fact that the knowledge of the financial situation is particularly important in making the decision to enter in to contract, and because it is often very difficult for a surety to withdraw from that contract, due to difficulties identifying and proving a relevant error (Section 95 CC) or fraudulent misrepresentation (Section 96 CC). The assistance offered by Japanese legislation is however limited to suretyship for an obligation assumed by the principal debtor for business purposes.

cc) Full information about the contract as a prerequisite for a valid conclusion of the contract?

(i) Requirements for the conclusion of a contract: Implied information duties?

As already mentioned, the conclusion of a contract requires corresponding declarations of intent from the parties to enter into the contract. One is technically called the "offer", the other the "acceptance" (new Section 522(1) CC).

This, however, does not require that both parties were fully informed about the details of the main subject matter of the contract, the further terms and conditions of the contract or the important surrounding circumstances of the contract. The necessary corresponding content of all declarations of intent of the parties involved must only identify the respective parties and the subject matter of the contract as characterized by the main duties of performance under the specific contract *(essentialia negotii).* This may include, for instance, sufficiently clear reference to the specific object of a purchase and to a specific purchase price. It is not necessary that the parties have fully understood what they actually have to do in order to perform their duties or that they know all details about the specific objects of performance, or that they were informed about it by the other party. Moreover, all declarations of intent must clearly refer to all other terms and conditions *(accidentalia negotii)* one party has proposed as *necessary* terms and conditions of the contract, that is, as prerequisites for the conclusion of the contract. As above, this does not require that they have fully understood these terms and conditions or that they were sufficiently informed about their meaning by the other party. Important surrounding circumstances do not need to be addressed at all in the declarations of intent, unless one party has made specific circumstances a necessary condition for entering into the contract. Whether the parties know these surrounding circumstances, understand them or whether they were informed about them is therefore usually irrelevant for the valid conclusion of a contract. Hence, the declarations of intent must only formally correspond to each other in identifying

the specific main duties of performance and necessary terms and conditions in order to bring about a valid conclusion of a contract.

The above description represents the traditional view of the requirements for the conclusion of a contract in civil law. It is based, however, more on historical concepts rather than on explicit legal provisions. There are no specific definitions of the valid "offer" and "acceptance" in the Civil Code from which this traditional concept can be irrefutably deduced. According to the "theory of a defective agreement (合意の瑕疵論, *gōi no kashi-ron*)", this rather formalistic, traditional view has to be modified in view of relevant disparities of information between the parties of a contract, in particular if they can be classified as a structural asymmetry of information, such as in the case of ordinary consumer contracts. In such cases, the proponents of this theory claim that the better informed party has to inform the other party sufficiently about the relevant important items of the transaction and the contract, and in particular must not make false or misleading explanations, even if there are no specific statutory information duties.[22] This concept is based on the general rule of good faith (Section 1(2) CC). In a situation where the provision of sufficient and accurate information is needed by a party who does not itself have full access to the information required to fully evaluate the transaction, but such information was not provided, or where the provided information was misleading or false, and as a result, this foreseeably led this party to the wrong impression about the transaction, i.e. the declaration of intent of the less informed party was not based on full and accurate information, the agreement should be considered defective, meaning invalid. This view, however, is not generally accepted by the courts and also not the prevailing view in legal theory. Accordingly, the concept of the requirements for the conclusion of a contract under civil law in general implies no information duties of either party.

(ii) Valid declarations of intent: Implied information duties?

A declaration of intent to enter into a contract can be invalid due to general reasons, for instance due to a limited capacity to act (制限行為能力, *seigen*

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22 K. YAMAMOTO, *Minpō ni okeru "gōi no kashi"-ron no tenkai to sono kentō* [A Study on the Development of the Theory of a "Defective Agreement" in Civil Law], in: Tanase (ed.), *Keiyaku hōri to keiyaku kankō* [Legal Basis for a Contract and Contract Customs] (Tōkyō 1999) 149–184; Y. IMANISHI, *Shōhi-sha torihiki higai ni okeru shōhi-sha no keiyaku teiketsu ishi ni tsuite* [On the Intent of the Consumer to Enter into a Contract in Cases of Damages Incurred by the Consumer in Consumer Transactions], in: Kōbe Shōdai Ronshū, Vol. 40, No. 4–5 (1989) 169–185, in particular at 171; M. DERNAUER, Verbraucherschutz und Vertragsfreiheit im japanischen Recht (Tübingen 2006) 109 et seq.

kōi nōryoku). This includes, for instance, declarations of intent uttered by minors without the consent of their legal representative, who, as a result of the declaration, would not solely receive a legal right or an exemption of a duty, but rather assume a duty, where the representative may avoid the declaration of intent of the minor (Section 5(1), (2) CC). Furthermore, a declaration of intent is invalid if the person who made the declaration lacks the general capability to form a will (意思能力, *ishi nōryoku*) – now clearly stipulated by new Section 3-2 CC –, as in cases involving young children.[23]

A valid declaration of intent, on the other hand, does not require, as such, that the declarant was fully aware of the main subject matter of a contract, all further terms of the contract or all important surrounding circumstances of the contract, but only to the extent necessary for a valid conclusion of a contract (see above). Moreover, the content of a declaration of intent is not decided based on the actual subjective will of the declarant, but on how the party to whom the declaration of intent is addressed ought to have understood it in view of the particular contract, considering legal and transaction certainty (取引安全, *torihiki anzen*).[24] This prevailing concept is called “declaration principle” (表示主義, *hyōji shugi*). Hence, it is generally of no relevance, what the declarant actually thought about the subject matter of the contract, its further terms and conditions and the basis for the decision to enter into the contract, unless those thoughts were noticeable for the addressee of the declaration as defining and necessary conditions for entering into the contract.

A minority opinion holds that in cases of a relevant disparity or structural asymmetry of information between the parties, such as generally to be assumed in case of consumer contracts, the subjective imagination of the declarant about the contract should be taken as a basis to decide on the content of the agreement reached by the parties. This is called the “rehabilitation of the will principle” (意思主義の復権, *ishi shugi no fukken*).[25] This view, however, is not shared by the courts. Only in exceptional cases of tremendously complicated subject matter or content of the consumer contract, where the consumer additionally was considered to be particularly inexperienced or weak-minded, and where the contract appeared to be particularly disadvantageous or unfitting for the consumer, have some courts denied a valid decla-

23 The capability to form a will is generally considered to emerge between the age of 7 to 10 years; see M. ARAI/N. OKA, *Minpō kōgi-roku* [Lecture Notes Civil Law] (Tōkyō 2015) 15.

24 ARAI/OKA, *supra* note 23, 89.

25 See J. NAGAO, *Shōhi-sha keiyaku ni okeru ishi shugi no fukken* [The Rehabilitation of the Will Principle in Case of Consumer Contracts], in: Hanrei Taimuzu No. 497, 12–26.

ration of intent of the consumer to enter into the contract. This usually, however, has not included clarifying the legal basis for such judgment,[26] when consumers in court have stated that they had not sufficiently understood the contract and would not have entered into it if they had understood it.

There is only one exception to this general rule that the subjective imagination of the relevant facts is of no relevance for the validity of the contract. According to Section 95 CC, the declaration of intent is void (avoidable according to new Section 95 CC) in case of a relevant error "about an essential element (要素)" of the contract (or other juristic act) not caused by gross negligence. Although the meaning of an error about an essential element is vague, under the current law, only a formal discrepancy between what the declarant intended in making the declaration and the actual statement that was made is considered to fulfill this requirement (表示錯誤, *hyōji sakugo,* literally "declaration error"). This encompasses typing errors and slips of tongue (表示上の錯誤, *hyōji-jō no sakugo*) on the one hand, and using words that unknowingly have a different meaning in the context of use for the declarant (内容の錯誤, *naiyō no sakugo,* literally "error as to content") on the other. This concept does generally not extend to errors in motivation (動機錯誤, *dōki sakugo*).[27] If the declarant formally referred to the actual subject matter of the contract in his declaration of intent, but erred about the substance or object of the subject matter because of not having fully understood, or if the declarant had not fully understood or was unaware of the terms and conditions referred to or the relevance of certain surrounding circumstances, and erred thus about their actual meaning for the contract, all those errors are usually qualified only as errors in motivation to enter into the contract, and are thus legally irrelevant for the validity of the declaration of intent. The courts only treat an error in motivation as legally relevant if any such motivation was actually referred to in the declaration of intent as a basis and precondition for entering into the contract, or if such motivation was at least obvious for the other party.[28] Only in those

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26 District Court Sapporo, 28 August 1986 (unpublished); Summary Court Honjō, 25 March 1985, in: Seikatsu Gyōsei Jōhō No. 318, 109; Summary Court Monji, 18 October 1985, in: Hanrei Taimuzu No. 576, 93; and the summary of these decisions in DERNAUER, *supra* note 22, 111–114.

27 YAMAMOTO, *supra* note 9, 181–188; for the legal treatment of errors in motivation see in particular also H. MORITA, *Minpō 95-jō: dōki no sakugo wo chūshin toshite* [Section 95 CC: In Particular on Errors in Motivation], in: Hironaka/Hoshino (eds.), *Minpō-ten no hyaku-nen II* [Hundred Years of the Civil Code II] (Tōkyō 1999) 147–197.

