

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16回 瑕疵担保責任： warranty
と瑕疵担保責任を比較検討し、債務
不履行の中の不完全履行の取り扱い
方を確認する

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第16回目の内容

- 第14回目のテーマは、瑕疵担保責任である。

■ 具体的な契約条項（例）

第22条（瑕疵担保）

1. 甲は、本件目的物の所有権移転後1年以内に本件目的物に隠れたる瑕疵を発見した場合は、乙に、乙の負担において修理させ、もしくは代品と交換させ、または代金の減額を請求することができる。
2. 甲は、前項の請求とともに、またはこれに代えて損害賠償を請求することができる。
3. 第1項に定める期間経過後といえども、乙の責に帰すべき隠れたる重大な瑕疵により甲が被った損害については、甲乙協議のうえその負担を定める。
4. 乙が個人事業者、または資本の額もしくは出資の総額が3億円以下の法人事業者である場合、甲は原則として所有権移転後6カ月を超えての代品との交換は行わないものとする。

第14回目の内容（続き）

■ 制度趣旨

- 「買った商品が欠陥品であった」
- 「仕様・要求事項を定めて発注したが、能力不足だった。」
- 「ライセンスの許諾を受けて使用していたら、真の権利者だと主張する者があらわれ、許諾対象の製品・製法が利用できなくなった。」

1. 瑕疵担保責任

民法

(売主の瑕疵担保責任)

第五百七十条 売買の目的物に隠れた瑕疵があったときは、第五百六十六条の規定を準用する。ただし、強制競売の場合は、この限りでない。

UCC

§ 2-314. Implied Warranty:
Merchantability; Usage of Trade.

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

2. 瑕疵担保責任（続き）

民法

- 買主がこれを知らず、かつ、そのために契約をした目的を達することができないときは、買主は、契約の解除をすることができる。
- この場合において、契約の解除をすることができないときは、損害賠償の請求のみをすることができる。
- 契約の解除又は損害賠償の請求は、買主が事実を知った時から一年以内にしなければならない。

UCC

(2) Goods to be merchantable must be at least such as:

- (a) pass without objection in the trade under the contract description;
- (b) in the case of fungible goods, are of fair average quality within the description;
- (c) are fit for the ordinary purposes for which goods of that description are used;
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promise or affirmations of fact made on the container or label if any.

3. 瑕疵担保責任（続き）

民法

（地上権等がある場合等における売主の担保責任）

第五百六十六条 売買の目的物が地上権、永小作権、地役権、留置権又は質権の目的である場合において、買主がこれを知らず、かつ、そのために契約をした目的を達することができないときは、買主は、契約の解除をすることができる。この場合において、契約の解除をすることができないときは、損害賠償の請求のみをすることができる。

2 前項の規定は、売買の目的である不動産のために存すると称した地役権が存しなかった場合及びその不動産について登記をした賃貸借があった場合について準用する。

3 前二項の場合において、契約の解除又は損害賠償の請求は、買主が事実を知った時から一年以内にしなければならない。

UCC

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

4. Warranties under the UCC (1)

§ 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

(1) Subject to subsection (3), there is in a contract for sale a warranty by the seller that:

(a) the title conveyed shall be good and its transfer rightful and shall not unreasonably expose the buyer to litigation because of any colorable claim to or interest in the goods; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

5. 民法一権利の瑕疵

（権利の一部が他人に属する場合における売主の担保責任）

第五百六十三条 売買の目的である権利の一部が他人に属することにより、売主がこれを買主に移転することができないときは、買主は、その不足する部分の割合に応じて代金の減額を請求することができる。

2 前項の場合において、残存する部分のみであれば買主がこれを買い受けなかったときは、善意の買主は、契約の解除をすることができる。

3 代金減額の請求又は契約の解除は、善意の買主が損害賠償の請求をすることを妨げない。

第五百六十四条 前条の規定による権利は、買主が善意であったときは事実を知った時から、悪意であったときは契約の時から、それぞれ一年以内に行使しなければならない。

（地上権等がある場合等における売主の担保責任）

第五百六十六条 売買の目的物が地上権、永小作権、地役権、留置権又は質権の目的である場合において、買主がこれを知らず、かつ、そのために契約をした目的を達することができないときは、買主は、契約の解除をすることができる。この場合において、契約の解除をすることができないときは、損害賠償の請求のみをすることができる。

