



RECOMMENDED BY
INSTITUTE OF DIRECTORS



中英文双语版

COMMERCIAL
CONTRACTS

国际商务合同

A
PRACTICAL GUIDE
TO
DEALS
CONTRACTS
AGREEMENTS
&
PROMISES

[英] 克里斯·索普 著
约翰·贝利
段佳陆 等 译

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commercial CONTRACTS

*a practical guide to
deals, contracts, agreements & promises*

Revised Edition

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致读者

本书为中英文双语版，为您提供更多的实用的便利。

本书作者是英国的两位执业律师，之所以将《COMMERCIAL CONTRACTS: A Practical Guide to Deals, Contracts, Agreements & Promises》译为《国际商务合同》是因为许多、而且越来越多的商务合同是由中国公司和中国商务人士的对方，也就是外国公司和外国商务人士起草并出具的，其依据就是英国或其他国家的《合同法》，因而对方的商务合同对于中国公司和中国商务人士而言就是国际商务合同。

本书基本上引用实际商务活动中的案例，对于读者而言，是真正的 Practical Guide。

前言

在工业社会中，企业的健康发展决定着工业社会的繁荣，而企业的长期健康发展依赖于企业订立的各种交易和合同的成功。合同法是各种交易和合同的法律，同时也是指导所有企业活动的法律框架。假如某人从事商业，无论其规模大小，了解合同法的基本原则是必要的，而不是一种奢望。

在我们刚开始从事我们的职业生涯时，虽然我们有许多法律知识，但在商业方面却知之甚少，并且我们会有点天真地认为，商人肯定至少对合同法的基本原则有所了解。随后，我们中的每个人很快地消除了这种错误的想法。

克里斯·索普（Chris Thorpe）在一家化学公司担任法律顾问的头一个月里，他认识了一个商务经理。这个经理认为合同是一份由当事双方签字认可的正式协议。如果没有签字的文件，合同是无效的。由于处于他这样位置的人有这种严重的误解，那么，他就没有意识到他这样做，会使他的公司处于约束在一个非正式合同的危险之中。

约翰·贝利（John Bailey）在从事商务律师生涯不久，也同样碰到了一份危险和错误的建议，该建议是由他所共事的一位经理提出的，关于出售其下属公司的建议：通过与购买方签订一份目的非常含糊的合同，他们能够要求买方承担购买的义务，同时，出售方如果愿意，可以保留任意改变出售行为的权利。

最后，再举一个常识性错误的例子。许多商人通常没有看一眼文件中小写印刷体，就按部就班地签署并提交那些并入对方标准条款和条件的文件，如销售发票、购买货物订单等。

如果一个人没有办法来摆脱他的无知，对他的这种无知行为的批判是错误的。本书阐明的基本原则是商务律师的经验，但是商人

2 国际商务合同

只有两种办法获得这些经验。一种是雇佣一名商务律师进行咨询。如果打算进行一场重大交易，如并购等，这种方法才有意义。对于那些日常贸易的交易，由于高昂费用使向律师咨询不是很经济（目前，一家伦敦大的律师事务所中律师费用大约是每小时250~350英镑），这种类型的交易通常是由商人自己来处理的。对商人剩下惟一可能的办法就是阅读一本律师自己使用的合同法教科书。

律师们所用的关于合同的权威书籍是1826年第一次出版的《简明合同》一书。目前，所用的是第27版，是由Sweet & Maxwell出版公司出版的，它包括两卷，一共2945页。通常，给法律专业学生介绍的课程要么是由Cheshire, Fifoot和Furmston共同编写的《合同法》（第13版，1996年出版，共674页），要么是由Treitel编写的《合同法》（第9版，1991年出版，共973页）。

这些教科书的问题是它们的内容太多、太长。而它们的目的和方法却很短。它们是一些由律师为法律工作者和学生们编写的法律书籍。它们与常规的书籍一致，书中的每一个建议都向当局咨询过并得到支持。虽然这种方法使这些教科书成为律师检查法律中每一个要点的优秀参考书，但对于刚接触这些教科书的人来说，要做到融会贯通是非常困难的。反过来，在可能充分使用这些书籍之前，你需要了解这些课程内容。我们认识许多商人，他们有这些书籍，通常是适合MBA学生使用的，但是我们还没有发现谁已经把书读完了。

本书有两个主要目的。一个目的是用简单易懂的方法阐述适用于英国和威尔士的合同法原理，即使以前没有本书内容知识的读者也能理解。另一个目的是为商人解释这些合同法原理的实际意义。

