



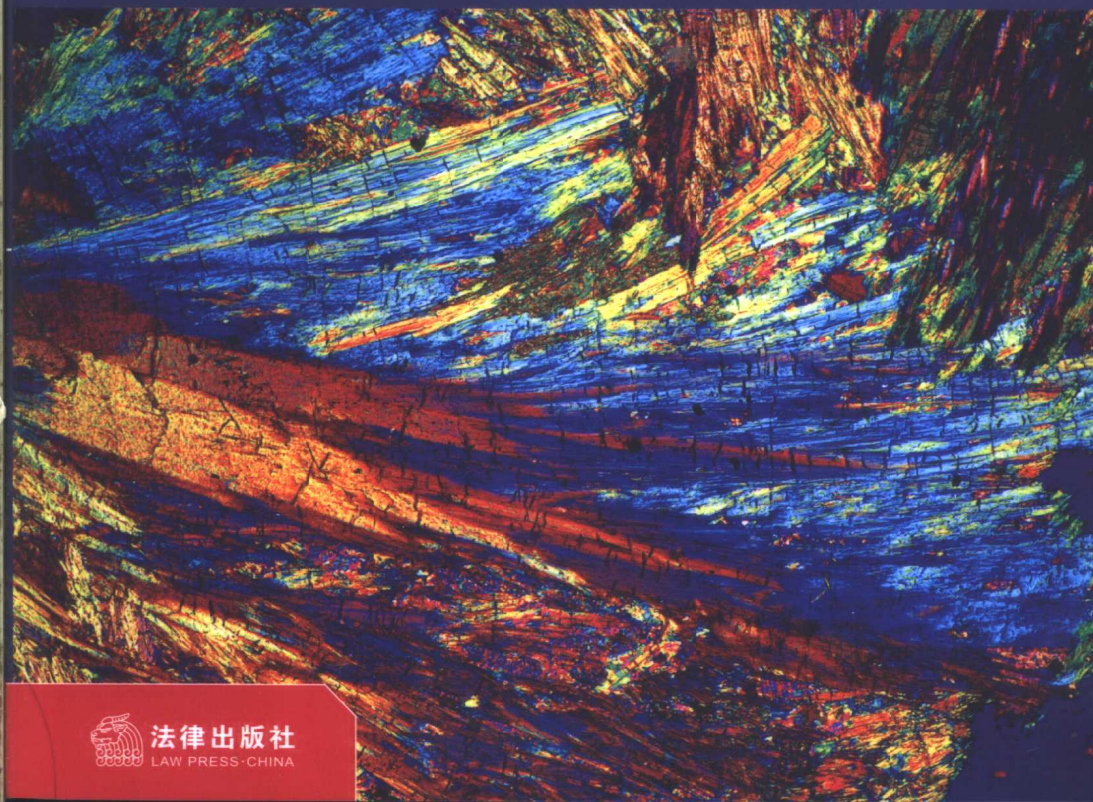
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合同法

第4版

THE LAW OF CONTRACT

[英]约翰·史密斯爵士◎著 张昕◎译



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当代英国法学名著系列丛书

英伦法律·一脉相承

古典英国法是普通法系的源头。就对世界法律体系形成中的影响而言，古典英国法与更古老的罗马法，皆属居功至伟。

当代英国法一脉相承了古典英国法的神韵，其于古典英国法的继承与变革之处，人常极关注而深借鉴之。更重要者，当代英国法应对现代社会的法律技术及其理念，尤启发而吸引世界法律学人。

二十余年来，在中国法学重建并逐步兴旺的过程中，在中英经贸往来愈加丰富的背景下，中国法学界也日益关注当代英国法。引介英国法的工作，从判例、法条、惯例之解释到教科书、学术书，日趋多元。所惜者，于学术书之引进，似未成系统，如东鳞西爪，不见英国法全貌。

当此时，法律出版社推出这套“当代英国法学名著”系列丛书，正意在系统介绍英国法，将素称权威或彰显前沿的当代英国法名著，次第引入。例如，高尔的《现代公司法原理》一书，国人久闻其名而未见其书，或未见其中文版，常以为憾。此类遗憾，正为本丛书所欲弥补。

近年来，法律出版社的“当代德国法学名著”与“当代法国法学名著”系列，颇受瞩目；本社对英国、美国、日本、德国经典教科书的引进，亦得嘉赏。本套“当代英国法学名著”，将同上述丛书一起，构建起中国人了解世界法学的基本体系，令中国法学纳百川之流而成浩大。

最后，感谢唐明毅博士积极参与本套丛书的策划工作。

法律出版社
2004年7月

序 言

本书的新版主要是因为《1999年合同(第三人权利)法》的制度使合同法的一个中心领域发生了重要的变化。有关“合同相对性”的章节讨论了该法的效果及其产生的若干问题,该章现在可能变成了本书中篇幅最大、内容最复杂的一章。本书的其他章节也讨论了该法对合同法其他领域的可能的影响。同样的,这几年也出现了大量重要的判例。*Barry v. Davies* 案最终确认了1859年 *Warlow v. Harrison* 案(有关无保留权的拍卖销售)中的附带陈述。*Shogun Finance Ltd v. Hudson* 案适用了关于要约与承诺中身份认识错误的既定原则,但引发了 Sedley 法官的不同意见,而这可能预示着上议院将在一个多世纪以来首次再度审查这一富有争议性的法律领域。有关默示条款的两个上议院判例——*Malik v. BCCI* 案和 *Johnson v. Unisys Ltd* 案——既显示出该方法所扮演的扩张性的角色,又显示了对其的某些限制。*Attorney-General v. Blake* 案使得本书增加了一个新的关于“返还因违约而获得的利润”的章节。根据 *Royal Bank of Scotland v. Etridge (No. 2)* 案,本书完全重写了有关不当影响的章节,并试图澄清法庭对“假定”与“负担”等概念的令人迷惑的使用。

2 合同法

在讨论判例时,我仍然保留了“plaintiff”和“writ”两个术语的用法。如果本书把它们叫作“claimant”和“claim”,可能会让勤奋阅读法律判例报告的读者感到困惑。必须在近期的判例中使用这些不够明了、不够精确的术语,已经是很糟糕的事了。很遗憾,我们已经与其余的普通法世界不大合拍,而在这些国家或地区,公民们并不是被视为难以理解这类已由聪明的法律门外汉普遍使用了数个世纪的术语。

本书交叉援引了 Smith & Thomas, *A Casebook on Contract* (《合同法案例》,2000 年第 11 版)一书。在该《合同法案例》中,读者可以发现本书所参考的绝大多数判例以及重要的成文法和规定。

我对我的同事, Horton Rogers 先生,深表谢意,我们在一起讨论了很多合同法问题。我也对出版商完成本书新版工作的彬彬有礼、迅速和高效而深表谢意。

约翰·史密斯
(John Smith)
2002 年 1 月

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