A good point for drafting commercial contracts governed by Chinese laws

Description

I am reviewing a real estate sale and purchase contract under which my client bought a villa house in Pudong Shanghai, China. My client has paid a down payment up to almost RMB 5 million. Now because of real estate policies imposed by central government, the deal is doomed to fail. Thus, client wanted his money back but the developer, as others in the industry deeply caught in shortage of fund, threw out various execuses for not refunding the money. so client came to me.

Apparently the contract was prepared in advance by the seller and it was a well-done contract. I am not going to list that many points but one point that interested me a lot. However, I am not sure whether this shining point is intentially coined or simply resulted by mistake.

It is about an arbitration clause. In the contract, it was stipulated that disputes are resolved by Shanghai Arbitration Commission, but the address described therein is actually the address of another arbitration institution. The mismatch caused a bit of ambiguity as to which institution is chosed by the parties.

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Under Chinese laws, ambiguity on choice of institution body may lead to the invalidation of the arbitration clause in its entirety. However this is not the point about the mismatch. With the ambiguity, it leaves one of the parties to the contract the right to take the issue to court or to arbitration body to decide whether the arbitration clause is valid or not. And this is a separate legal proceeding which will consume time, and the more importantly, entertainment of the case for deciding the validity of arbitration clause will for sue get the parties trapped in a procedural issue, and bar them from moving to solve their substantive issue. And unfortunately, the time limit for deciding the validity of an arbitration clause is not clearly provided by laws or China Supreme Court, leaving the possibility of unreasonably long delay, though generally speaking, this won't take too much time for a court to make a decision (we do notice that Beijing High Court has prescribed that court shall make a decision within two months after accepting the filing of case).

Now from my client's point of view, this may be a real risk because it will definitely delay the return of the money even though we finanally succeed in the case. On the other hand, sided with the seller, I can see the clear benefit of using the proceeding to delay paying back a bulky amount of money. At this moment, I am not sure whether the developper will pull the trick later after we file the case with arbitration body.

The lesson is that, when drafting a contract for clients, it may be advisable to intentionally "make" a mistake in the contract which may in the end give leverage for the maker of the mistake.

Of course, it shall be closely heeded that this mistake may backfire if it is not fully understood and delicately designed. Generally speaking, the party to a contract whose rights under the contract are realized first (entirely or partially) may think of playing the trick.

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Author

admin

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