SINO-RUSSIAN BUSINESS: FIVE TIPS ON RUSSIAN CONTRACT LAW

Along with the growth of the consumer and technology markets, Russia has been steadily developing its cooperation with Chinese partners in areas such as the sale of goods, IT technologies and hardware, energy, and oil and gas. Once just a tendency, this cooperation has now proved to be a tradition.

As trade activity between Russia and China continues to develop, so do the number of disputes. The law in this respect continues to grow, as does the awareness of contractors in relation to national laws that may become key to building trustful and long-standing relations. It is no secret that differences in mentality and culture may prove harmful to businesses, but once these are overcome the results exceed all expectations (as shown by the relevant trade figures).

Both the Russian Civil Code regulating contractual relationships is based on borrowed European legal concepts, though it has acquired its own features in the course of its development. Below are some tips that will aid with the understanding of practical Russian legal points and Russian legal culture.

Tip 1: Mode of Correspondence

Formation of the contract is of crucial importance as a contract includes not only the initial document signed by the parties, but also further amendments and, if it is a master contract, further specifications or orders based thereon. It is important to note that under Russian law any cross-border transactions must be executed in writing, otherwise they are deemed invalid.

Once the contract is signed the parties need to simplify the communication procedure and unify its format. Choosing the mode of correspondence is therefore of crucial importance.

In cross-border transactions a mixed mode of correspondence is preferred, in order to speed up the communication process and simultaneously satisfy certain formalities by exchanging written documents. Although in many cases parties agree on electronic means of correspondence, from a Russian legal perspective these should be approached carefully.

Court practice in Russia has established that electronic evidence is admissible in court. It is important to specify in the body of the contract however that the parties accept emails as a proper type of correspondence in their relations. It is also necessary to ensure that it is possible to identify the addressee and the recipient in the emails. It is also desirable that the email be communicated directly by the contractor to the recipient, as the courts are unlikely to admit emails sent from or to unknown addresses, i.e. if the address used has not been indicated as the address for business correspondence by the relevant party.

However, courts may demand to see the originals of the documents that have been presented in electronic form. It is therefore advisable in practice to have the key documents (e.g. the claim, the termination notice, and so on) executed and delivered in writing.

As a substitute to handwritten signatures, parties are in certain cases allowed to use electronic signatures. Russian law stipulates simple electronic signatures and enhanced electronic signatures, and the latter may be qualified or unqualified.

A certificate to a qualified electronic signature shall be issued by an accredited certification center. The validity of the information signed by qualified electronic signature is the same as the validity of documents signed by handwritten signature (except for cases where Russian law directly requires the execution of documents in paper form).

It is also necessary to identify the parties' authorized representatives. This is of vital importance in complex transactions which require various decisions to be taken by several specialists.

Finally, special attention should be paid to the identification of ‘business days’ for correspondence purposes, as Russian and Chinese holidays may impact the course of the transaction.

Tip 2: Choice of Law

The Russian Civil Code allows parties to choose the law that will apply to either to the whole contract or to its parts. Where the parties fail to specify the applicable law in the contract, it shall be governed by and construed in accordance with the laws of the country where the party having the most impact on the transaction is located (e.g. the seller in the sales agreement, the supplier in the supply agreement, the lessor in the lease agreement, and so on; see Art. 1211 of the Civil Code).

There are both advantages and disadvantages to choosing Russian law as the law of the contract. On the one hand, if the property in question is deemed to be located in the Russian Federation, choosing Russian law would ensure a prompt settlement of the dispute. On the other hand, one should take into account the formalistic approach of Russian courts and the underdevelopment of many business concepts; disputes revolving around the breach of fiduciary duties are likely to prove unsuccessful.

Similarly to China, Russia has a civil law legal system. This means that the courts play a passive role and they will always give preference to the express terms of a contract over the implied ones.

It is worth noting that certain mandatory rules of Russian law shall apply irrespective of the parties' choice of law, such as statutory requirements on the certification and quality of goods, health regulations, and so on. Parties will therefore still need to consider the mandatory provisions of Russian law when drafting and performing the contract.

Tip 3: Mixed Contracts

Both Russian and Chinese civil law recognizes specific contracts (sales contracts, supply contracts, services contracts, and so on), each type with its own particular features. The contract may also regulate mixed transactions (such as services and agent agreements), in which case it is called a mixed contract.

Dealing with mixed contracts may be problematic, as Russian law provides different rules for regulating and terminating them. For example, according to the Russian Civil Code a services agreement can be terminated at any time by the client, subject to the client paying the executor the factual expenses accrued at the termination date; however, the executor can only terminate the agreement by compensating the client for its respective losses. With agency agreements, the legislation allows for termination of the contract by any party and at any time only if the contract was concluded for an indefinite term. In some cases services and agency relations may be inseparable in the context of the contract; in these cases, it is imperative that the underlying relations are defined correctly in order to avoid the court applying different rules, and to also help reduce the risk of disputes and of extra costs.

Such disputes may concern liability and termination procedures, if different types of contracts are concerned. Where the court decides to apply different rules to different parts of the contract, the parties' contractual expectations may be affected, and a party's lack of awareness may even result in abuse of the situation by the counterparty.

Tip 4: Confidentiality

Another issue is confidentiality, as Russian legislation doesn't fully recognize implied confidentiality undertakings. Express and unequivocal undertakings should therefore be contractually procured. Russian courts are still reluctant to interpret confidentiality terms and conditions broadly and tend to limit liability even if a party is found liable. Liability itself is difficult to prove, requiring parties to elaborate thoroughly on the list, contents, marking, receipt, storage and return of any confidential information and its carriers.

Unfortunately, at this stage of Russian legal development it is almost impossible for parties to avoid bulky confidentiality clauses. In major transactions it is advisable to enter into separate confidentiality agreements that govern the full spectrum of confidentiality issues in the course of the parties' business.

It is important for the contract to allow the affected party to react immediately in order to mitigate the risks related to the breach of confidentiality, as statutory provisions are highly unlikely to be helpful at this stage.

It is also worth noting that information treated as commercial secrets (which itself requires the establishment of a special "commercial secrets" regime in respect of such information) is generally more protected than other confidential information. At the same time, the commercial secrets regime requires a number of formalities to be taken by the owner and the recipient of the relevant information (such as composing a list of the information, adopting internal rules for dealing with it, determining authorized persons, and so on).

Tip 5: Termination of the Contract

As mentioned, unilateral termination of each type of contract may be subject to specific rules established by the Civil Code (which largely depend on the party they apply to). Normally the party ordering the services or products, or that is entitled to give instructions, would be in an advantageous position when it comes to termination.

In certain cases the contract can be unilaterally repudiated where a party commits certain material breaches described in law. In these circumstances the counterparty may be able to terminate the contract via court order without incurring penalties. For example, if in a supply contract the buyer commits multiple breaches of payment terms, or the supplier commits multiple breaches of supply terms, this will constitute a material breach. However, such breaches will not permit the counterparty to repudiate the contract if the breaching party cures the breaches in a timely fashion, allowing further performance of the contract.

It is also important to note that Russian law generally allows parties to establish different termination options in the body of the contract.

Very often post-contractual payments are discussed in the context of contract termination, as some countries recognize post-contractual payments in cases where an agent negotiated the contract with the principal's clients, and the contract is executed or performed after the agency contract is terminated. The payments are negotiated as excluding any accrued or outstanding payments that the parties may have as at the moment of termination. However, Russian practice is rather ambiguous on this matter, and to validate any such payments it would be necessary to expressly agree on them within the contract (e.g. commissions or fees), otherwise there is a risk that the court will deny them.

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