

STATUTE OF FRAUDS

Outline of the Rule

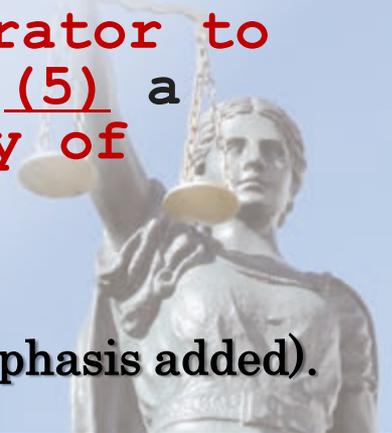
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総務省
〈消費者保護ルールの在り方
に関する検討会〉
June 23, 2021

概要

主に以下6種の契約が対象

“2. A statute (based on the English Statute of Frauds) **designed to prevent fraud and perjury** by requiring certain contracts to be in writing and signed by the party to be charged. • Statutes of frauds traditionally apply to the following types of contracts: **(1) a contract for the sale or transfer of an interest in land, (2) a contract that cannot be performed within one year of its making, (3) a contract for the sale of goods valued at \$500 or more, (4) a contract of an **executor** [遺言執行人] or **administrator** to answer for a **decedent's** [故人の] **debt**, (5) a contract to **guarantee** the debt or duty of another, and (6) a contract made in consideration of **marriage**.”**



BLACK'S LAW DICTIONARY [Westlaw web ver.] (11th ed. 2019)(emphasis added).

歴史と経緯

- 1677年のイギリスの制定法 “AN ACT FOR THE PREVENTION OF FRAUDS AND PERJURIES” 29 Charles II, c.3
- その後、一部修正が繰り返された。
- アメリカでは、ルイジアナ州以外の州で複製化（MDとNMは判例法として承継）。
- UCCも § 2-201等が採用。

RESTATEMENT (SECOND) OF CONTRACTS § 5 stat. note (1981).



目的

- 主に〈証拠機能〉(evidential function)。
- 更に、〈注意喚起機能〉(cautionary function) や
〈伝達機能〉(channeling function) も。
→ 次頁 & 次々頁参照。

Lon L. Fuller, *Consideration and Forms*, 41 COLUM. L. REV. 799, 801-02 (1941); RESTATEMENT (SECOND) OF CONTRACTS s.5 stat. note (1981); 平野晋『体系アメリカ契約法: 英文契約の理論と法理』80～83頁(中央大学出版部, 2019年改訂版).

K. Llewelynが指摘する channeling function

“Formal acts of the known type^[] then signify openly definitive intent to change the existing situation—and to be relied on. Early or late, and in whatever culture, and whatever the form in vogue, this feature is common to all. The copper and scales [ローマ時代の象徴的取引慣習], the ceremonial handclasp (“Shake on it!”), a magical ceremony like the establishment of blood-brotherhood, the solemn invocation of supernatural sanction by oath^[] or conditional curse, the promise or act before official witnesses, the delivery and acceptance of the unambiguous token (engagement ring, pledge button, King's shilling and the nosegay in the hat) or the ambiguous token (earnest money), sealing and delivery, indenture or broken shard or crooked sixpence, the speaking of the binding words, the known words which had power (“I warrant;” “Spondesne? Spondeo;” “Open, Sesame!”)—whether sanctions other than legal be invoked in addition or not, and **whether or not the form accomplishes additional purposes (identification of person, transaction, and terms), the common purpose of the form is clear. The overt sign of utter intent to assume obligation has been given. The other party has reason to rely.**^[]”

Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L. J. 704, 711-12 (1931)(emphasis added).

K. Llewelynが指摘する重要性

"That statute [of frauds] is an amazing product. . . . After two centuries and a half the statute stands, in essence better adapted to our needs than when it first was passed.^[1] By 1676 literacy . . . may well have been expected in England of such classes as would be concerned in the transactions covered by the statute's terms. Certainly, however, we had our period here in which that would hardly hold—we counted our men of affairs [商工業従事者], in plenty, who signed by mark. But schooling has done its work. The idea, which must in good part derive from the statute, that contracts at large will do well to be in writing, is fairly well abroad [広く広まる] in the land. "His word is as good as his bond" contains a biting innuendo [痛烈な示唆] preaching caution. Meantime the modern developments of business—large units, requiring internal written records if files are to be kept straight, and officers informed, and departments coordinated and the work of shifting personnel kept track of; the practice of confirming oral deals in writing, the use of typewriters, of forms, —all these confirm the policy of the statute; all these reduce the price in disappointments exacted for [～の為に厳しく要求される] its benefits."