28 Imperial Court *(Daishin'in),* 15 December 1914, Minroku 20, 1101; Supreme Court, 26 November 1954, Minshū 8, 2087; Supreme Court, 26 March 1963, Hanrei Jihō No. 331, 21; Supreme Court, 25 September 1965, Shūmin 75, 525; Supreme Court,

cases will the courts render the respective declaration of intent invalid, and, as a result, also the contract. However, in such cases, it is better to assume that the motivation has itself become part of the agreement as a precondition for entering into the contract, and that entering the contract therefore was contingent on the respective precondition, which would cause the contract to become invalid where those relevant facts were lacking. The above prevailing concept of a legal error therefore hardly allows the appreciation of information duties in the context of the application of Section 95 CC. Some legal scholars, on the other hand, argue that the dichotomy of distinguishing between legally relevant and legally irrelevant errors (二元的構成説, *nigen-teki kōsei-setsu*) inherent in the prevailing concept, is not adequate and also not prescribed by Section 95 CC. They recommend the application of a uniform concept of error for all kinds of errors (一元的構成説, *ichigen-teki kōsei-setsu*) or a modification of the prevailing concept. Based on this concept of a legal error, all types of errors might become legally relevant depending on the specific circumstances, including errors in motivation.[29] The evaluation of the specific error as relevant could also take into account a disparity in information, knowledge and experience between the parties (in particular for consumer contracts), and whether the better-informed and more experienced party had made efforts to inform and explain the relevant aspects of the contract to the other party.[30] According to this interpretation, therefore, Section 95 CC could also serve as a legal basis for requiring one party to a contract to explain to the other party important aspects of the contract, including its specific main subject matter, its terms and conditions and relevant surrounding circumstances in order to avoid a subsequent judgment rendering the contract void. The courts, however, generally do not follow this concept at all. Only in very few cases have the courts so far departed from the prevailing concept of an error, as explained above, to help consumers to withdraw from unwanted contracts.[31]

After the reform of the law of obligations, the wording of Section 95 CC will change, but not the prevailing concept of a legal error under this provision. Most declaration errors are still included by the new Section 95(1)

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29 May 1970, Hanrei Jihō No. 598, 55; Supreme Court, 14 September 1989, Hanrei Jihō No. 1336, 93; see also H. HIRANO, *Minpō sōsoku* [General Provision of the Civil Code] (Tōkyō 2017) 214–217.

29 YAMAMOTO, *supra* note 9, 183, 188–203; YAMAMOTO, *supra* note 22, 154–155, 166–171; H. MORITA, *"Gōi no kashi" no kōzō to sono kakuchō riron* [The Structure of the "Defective Agreement" and the Theories to Extend it] (1), in: NBL No. 482 (1991) 22, 24–31;

30 In particular YAMAMOTO, *supra* note 22, 154–155, 166–171, with further references.

31 For example: Nagoya High Court, 26 September 1985, Hanrei Jihō 1180, 64; District Court Tōkyō, 30 April 1994, Hanrei Jihō 1493, 49.

No. 1 CC. Errors as to the content and errors in motivation can still be legally relevant as factual errors (事実錯誤, *jijitsu sakugo*) according to new Section 95(1) No. 2, (2) CC, which is formally a new category of a relevant error in regard to relevant facts and circumstances, but which will hardly change the hitherto case law. Henceforth, however, the relevant facts and circumstances must be expressly mentioned by the declarant.[32] This is, in fact, a slightly stricter requirement than the hitherto requirement set by case law for relevant errors in motivation. However, the new Section 95 CC still does not allow for consideration of a relevant disparity of information, knowledge or experience between the parties, or unfair influence by one party (for instance by allowing consideration of negligent or factually insufficient information or incorrect or misleading information, linked to such disparity), which could be classified as a violation of implied positive or negative information duties. The introduction of such a concept was discussed during the preparation stage of a draft text for the reform of the law of obligations, but finally dropped.[33] As a rather technical aspect, the reform will change the legal consequence of a legal error. In the future, the declaration will not be invalid, but the erring declarant may avoid the declaration of intention.

Accordingly, full knowledge and information about the main subject matter of a contract, the terms and conditions of the contract, and relevant surrounding circumstances are not prerequisite for a valid declaration of intent to enter into a contract.

(iii) No implied information duties

As a result, neither the prevailing view of the legal requirements for a valid conclusion of a contract nor the requirements for a valid declaration of intent require full information about the main subject matter of the contract, the further terms of the contract or its surrounding circumstances. It also does not permit consideration of a possible breach of implied information duties, for instance in cases of a disparity or a structural asymmetry of information, knowledge and experience between the parties.

dd) Information duties and the inclusion of general terms and conditions

As explained above, under the general civil law concept regarding the requirements for the conclusion of a contract, the offer and the acceptance must both only formally refer to the terms and conditions that shall become

32 A. YAMANOME, *Atarashii saiken-hō wo yomitoku* [Exploring the New Law of Obligations] (Tōkyō 2017) 42–43, 46–47.

33 YAMANOME, *supra* note 32, 49.

part of the contractual agreement. If one party wants to include its general terms and conditions (GTC) into the contract, that party must explicitly refer to those GTC in its declaration of intent to enter into the respective contract. Since a failure to refer to the GTC usually means they are not included in the contract – a disadvantageous outcome – one may broadly consider classifying the necessity to point to the GTC as a formal information duty. On the other hand, indicating desired terms and conditions to the other party is only part of the contract negotiations, and thus should not qualify as an information duty.

The established case law in Japan, however, holds that GTC have to be treated specially. If one party generally uses certain GTC toward its customers, the courts generally tend to confirm the inclusion of the GTC as part of the applicable terms and conditions of the contract, in all cases where a contract was concluded. The leading case in this regard, decided by the Imperial Court, the highest civil court in Japan before the establishment of the modern Supreme Court in 1947, involves GTC of an insurance company. The company had neither delivered a copy of its GTC nor otherwise fully referred to them during negotiations of the contract. There was only a small reference in the application form for the customer that the insurance company uses GTC. For the Court, this was sufficient to confirm the valid inclusion of the GTC into the insurance contract. Even more, the Court held that if one party generally uses GTC as part of its business transactions, those GTC should generally be treated as part of the contract, unless (at least) one party, for instance the other party, has explicitly stated it did not wish its use before entering into the contract, regardless of whether the other party had knowledge of the existence of the respective GTC. This legal concept is called "theory of the presumed intention (意思推定説, *ishi suitei-setsu*)" and has been generally applied by the courts ever since.[34] The courts make only few exceptions with regard to particularly unfair and unusual clauses in GTC, especially for lease contracts for real property,[35] for arbitration clauses, and for clauses determining the applicable jurisdiction.[36] Therefore, according to the relevant case law, making formal reference to generally used GTC is not necessary for their inclusion into the contract.

This, however, will change with the upcoming reform of the law of obligations. New Section 548-2(1) No. 2 CC will require the user of GTC, now called "fixed terms and conditions (定型約款, *teikei yakkan*)" and defined

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34 Supreme Court, 6 February 1962, Shōji Hōmu 248, 31; Supreme Court, 24 October 1967, Saihanshū 88, 741; Supreme Court, 8 May 1980, Hanrei Taimuzu 417, 83.

35 S. KAWAKAMI, *Yakkan kisei no hōri* [The Regulation of General Terms and Conditions] (Tōkyō 1988) 198–199.

36 Supreme Court, 23 February 1982, Minshū 36, 183.

in new Section 548-2(1) CC, to refer to them in contract negotiations, that is, in the declaration of intent to enter into the contract. Moreover, according to new Section 548-3(1) CC, the user has, on request from the other party, to present the GTC in full before the conclusion of the contract, in the appropriate form (and also after entering into the contract). If the user of GTC does not comply with this duty, the GTC will not become part of the contract, even if its inclusion was expressly agreed upon by the parties (new Section 548-3(2) CC). In view of the long-standing case law generally confirming the inclusion of the GTC as part of the agreement, this new regulation can be classified as an information duty for the user of GTC that aims to protect the other party from entering into the contract without having full opportunity to take note of the content. It does, however, not go beyond that. It does not aim to ensure the other party has in fact taken note of it before entering into the contract.

ee) Information duties based on good faith (bona fide)

Although not specifically addressed by the Civil Code, at present there is no longer dispute that a significant information disparity or a structural information asymmetry between the parties in principle gives rise to a pre-contractual information duty for the dominant party (including its assistants), based on the principle of good faith (Section 1 para. 2 CC, *shingi seijitsu no gensoku*). This means, the dominant party has to inform the other party during contract negotiations about all important details (重要事項, *juyō jikō*) regarding the main subject matter of the contract, the further terms and conditions, and the relevant surrounding circumstances, if the other party needs to receive this information. This is not only acknowledged by academic law theory,[37] but also by numerous court decisions of the Supreme Court and other courts at all levels.[38]

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37 KONDA, *supra* note 16, 3–4, 6; K. YAMAKAWA, *Setsumei gimu no hōteki konkyo, zentaizō* [The Basis for Information Duties and the Overall Concept, in: Konda (ed.), *supra* note 16, 9, 10–17; S. MIYASHITA, *Keiyaku kankei ni okeru jōhō teikyō gimu* [Information Duties in Contractual Relations] (1), in: Hōsei Ronshū 2000, 61, 63 et seq., 68 et seq.; M. YOKOYAMA, *Keiyaku teiketsu katei ni okeru jōhō teikyō gimu* [Information Duties Upon Entering into a Contract], in: Jurisuto 1996, 128–138; M. GOTŌ, *Keiyaku-hō kōgi* [Lecture Contract Law] (Tōkyō 2013) 13; Y. SHIOMI, *Kihon kōgi – Saiken kakuron I* [Basic Lecture – Special Law of Obligations I] (3rd ed. Tōkyō 2017) 4–7; YAMAMOTO, *supra* note 16, 474 (recital 43); K. YAMAMOTO, Basic Questions of Tort Law from a Japanese Perspection, in: Koziol (ed.), Basic Questions of Tort Law from a Comparative Perspective (Vienna 2015) 515, 560–561; C. FÖRSTER, Haftung für vorvertragliche Aufklärungspflichtverletzungen im japanischen Recht, Recht der Internationalen Wirtschaft (RIW) 2013, 44–55; M. DERNAUER, Vorvertragliche Aufklärungspflichtverletzungen im japani-

This information duty ensures that both parties enter into a contract with the relevant information about the contract. Depending on the case, this can be a *positive information duty* to actively provide all necessary information to the other party or to explain all relevant details, or a *negative information duty,* not to misinform the other party. The existence and the specific content of an information duty depend on the specific circumstances of the case. In order to decide about whether a party indeed has a duty to inform the other party and about what items, usually the specific experience and knowledge of the parties as well as the presence, availability or opportunity to collect the relevant information on both sides are taken into consideration.

