

日本の民法の編別にしたがった英米契約法の実用的コース実施の試み

基礎英文契約書講座

第15回 契約と第三者： 「第三者のための契約」と、契約上の権利を第三者が行使できない条項の意味を検討する

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第14回目の内容

- 第15回目のテーマは、「契約と第三者」である。

■ 具体的な契約条項（１）

11.15 No Beneficiaries. Nothing herein express or implied, is intended to or shall be construed to confer upon or give to any person, firm, corporation or legal entity, other than the Parties and their Affiliates, any interests, rights, remedies or other benefits with respect to or in connection with any agreement or provision contained herein or contemplated hereby. Notwithstanding the foregoing, the Parties agree that Fujitsu shall be deemed a third party beneficiary to NewCo's rights under the License Agreement in the event of a material breach of the License Agreement by WNI. The Parties further agree, however, that a material breach of the License Agreement by WNI shall not be deemed to be a Material Breach of this Agreement. WNI and NewCo agree to provide to Fujitsu copies of any notice or correspondence relating to an alleged breach of the License Agreement concurrently with the provision of such notice or correspondence to the other.

第14回目の内容（続き）

■ 参考訳

11.15 第三者たる受益者の排除。明示によるものであると黙示によるものであるとを問わず、本契約書は、本契約書に含まれる又は本契約書に規定される同意もしくは規定に関して又はこれに関連して、当事者及びその関連会社以外の人、会社又は法人に対し権益、権利、救済又はその他の利得を与えることを意図せず、又は与えるものではない。上記にかかわらず、当事者は、WNIが使用許諾契約書に重大な違反を犯した場合には、富士通が、使用許諾契約書に基づく新会社の権利に対する第三者受益者となるみなされることに同意する。しかしながら当事者は、さらに、WNIによる使用許諾契約書の重大な違反が本契約書の重大な違反とはみなされないことに同意する。WNI及び新会社は、使用許諾契約書の違反申し立てに関する一切の通知及び連絡の写しを他者に対し当該通知及び連絡を提出すると同時に、富士通に対してもこれを提出することに合意する。

1. 「第三者のためにする契約」

民法

（第三者のためにする契約）

第五百三十七条 契約により当事者の一方が第三者に対してある給付をすることを約したときは、その第三者は、債務者に対して直接にその給付を請求する権利を有する。

2 前項の場合において、第三者の権利は、その第三者が債務者に対して同項の契約の利益を享受する意思を表示した時に発生する。

Contracts (Rights of Third Parties) Act 1999

1 Right of third party to enforce contractual term.

(1) Subject to the provisions of this Act, a person who is not a party to a contract (a “third party”) may in his own right enforce a term of the contract if—

(a) the contract expressly provides that he may, or
(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

2. 「第三者のためにする契約」 （続き）

民法

（第三者のためにする契約）

第五百三十七条 契約により当事者の一方が第三者に対してある給付をすることを約したときは、その第三者は、債務者に対して直接にその給付を請求する権利を有する。

2 前項の場合において、第三者の権利は、その第三者が債務者に対して同項の契約の利益を享受する意思を表示した時に発生する。

Contracts (Rights of Third Parties) Act 1999

(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).

(6) Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.

(7) In this Act, in relation to a term of a contract which is enforceable by a third party—

“the promisor” means the party to the contract against whom the term is enforceable by the third party, and
“the promisee” means the party to the contract by whom the term is enforceable against the promisor.

3. 「第三者のためにする契約」 （続き）

民法

（第三者の権利の確定）

第五百三十八条 前条の規定により第三者の権利が発生した後は、当事者は、これを変更し、又は消滅させることができない。

Contracts (Rights of Third Parties) Act 1999

2 Variation and rescission of contract.

(1) Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if—

- (a) the third party has communicated his assent to the term to the promisor,
- (b) the promisor is aware that the third party has relied on the term, or
- (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.

(2) The assent referred to in subsection (1)(a)—

- (a) may be by words or conduct, and
- (b) if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him.

(3) Subsection (1) is subject to any express term of the contract under which—

- (a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party, or
- (b) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1)(a) to (c).

4. 「第三者のためにする契約」 （続き）

民法

（第三者の権利の確定）

第五百三十八条 前条の規定により第三者の権利が発生した後は、当事者は、これを変更し、又は消滅させることができない。

Contracts (Rights of Third Parties) Act 1999

(4) Where the consent of a third party is required under subsection (1) or (3), the court or arbitral tribunal may, on the application of the parties to the contract, dispense with his consent if satisfied—

(a) that his consent cannot be obtained because his whereabouts cannot reasonably be ascertained, or

(b) that he is mentally incapable of giving his consent.