Llewellyn, *supra*, at 747 (emphasis added).

Lon Fullerの指摘

“ § 3. ***The Cautionary Function***. -A formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action. The seal in its original form fulfilled this purpose remarkably well. The affixing and impressing of a wax wafer-symbol in the popular mind of legalism and weightiness-was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future. To a less extent any requirement of a writing, of course, serves the same purpose, as do requirements of attestation, notarization, etc.”

Fuller, *supra*, at 800 (emphasis added).



wrap型契約に於ける指摘

- wrap型契約とは、....
 - ✓ See, e.g., 平野晋「米国における『ラップ型契約』について」『海外情報通信判例研究会報告書(第一集)』103～21頁(総務省 情報通信政策研究所, 2010年1月).
 - Cf. *id.* at 103頁「誤解を怖(おそ)れずに更に私見を述べれば、これまでのように逃げも隠れもできない伝統的な電気通信事業者だけが提供者側の選択肢として存在していた時代においてならば、情報も交渉力も劣る利用者との間で怪しい契約を締結するような事態は、その『暖簾(のれん)』に懸けても、一定の歯止めが掛かっていたと捉え得る。法『以外』の社会規範が、自然な抑止力となっていたのである[□]。しかし、自由化とともに、いわゆる『fly-by-night』[□]な役務提供者さえも市場に参入できる時代を迎えたために、かつてのような牧歌的な前提のままでは済まないトラブルが多発するに至り、消費者の保護がなお一層必要な場面も出てきたのである。」(強調付加)
- 〈法と行動/認知科学〉——の知見も交えた、クリックラップ契約に於ける承諾の意思表示の在り方に対する批判アリ。
- 特に、cautionary functionへの懸念表明。
 - ✓ 平野「ラップ型契約」前掲, 104頁.
 - ✓ Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electric Age*, 77 N.Y.U. L. REV. 429 (2002).
 - ✓ Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307 (2005).



Hillman & Rachlinskiの指摘

“Internet contracting raises some new social concerns, however. Consumers are accustomed to the importance of signing their names.^[1] For many people, a signature denotes a binding commitment and is the essence of a contract.^[1] The importance that most consumers place on signing their names is, in fact, a prime reason that agents use social pressures--consumers may balk when the time arrives to put their names on the dotted line. The requirement of a signature is nothing less than the law's signal to consumers that the document in front of them is important and that they should be cautious about agreeing to it.^[1] After years of judicial enforcement of electronic agreements, consumers will perhaps become as accustomed to the equal importance of clicking “I agree.” It is unclear, however, whether contemporary e-consumers attach the same importance to a mouse click.”



Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electric Age*, 77 N.Y.U. L. REV. 480-81 (2002)(emphasis added).

Hillman & Rachlinskiと同様な指摘

“The assumption that a click serves all of the same purposes that a signature does is also flawed. While the electronic contracting statutes address the statute of frauds function of a handwritten signature and hold that an electronic signature is as valid as a handwritten signature,^[1] they do not give any guidance on the other functions that signatures, and forms generally, perform. One of those functions is the cautionary function.^[1] While it is clear that an offeree need not read contract terms in order to be bound by them, it is also clear that she must be given some signal that she is entering into a legally binding transaction so that she knows to read the offered terms.^[1] A signature provides that signal. It is not yet clear, however, that a click provides that signal, and courts do not seem to even address the possibility that is does not.^[1]”

Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307 (2005)(emphasis added).

Bibliography

- RESTATEMENT (SECOND) OF CONTRACTS (1981).
 - BLACK'S LAW DICTIONARY [Westlaw web ver.] (11th ed. 2019).
 - Lon L. Fuller, *Consideration and Forms*, 41 COLUM. L. REV. 799 (1941).
 - Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electric Age*, 77 N.Y.U. L. REV. 429 (2002).
 - Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L. J. 704 (1931).
 - Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307 (2005).
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- 木原浩之「改正UCC第2編における『合意』を基礎とする契約法理(4)」『亜細亜法学』47巻2号124頁(2013)。
 - 平野晋『体系アメリカ契約法: 英文契約の理論と法理』80～83頁, 243～46頁, 306～10頁(中央大学出版部, 2019年改訂版)。
 - 平野晋「米国における『ラップ型契約』について」『海外情報通信判例研究会報告書(第一集)』103頁(総務省情報通信政策研究所, 2010年1月)
https://www.soumu.go.jp/main_content/000050881.pdf (last visited June 21, 2021).

Thank you ;-)



於：OECD・AI専門家会合@パリ, Sept. 2018.

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