Dispute resolution where international lawyers may be weak in China

Description

International law firms and lawyers are thriving in China for long. Foreign investors generally come into China hand in hand with a foreign law firm.

International law firms are appealing to foreign investors in China for various reasons: feeling more bonded with each other due to language skills and culture, having global connections and resources to serve clients and the like.

Even though foreign law firms and lawyers are not allowed to represent clients in Chinese courts, but they are allowed in arbitration proceedings in China like CIETAC or SHIAC. That is probably the reason why arbitration is suggested and recommended by international law firms to foreign investors doing business in China, since by this way, they will not lose the lucrative dispute settlement legal services clients may need in the future.

But can they really do a good job in dispute settlement in China **when the applicable law to the underlying legal documents is Chinese laws**? It may depend but I have serious doubt over their reputation in this field.

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Recently, a European company that is caught in fierce fight in a joint venture with its Chinese partner approached me for legal representation in arbitration. The arbitration is related to a trademark transfer dispute. The client was previously represented by a big international law firm who has helped the client in setting up the joint venture. It is natural for the clients to come to the international firm since it is supposed to best know the deal documents and know the best way to fight with the Chinese partner.

Along the way of arbitration proceeding, the client felt that the international firm is not doing enough. The reason as explained by the firm is that they thought the arbitration commission had no jurisdiction over the case, so they didn't respond to the substantive claims raised by the other party and didn't attend the arbitration hearing. Now the arbitration commission is about to deliver the award. So the question is: is it right to be so passive in the arbitration? What if the arbitration award is issued and becomes binding against the client? Why didn't the international firm challenge the jurisdiction at Chinese court?

I reviewed the related joint venture contract and trademark transfer contract and some clauses are actually in violation of Chinese laws, and may well be struck down by Chinese courts. During my talk with their team, they admitted that they don't handle dispute settlement or resolution much in their practice, meaning they are not experienced in this regard.

Unlike non-litigation legal matters where most work is about drafting transaction documents based on templates that have been used again and again over time, litigation or arbitration work is nothing similar. Instead, lawyers in dispute settlement have no ready templates or boilerplate strategies to copy and imitate and they have to come up with fresh and new ideas and strategies in light of concrete conditions of each case to safeguard clients' interests. After all, disputes don't often come alike.

In essence, in the case of dispute resolution, what matters is not the legal writing skill but the understanding of the applicable laws which are very often Chinese laws and the actual application thereof. When you don't practice arbitration or litigation much, you are not familiar with these areas of laws, which can lead to mistaken strategy in fight.

So for foreign investors and companies, it is important to bear this in mind.

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