A specific information duty is particularly straightforward where the circumstances involve a general structural information asymmetry between the parties engaged. Such a structural information asymmetry is generally recognized for example with regard to consumer contracts, [39] contracts involving the sale of financial products (e.g. investment products like securities and derivatives, and insurance contracts[40]) where only one party is a professional entrepreneur (financial service provider),[41] labor contracts,[42]

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schen Vertragsrecht, in: Coester-Waltjen/Lipp/Waters, Liber Amicorum Makato Arai (Baden-Baden 2015) 210, 213–214, 232–236.

38 Supreme Court, 27 November 2012, Hanrei Jihō 2175, 15; Supreme Court, 16 September 2005, Hanrei Jihō 1912, 8 – see also the partial English translation and comment of M. DERNAUER, Case No. 7, in: Bälz/Dernauer/Heath/Petersen-Padberg (eds.), Business Law in Japan – Cases and Comments (Alphen aan den Rijn 2012) 65–76; Supreme Court, 18 November 2004, Minshū 58, 2225.

39 N. YAMAGUCHI, *Shōhi-sha keiyaku to setsumei gimu* [Consumer Contracts and Information Duties], in: Konda (ed.), *supra* note 16, 185–199; MIYASHITA*, supra* note 37, Hōsei Ronshū 2000, 63 ff; A. ŌMURA*, Shōhi-sha, shōhi-sha keiyaku no tokusei* [The Particular Nature of the Consumer and the Consumer Contract] (3), NBL 1991, 36 et seq.; GOTŌ, *supra* note 37, 13; M. DERNAUER, *supra* note 22, 54 et seq. The perceived general structural information asymmetry is also reflected in the purpose definition in Section 1 Consumer Contract Act *[Shōhi-sha Keiyaku-hō],* Law No. 61/2000.

40 H. IGUCHI, *Hoken keiyaku to setsumei gimu* [Insurance Contracts and Information Duties], in: Konda (ed.), *supra* note 16, 284–314.

41 T. MATSUSHIMA, *Kin'yū shōhin torihiki to setsumei gimu* [Financial Products Transactions and Information Duties], in: Konda (ed.), *supra* note 16, 226–248; YAMAKAWA, *supra* note 37, 12; T. SAKURAI/T. UEYANAGI/Y. ISHITOYA*, Kin'yū shōhin torihiki-hō handobukku* [Handbook Financial Products Transactions] (Tōkyō 2002) 7–9. See also Section 1 Financial Products Sales Act *[Kin'yū shōhin hanbai-hō],* Law No. 101/2000.

42 KONDA, *supra* note 16, 6.

real property transactions,[43] and other contracts of ordinary individuals with professionals or experts, such as attorneys at law,[44] medical doctors,[45] tax consultants,[46] and public accountants.[47] Some see a general structural information asymmetry also between the parties of franchise contracts.[48] In all these cases, courts frequently acknowledge specific information duties and their violations.[49] Even in contracts between entrepreneurs or merchants (BtoB contracts), information duties will be sometimes acknowledged if there is a specific information disparity between the parties.[50]

(i) Tort law liability I: General features

The courts usually apply general tort law as a basis for sanctioning a violation of an information duty.[51] This results in a claim for compensation of damages (in money) based on a tort liability provision of the Civil Code, in the absence of a specific private law remedy ruling out the application of general tort law. The most important basis for assuming a tort liability in such cases is the general tort law provision Section 709 CC, which provides that a person who has intentionally or negligently (and illegally[52]) infringed

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43 N. YATA, *Manshon hanbai to setsumei gimu* [Sale of Condominiums and Information Duties], in: Konda (ed.), *supra* note 16, 48–71; K. SHIMIZU, *Fudōsan chūkai torihiki to setsumei gimu* [Real Property Transactions Involving Intermediaries and Information Duties], in: Konda (ed.), *supra* note 16, 35–47; Y. HORIE, *Kensetsu-gyō to setsumei gimu* [Construction Industry and Information Duties], in: Konda (ed.), *supra* note 16, 72 – 91; and further contributions in Konda (ed.), *supra* note 16.

44 K. FURUSATO, *Bengoshi to setsumei gimu* [Attorneys at Law and Information Duties], in: Konda (ed.), *supra* note 16, 435–457.

45 R. FUKUHARA, *Ishi to setsumei gimu* [Medical Doctors and Information Duties], in: Konda (ed.), *supra* note 16, 518–534.

46 N. TAKAGISHI, *Zeirishi to setsumei gimu* [Tax Consultants and Information Duties], in: Konda (ed.), *supra* note 16, 479–498.

47 T. AKISAKA / Y. HORINO, *Kōnin kaikei-shi to setsumei gimu* [Public Accountants and Information Duties], in: Konda (ed.), *supra* note 16, 499–517.

48 MIYASHITA, *supra* note 37, Hōsei Ronshū 2000, (10) 334 et seq.; DERNAUER, *supra* note 22, 63. See also O. TANABE, *Furanchaizu keiyaku to setsumei gimu* [Franchise Agreements and Information Duties], in: Konda (ed.), *supra* note 16, 327 – 364.

49 KONDA, *supra* note 16, 6.

50 See O. TANABE, *B to B torihiki to setsumei gimu* [BtoB Transactions and Information Duties], in: Konda (ed.), *supra* note 16, 315–321.

51 See e.g. above the decisions mentioned in *supra* note 38; see also e.g. SHIOMI, *supra* note 37, 6–9; YAMAMOTO, *supra* note 37, 561; YAMAKAWA, *supra* note 37, 13–14.

52 "Unlawfullness" or "illegality" (違法性, *ihō-sei*) is not expressly mentioned as a requirement for a tort (tort liability) in Section 709 CC, or in other special tort liability provisions of the Civil Code, but it is nonetheless generally considered to be

any right or legally protected interest of others, shall be liable to compensate any resulting damages. In this regard, the violation of an information duty is often qualified as an illegal infringement of a right to self-determination (自己決定権, *jiko kettei-ken*).[53]

If a specific information duty for the protection of a party is expressly laid down in a particular legal provision and if the respective legal provision has been violated by the obliged other party, it is also possible to construe a relevant illegal infringement of a right or legally protected interest as required by Section 709 CC, if the law provides no special sanction that excludes tort liability for such violation. Tort liability is most easily assumed where the conduct of a party constitutes a crime stipulated by the Penal Code (PC), such as fraud (Section 246 PC), regardless of criminal liability. A violation of special private law provisions with information duties can also constitute a tort, but most cases of private law information duties explicitly set by law, provide a specific private law consequence. A violation of administrative regulations with public law information duties or rules set through self-regulation alone, on the other hand, does not always constitute a tort.

Tort law liability in principle grants the injured party a monetary claim for compensation of pecuniary damages (Sections 722(1), 417 CC) and non-pecuniary damages (Section 710 CC). Claims for compensation of non-pecuniary damages will be only granted if the injured party has also suffered physical or mental pain.[54] In cases of a violation of an information duty, courts grant claims for non-pecuniary damages only under special circumstances for mental pain (精神的苦痛, *seishin-teki kutsū*), for instance if the incurred pecuniary damage is particularly high and/or if the tort has significantly affected the daily life of the injured party. These cases include those where an ordinary consumer has suffered high financial losses as a result of the purchase of high-risk financial products for investment purposes,[55] through fraudulent investment transactions[56] or other fraudulent

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such a requirement; cf. YAMAMOTO, *supra* note 37, 539–542; Y. SHIOMI, *Kihon kōgi – Saiken kakuron II* [Basic Lecture – Special Law of Obligations II] (3rd ed., Tōkyō 2017) 18–24.

53 SHIOMI, *supra* note 37, 6; YAMAKAWA, *supra* note 37, 11; FUKUHARA, *supra* note 45, 534. Some also assume that a violation of an information duty can qualify as an infringement of a relevant expectation right (期待権, *kitai-ken*), or of a relevant economic interest (*torihiki rieki,* 取引利益 or *keizai-teki rieki,* 経済的利益), see DERNAUER, *supra* note 22, 187.

54 YAMAMOTO, *supra* note 37, 571–575.

55 District Court Saga, 18 July 1986, Hanrei Jihō 1222, 114; District Court Okayama, 28 April 1994, Sakimono Torihiki Saibanrei-shū XVI, 43 (commodity futures transactions).

transactions.[57] In such cases the amount granted as compensation for non-pecuniary damages is often schematically calculated as approximately ten percent of the incurred pecuniary damages.[58] In addition, tort law allows the injured party to claim statutory interest on the due amount of compensation, calculated from the day the damages have occurred[59] and compensation for a part of the fees paid to an attorney at law for pursuing the damage claims.[60]

Sections 709, 710 CC thereby provide a basis for liability for damages of the individual actors. This liability arises from a negligent or intentional violation of a pre-contractual information duty based on good faith, particularly when committed by individual experts, sole entrepreneurs, governing organs, executive officers, partners, or employees of companies (and other legal entities), or assigned third party assistants and agents (including employees and organs of companies and other legal entities). This includes in particular third party experts such as managing partners, organs, or staff of real estate companies entrusted and commissioned with a particular transaction by a party to the contract.[61] Violation of an information duty by governing organs, executive officers and partners of companies automatically extends the tort liability to the respective company itself (based on Sections 350, 600 Company Act). Similar considerations apply for other legal entities established on other special laws. In cases where a legal entity is to enter into a contract, the courts do not always precisely distinguish between the legal entity itself and the individual acting on behalf of the legal entity when they give reasons for a particular pre-contractual information duty relevant in the context of tort law. Depending on the case, the acting individuals and legal entities are treated as a unit with particular expert knowledge, or the acting individuals themselves are the reason for the assumption of an information disparity and a resulting information duty, for example because they are viewed as having the relevant expert knowledge, which also extends to one party to the contract.