2 前項の規定は、売買の目的である不動産のために存すると称した地役権が存しなかった場合及びその不動産について登記をした賃貸借があった場合について準用する。

3 前二項の場合において、契約の解除又は損害賠償の請求は、買主が事実を知った時から一年以内にしなければならない。

（抵当権等がある場合における売主の担保責任）

第五百六十七条 売買の目的である不動産について存した先取特権又は抵当権の行使により買主がその所有権を失ったときは、買主は、契約の解除をすることができる。

2 買主は、費用を支出してその所有権を保存したときは、売主に対し、その費用の償還を請求することができる。

3 前二項の場合において、買主は、損害を受けたときは、その賠償を請求することができる。

6. Warranties under the UCC (2)

§ 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

(2) Unless otherwise agreed, a seller that is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer that furnishes specifications to the seller must hold the seller harmless against any such claim that arises out of compliance with the specifications.

7. Warranties under the UCC (3)

§ 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

(3) A warranty under this section may be disclaimed or modified only by specific language or by circumstances that give the buyer reason to know that the seller does not claim title, that the seller is purporting to sell only the right or title as the seller or a third person may have, or that the seller is selling subject to any claims of infringement or the like.

（担保責任を負わない旨の特約）

第五百七十二条 売主は、第五百六十条から前条までの規定による担保の責任を負わない旨の特約をしたときであっても、知りながら告げなかった事実及び自ら第三者のために設定し又は第三者に譲り渡した権利については、その責任を免れることができない。

8. Warranties under the UCC (4)

§ 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

9. Warranties under the UCC (5)

§ 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to Section 2-202, negation or limitation is inoperative to the extent that such construction is unreasonable.

10. Warranties under the UCC (6)

§ 2-316. Exclusion or Modification of Warranties.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it in a consumer contract the language must be in a record, be conspicuous, and state "The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract," and in any other contract the language must mention merchantability and in case of a record must be conspicuous. Subject to subsection (3), to exclude or modify the implied warranty of fitness, the exclusion must be in a record and be conspicuous. Language to exclude all implied warranties of fitness in a consumer contract must state "The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract," and in any other contract the language is sufficient if it states, for example, that "There are no warranties that extend beyond the description on the face hereof." Language that satisfies the requirements of this subsection for the exclusion or modification of a warranty in a consumer contract also satisfies the requirements for any other contract.

11. Warranties under the UCC (7)

§ 2-316. Exclusion or Modification of Warranties.

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language that in common understanding calls the buyer's attention to the exclusion of warranties, makes plain that there is no implied warranty, and, in a consumer contract evidenced by a record, is set forth conspicuously in the record;

(b) if the buyer before entering into the contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods after a demand by the seller there is no implied warranty with regard to defects that an examination in the circumstances should have revealed to the buyer; and

(c) an implied warranty may also be excluded or modified by course of dealing or course of performance or usage of trade.

12. Remedies for Breach of Warranty under UCC

§ 2-719. Contractual Modification or Limitation of Remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its **essential purpose**, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

13. 「契約の本質的目的」

第9条 責任及び救済方法の制限

ライセンシーが理由の如何を一切問わず被る損害（前記に言及するすべての損害及びすべての直接的又は一般的損害を含むが、これらに限られない。）にもかかわらず、本契約の規定に基づくマイクロソフト、MAL、これらの関連会社及びライセンサー並びにサプライヤーの全責任、並びに前記事項すべてに関わるライセンシーの排他的救済方法は、ライセンシーが「XDK」につき実際に支払った金額に限定されるものとする。前記の制限、免責及び保証の排除（上記第7条及び8条を含む。）は、そのことによりいずれかの救済方法が本質的目的を達成することができなくなる限り、適用される法律により認められる最大の範囲で適用されるものとする。