本书不是一本传统意义上的法律书籍，并且少了一些学术特点。我们所感兴趣的是那些实际工作中会出现的问题。我们的目的不仅是认识问题的本质，而且还可以找到可能解决问题的办法。我们的经验是，合同中的同样问题经常、反复地出现，同时，我们希望通过阅读本书，你不仅能认识那些问题，而且能知道怎样去处理它们。

本书的两位作者都是执业律师，克里斯·索普自己开业，他善于石油、天然气方面的工作，但他更多地从事商业谈判而不是传统的法律工作，约翰·贝利自己有事务所，擅于商法和公司法，因此他们各自对商业有不同的理解，但他们各自职业生涯使得他们对那些在商业中重要的法律问题有他们一致的看法，那就是本书所要阐述的观点。

我们试图用传统方法来编写这本书，尽可能用真实案例来加以说明所讨论的原理，而不是用虚拟案例和用“我和你”等词语来描述案例，我们认为这是最直接、亲切的写作方式，并且这种解释事物的方式是最自然的，使人身临其境。虽然所表述观点是我们俩人的共同观点，但所列举的实践经验，有些是他的，有些是我的。想要陈述的法律是完全符合1999年3月1日的法律。

根据1889年和1978年《法律解释法令》，任何在《议会法令》中适用于男性公民的，均适用于女性公民，反之也一样，除非上下文需要指明。许多书面合同通常有一章就相同的原理进行解释。在本书中，为了避免使人模糊和重复使用“他”和“她”，我们也使用这一种法律解释原则。

上述说明，我们试图使本书内容保持清楚和简洁。部分原因是我们相信表述事物越简洁越好，另外的原因是，我们感觉到，应使读者从本书中得到最大受益，因为时间是宝贵的并且是短暂的。

Preface

The prosperity of an industrial society depends on the health of the businesses operating in it, and the long term health of a business depends on the success of the deals and transactions which it enters into. The law of contract is the law of deals and transactions, and is the legal framework within which all business activity is conducted. For someone involved in business, in whatever capacity, an understanding of the principles of contract law is not a luxury but a necessity.

When we began our careers we knew a lot of law but very little about business, and we somewhat naively assumed that businessmen did understand at least the basic principles of contract law. Each of us was quickly disabused of that assumption.

Within a month of starting work as an in-house lawyer at a chemical company, Chris Thorpe met a commercial manager who thought that a contract was a formal agreement signed by both parties, and that in the absence of a signed document no contract could exist. For someone in his position that was a serious misapprehension, as he was in constant danger of committing his company to less formal contracts without realising that he was doing so.

Equally dangerous and mistaken was the proposition put to John Bailey by a director with whom he was working on the proposed sale of a subsidiary shortly after he began his career as a commercial solicitor: that by signing a sufficiently vague letter of intent with the purchaser, they could commit the purchaser to the transaction while the vendor itself remained free to change its mind if it wished.

To give one final example of a cardinal error, many businessmen routinely sign and return documents such as sales invoices or purchase orders which incorporate the other party's standard terms and conditions, usually without so much as a glance at the small print.

It is wrong to criticise someone's ignorance if he has no means available to enlighten it. The principles set out in this book are the stock-in-trade of the commercial lawyer, but the businessman has only two possible means of access to them. The first is to hire a commercial lawyer to advise him. While this makes sense where the business is contemplating a major transaction such as an acquisition, the lawyer's fees (currently around £250 to £350 per hour with a solicitor from a major London firm) make it uneconomic to engage him on the more routine trading transactions which represent the

2 *Commercial contracts*

bread and butter of the business. With transactions of this type the businessman is generally left to his own devices. The only remaining possibility open to him is to read one of the contract law textbooks which the lawyers themselves use.

The lawyers' bible so far as contracts are concerned is Chitty on Contracts, first published in 1826. The current 27th edition (1994) published by Sweet & Maxwell consists of two volumes totalling 2,945 pages. Law students are generally introduced to the subject by means of either the Law of Contract by Cheshire, Fifoot and Furmston (12th edition 1991, 674 pages) or the Law of Contract by Treitel (9th edition 1991, 973 pages).

The problem with these textbooks lies not so much with their length as with their purpose and method. These are law books, written by lawyers for legal practitioners and students, and as such they conform to the convention for such books that every proposition must be supported by reference to authority. While this approach makes them excellent reference books for the lawyer wanting to check a particular point of law, it makes it very hard for someone coming new to the subject to see the wood for the trees. Perversely, you need to know the subject before these books can be of use to you. We know a number of businessmen who have acquired one of these textbooks, usually for the purposes of an MBA, but we have never met one who claimed to have read it.