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56 District Court Akita, 27 June 1985, Hanrei Taimuzu 494, 116; District Court Kōbe, 28 September 1987, in: Nagoya Shōhi-sha Mondai Kenkyū-kai (ed.), *Hanrei – Shōhi-sha torihiki-hō* [Case law – Consumer Transactions] (Tōkyō 1992) 343.

57 DG Ōsaka, 24 April 1981, Hanrei Jihō 1009, 33.

58 For details, DERNAUER, *supra* note 22, 205–207.

59 Supreme Court, 4 September 1962, Minshū 16, 1834.

60 Supreme Court, 27 February 1969, Minshū 23, 441. Usually about 20 to 30 % of the full lawyers' fees the injured party actually has to bear, see SHIOMI, *supra* note 52, 79.

61 See Supreme Court, 16 September 2005, Hanrei Jihō 1912, as well as the translation and comment on this case, DERNAUER, *supra* note 38, 65–76.

If the individual acting for a party to the contract has committed a relevant violation of a pre-contractual information duty (and is therefore liable based on Section 709 CC) and is not an organ of that party, the tort liability of the contracting party itself is based on Section 715 CC, the employer's or principal's liability. Although the wording of Section 715 CC provides that the employer may in principle escape this liability (by proving due care was taken with respect to the selection and supervision of the employee or auxiliary), in legal theory and practice, employer's liability is considered to be a strict liability.[62] Other individuals that have helped in the solicitation of the contract on behalf of the principal contracting party and which are considered to have assisted in the violation of the information duty, or instigated it, can easily be held liable based on the joint liability pursuant to Section 719 CC. This requires only an objective connection between the main perpetrator and the assistants in the tortious acts, and negligence on behalf of the assistant.[63] All individuals or legal entities liable for the violation of an information duty, be it based on Section 709, 715 or 719 CC, or on any other special tort law provision, are always jointly and severally liable towards the injured person.

Although the acknowledgment of a tort law liability for a violation of a pre-contractual information duty does not automatically invalidate a contract entered into by the contracting parties, in practice, the courts sometimes treat the contract as no longer existing, although they sometimes give no specific further reason for the invalidity of the contract (which could be, for instance, the violation of public order or policy, Section 90 CC). Moreover, the monetary compensation can include an amount equivalent to all the payments made by the injured party. Therefore, the acknowledgement of a tort liability in such cases is by some scholars regarded as "equivalent to a restitution in kind (原状回復的損害賠償, *genjō kaifuku-teki songai baishō*)"[64], involving something like an opportunity for the aggrieved party

62 M. C. CHINO/N. KASHIWAGI/A. OKADA, Contract and Tort, in: McAlinn (ed.), Japanese Business Law (Alphen aan den Rijn 2007) 173, 216; YAMAMOTO, *supra* note 37, 630–633; SHIOMI, *supra* note 52, 141–142; DERNAUER, *supra* note 22, 207–209.

63 CHINO/KASHIWAGI/OKADA, *supra* note 62, 219–220; SHIOMI, *supra* note 52, 177–182; for details, see also DERNAUER, *supra* note 22, 209–211.

64 YAMAMOTO, *supra* note 22, 164; Y. SHIOMI, *Kihan kyōgō no shiten kara mita songai baishō-ron no genjō to kadai* [The present state of the legal theory regarding compensation for damages from of the viewpoint of concurring rules, and the involved functions], in: Jurisuto 1079 (1995) 91, 94–95; Jurisuto 1080 (1995) 86, 91–94; K. YAMAMOTO, *supra* note 37, 561; SHIOMI, *supra* note 37, 9; restitution in kind as a form of compensation for damages is usually available only in special cases, such as defamation (Section 723 CC).

to disengage from an "undesired contract".[65] However, in many cases the courts also confirm a contributory negligence of the injured party leading to a reduction of the claim for compensation of damages based on Section 722(2) CC.[66] The structure of Japanese tort law and the concept of a disengagement from an undesired contract are hence not fully consistent.

The Japanese Supreme Court, for instance, acknowledged a tort law liability in a case where a real estate company as a landlord wrongly informed the tenants of a housing complex that they would receive a special purchase offer for their apartment if they agreed to leave the apartment for upcoming renovation works, although the company was planning a general purchase offer regardless of the tenants' conduct.[67]

Another case of the Supreme Court involved failing to inform about the existence and location of a fire door inside a condominium.[68] Here a real estate company acted on behalf of the seller of the condominium, as an agent in regard of the conclusion of the sales contract as well as an assistant in performing the contract. The seller was held liable for damages resulting from a (negligent) failure to inform before entering into the contract and after the conclusion of the contract, based on tort law (Section 709, 715 CC) and for non-performance of the contractual obligation (Section 415 CC, breach of a contractual information duty). However, the real estate company itself was also held liable, as an expert in the real estate business, based on tort law (Section 709, 715 CC). Hence, third parties who act as experts on behalf of a contracting party can also have information duties based on good faith towards the other party to the contract, before (pre-contractual) and after (equivalent to a contractual information duty) the conclusion of a contract.

In a Supreme Court case regarding a non-consumer transaction, a tort law liability of a financial service provider was acknowledged because the provider did not sufficiently inform a potential finance provider (a bank) about the desolate financial situation of the company that sought financial support.[69] Here again, the main aspect of the case was not the liability of

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65 Based on the concept of S. LORENZ, Der Schutz vor dem unerwünschten Vertrag – Eine Untersuchung von Möglichkeiten und Grenzen der Abschlußkontrolle im geltenden Recht (Munich 1997) 2. This concept has also been picked by some scholars in Japan; see for example Y. SHIOMI, *Kihon kōgi – Saiken kakuron I* [Basic Lecture – Special Law of Obligations I] (2nd ed., Tōkyō 2009) 5 *(„nozomanakatta keiyaku").*

66 SHIOMI, *supra* note 37, 9; for details see DERNAUER, *supra* note 22, 203–204.

67 Supreme Court, 18 November 2004, Minshū 58, 2225.

68 Supreme Court, 16 September 2005, Hanrei Jihō 1912; translation and comment on this case by DERNAUER, *supra* note 38, 65–76.

69 Supreme Court, 27 November 2012, Hanrei Jihō 2175.

the contractual party, the company that sought financial support, but rather the (additional) liability of the expert acting on its behalf.

(ii) Tort law liability II: "Tortious acts in business transactions"

Although a tort liability can be reasonably construed in cases of a violation of a specific information duty based on good faith in accordance with the requirements explained above (under (1)), most court decisions do not exclusively deal with the violation of one single information duty in the context of tort law, instead taking into account the list of wrongdoings and assessing the overall picture from the rather flexible and vague standard of "unlawfullness (違法性, *ihōsei*)". That means, assessments under Section 709 CC (and Sections 715, 719 CC etc.) do not focus on one single wrongdoing, but a bundle of assumed minor wrongdoings or illegal circumstances on the basis of an overall view (総合判断, *sōgō handan*). Conduct of one party, considered on the whole to be "illegal", gives rise to a tort liability under Section 709 CC. This court practice has been described in legal literature with an analogy from Jūdō competition as a "合わせて一本 *awasete ippon*" judgment.[70] In those cases, the questions of whether a specific right or legal interest has been infringed, of whether one single wrongdoing is sufficient to constitute a tort, or whether negligence occurred, is usually not fully discussed.

Violations of pre-contractual information duties of various kinds play a predominant role in those cases. These are based on good faith, as well as more specific regulations (including public law information duties), but also breaches of other pre-contractual duties, of contractual duties (non-performance), and all sorts of violations of regulations and other rules. These rules include those set through self-regulation, for instance statutes set by stock market operators and rules set by associations of securities dealers.

The number of such court decisions is particularly high in cases involving the sale of financial products[71] (e.g. securities transactions,[72] commodi-

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70 T. MATSUMOTO, *Gimanteki torihiki ni okeru keiyaku no kōryoku to fuhō kōi sekinin – sakimono torihiki higai wo sozai ni* [Validity of Contracts and Tort Law Liability in Fraudulent Business Transactions: The Example of Damages Resulting from Commodity Futures Transactions], in: Sakimono Torihiki Higai Zenkoku Kenkyū-kai (ed.), *Sakimono torihiki higai kenkyū* [Studies on Damages Suffered from Commodity Futures Transactions] No. 9 (1993) 9, 14.

71 S. YAMADA, *Kinyū torihiki ni okeru setsumei gimu* [Information Duties in Financial Transactions], in: Jurisuto No. 1154 (1999) 21–29; S. MIYASHITA, *Kin'yū kikan ni yoru shōhin hanbai no kan'yū to setsumei gimu* [The Solicitation of a Sale of Products by Financial Institutes and Information Duties], in: Shizuoka Daigaku Hōsei Kenkyū Vol. 10, No. 3=4 (2006) 1–56.

ty futures transactions,[73] and other investment transactions[74]), fraudulent consumer transactions,[75] and consumer contracts[76] in general; that is, in cases where a significant disparity in information, knowledge and experience between the parties is presumed. This specific case law is considered to constitute a separate category of tort law application and is called "tortious acts in business transactions" (取引的不法行為, *torihiki-teki fuhō kōi* or 取引型不法行為, *torihiki-gata fuhō kōi*)[77].