第5条 保証の排除

第7条 「XDK」は、ライセンシーにより許容されたものみなす。適用される法律により認められる最大の限度で、マイクロソフト、MAL並びにこれらの関連会社、ライセンサー及びサプライヤーは、「XDK」及び（もしあれば）「XDK」に関連する何らかのサポートサービス（以下「サポートサービス」という。）を、現状で、またすべての瑕疵を伴って提供するものであり、また、本契約によって、「XDK」及び「サポートサービス」を提供したこと又は提供を怠ったことすべてに関して、商品性、特定目的への適合性、ウィルスに感染していないこと、無過失、商品の出来映え確保の努力の欠如について、何らかの（もしあれば）黙示の保証又は条件を含む（ただし、これらに限られない。）、明示のものであると、黙示のものであると、あるいは制定法上のものであるとを問わず、すべての保証及び条件を排除する。また、「XDK」に関しては、権原、所有権の享有、占有の享有、製品説明への適合性、又は権利侵害のないことについての保証又は条件は付けられていない。「XDK」の品質又は「XDK」の使用もしくは実行から生ずるリスクのすべては、ライセンシーがこれを負担する。

14. Third Party Beneficiaries of Warranties under the UCC (1)

§ 2-318. Third Party Beneficiaries of Warranties Express or Implied.

(1) In this section:

(a) "Immediate buyer" means a buyer that enters into a contract with the seller.

(b) "Remote purchaser" means a person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.

15. § 2-313. Express Warranties by Affirmation, Promise, Description, Sample.

§ 2-313. Express Warranties by Affirmation, Promise, Description, Sample.

- (1) In this section, "immediate buyer" means a buyer that enters into a contract with the seller.
- (2) Express warranties by the seller to the immediate buyer are created as follows:
 - (a) Any affirmation of fact or promise made by the seller which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (3) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.
- (4) Any remedial promise made by the seller to the immediate buyer creates an obligation that the promise will be performed upon the happening of the specified event.

16. § 2-313A Obligation to Remote Purchaser Created by Record Packaged With or Accompanying Goods

§ 2-313A Obligation to Remote Purchaser Created by Record Packaged With or Accompanying Goods

(1) In this section:

(a) "Immediate buyer" means a buyer that enters into a contract with the seller.

(b) "Remote purchaser" means a person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.

(2) This section applies only to new goods and goods sold or leased as new goods in a transaction of purchase in the normal chain of distribution.

(3) If in a record packaged with or accompanying the goods the seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, and the seller reasonably expects the record to be, and the record is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that:

(a) the goods will conform to the affirmation of fact, promise, or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise, or description created an obligation; and

(b) the seller will perform the remedial promise.

(4) It is not necessary to the creation of an obligation under this section that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to undertake an obligation, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create an obligation.

(5) The following rules apply to the remedies for breach of an obligation created under this section:

(a) The seller may modify or limit the remedies available to the remote purchaser if the modification or limitation is furnished to the remote purchaser no later than the time of purchase or if the modification or limitation is contained in the record that contains the affirmation of fact, promise, or description.

(b) Subject to a modification or limitation of remedy, a seller in breach is liable for incidental or consequential damages under Section 2-715, but not for lost profits.

(c) The remote purchaser may recover as damages for breach of a seller's obligation arising under subsection (3) the loss resulting in the ordinary course of events as determined in any reasonable manner.

(6) An obligation that is not a remedial promise is breached if the goods did not conform to the affirmation of fact, promise, or description creating the obligation when the goods left the seller's control.

17. § 2-313B Obligation to Remote Purchaser Created by Communication to the Public

§ 2-313B Obligation to Remote Purchaser Created by Communication to the Public

(1) In this section:

(a) "Immediate buyer" means a buyer that enters into a contract with the seller.

(b) "Remote purchaser" means a person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.

(2) This section applies only to new goods and goods sold or leased as new goods in a transaction of purchase in the normal chain of distribution.