This book has two main purposes. The first is to set out in an accessible way the principles of contract law applicable in England and Wales, assuming no prior knowledge of the subject. The second is to explain the practical significance of these principles for the businessman.

This is not a law book in any conventional sense, still less an academic treatise. What is of interest to us are those areas where practical problems arise, and in those areas the aim is not only to identify the precise nature of the problem, but also to examine the possible solutions to it. Our experience is that the same contractual issues recur time and again, and our hope is that having read this book you will not only recognise those issues as they arise, but also know what to do about them.

Both of the authors are practising lawyers. Chris Thorpe has his own practice, specialising in oil and gas, although increasingly he is involved in negotiating rather than traditional legal work. John Bailey is in private practice and specialises in commercial and corporate law. They therefore see different aspects of business, although their separate careers have led them to a consistent view of business and of the legal topics which are important in business. That is the view set out in this book.

We have tried to write in a conversational style, where possible using real examples to illustrate the principles discussed, or failing that using imaginary examples expressed in terms of 'I' and 'you'. This we believe is the most

direct and personal style of writing, and it is the natural way of explaining something to someone in person. The opinions expressed are however the opinions of us both, and the experiences recounted happened to one or other of us. The law stated is intended to be accurate as at 22 April 1996.

Under the Interpretation Acts 1889 and 1978, any reference in an Act of Parliament to the male gender includes the female, and vice versa, unless the context requires otherwise. Substantial written contracts usually have a section on interpretation which includes the same principle. In this work we too will use this principle of interpretation in order to avoid the clumsy and distracting use of 'he/she'.

Above all we have tried to keep the treatment of the subject simple and clear. This is due partly to our own conviction that if something is worth saying it is worth saying simply, but partly also to our perception that, for those who are most likely to benefit from this work, time is both valuable and short.

目 录

前言 1

1 什么是合同 1

1.1 合同的定义和合同法的意义 2

1.2 协议 3

1.3 当事人 10

1.4 合同意图 11

1.5 合同之间相互关系 16

2 当事人 19

2.1 法人 20

2.2 合同的订约能力 28

2.3 多个当事人的合同 31

2.4 代理 34

3 订立合同 41

3.1 要约和承诺 43

3.2 对价 54

3.3 合同的商业现实 58

3.4 不披露 64

3.5 竞标 67

4 合同条款 75

4.1 证据的有关问题 76

4.2 条款的确认 80

4.3 非条款说明 83

4.4 明示条款 86

4.5 免责条款和赔偿 90

4.6 1977年的《不公正合同条款法》 95

4.7 默示条款 98

4.8 法律规定的默示条款 101

4.9 其他法律假设 104

5 标准条款和条件 109

5.1 什么是标准条款和条件 110

5.2 实用的标准条款的应用 111

5.3 合同利益的标准条款的应用 113

5.4 标准条款和《不公正合同条款法》 127

5.5 1994年颁布的《消费者合同中不公正条款的规定》 130

6 合同的解释 133

6.1 关于解释 134

6.2 解释的基本原则 136

6.3 解释的特殊规则 144

6.4 实质性书面协议 146

7 履行合同和不履行合 153

- 7.1 严格责任 154
- 7.2 有限义务 155
- 7.3 受挫 162
- 7.4 合同的变更、终止和放弃 164

8 违反合同的法律补救措施 169

- 8.1 前期事务 170
- 8.2 终止权 171
- 8.3 损害赔偿权利 177
- 8.4 禁令及实际履行判决 188
- 8.5 拒绝履行 191
- 8.6 时间限制 191
- 8.7 关于诉讼 192
- 8.8 破产 195

9 诉讼和破产的前兆 197

- 9.1 合同的策略 199
- 9.2 以财产作为抵押 201
- 9.3 第三方担保 206
- 9.4 磋商和纠纷的解决 210
- 9.5 诉讼的其他方法 215

10 无效合同 219

- 10.1 无效合同及其后果 220
- 10.2 形成性缺陷 222
- 10.3 法律上的无效性 224
- 10.4 有矛盾的合同 230

11 涉及第三方 237

- 11.1 自愿转让 238
- 11.2 合同更新 241
- 11.3 转包合同 243
- 11.4 非自愿转让 244
- 11.5 个人合同 246

12 国际交易：更广阔的前景 249

- 12.1 法律体系 250
- 12.2 司法管辖权的问题 253
- 12.3 理解和信任 257