(iii) Concept of "culpa in contrahendo": Contractual liability for pre-contractual information duties

Some scholars argue that the relation of good faith established by the commencement of contract negotiations is a key reason for the acknowledgement of specific pre-contractual information duties between the would-be parties to a contract. A liability for a violation of such pre-contractual information duties must therefore be a contractual liability, not a tort law liability. As a basis for this concept, they use the theory of *culpa in contrahendo,* first introduced from Germany to Japan by legal academics in the 1920s and discussed in Japan ever since.[78]

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72 See the analysis of A. M. Pardeck, *Shōken torihiki kanyū no hō-kisei: „kaiji gimu", „setsumei gimu" wo koete* [Regulating the Solicitation of Securities Transactions: Beyond Disclosure and the Duty to explain] (Tōkyō 2001) 95–214.

73 DERNAUER, *supra* note 22, 216–228, with several examples; MIYASHITA, *supra* note 37, Hōsei Ronshū 2003 (7) 213–253, with a list of 245 cases; M. SUMIDA, Anlegerschutz bei Warentermingeschäften in Japan, ZJapanR/J.Japan.L No. 12 (2001) 129–138.

74 For details see T. SHIMIZU, *Tōshi kan'yū to fuhō kōi* [Solicitation of Investment transactions and tort] (Tōkyō 1999).

75 See the court "decisions in the "Toyota Shōji" case and the "Belgian Diamonds" case, DERNAUER, *supra* note 22, 229–243.

76 For details see DERNAUER, *supra* note 22, 181–244; M. SAITŌ, *Shōhi-sha torihiki to fuhō kōi* [Consumer Transactions and Tortious Acts], in: Nihon Bengoshi Rengōkai (ed.), *Shōhi-sha-hō kōgi* [Lecture Consumer Law] (4th ed., Tōkyō 2013) 107–133, in particular 116–119; in Japanese, *culpa in contrahendo* is referred to by the term "契約締結上の過失, *keiyaku teiketsu-jō no kashitsu*".

77 See e.g. S. YAMADA, *Tōrihiki ni okeru fuhō kōi – yōken wo chūshin ni* [Torts in Business Transactions: Focusing on the Requirements], in: Jurisuto No. 1097 (1996) 98; SAITŌ, *supra* note 76, 115; SHIOMI, *supra* note 52, 147. For a detailed explanation see M. OKUDA (ed.) *Torihiki kankei ni okeru ihō kōi to sono hōteki shori* [Illegal Acts in Business Relations and its Legal Handling], Jurisuto Bessatsu (Tōkyō 1996).

78 SHIOMI*,* *supra* note 37, 4–5; YAMAKAWA, *supra* note 37, 14; for details: see for instance M. TAKAHASHI, *Keiyaku teiketsu-jō no kashitsu-ron no gen-dankai* [The Present State of the Theory of *culpa in contrahendo*], in: Jurisuto 1094 (1996) 121–

This legal theory provides a comprehensive theoretical basis for establishing a liability for damages resulting from negligent or willful breaches of various forms of pre-contractual duties. The commencement of contract negotiations establishes a quasi-contractual relationship with loyalty duties and protective duties between the negotiating parties, which may include mutual information duties in cases of a significant information disparity.[79] In Germany, liability based on the concept of *culpa in contrahendo* was long acknowledged in continuous case law by the German Supreme Court in civil cases (Bundesgerichtshof, BGH) and its predecessor, the German Imperial Court (Reichsgericht, RGH), and was finally codified in 2002 in Sections 280(1), 311(2), 241(2) of the German Civil Code as a special non-tortious statutory form of liability for damages. In the past, however, it was often qualified as a quasi-contractual liability.

Following this concept, some scholars in Japan hold that a breach of pre-contractual information duties can lead to liability for non-performance of an obligation pursuant to Sections 415, 541–543 CC, with a monetary claim for the compensation of damages and a right to rescind the contract.[80] Others hold, that the specific basis for granting claims for the breach of pre-contractual information duties should remain a tort law provision, such as Section 709 CC.[81]

The Japanese courts, however, usually do not mention the concept of *culpa in contrahendo* at all. Moreover, they use tort law as a basis for a liability for the violation of pre-contractual duties, as described above. The courts in particular do not grant any claims based on a liability for non-performance pursuant to Sections 415, 541–543 CC.[82] The Japanese reform commission for the law of obligations temporarily considered proposing the

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128; T. TSUBURAYA, Die Entwicklung der "culpa in contrahendo" in Japan, in: Müller-Freienfels et al. (eds.), Recht in Japan No. 10 (1996) 39–52; N. TANAKA, Zur Befreiung des Verbrauchers aus dem aufgrund unlauterer Verhandlungen abgeschlossenen Vertrag im japanischen Zivilrecht, in: Müller-Freienfels et al. (eds.), Recht in Japan No. 11 (1998) 43–62; J. HONDA, *"Keiyaku teiketsu-jō no kashitsu" riron ni tsuite* [On the Theory of the culpa in contrahendo], in: Endō (ed.), *Gendai keiyaku-hō taikei* [The Modern System of Contract Law], Vol. 1 (Tōkyō 1983) 193–215; YAMAMOTO, *supra* note 16, 472; DERNAUER, *supra* note 22, 132–139; DERNAUER, *supra* note 38, 72–74.

79 SHIOMI*, supra* note 37, 4–5; for the original German concept of *culpa in contrahendo,* see e.g. D. MEDICUS/S. LORENZ, Schuldrecht I (20th ed., Munich 2012) 52–61, with further references.

80 See e.g. HONDA, *supra* note 78, 207–208; TAKAHASHI, *supra* note 78, 144; TANAKA, *supra* note 78, 52.

81 TAKAHASHI, *supra* note 78, 141 (footnote 4), 142–143; YAMAMOTO, *supra* note 16, 473 et seq.

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

inclusion of a new legal provision for the Civil Code as a special basis for pre-contractual information duties in cases of a particular information disparity between the parties. The commission also considered proposing a new special liability provision for the compensation of damages in cases of a violation of this and other pre-contractual duties. This concept, however, was abandoned during the deliberation process.[83]

(iv) Result

Therefore, under the Civil Code, a breach of pre-contractual information duties is often dealt with by the application of tort law in the absence of more specific legal remedies.

b) Special private laws

aa) The Act on the Sale of Financial Products

One of the relevant special private laws in regard of pre-contractual information duties is the Financial Products Sales Act (金融商品販売法, *Kinyū shōhin hanbai-hō,* FPSA[84]), which came into effect in 2001. This law provides a basis for a special tort liability in case of a breach of specifically defined pre-contractual information duties in the context of the sale of many financial products, such as securities, derivatives (e.g. options, financial futures and forward transactions), or insurance certificates, as defined by Section 2 FPSA.

According to Section 3 FPSA, the professional seller has to properly inform a customer who is not a professional financial entrepreneur about certain important details (重要事項, *jūyō jikō*) of the contract, before entering into the contract. These details include the market risks involved (Section 3(1) nos. 1, 2 FPSA) and strict periods for the exercise of rights or for the cancellation of contracts (Section 3(1) no. 7 FPSA). Additionally, the professional financial entrepreneur must also inform the customer about the potential risk of loss of the invested capital because of the financial situation of the respective entrepreneur itself or involved third parties (Section 3(1) nos. 3, 4 FPSA) *("positive information duties").* The information provided must also be accurate to fulfill the legal duties, so that the information duties are at the same time also *"negative information duties".* The degree the customer has to be informed depends on the knowledge and experience of the

83 See the draft provision in Paragraph 27 (p. 48) of the Intermediate Proposal for the Reform of the Civil Code (Obligational Relations) *(Minpō (saiken kankei) no kaisei ni kansuru chūkan shian)* of February 2013.

84 In full: 金融商品の販売等に関する法律, *Kin'yū shōhin no hanbai-tō ni kansuru hōritsu,* Law No. 101/2000. For details see DERNAUER, *supra* note 22, 301–389.

customer on the one hand and, on the other hand, on the financial situation and the customer's purpose for purchase (Section 3(2) FPSA). In addition, pursuant to Section 4 FPSA, the financial entrepreneur must not provide a misleading determinative opinion (断定的判断の提供の禁止, *dantei-teki handan no teikyō no kinshi*) on uncertain circumstances, for instance regarding the possible rate of return *("negative information duty")*.

The liability for a violation of either information duty (Sections 3, 4 FPSA) is a strict liability to compensate the customer for all resulting damages (Section 5 FPSA). All financial disadvantages the customer suffered, including loss of the invested money and money otherwise paid, are presumed to be damages resulting from the violation of the respective information duties (Section 6 FPSA). Moreover, the law does not care whether the financial entrepreneur (its organs) itself or an employee or other agent solicited the contract. An insufficient or incorrect provision of information results in direct liability for the financial entrepreneur.

The reasons for establishing this liability are referred to in Section 1 FPSA as ensuring the fairness of solicitation for financial products such as sales contracts, and protecting customers, thereby also contributing to the sound development of the national economy. The background for the information duties under this law is therefore a presumed structural asymmetry as regards information, knowledge and experience between financial entrepreneurs and their customers. This includes the objective that the customers in financial transactions shall be properly informed about the relevant information of the respective financial transactions before entering into the contract. Liability arises only if a pre-contractual information duty provided by the law was violated. The liability for compensation of damages pursuant to Section 5 FPSA therefore safeguards the information duties in Sections 3 and 4 FPSA. Although this law does more than only protect consumers, consumer protection is its primary objective.

The liability for damages pursuant to Section 5 FPSA is being classified as either a special tort liability[85] or a special statutory liability for a case of *culpa in contrahendo*.[86] Irrespective of the dispute in regard of its classification, the application of the FPSA does not exclude the application of general tort law, be it as a separate basis for a claim for compensation of damages (e.g. based on Section 709 CC), or only regarding the results of a

85 For instance, Y. SHIOMI (ed.), *Shōhi-sha keiyku-hō, Kin'yū shōhin hanbai-hō to kin'yū torihiki* [The Consumer Contract Act, the Financial Products Sales Act and Financial Transactions] (Tōkyō 2001) 127 et seq.

