

non-competition clause in outsourcing deals

Description

An American client recently complained that his Chinese OEM manufacturer in Shanghai is selling the products designed by him which is supposed not to happen pursuant to his understanding.

It is a small transaction where the American client asked the Chinese manufacturer to manufacture a new-model product designed by him. After the Chinese manufacturer delivered the products ordered, the American client found shortly that the Shanghai OEM is putting up the same product on its website for sale at a much lower price. The product is not anything technically sophisticated but a new model designed by the client. The client has filed no patent.

Now upon discovery of the Shanghai OEM's breach of their contract, the client came to me for advice on how to tackle the problem.

As an attorney, the first thing I do is to ask the client to provide a copy of their OEM contract for review. When I saw the contract provided by the client, I was kind of shocked to see such a rough primitive contract that was concluded by the client. The contract consisted of three pages of bilingual contents with the Chinese version above the English version. The English version is full of "Chiglish" (Chinese English).

The contract did contain a clause saying "The property right of mould belong to the buyer after paid up?the seller can not offer the mould and products to other company in any way, if have prove, the seller sell product or mould to other company without the buyer's agreement, the buyer should compensate the loss of economy". But on one hand, the contract failed to define "products" and it could be argued that the reference to products in this clause means those products ordered b the client, and further, the clause and the contract failed to set a liquidated damages clause which will save a lot of trouble to prove the loss on the part of the client.

I used to think that western businessmen are more advisable or more concerned about legal documentation in contrast to Chinese businessmen who are always reluctant to draw up detailed business contracts in practice. However, the past few years have proved that western small businesses (proprietorships) are somehow similarly grudging in spending money on legal services when dealing with Chinese businesses.

Not long ago, another individual client from United States who entrusted a company in Nanjing to produce a series of pest repellers finally signed a contract with his OEM factory in Nanjing without getting a Chinese lawyer to review that contract even though he initially approached me for help to review the contract. He later told me that he got a detailed contract from the OEM company which he felt perfectly comfortable with, so he just signed it believing that he will be safe thereunder.

Believe it or not, China is not a place foreigners will easily understand and feel comfortable with without being in it for years. People who do businesses with Chinese merchants can be very naive to believe that their Chinese counterparts (esp small businesses) will honor their words. It will be late to regret that a Chinese lawyer should have been hired to look at the contract after dispute arises and

irreparable damage is suffered.

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