(5) The court or arbitral tribunal may, on the application of the parties to a contract, dispense with any consent that may be required under subsection

(1)(c) if satisfied that it cannot reasonably be ascertained whether or not the third party has in fact relied on the term.

(6) If the court or arbitral tribunal dispenses with a third party's consent, it may impose such conditions as it thinks fit, including a condition requiring the payment of compensation to the third party.

(7) The jurisdiction conferred on the court by subsections (4) to (6) is exercisable by both the High Court and a county court.

5. 「第三者のためにする契約」 （続き）

民法

（債務者の抗弁）

第五百三十九条 債務者は、第五百三十七条第一項の契約に基づく抗弁をもって、その契約の利益を受ける第三者に対抗することができる。

Contracts (Rights of Third Parties) Act 1999

3 Defences etc. available to promisor.

(1) Subsections (2) to (5) apply where, in reliance on section 1, proceedings for the enforcement of a term of a contract are brought by a third party.

(2) The promisor shall have available to him by way of defence or set-off any matter that—

(a) arises from or in connection with the contract and is relevant to the term, and

(b) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.

(3) The promisor shall also have available to him by way of defence or set-off any matter if—

(a) an express term of the contract provides for it to be available to him in proceedings brought by the third party, and

(b) it would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.

6. 「第三者のためにする契約」 （続き）

民法

（債務者の抗弁）

第五百三十九条 債務者は、第五百三十七条第一項の契約に基づく抗弁をもって、その契約の利益を受ける第三者に対抗することができる。

Contracts (Rights of Third Parties) Act 1999

- (4) The promisor shall also have available to him—
 - (a) by way of defence or set-off any matter, and
 - (b) by way of counterclaim any matter not arising from the contract, that would have been available to him by way of defence or set-off or, as the case may be, by way of counterclaim against the third party if the third party had been a party to the contract.
- (5) Subsections (2) and (4) are subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.
- (6) Where in any proceedings brought against him a third party seeks in reliance on section 1 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.

7. 「第三者のためにする契約」

民法

（債務者の抗弁）

第五百三十九条 債務者は、第五百三十七条第一項の契約に基づく抗弁をもって、その契約の利益を受ける第三者に対抗することができる。

Contracts (Rights of Third Parties) Act 1999

(4) The promisor shall also have available to him—

(a) by way of defence or set-off any matter, and

(b) by way of counterclaim any matter not arising from the contract, that would have been available to him by way of defence or set-off or, as the case may be, by way of counterclaim against the third party if the third party had been a party to the contract.

(5) Subsections (2) and (4) are subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.

(6) Where in any proceedings brought against him a third party seeks in reliance on section 1 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.

8. 具体的な契約条項（２）

23.3 No Third Party Beneficiaries. Nothing express or implied in this Agreement is intended or shall be construed to confer upon or give any person or entity other than the parties, any rights or remedies under or by reason of this Agreement or any transaction contemplated hereby.

23.3 第三者受益者の排除. 本契約のいかなる規定も、明示であると黙示であるかを問わず、当事者以外のいかなる人又は法人等に対しても、本契約又は本契約において企図される何らかの取引に基づき又はこれらを理由として、いかなる権利又は救済方法も提供もしくは付与することを意図するものではなく、またかように解釈されてはならないものとする。

9. 具体的な契約条項（3）

11.9 Third-Party Beneficiary. OptiMark is a third-party beneficiary to this agreement to the extent that Confidential Information of OptiMark or its affiliates is disclosed pursuant to this Agreement or Developments are created which are to be owned by JOS and assigned to OptiMark under the OptiMark Agreement. As a beneficiary of the obligations undertaken by Company and JOS herein, OptiMark or its designated assigns, shall have the right to directly enforce any provision of this Agreement, as permitted under the OptiMark Agreement or otherwise under applicable law.

11.9 第三者たる受益者。OptiMarkは、OptiMarkもしくはその関連会社の秘密情報が本契約書にしたがい開示され、又はOptiMark契約書にしたがい、JOSにより所有されて、OptiMarkに譲渡されるべき開発物が創作される範囲では、本契約書の第三者たる受益者となる。本契約書において会社及びJOSが負う義務の受益者として、OptiMark又はその指定する譲受人は、OptiMark契約書に基づき認められ又はその他準拠法に基づき認められる態様で、本契約書のすべての規定を直接的に実現する権利を有するものとする。

10. Himalaya Clauses

"It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions of this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defense and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."