86 For instance, H. KANSAKU, *Shōhi-sha keiyaku-hō to Kin'yū shōhin hanbai-hō* [The Consumer Contract Act and the Financial Products Sales Act], in: Jurisuto 1200 (2001) 39, 40.

claim pursuant to Section 5 FPSA, for which no specific rules are provided in the FPSA (Section 7 FPSA). This means, for instance, that contributory negligence of the customer can be taken into consideration to reduce the claim for compensation of damages against the financial entrepreneur, as in cases of tort based on the Civil Code.

Although the FPSA has certain formal advantages over tort claims based on the Civil Code (e.g. strict liability, presumption of causality and amount of damages), the claims provided by the FPSA in fact are generally not considered to be more advantageous over civil law claims brought in a law suit. This is because customers could already quite easily pursue claims in well-founded cases under the case law based on tort law that had been established to deal with financial losses of customers in investment transactions and other financial transactions before the FPSA came into effect. Therefore, the number of cases predominantly using Section 5 FPSA has turned out to be fewer than expected.[87]

bb) The Consumer Contract Act

The Consumer Contract Act (消費者契約法, *Shōhi-sha keiyaku-hō,* CCA[88]), which also came into effect in 2001, provides for special *negative* pre-contractual information duties for entrepreneurs (including its employees and other assistants) when they are about to enter into a contract with a consumer.

Pursuant to Section 4(1) no. 1, (2) CCA, the entrepreneur must not provide false information (不実告知の禁止, *fujitsu kokuchi no kinshi*) or intentionally conceal disadvantageous facts (事実不告知の禁止, *jijitsu fu-kokuchi no kinshi*) regarding important details (*jūyō jikō*) of the contract, which are defined in Section 4(5) CCA as

1. the quality, usage or further items in regard of the subject matter of the contract, or
2. the price/consideration and further contract terms and conditions, or
3. the factors which usually require prevention measures to avoid a damage to or danger for the life, the body, the property or any other important interest of the consumer,

if they usually influence the decision of consumers to enter into the contract.

87 KIN'YŪ SHŌHIN TORIHIKI-HŌ KENKYŪ-KAI (ed.), *Kin'yū shōhin torihiki-hō kenkyū kiroku dai 27gō: Kin'yū kikan ni yoru setsumei, tekigō-sei no gensoku to Kin'yū shōhin hanbai-hō* [Protocol No. 27 of the Studies on the Law of Financial Products Transactions: The Provision of Information by Financial Institutes, the Suitability Doctrine and the Financial Products Sales Act] (Tōkyō 2009) 2.

88 Law No. 61/2000.

In the former case of a "provision of false information", it is irrelevant whether the information duty was violated negligently or not. In contrast, in the latter case of a "concealment of disadvantageous facts", the concealment must have been carried out intentionally.[89]

Moreover, the entrepreneur must not provide a misleading determinative opinion (断定的判断の提供の禁止 *dantei-teki handan no teikyō no kinshi*) on a future price, an amount of money the consumer should receive in the future or other future items where fluctuations make these amounts uncertain (Section 4(1) no. 2 CCA). Here, negligence is also no precondition for a violation of this information duty.

In all the cases of a violation of a defined pre-contractual information duty, the consumer has a right to avoid the declaration of intent to enter into the contract if the violation resulted in a misunderstanding (誤認, *gonin*) on the part of the consumer, and if this misunderstanding eventually resulted in the conclusion of the contract. Moreover, a specifically registered consumer association may claim injunctive relief for a violation of Section 4 CCA by an entrepreneur for the benefit of all consumers (Sections 12 et seq. CCA).

In addition, Section 3(1) CCA provides a duty of the entrepreneur to make efforts to inform the consumer, before entering into the contract, about the rights and duties of the consumer resulting from the contract as well as about the further content of the contract, and to take care that a draft contract is clearly formulated and easy to understand for the consumer. At the same time, pursuant to Section 3(2) CCA, the consumer also has to make efforts to use the provided information and to understand the content of the contract. There is some dispute whether these "duties of endeavour" are real duties and thus justiciable, or only moral statements or interpretation provisions with no direct result. The CCA stipulates no direct consequence for a violation. The courts do not treat a violation uniformly, some acknowledge a claim for compensation of damages based on tort (Section 709 CC),[90] while others refuse to acknowledge such a claim, with the argument that the legislators would have clearly provided a legal result in the law had they wanted it.[91]

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89 For details see DERNAUER, *supra* note 22, 252–259; K. YAMAMOTO, Das Verbrauchervertragsgesetz in Japan und die Modernisierung des Zivilrechts, in: Becker/Hilty/Stöckli/Würtenberger (eds.), Recht im Wandel seines sozialen und technologischen Umfeldes: Festschrift für Manfred Rehbinder (Munich/Zurich 2002) 819–836; M. DERNAUER, § 13 Verbraucherschutz, in: Baum/Bälz (eds.), Handbuch Japanisches Handels- und Wirtschaftsrecht (Cologne 2011) 567, 581–582.

90 See for example District Court Ōtsu, 3 October 2003, in: Shōhi-sha-hō Nyūsu No. 58, 129; Lex DB Case No. 28090191, also available at *http://www.courts.go.jp/;* see also the comment on the case with summary of S. MIYASHITA, in: *Shōhi-sha-hō Hanrei Hyakusen,* Bessatsu Jurisuto 200 (2010) 78.

Section 1 CCA justifies these information duties by reference to a presumed structural information asymmetry between entrepreneurs and consumers, as well as the purpose of ensuring the sound development of the national economy. The information duties are therefore to ensure that the consumer will not enter into a contract with an entrepreneur on the basis of misinformation by the entrepreneur. The CCA does not preclude the additional application of the Civil Code (tort law, Section 96 CC etc.) and, arguably, of the Financial Products Sales Act (Section 11 CCA).

cc) The Act on Specific Commercial Transactions (SCTA) and the Instalments Transaction Act

Similar negative pre-contractual information duties as in the Consumer Contract Act can be found in the Act on Specific Commercial Transactions[92] (Sections 9-3, 6; 24-2, 21; 40-3, 34; 49-2. 44; 58-2, 52; 58-10, 58-24 SCTA) and in the Instalments Transaction Act[93] (Sections 35-3-13 to 35-3-16) with regard to some specific consumer transactions: door-to-door sales transactions and similar transactions outside a commercial office, sales transactions via telephone, multilevel marketing transactions, specific long-term service contracts, occasional business opportunity related sales contracts, purchase transactions outside a commercial office, and consumer credit transactions, pursuant to the Instalments Transaction Act, related to any of the regulated commercial transactions in the SCTA. The entrepreneur (including its employees and other assistants) must not provide false information (不実告知の禁止, *fujitsu kokuchi no kinshi*) or intentionally conceal important information (事実不告知の禁止, *jijitsu fu-kokuchi no kinshi*) about the transaction and the contract. In this law, the relevant details are more precisely defined than in the CCA. They include, for instance, details about the "sort of product, the ability to use the product, the quality of the product", the "price for the product", the "time of performance", "the cooling-off period and the rights involved therewith", and "other important details in regard of the contract which are important for the decision of the consumer to enter into the contract", and specific "details listed in an ordinance of the Ministry of Economy, Trade and Industry". In case of a violation of any of these information duties, the consumer may again avoid and nullify the contract if the violation resulted in a misunderstanding on side of the consumer and if this misunderstanding resulted in the conclusion of the contract. Should a related credit contract for the financing of any of the

91 DG Nagoya, 29 January 2007, unpublished, retrieved at the homepage of the Kōbe Attorneys' Association.

92 特定商取引に関する法律, *Tokutei shō-torihiki ni kansuru hōritsu,* Law No. 57/1976.

93 割賦販売法, *Kappu hanbai-hō,* Law No. 159/1961.

specifically regulated transactions have been concluded, both contracts can be avoided, regardless of whether the violation of an information duty took place at the occasion of entering into the contract for the financed transaction or on conclusion of the credit contract. Furthermore, here again, a registered consumer association may pursue a violation of any information duty by a claim for injunctive relief.

In contrast to the information duties provided by the Consumer Contract Act, however, the information duties in the SCTA are also of public law nature ("prohibitions"). The Ministry of Economy, Trade and Industry can take administrative measures in case of a violation, and violations may be also punished with a fine of up to 3 Mio. Yen (ca. 25.000 EUR) and/or imprisonment of up to three years. Hence, the information duties are civil law duties, administrative law duties, and penal law duties.[94]

These information duties were introduced to protect consumers in view of their reduced ability to judge the transactions due to a presumed structural asymmetry in information, experience and knowledge. Moreover, as a general purpose of both laws, they contribute to the sound development of the national economy.

dd) Further pre-contractual information duties

This paper cannot explain in detail all pre-contractual information duties. More private law information duties can be found in laws that regulate particular types of contracts where generally an information asymmetry between the parties is presumed, such as for instance in the case of labor contracts (e.g. Section 4 Labor Contract Law)[95] and Insurance Contracts (e.g. Section 4 Insurance Law)[96].

2. Public Law Information Duties

Two types of public law pre-contractual information duties of entrepreneurs vis-à-vis specific customers or consumers have been discussed above; namely, a duty not to provide false information *(fujitsu kokuchi no kishi)* and a prohibition to conceal important information *(jijitsu fu-kokuchi no kinshi).* Both duties can be found in the Act on Specific Commercial Transactions where they also have private law effects. A violation of any of these provisions may at the same time also constitute a fraud under the Penal Code (Section 246 PC)

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94 For details see also DERNAUER, *supra* note 22, 301–326; DERNAUER, *supra* note 89, 582–583.