(3) If in an advertisement or a similar communication to the public a seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, and the remote purchaser enters into a transaction of purchase with knowledge of and with the expectation that the goods will conform to the affirmation of fact, promise, or description, or that the seller will perform the remedial promise, the seller has an obligation to the remote purchaser that:

(a) the goods will conform to the affirmation of fact, promise, or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise, or description created an obligation; and

(b) the seller will perform the remedial promise.

(4) It is not necessary to the creation of an obligation under this section that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to undertake an obligation, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create an obligation.

(5) The following rules apply to the remedies for breach of an obligation created under this section:

(a) The seller may modify or limit the remedies available to the remote purchaser if the modification or limitation is furnished to the remote purchaser no later than the time of purchase. The modification or limitation may be furnished as part of the communication that contains the affirmation of fact, promise, or description.

(b) Subject to a modification or limitation of remedy, a seller in breach is liable for incidental or consequential damages under Section 2-715, but not for lost profits.

(c) The remote purchaser may recover as damages for breach of a seller's obligation arising under subsection (3) the loss resulting in the ordinary course of events as determined in any reasonable manner.

(6) An obligation that is not a remedial promise is breached if the goods did not conform to the affirmation of fact, promise, or description creating the obligation when the goods left the seller's control.

18. Warranties under the UCC (2)

Alternative A to subsection (2)

A seller's warranty to an immediate buyer, whether express or implied, a seller's remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section 2-313A or 2-313B extends to any individual who is in the family or household of the immediate buyer or the remote purchaser or who is a guest in the home of either if it is reasonable to expect that the person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty, remedial promise, or obligation. A seller may not exclude or limit the operation of this section.

19. Warranties under the UCC (3)

Alternative B to subsection (2)

A seller's warranty to an immediate buyer, whether express or implied, a seller's remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section 2-313A or 2-313B extends to any individual who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by breach of the warranty, remedial promise, or obligation. A seller may not exclude or limit the operation of this section.

20. Warranties under the UCC (4)

Alternative C to subsection (2)

A seller's warranty to an immediate buyer, whether express or implied, a seller's remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section 2-313A or 2-313B extends to any person that may reasonably be expected to use, consume, or be affected by the goods and that is injured by breach of the warranty, remedial promise, or obligation. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty, remedial promise, or obligation extends.

21. Magnuson-Moss Warranty Act

The Act provides that any warrantor warranting a consumer product to a consumer by means of a written warranty must disclose, fully and conspicuously, in simple and readily understood language, the terms and conditions of the warranty to the extent required by rules of the Federal Trade Commission. The FTC has enacted regulations governing the disclosure of written consumer product warranty terms and conditions on consumer products actually costing the consumer more than \$15. The Rules can be found at 16 C.F.R. Part 700.

Under the terms of the Act, ambiguous statements in a warranty are construed against the drafter of the warranty. Likewise, service contracts must fully, clearly, and conspicuously disclose their terms and conditions in simple and readily understood language.

Warrantors cannot require that only branded parts be used with the product in order to retain the warranty.[2] This is commonly referred to as the "tie-in sales" provisions,[3] and is frequently mentioned in the context of third-party computer parts, such as memory and hard drives.

Under a full warranty, in the case of a defect, malfunction, or failure to conform with the written warranty, the warrantor:

- can remedy the consumer product within a reasonable time and without charge;
- may not impose any limitation on the duration of any implied warranty on the product;
- may not exclude or limit consequential damages for a breach of any written or implied warranty on the product, unless the exclusion or limitation conspicuously appears on the face of the warranty; and
- if the product, or a component part, contains a defect or malfunction, must permit the consumer to elect either a refund or replacement without charge, after a reasonable number of repair attempts.

In addition, the warrantor may not impose any duty, other than notification, upon any consumer, as a condition of securing the repair of any consumer product that malfunctions, is defective, or does not conform to the written warranty. However, the warrantor may require consumers to return a defective item to its place of purchase for repair.