95 労働契約法, *Rōdō keiyaku-hō,* Law No. 128/2007.

96 保険法, *Hoken-hō,* Law No. 56/2008.

There are, however, many other types of (administrative and criminal) positive and negative pre-contractual information duties for entrepreneurs towards customers (mostly consumers or non-professional customers in financial transactions). Most important of these are the general duties to provide certain important information or to explain important details regarding the entrepreneur and the transaction (contract) (情報提供義務, *jōhō teikyō gimu* or 説明義務, *setsumei gimu*),[97] duties to provide formalized documents with specifically required information (書面交付義務, *shomen kōfu gimu*),[98] duties to show or present standard terms of business used by the entrepreneur,[99] duties to provide certain specific information about the entrepreneur and/or its products in public advertisements (広告における表示義務, *kōkoku ni okeru hyōji gimu*),[100] prohibitions of excessive and misleading advertising (誇大広告の禁止, *kodai kōkoku no kinshi kōkoku no kinshi*),[101] and prohibitions to provide a determinative opinion (断定的判断提供の禁止, *dantei-teki handan teikyō no kinshi*).[102] These and other types of public law pre-contractual information duties can be found in many different laws, ordinances and statutes of prefectures and municipalities in Japan;

97 For example: Section 12-4 Travel Business Act (旅行業法, *Ryokō-gyō hō*), Law No. 239/1952 (travel contracts); Section 24 Real Property Funds Act (不動産特定共同事業法, *Fudōsan tokutei kyōdō jigyō-hō*), Law 77/1994 (contracts regarding the sale of shares of a real property fund); Sections 34, 35 Real Property Business Act (宅地建物取引業法, *Takuchi tatemono torihiki-gyō hō,* Law No. 176/1952) (real property sales transactions), Section 37 Financial Instruments and Exchange Act (金融商品取引法, *Kin'yū shōhin torihiki-hō*) Law No. 25/1948 (sales transactions and intermediate transactions regarding financial and investment products).

98 For example: Sections 4, 5 SCTA; Sections 37-3, 37-4 Financial Instruments and Exchange Act (*supra* note 97); Sections 24, 25 Real Property Funds Act (*supra* note 97); Sections 296, 298 Insurance Business Act (保険業法, *Hoken-gyō hō*), Law No. 105/1995 (insurance contracts).

99 For example: Section 20 Electricity Business Act (電気事業法, *Denki jigyō-hō*) Law No. 170/1964) (electricity supply contracts); Section 19 Gas Business Act (ガス事業法, *Gasu jigyō-hō,* Law No. 51/1964) (gas supply contracts); and Section 12-2(3) Travel Business Act (*supra* note 97).

100 For example: Section 11 SCTA; Section 3 Installments Transaction Act, Section 37 Financial Instruments and Exchange Act (*supra* note 97); and Section 12-7 Travel Business Act (*supra* note 97).

101 For example: Section 12 SCTA; Section 37 Financial Instruments and Exchange Act (*supra* note 97); and Sections 12-4, 12-12-8 Travel Business Act (*supra* note 97).

102 For example: Sections 38, 39 Financial Instruments and Exchange Act (*supra* note 97); Section 21 Real Property Funds Act (*supra* note 97), and Sections 214(1), 214-3 Commodity Futures Transaction Act (商品先物取引法, *Shōhin sakimono torihiki-hō*), Law No. 91/2014 (sales transactions and intermediate transactions regarding commodity futures).

for instance, in the Travel Business Act,[103] the Act on the Business of Real Property Transactions,[104] the Financial Products and Exchange Act,[105] and the Act on the Regulation of the Money Lending Business.[106] In particular, public law information duties can also be found in the fields of financial law and consumer law.[107]

All these duties aim at protecting consumers or customers of financial services in view of an assumed asymmetry in information, knowledge and experience between the entrepreneur and the consumer/customer. Moreover, they aim at ensuring fair business and trading practices and fostering a functioning market as part of sound development of the national economy.[108]

In many cases where a law stipulates a duty to provide documents with specific information *(shomen kōfu gimu),* the consumer or customer is also provided with a cooling-off period and may therefore withdraw (rescind) from a contract during a specific period of time, usually between 8 and 20 days from the day the document was given to the consumer/customer, fulfilling all requirements stipulated by law and further ordinances. While the grant of this special right of withdrawal from the contract is not a civil remedy for the violation of the information duty itself – the contract party has the right in any event – the private law remedy for not providing the required information is that the cooling-off period does not start to run. In addition, of course, administrative dispositions and criminal sanctions are possible. Therefore, in Japan, cooling-off periods (rights) are very closely connected with a public law information duty.[109]

3. Conclusion

There are plenty of pre-contractual information duties in Japan which all aim to ensure that one party, who is or is presumed to be disadvantaged in regard to information about the contract and surrounding circumstances, will receive sufficient information before entering into the contract in order to enable that party to correctly evaluate the contract. Pre-contractual in-

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103 *Supra* note 97.

104 *Supra* note 97.

105 *Supra* note 97.

106 貸金業の規制等に関する法律, *Kashikin-gyō no kisei-tō ni kansuru hōritsu,* Law No. 32/1983.

107 See also KONDA, *supra* note 16, 4–6.

108 For details, see M. DERNAUER, Die Rolle des öffentlichen Rechts beim Schutz von Vertragspartnern in Japan, in: Bälz (ed.), Recht als Verwirklichung individueller Ansprüche in Japan. Diskurse und Anwendungen, Special Issue No. 9, Journal of Japanese Law, forthcoming 2018; DERNAUER, *supra* note 22, 433–455.

109 For details, see DERNAUER, *supra* note 22, 327–382; DERNAUER, *supra* note 89, 575–580.

formation duties always require a general presumption of information asymmetry between the parties or an information disparity in the specific case, which may result from a general lack of knowledge or experience. Private law sanctions or remedies (claims for compensation of damages, rights to avoid the contract, invalidity of the contract or parts thereof), administrative law sanctions (administrative dispositions) and criminal law sanctions safeguard the observation of the duties. Most duties aim at the protection of consumers or non-professional customers, in particular in the field of financial and real property transactions.

IV. CONTRACTUAL INFORMATION DUTIES

1. Private Law Information Duties

a) The Civil Code

aa) Explicit statutory information duties

As with pre-contractual information duties, the Civil Code also does not provide many explicit contractual information duties. One of the few exceptions here is Section 615 CC, which provides that a lessee/tenant must inform the lessor/landlord when the rented object needs to be repaired or if a third party claims a right in regard of the rented object. The objective of this duty is to prevent damages of the lessor/landlord due to unknown risks, of which the lessor/tenant, on the other hand, is aware.

Further contractual information duties are stipulated in Sections 645, 656 CC which provide that a mandatary, in cases of a mandate, i.e. a contract in regard of the management of affairs of another or in similar contractual relations, must inform the mandator about the state of the activity to be carried out (by the mandatary), and render account after completion. The objective of these duties is to enable the mandator to gather the information he needs to evaluate its own position vis-à-vis the activity.

Section 660 CC, which provides that the depositary has to inform the depositor if a third party claims to have a right in regard of a stored object and when the third party has filed a court action or seized the object. The objective of this information duty is to prevent damages of the depositor due to a claim of a third party, of which the depositor is not aware himself. Section 661 CC, on the other hand, provides that the depositor has to inform the depositary about the particular nature of the object and any defects in order to avoid liability for possible damages. Here, the objective of the duty is to prevent damages for the depositary due to unknown risks.

The reform of the law of obligations will introduce further duties of the creditor to inform an individual surety, upon request, about all (changing)

details of the remaining principal obligation if the surety has entered into the contract of suretyship with the creditor on request of the principal debtor (Section 458-2 CC). Moreover, the creditor also has to inform the surety about any event where the principal debtor has lost a benefit connected to a given time limit (Section 458-3 CC).

Since these information duties are contractual duties, their violation would constitute a case of non-performance of the contract, with the liability as provided by Section 415 CC (compensation for damages), in case of negligence or intent, and by Sections 540 et seq. (possibly a right to rescind the contract).

The objective of all these statutory information duties is to protect one party to a contract from suffering damages or disadvantages resulting from a lack of information about the circumstances regarding the subject matter of the contract. The key reason remains an information disparity between the parties. The reason and function of these contractual information duties is therefore at least similar to pre-contractual information duties.

bb) Information duties based on good faith (bona fide)

Similar to pre-contractual information duties, further contractual information duties may arise in particular cases based on bona fide (Section 1(2) CC, *shingi seijitsu no gensoku*). One example is the duty of financial entrepreneurs to inform the non-professional customer about the details of the hitherto contractual relationship.[110]

A reason for such contractual information duties is, again, often a presumed structural asymmetry or a disparity in a specific case of information, knowledge and professional management of contracts between the parties and the need to protect the less informed and experienced party against damages. In addition to the right to provision of relevant information by the creditor – in appropriate cases – a negligent breach of contractual information duties may again result in an obligation of the debtor to pay compensation for damages based on Section 415 CC due to non-performance of the obligation.

Further contractual information duties based on the principle of good faith are often acknowledged in other types of contracts between professionals, experts or entrepreneurs on the one side and consumers or other non-professionals on the other.[111] In certain cases, such contractual infor-

110 Supreme Court, 22 January 2009, Hanrei Jihō 2034, 29 (financial institute, bank); Supreme Court, 19 July 2005, Kinyū Hōmu 1753, 41 (professional money lender).

111 KONDA, *supra* note 16, 6.

mation duties may also be acknowledged in BtoB or commercial contracts. Pre-contractual information duties, however, are more frequent.

b) Special private laws

In contrast to pre-contractual information duties, however, explicit statutory private contractual information duties are also less frequent in special private laws. Section 526 Commercial Code stipulates a duty for the purchaser in commercial purchase contracts to inform the seller of detected defects in the received products in order to accelerate the execution of such contract relations.

2. Public Law Information Duties

There are also some special public law contractual information duties, mostly aiming to protect consumers or other non-professional customers in the business sector the contract is related to, but to a lesser extent than pre-contractual information duties.

These include, for example, duties of entrepreneurs to provide a formalized document with important information about the subject matter and the further terms and conditions of the contract, or to provide a copy of the written contract (e.g. Section 17 Money Lending Business Act[112]) in order to clarify the contractual obligations of both parties; duties to provide a written document on the remaining contractual obligations after the customer has fully or partly performed its contractual obligations (e.g. Section 18 Money Lending Business Act); and duties to keep and retain records on the implementation of the contract and to allow the customer to inspect the records (e.g. Section 19, 19-2 Money Business Lending Act), and some others.

There are also some prohibitions to provide false information on the possibility to disengage from a contract and thereby impeding the customer in exercising a right (e.g. Section 25 no. 6 Tōkyō Statute on Consumer Protection[113]), and a prohibition to conceal certain facts in order to induce the customer to perform alleged obligations under the contract (e.g. Section 25 no. 4 Tōkyō Statute on Consumer Protection.

All these duties primarily aim at protecting consumers and other similar customers in view of a presumed disparity or structural asymmetry between the parties in regard to information, knowledge, experience, and the professional management of contracts.

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112 *Supra* note 106.

113 東京都消費生活条例, *Tōkyō-to shōhi seikatsu jōrei,* Statute No. 110/1994.

3. *Result*

In Japan, contractual Information duties generally seem to be of less importance than pre-contractual information duties, in particular for the purpose of consumer protection and other non-professional customers.

V. POST-CONTRACTUAL INFORMATION DUTIES

Post-contractual information duties may be acknowledged based on the principle of good faith, but they are generally considered to be of less relevance, compared to pre-contractual and contractual information duties. Statutory post-contractual information duties could not be identified.

VI. DUTIES TO INFORM CUSTOMERS ABOUT THE RISK INVOLVED IN THE PURCHASE OF FINANCIAL PRODUCTS

As one example of regulation under Japanese law, the following demonstrates the existing information duties of a financial entrepreneur (e.g. financial service provider) towards consumers and other non-professional customers. These information duties relate in particular to the risk involved in the purchase of some financial products (investment products such as stocks or derivatives). In such a case, the following regulations apply:

Before the conclusion of the contract:

1) Financial Products Sales Act (FPSA)

Section 3(1) FPSA

Duty […] to explain the following “important details”:

(i) if there is a risk of suffering a loss of the invested capital [more specifically defined] directly to be associated with the interest, currency rate, the market rate on financial products markets or the change of other indicators, about the risk, the respective indicator, the important details about the structure of the transaction in regard to the purchase of the financial product and the change of the indicators that that can directly be associated with the risk of suffering a loss of the invested capital.

(ii) *[the same in regard of a risk to suffer a loss exceeding the invested capital]*.

Section 3(2) FPSA

The duty to explain has to be fulfilled to the extent and in the way necessary to ensure the understanding of the customer in view of the customer’s knowledge, experience, financial situation and customer’s purpose for concluding the contract.

Section 4 FPSA

The financial entrepreneur must not to provide a *determinative opinion in regard of uncertain details* (for instance future market prices) or induce a misunderstanding that the details are certain (provision of a determinative opinion).

A violation of the information duties in Section 3(1) or 4 FPSA leads to a strict liability of the financial entrepreneur to compensate the customer for any losses resulting from the non-fulfillment of the explanation duty or from the provision of the determinative opinion (Art. 5 FPSA).

2) Consumer Contract Act (CCA)

Section 4(1) no. 1, (2), (5) CCA

The financial entrepreneur must not provide *false information* or *intentionally conceal disadvantageous circumstances* in regard of *important details* such as

1. quality, usage or further items in regard of the subject matter of the contract, or
2. the price/consideration and further contract terms and conditions, or
3. the factors which usually require prevention measures to avoid damage to or danger for life, body, property or any other important interest of the consumer,

if they usually influence the decision of consumers to enter into the contract.

The contract may be voidable and a possible claim for return of the invested money based on unjust enrichment may arise. However, an incorrect explanation about future gold prices and other uncertain fluctuations was considered by the Supreme Court not to be an explanation about "important details" under this provision.[114] Therefore, this provision is difficult to apply to misinformation about the risk involved in the purchase of financial products (investment products).

Section 4(1) no. 2 CCA

The financial entrepreneur must *not provide a determinative opinion* in regard of *uncertain details* (for instance future market prices) or induce a misunderstanding that the determinative opinion is certain (provision of a determinative opinion).

This provision however, would be applicable if the financial entrepreneur made a definitive statement about the development of the future price or value of the financial product, implying that no risk or a very low risk is involved in the purchase of the financial product. The contract then would be avoidable, and the customer would have a claim for the return of the invested money based on unjust enrichment.

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114 Supreme Court, 30 March 2010, Hanrei Jihō 2075, 32.

3) Civil Code

Sections 709, 1(2) CC

Duty to inform and explain correctly and sufficiently the risk involved in view of the customer's knowledge, experience, financial situation and purpose for concluding the contract.

Incorrect or insufficient information about the risk involved in the purchase of a financial product would result in a tort liability for the financial entrepreneur, involved employees and organs of the company to compensate the customer for the loss incurred as a result of the insufficient or incorrect information/explanation.

4) Financial Products and Exchange Act (FPEA)

Section 37(2) FPEA

In any advertising, the financial entrepreneur must not make any statements on the chances of the profit to be earned from a financial product transaction that significantly differs from the facts or that may induce a significant misunderstanding.

A violation of this provision by exaggerating the chances of a profit or underplaying the risk involved would lead to a possible administrative disposition to change the business practice (Section 51 FPEA), and, in addition, to a possible criminal penalty of imprisonment of up to 6 months and/or a fine of up to 500.000 Yen (Section 205 no. 11 FPEA).

Section 37-3(1) FPEA

Duty to *provide a document before entering into a contract* regarding a financial products' transaction with an explanation

(v) of any risk of suffering a loss of the invested capital directly to be associated with the interest, currency rate, the market rate on financial products markets or the change of other indicators, where such risk exists. This explanation of the risk must include the respective indicator, the important details about the structure of the transaction in regard of the purchase of the financial product and the change of the indicators that that can directly be associated with the risk of suffering a loss of the invested capital

(vi) *[the same in regard of a risk to suffer a loss exceeding the invested capital]*.

A violation of this provision would result in a possible administrative disposition to change the business practice (Section 51 FPEA), and, in addition, to a possible criminal penalty of imprisonment of up to 6 months and/or a fine of up to 500.000 Yen (Section 205 no. 12 FPEA).

Art. 38 no. 1 FPEA

Must not provide false information *(fujitsu kokuchi no kishi).*

Art. 38 no. 2 FPEA

Must not provide a determinative opinion in regard of uncertain details or induce a misunderstanding that the details are certain (provision of a determinative opinion).

In case of an incorrect explanation of the risks involved, it is likely that either of these provisions would be violated. This would lead to a possible administrative disposition to change the business practice (Section 51 FPEA), and in case of a violation of Section 38 no. 1, in addition, to a possible criminal penalty of imprisonment of up to 3 years and/or a fine of up to 3.000.000 Yen (Section 198-6 no. 2 FPEA).

As a result, for the sale of a financial product, the financial entrepreneur has to positively, correctly and sufficiently inform the consumer or non-professional customer about the risks involved in the purchase of the financial product or in the investment by providing a correct formalized written document and, in addition, by oral explanation. If the entrepreneur fails to do so, he will be at least liable to compensate the customer for incurred damages under Section 5 FPSA and general tort law. In addition, the contract may be avoidable, depending on the specific case, based on Section 4 CCA or Section 96 CC (+ claim to return the invested money as unjust enrichment, Section 703 CC). The entrepreneur may also be sanctioned by an administrative disposition or a criminal penalty. It is questionable whether this plurality of possible civil law, administrative law and criminal law sanctions is not exceeding the necessary legal liability. A similar structure exists with regard to consumer contracts in general.

VII. SUMMARY AND CONCLUSION

In the field of general civil law and consumer law in Japan, information duties are, for the most part, pre-contractual information duties with the aim of protecting consumers or non-professional customers who are treated as or similar to consumers. This pertains in particular to customers of investment or other financial services, but also customers of other professionals and experts. The function of most information duties is primarily to compensate for an assumed information disparity or structural information asymmetry between the parties of a contract, often resulting from a disparity in knowledge and business experience. Contractual information duties are of less relevance than pre-contractual information duties, with post-contractual information duties the least relevant.

Under general civil law in Japan, the main basis for a liability with respect to a breach of pre-contractual information duties is general tort law (e.g. Section 709 CC), but there are many further special private law remedies for the protection of consumers, such as special rights to avoid a con-

tract and a special tort law liability. Special private law pre-contractual information duties are more frequently negative information duties rather than positive pre-contractual information duties: except in the case of information duties for the sale of financial products. The use of written form requirements (including the function to inform a party about the contract) is rarely used in Japan (only surety contracts, Section 446(2) CC). In addition, there are numerous special positive and negative public law pre-contractual information duties.

Under Japanese civil and consumer law, contracts are heavily, if not overly regulated by information duties, in particular by pre-contractual information duties. Information duties are regularly combined with various forms of remedies, in order to ensure their compliance by the duty bearers. The breach of civil law duties by one party can result in specific rights and claims of the other party. The breach of administrative law duties leads to a possibility for the authorities to take administrative measures. The breach of criminal law duties may give rise to criminal prosecution.